THE LAW

OF

LIBEL AND SLANDER

IN

CIVIL AND CRIMINAL CASES

AS

ADMINISTERED IN THE COURTS OF THE UNITED STATES OF AMERICA.

BY

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SECOND EDITION.

CHICAGO:
CALLAGHAN AND COMPANY.
1898.

STATE JOURNAL PRINTING COMPANY,
PRINTERS AND STEREOTYPERS,
MADISON, WIS.

PREFACE TO THE FIRST EDITION.

In the preparation of this work it has been the design of the writer to glean from the reports of the courts of all English-speaking countries the principal adjudications upon the law of defamation, and to arrange and classify them into one book, containing the entire law of libel and slander as administered in the courts of the United States of America.

In the work, it is hoped, will be found everything needed by the attorneys for the plaintiff as well as for the defendant in the prosecution and defense of all actions for defamation, both civil and criminal.

With this object in view, the writer has placed in one chapter a brief historical review of the law, for the use of those members of the profession who take pride in knowing something of its history as well as of the law itself. Following this will be found chapters upon the American law of defamation, oral and written; imputation of crime; want of chastity; imputations affecting persons in offices, professions and trades; words imputing the existence of contagious diseases; scandalum magnatum, and the slander of property, or, as it is commonly called, slander of title.

As there can be no defamation without publication, a chapter is devoted to the discussion of the law upon this subject. Following this will be found chapters upon certainty of imputation, construction of language, and interpretation of defamatory words, in which the writer has endeavored to present the law upon these subjects in a clear and intelligent manner. Further on, malice — both malice in law and malice in fact as applied in actions for defamation — is discussed and the law presented, with an additional chapter on the repetition of defamatory words.

As the law governing parties to civil actions for defamation depends somewhat upon the local jurisdiction, but little more than a sketch of the doctrine at common law is presented.

The subject of privileged occasion and communications, it is hoped, will be found fully and satisfactorily presented, as well as the law of criticism and comment and freedom of speech and liberty of the press.

Although in many states the common-law system of pleading does not prevail, it must be conceded that it is the foundation of all codes. No member of the profession can be a successful pleader without some knowledge of the old system. The writer has therefore presented an analysis of the declaration at common law in the action for defamation with appropriate comments upon its component parts, illustrating the subject by a collection of precedents both under the common law and the modern English systems.

In the chapter upon evidence the law has been given both as to the plaintiff's proofs under pleas of the general issue and justification in actions

for words actionable with and without proof of special damage, as well as the defendant's proof in all cases.

Upon the subject of damages will be found a full and exhaustive treatise, including general, nominal and exemplary damages, together with matters both competent in mitigation and aggravation of damages, and excessive damages.

In the criminal department of the law of defamation the writer has aimed to present a complete and exhaustive discussion of the subject in all its bearings, together with precedents of indictments and informations.

In the plan of the work he has endeavored to present in all cases the general rules and propositions of the law, and to illustrate the same by digests of American and English cases where the subject of the text has been applied or adjudicated upon.

MARTIN L. NEWELL.

Chicago, 1890.

PREFACE TO THE SECOND EDITION.

The general favor with which the first edition of this work has been received by the profession throughout the country has been deemed sufficient to warrant the author in the preparation of a second edition. In the new edition the principal decisions of the American and English courts upon the questions involved, rendered since the publication of the first edition, are cited in support of the text.

New sections have been added, treating upon the subject of restraining the publication of libels by injunction, with citations of, and extracts from, all the American and English decisions upon this question.

The question of new trials for inadequacy of damages is also discussed.

New sections upon the publication of libels by letters, telegrams, postal cards, etc., are also added to this edition of the work.

M. L. NEWELL.

Springfield, Ill., November 1, 1897.

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A. & E.	Adolphus and Ellis	12	K. & Q. B.	1834-1840
.....	Atkyns' Reports, by Sanders	3	Chancery	1736-1755
B. & Ad.	Barnewall and Adolphus.	5	K. B.	1830-1834
B. & Ald.	Barnewall and Alderson.	5	K. B.	1817-1823
B. & C.	Barnewall and Cresswell.	10	K. B.	1822-1830
B. & S.	Best and Smith	10	Q. B.	1861-1869
B. & P.	Bosanquet and Puller	5	C. P.	1796-1807
Bing.	Bingham's Reports	10	C. P.	1822-1834
Bing. N. C.	Bingham's New Cases	6	C. P.	1834-1840
Burr.	Burrow's Reports	5	K. B.	1757-1771
C. B.	Common Bench Reports.	18	C. P.	1845-1856
C. B. (N. S.)	Common Bench (New Series)	20	C. P.	1856-1865
C. & J.	Crompton and Jervis	2	Exch.	1830-1832
C. & K., *or* Car. & K.	Carrington and Kirwan	2, and vol. iii, pts. 1, 2	Nisi Prius.	1843-1850
C., M. & R., *or* Cr., M. & R.	Crompton, Meeson and Roscoe	2	Exch.	1834-1836
C. & P.	Carrington and Payne	9	Nisi Prius	1823-1841
Camp., *or* Camp. N. P. Rep.	Campbell's Nisi Prius Reports	4	Nisi Prius	1808-1816
.....	Central Criminal Court Session Papers	.....	.....	.....
.....	Charley's Cases at Chambers	.....	.....	.....
Co. Rep.	Coke's Reports	6	K. B.	1572-1616
Comb.	Comberback's Reports	1	K. B.	1685-1699
Cowp.	Cowper's Reports	2	K. B.	1774-1778
Cox C. C., *or* Cox Crim. Cas.	Cox's Criminal Cases	13 and vl. xiv, pt. 1.	.....	1843
Cro. Jac.	Croke's Reports (temp. Eliz., Jam., Cha.)	4	K. & Q. B.	1582-1641
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Dow. (N. S.)	Dowling's Practice Reports (New Series)	.....	.....	.....
E. & B.	Ellis & Blackburn	8	Q. B.	1852-1858
E., B. & E.	Ellis, Blackburn and Ellis	1	Q. B.	1858
E. & E.	Ellis and Ellis	3	Q. B.	1858-1861
East.	East's Reports	16	K. B.	1801-1812
Esp.	Espinasse's Reports	6	Nisi Prius	1793-1807
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F. & F. N. P. Rep.	Foster and Finlason	4	Nisi Prius	1858-1867
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ABBREVIATED FORM OF REFERENCE.	TITLES.	VOLS.	COURT.	PERIOD OF TIME COMPREHENDED.
H. L. Cas.	Clark and Finelly	12	House of Lds.	1831–1846
H. & N.	Hurlstone and Norman	7	Exch.	1856–1861
Hob.	Hobart's Reports	1	K. B.	1603–1625
	Holt's Reports	1	K. B.	1688–1711
How. St. Tr.	Howell's State Trials	34	.....	Early date 1820.
J. & H.	Johnson and Hemming	2	Chancery	1860–1862
Keb.	Keble's Reports	3	K. B.	1661–1679
L. & C.	Leigh and Cave	1	Crown Cases.	1861–1865
L. R L. J. L. T.	Law Reports Law Journal Law Times	See Note to Comparative Table of Law Reports.		
Lev.	Levinz's Reports	3	K. B.	1660–1697
Lofft.	Lofft's Reports	1	K. B.	1772–1774
M. & G.	Manning and Granger	7	C. P.	1840–1844
M. & M.	Moody and Malkin	1	Nisi Prius	1827–1830
M. & R., *or* M. & Rob.	Moody and Robinson	2	Nisi Prius	1831–1844
M. & S.	Maule and Selwyn	6	K. B.	1813–1817
M. & W.	Meeson and Welsby	16	Exch.	1836–1847
Mod. Rep.	Modern Reports	12	K. B.	1669–1732
Moo. & Rob. N. P. Rep.	Moody and Robinson	2	Nisi Prius	1831–1844
P. & D.	Perry and Davison	4	Q. B.	1838–1841
.....	Popham's Reports	1	K. B.	1592–1627
Price.	Price's Reports	13	Exch.	1814–1824
Q. B., *or* Q. B. Rep.	Adolphus and Ellis (New Series)	18	Q. B.	1841–1852
.....	Raymond (Lord)	3	K. B.	1694–1734
Roll. Abr.	Rolle's Abridgment	2	K. B.	1614–1625
Ry. & M.	Ryan and Moody	1	Nisi Prius	1823–1826
Scott N. R.	Scott's New Reports	8	C. P.	1840–1845
Starkie N. P. Cas.	Starkie's Reports	2, and vol. iii, pt. 1.	Nisi Prius	1815–1823
Strange	Strange's Reports	2	K. B.	1726–1742
T. & G.	Tyrwhitt and Granger	1	Exch.	1836
T. R.	Term Reports (Durnford and East)	8	K. B.	1785–1800
Taunt.	Taunton's Reports	8	C. P.	1808–1819
Vent.	Ventris' Reports	1	K. B.	1668–1691
W. N.	Weekly Notes	Published weekly with the Law Reports.		
W. R., *or* W. Rep.	Weekly Reporter	See the Comparative Table of Law Reports.		
Wms. Saund.	Sir E. V. Williams' Notes to Saunders' Reports (1642–1673)	2	K. B.	1871

COMPARATIVE TABLE OF CURRENT ENGLISH REPORTS.

In this book, the Law Reports (L. R.) and those of *The Law Journal* (L. J.) are generally cited together. To enable the reader, however, readily to consult with them the valuable series of Reports issued weekly with *The Law Times* (L. T.) and *The Solicitor's Journal* (S. J.)—which latter are contained in the publication known as *The Weekly Reporter* (W. R.)—a Table is here given which will facilitate reference to these from any citation of the other two Reports above mentioned, since the year 1860. No mention is made of the Reports in Chancery Cases, although in one or two instances some of these are referred to in the following pages, mainly, however, for the purpose of showing the tendency to bring about uniformity of practice in certain matters throughout the High Court of Justice.

FROM MICHAELMAS TERM IN ONE YEAR TO THE SAME TERM IN THE NEXT.

Titles.	1860 to 1861	1861 to 1862	1862 to 1863	1863 to 1864	1864 to 1865	1865 to 1866	1866 to 1867	1867 to 1868	1868 to 1869	1869 to 1870	1870 to 1871	1871 to 1872	1872 to 1873	1873 to 1874	1874 to 1875	1875 to 1876	1876 to 1877	1877 to 1878	1878 to 1879	1879 to 1880
Law Reports (*a*) (cited prior to Mich. Term, 1875, as L. R., Q. B., C. P., Ex., or Eq., and since then as L. R., Q. B., etc., Division or Div.).....	.....	.....	.....	.....	.....	1	2	3	4	5	6	7	8	9	10	Q. B., C. P., and Ex. Divs. 1	2	3	4	5
Law Journal (*b*) (cited before above date as L. J., Q. B., etc., and since then as L. J., C. L., etc.).....	30	31	32	33	34	35	36	37	38	39	40	41	42	43	44	Bench, Pleas and Exchequer, or C. L. 45	46	47	48	49
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Weekly Reporter (*d*) (cited as W. R.).....	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28

(*a*) First issued in 1865. (*b*) First issued in 1823. From that year to 1831 cited as L. J., O. S. (Old Series), afterwards as L. J., N. S. (New Series). In this work the latter is always intended, unless otherwise is indicated. (*c*) Commenced in 1843, and from then until 1859 cited as L. T. (O. S.), since then as L. T. (N. S.), or L. T. (*d*) Commenced in 1852.

THE LAW OF DEFAMATION.

CHAPTER I.

A BRIEF HISTORICAL REVIEW OF THE LAW OF DEFAMATION.

ANCIENT LAWS.

A preliminary review of the codes of those law-makers who in the beginnings of society united the law with their religion

and morals will undoubtedly be of some assistance in an examination of the present state of the law of defamation.

As to the importance of laws by which every man's conduct is to be regulated, not only whenever he writes, but even whenever he speaks, or as to the necessity for legislative caution where the mischief and inconvenience which would result from even a slight defect are liable to indefinite multiplication by the constant application of the law, little remains to be said.

§ 1. **Mosaic Law.**— Among the Jews, to whom a distinct revelation was made, one of the main purposes of which was to revive the characters of the law of nature and to retrace those lines which were defaced and almost obliterated by corrupt traditions, to slander any one, particularly those in authority, was expressly forbidden by the law of Moses. The early denunciations of the Mosaic law against defamation are few and simple; no specific punishment, except in one instance, was appointed against calumniators. There is, however, scarcely any offense which is more frequently alluded to in the psalms of David, or more strongly described in the energetic and figurative language of the East, than that of defamation — whether it be for the purpose of characterizing the conduct of depraved and malicious men, of denouncing Divine vengeance against them, or depicting the wretched and forlorn state of their unhappy victims. Mention is seldom made of this species of injury without some expression which shows that defamation was meant in its strict sense as implying a false and deceitful representation. For example, we are told in the psalms: Thou shalt destroy them that seek leasing; the Lord will abhor both the bloodthirsty and deceitful man.[1] His mouth is full of cursing, deceit and fraud; under his tongue, ungodliness and vanity.[2] There is none that doeth good, their throat is an open sepulchre, the poison of asps is under their lips, their mouth is full of cursing and bitterness, their feet are swift to shed blood.[3] Let the lying lips be put to silence which cruelly, disdainfully and despitefully speak against the righteous.[4] What man is he that lusteth to live and would fain see good days; keep thy tongue from evil and

[1] Psalm 5.
[2] Psalm 10.
[3] Psalm 14.
[4] Psalm 31.

thy lips that they speak no guile.[1] False witnesses did rise up against me; they laid to my charge things that I knew not; the very abjects came against me unawares, making mouths at me, and ceased not. They imagine deceitful words against those that are quiet in the land; they gaped on me with their mouths and said, fie on thee! fie on thee! we saw it with our eyes.[2] My lovers and my neighbors did stand looking upon my trouble and my kinsmen stood afar off; they also that sought after my life laid snares for me, and they that went about to do me evil, talked of wickedness and imagined mischief all the day long.[3] Thy tongue imagineth wickedness and with lies thou cuttest like a sharp razor. Thou hast loved to speak all words which may do hurt; O thou false tongue, therefore shall God destroy thee forever.[4] The ungodly are froward even from their mother's womb; as soon as they are born they go astray and speak lies, they are venomous as the poison of a serpent.[5] Deliver me from mine enemies, O God! behold they speak with their mouth, and swords are in their lips.[6] They that sit in the gate speak against me, and the drunkards make songs upon me.[7]

The publication of false reports affecting the character of others is prohibited by the Mosaic law, although no punishment is annexed to a violation.[8] Whether that was left to the discretion of the judge, or no punishment whatever was inflicted, seems to be doubtful. This last supposition prevailed with respect to the greater number of extrajudicial offenses during the infancy of nations, which approaches nearly to a state of barbarism and lawlessness, wherein mere verbal attacks on reputation are not so highly estimated, nor yet even violent outrages so strictly interdicted as afterwards. But, on the contrary, a person thus injured was permitted to avenge himself on his traducer, provided he did not beat him to death or render him a cripple. If a wicked action which a man related concerning his neighbor was true he received no punishment whatever; for the *exceptio veritatis* then operated in full force.[9]

[1] Psalm 34.
[2] Psalm 35.
[3] Psalm 38.
[4] Psalm 52.
[5] Psalm 58.
[6] Psalm 59.
[7] Psalm 59.
[8] Exodus, 23: 1.
[9] Michaelis' Comm. on the Laws of Moses, art. 281, sec. 2 (Smith's translation).

There was one instance, and but one, where the law of Moses imposed a specific punishment upon the publication of calumnious falsehood, and that was where a man falsely accused his wife of not having proved a virgin on the wedding night.[1] The penalty in respect to such a charge, which, where well founded, was expiated by the death of the criminal, was threefold: 1st, corporal, by stripes; 2d, by the payment of a pecuniary fine, viz., one hundred shekels, to the woman's father, which was the highest fine imposed by the Mosaic law, and was no doubt given to the father in respect of the reproach which had been cast, not merely on the woman herself, but on her parents, brothers and sisters, and the whole family; 3d, by his forfeiture of the right of divorce.

§ 2. **The Laws of Ancient Egypt.**— Little is known of the laws of ancient Egypt,— the venerable territory at once of science and of superstition,— yet is it matter of moral certainty that they were not destitute of such restraints. The well-known fact that this singular people erected a tribunal[2] for trying the conduct even of their kings after death, and of decreeing or denying the honors of sepulture, according to the verdict, is in itself sufficient to demonstrate not only that they fully understood and appreciated the value of reputation and character, but also that they duly estimated and encouraged the love of reputation as a great moving principle of human conduct; and that they possessed sagacity sufficient to turn that knowledge practically to the public account by using this moral power in the most forcible and advantageous manner. There is perhaps no other memorial extant of this extraordinary nation which so strongly characterizes their political genius as does this remarkable institution. The effect of this custom among the Egyptians must have been greatly heightened by its connection with their superstition in respect of the rights of sepulture, and the religious necessity of preserving the bodies of their dead in order to their subsequent re-animation.[3] It is impossible to suppose that, whilst even after death conduct and reputation were the subject of anxious inquiry, direct and immediate provision was not also made by the laws of Egypt for securing and preserving the characters of the living.[4]

[1] Deut., 22: 13, 19.
[2] Diod. Sic., B. 1.
[3] Rollin's Histoire des Egyptiens, 73.
[4] 1 Starkie on Slander, VII.

§ 3. **The Laws of the Athenians.**—The laws of Solon, which embraced morals as well as civil duties, extended in a most direct aim to calumny. Whoever, says that legislator, shall calumniate any man while alive, in the temples, courts of law, treasuries, or where games are celebrated, shall pay three drachms to the injured man and two to the public treasury. In the life of Solon, Plutarch adverts to the same law: "He shall be fined who slanders any man." This law is alluded to by Lycias in his oration in Theomnestem. Isocrates, in Lochitem, quotes another law of Solon. He shall incur a fine of five hundred drachms who reproaches any one with a heinous offense against the laws of his country. The laws of Solon had a sweetness and benevolence which passed into the manners of the Athenians, and, in the form of politeness, constituted their distinguishing feature. The Athenians were only the most polite people of Greece, inasmuch as they were the most social and benevolent.[1] Solon justly concluded that the liberty of the citizen would be imperfect unless his character were protected. Hence the penalties denounced against libelers, and the permission to prosecute them by public accusation; the prohibition of libeling the dead, as offending the piety of the living, and perpetuating the hatred of families. Plutarch commends this law. He has, however, quoted it partially. Solon punished the calumniator, not on account of injury to the dead, but in respect to the quiet of families and the public peace. Ulpian adverts to this law, and according to Suidas it was the subject of public accusation. "Itaque veteres," says Pliny, "ad mentionem defunctorum testabantur, memoriam eorum a se non solicitari."[2] There are other laws of Solon directed against defamation, but as no penalties are annexed to them they are merely prohibitory. The orators of Athens were restrained in their public harangues, and subject to a fine for contumelious language. The Athenians had one law which was purely political. At Athens an action of slander was given against any one who disparaged another for belonging to a trade.[3] The laws against libels which involved the peace and honor of Athens were executed with great severity. Phidias, the celebrated sculptor, was prosecuted for a libel and thrown into

[1] Epitaphius of Pericles, 2d lib. Thuc.

[2] 1 Pet. Leg. Atticæ, 535.

[3] Holt on Libel, 15.

prison because he had represented on the shield of Minerva some circumstances which impeached the credit of the ancient history of Athens.[1]

§ 4. **The Ancient Roman Law of the Twelve Tables** — compiled about three hundred years after the founding of the imperial city — of Roman codes comes first in the order of time. Its compilation, so far as it relates to private law, was only the reducing to writing of what had been before matters of usage. The object in view seems to have been political rather than legislative — the settlement of disputes between the patricians and plebeians as to the rights of the latter, and the regulation of judicial proceedings so as to check the arbitrary power of the consuls. All we know of them now is from the commentaries upon them by Gaius, Ulpian and others contained in the Pandects, and some passages in the writings of Cicero and in Livy's history. By the law of the Tables on this subject it appears that "whosoever slanders another by words or defamatory verses, and injures his reputation, shall be beaten with a club."[2] A corrupt and malicious witness expiated his offense by being thrown headlong from the Tarpeian rock. It is presumable that the laws against defamation would, in all early stages of civilization, be few and simple. Their main object would be the preservation of the public peace by the infliction of penalties in respect of oral defamation. Libels would be out of the question when few could read, and fewer still could write. Many of the earliest laws which history has transmitted to us are of a penal rather than remedial nature; they prescribe specific penalties or fines rather than damages, proportioned to the real circumstances, and, as is usual with early legislators, their enactments are not general, but frequently limited and confined to particular imputations which were considered as likely to produce violence and outrage.

§ 5. **Progress of the Roman Law.**— With respect to the laws of Rome, in cases of defamation, there is some perplexity. In the dark age of the Decemviri, the author of libels and satires was punished with death.[3] But as the manners of the Romans were insensibly polished after the expulsion of the Decemviri, their laws fell into disuse — not formally re-

[1] Plutarch, in Periclem.
[2] Cooper's Justinian, 667.
[3] Hook's Rom. Hist., 314.

pealed, but the humanity of the age stopped the mouth of the accusers. The Valerian law took from the magistrates the power of inflicting death or any corporal punishment upon a free citizen; the laws of the Decemviri were thus indirectly repealed. It was to this early time of the republic that we may refer what Livy says of the Romans, that no people were disposed to more moderation in their punishments.

§ 6. **The Laws of Sylla** partook of the darkness of the age of the first kings of Rome, and followed the examples of early times in his laws against libelers. But they fell into disuse after his death; and though in the days of Horace a libeler might be deterred *formidine fustis*, it was deemed no great hazard in cases of private libel if the libeler could support the truth of his charge.

§ 7. **The Cornelian Law** decreed that the convicted author Famosi Carminis should be deprived of the right of making a testament, or, as some understand it, should not be suffered to give evidence in a court of justice. Tiberius, through the whole of his reign, subjected satirical writers, in cases of private calumny, to the same punishments as for offenses against the laws *læsæ majestatis*. The Cæsars were not, however, the first who extended these laws to libelers. Sylla decreed that it should thenceforward form a part of the laws *læsæ majestatis* to declaim against any public officers.[1] In the early ages of the republic the laws *læsæ majestatis* implied crimes against the state; the title of the law was indeed known in ancient times, but the spirit of it differed from the modern application. In the days of the republic the treachery of a commander, the seditious spirit which threw the state into disorder, the corrupt administration which impaired the majesty of the Roman people, were the objects of this law. These were acts, and acts were punished; but words, says Tacitus, were free. Augustus was the first who brought private libelers under the penalties of this law, incensed by the licentious spirit of Cassius Severus, who had wantonly defamed the most illustrious characters of Rome. This law would probably have perished with the occasion but for the succession of Tiberius, who, on being asked by the prætor if process should be granted upon this law of Augustus, replied that the law against libelers must be executed.

[1] Cic. Fam. Epist., 3, 11.

It is proper to observe, in this place, that a distinction was very early taken in the Roman law between slander spoken and written; and the *injuria verbalis* was deemed to constitute a much lower degree of injury than the *malum carmen* and *famosus libellus*. The jurists are unanimous in their interpretation of the laws against slander that the truth of contumelious charges excused the speaker; in other words, according to the technical language of our law, that he might justify his charges, provided they were imputations of crimes falling under the cognizance of the ordinary tribunals. It is to this distinction, and a consideration of the security which the law necessarily extended to such as made charges with a view of bringing them into legal inquiry, that we must refer the famous response of Paulus, "Eum qui nocentem infamavit, non esse bonum æquum ob eam rem condemnari, peccata enim nocentium nota et opertere et expedire." He adds, "Nulla scilicet est contumelia quæ fit dignis." But if the charge at the time of making it were not cognizable by law, the crime being either satisfied by punishment or excused by pardon, or in case the reproach were of a corporal defect or natural infirmity, under such circumstances the truth was deemed rather to enhance than to palliate the injury, and the malignity of the speaker's mind was principally regarded.[1]

§ 8. **Codex Theodosianus, the Theodosian Code.** — Theodosius II., emperor of Rome, caused to be made a collection of the constitutions of the former emperors, which has been called the Theodosian Code. It is in this code that we find for the first time a distinct series of laws on defamation, entitled the four constitutions of Constantine, *de Famosis Libellis*. As these constitutions are said by Barrington to have been introduced by Sir Edward Coke into the Star Chamber, and declared by him to be the resolutions of the judges of that court, and to have descended to us from that period as the language and rule of the common law, it would seem necessary to consider them with more than a passing reference. I have therefore given the constitutions in the Latin, with a translation of my own, for the benefit of those members of the profession who are not familiar with the original tongue.

In the Theodosian Code the constitutions are called Quatuor Constitutiones Constantini de Famosis Libellis, though they

[1] Holt on Libel, 21.

include the rescripts of Valens, Valentius and Valentian. The first is as follows:

First Constitution: "Si quando famosi libelli reperiantur, nullas exinde calumnias, patiantur ii, quorum de factis vel nominibus aliquid continebunt, sed scriptoris auctor potius reperiatur, et, repertus, cum omni vigore cogatur, his de rebus, quas proponendas credidit, comprobare, nectamen supplicio, etiamsi aliquid ostenderit, subtrahatur."

Translation: If at any time libels are found, let those concerning whose acts or names they make mention suffer no false accusations therefrom, but rather let the one who instigated the writer be found, and, when found, let him be compelled with all rigor to give proof concerning those things which he has thought fit to set forth; nor yet let him be released from punishment even if he shall show anything.

This constitution points at libels containing charges against officers of the state, the authors of which could not be found. The design of the emperor seems to have been to bring the accusers forward, and not to suffer them to disperse anonymous defamation.

Second Constitution: Constantini Secunda Constitutio.— "Licet serventur in officio tuo, et vicarii, exemplaria libellorum, qui in Africa delati sunt, tamen eos, quorum nomina continent, metu absolutus securitate perfrui sinas, solumque moneas, ut ab omni non solum crimine, sed etiam verisimili alieni esse festinent.— Nam qui accusandi fiduciam gerit, oportet comprobare, nec occultare quæ sciverit, quoniam predicabilis erit ad dictationem publicam merito perventurus."

Translation: Second Decree of Constantine.— Although copies of libels which have circulated in Africa are preserved in your office and in that of your deputy, nevertheless you will permit those whose names they contain, to enjoy peace and freedom from fear, and you will only admonish them that they hasten to be free not only from crime but also from the appearance of it.— For he who has the confidence to make an accusation ought to establish it and not conceal what he knows, since with merit about to fall into the act of public prescription, he will be praiseworthy.

It will be seen by the translation that this constitution refers to libels already in the possession of his proconsul or his

deputy, or to such as were transmitted anonymously to the magistrate. It relates to the various laws in the Digest de criminis nunciatione magistratrui, facta, of which mention is frequently made by Seneca, Pliny and Tacitus.

Third Constitution: CONSTITUTIO TERTIA AD JANURIUM.— "Ut accusatoribus patientia præbenda est si quem in Judicio persequi volunt, ita famosis libellis fides habenda non est, nec super his ad nostram scientiam referendam cum eosdem libellos flammis protinus conducat aboleri, quorum auctor nullus existit."

Translation: THIRD DECREE IN JANUARY.— As patience is to be shown to accusers if they desire to prosecute any one in court, so no credit must be given to libels; nor should they be brought to our knowledge, since he may cause such libels, of which no other appears, to be immediately destroyed by fire.

Fourth Constitution: CONSTITUTIO QUARTA.— "Famosa scriptio libellorum quæ nomine accusatoris caret, minime examinanda est, sed penitus abolenda; nam qui accusationis promotione confidat, libera potius intentione, quam captiosa atque occulta conscriptione, alterius debet vitam in judicium devocare."

Translation: FOURTH DECREE.— A defamatory writing which does not have the name of the accuser must not be examined at all, but must be wholly destroyed; for he who trusts in the motive of his accusation ought to call another's life into judgment rather by an outspoken charge than by an insidious and secret writing.

Fifth Constitution, to the Africans: CONSTITUTIO QUINTA, AD AFROS.— "Libellos, quos famosos vocant, si fierit possit, abolendos, inclytus pater noster providit, et hujusmodi libellos, ne in cognitionem quidem suam, vel publicam jussit admitti; non igitur vita cujusquam, non dignitas, concussa his machinis vacillabit; nam omnes hujusmodi libellos concremari decernimus."

Translation: FIFTH DECREE, TO THE AFRICANS.— Our illustrious father took care that writings which are called defamatory should, if possible, be destroyed, and he ordered that such writings should not even be admitted to his knowledge nor that of the public; therefore neither the life nor the reputation of any one shall be disturbed and endangered by these contrivances; for we decree that all such libels be burned.

Sixth Constitution, to the People: CONSTITUTIO SEXTA, AD POPULUM.— "Nemo prorsus de famosis libellis, qui neque apud me, neque in judicio, ullum obtinent locum, calumniam patiatur. Nam et innocens creditur cui defuit accusator, cum non defuerit inimicus."

Translation: SIXTH DECREE, TO THE PEOPLE.— No one, in fine, shall suffer false accusation on account of libels which have no place either before me or in court. For he is even held innocent who has no accuser, though a personal enemy has not been wanting.

It would be difficult to pass any judgment on these laws of Constantine which would not redound to the credit of his humanity and experience in the art of government.

The purpose of the sixth constitution was to extinguish secret and anonymous libels, but at the same time not to impair those sources of information and charge which were necessary to bring crimes to the notice of the public tribunals, seems to have been the aim of these laws. The laws cannot be duly executed unless a wide door be open to public accusation; and it is the policy of every wise code not to press upon public accusers the heavy responsibility of establishing, under all circumstances, the truth of their charges. The effect of this law of Constantine was to call the libelers into court, to arm them with public accusations, and, by means of a legal inquiry, to administer an immediate remedy to their calumnies.

Ninth Constitution: In the Theodosian Code follow two constitutions of Valens, de Fam. libellis:

CONSTITUTIO NONA.— Imp. Valentinianus, Theodosius, et Arcadius, Cynegio, P. P.

"Si quis famosum libellum, sive domi, sive in publico, vel in quocunque loco, ignarus offenderit, aut discerpat priusquam alter inveniat, aut nulli confitetur inventum; nemini denique, si tam curiosus sit, referat, quid legendo cognoverit. Nam quicunque obtulerit inventum, certum est ipsum reum ex lege retinendum, nisi prodiderit auctorem; nec evasurum pœnas hujusmodi criminibus constitutas, si proditus fuerit cuiquam retulisse quod legerit."

Translation: NINTH DECREE.— If any one shall come unawares upon a libel, whether at home or in public, or in any place whatever, he shall either tear it to pieces before another

finds it or confide to no one the fact that he has found it; to no one, finally, if he be so curious, shall he relate what he has learned by reading. For whoever exhibits the thing found, it is certain that he ought to be held as the very culprit according to law, unless he shall produce the author; nor shall he escape the penalty appointed for such offenses if it shall appear that he related to any one what he has read.

Such are the laws against libelers which are contained in the Theodosian Code.

"It is to be lamented," says Holt, "that many excellent writers have misunderstood these laws, and considered them rather as effects and instruments of despotism than benevolent and salutary provisions for the peace and security of the community. It may be seen almost in every page of the latter Roman writers, such as Pliny, Tacitus and Seneca, that the courts of the emperors were pestered with a set of men who solicited the imperial favor by an ostentatious zeal in accusing the most eminent characters in Rome. The punishment of the delatores of Nero, in the succeeding reign, is well known. The design, therefore, of most of the laws *de libellis famosis* was to prevent secret and ambiguous accusation; the severity was pointed against those who found, read or circulated anonymous charges of crimes; it compelled every man to invest himself with his own accusation, and, to adopt a colloquial expression, to stand forth and prove his words." [1]

Constitution Concerning Slanders: It would be uncandid to the memory of Theodosius to omit one of his constitutions with respect to a crime of frequent occurrence in the present day.

Theodosii Constitutio de Maledictis in Principem, Ejusque Tempora Jactatis.—"Si quis modestiæ nescius, et pudoris ignarus, improdo, petulantique maledicto, nomina nostra crediderit lacessenda, ac temulentia turbulentus obtrectator temporum fuerit, eum pœnæ nolumus subjugari, neque durum aliquid, neque asperum sustinere: quoniam, si id ex levitate processerit, contemnendum est; si ex insania miseratione dignissimum, si ab injuria remittendum."

Translation: Decree of Theodosius Concerning Slanders Uttered against a Ruler and His Times.— If anybody, unacquainted with modesty and ignorant of shame, by false and

[1] Holt on Libel, 25.

wilful slander shall think our name is to be injured, and shall become a rash and troublesome traducer of the times, we do not wish him to be subjected to punishment, nor to suffer any severe or harsh treatment: since if it has proceeded from levity it is to be despised; if from unsoundness of mind it is most deserving of pity; if from intent to do wrong it is to be forgiven.

§ 9. **Laws Inflicting Punishment upon Libelers.**— In the digest many laws are to be found, besides the Cornelian law, or *senatus consultum*, cited by Ulpian, inflicting punishment upon libelers. The general tenor of these laws seem to be that the truth or falsehood of the charge was everywhere taken into account. If the subject of the defamation were of a nature which concerned the commonwealth, the libeler was absolved if he could prove his accusation before a competent tribunal; a kind of option was allowed him to vindicate his charge by becoming an open accuser. The truth was not in the nature of a defense, or what is called with us justification in law, but it afforded him a refuge behind which to shelter himself, and, as it were, to compromise a breach of the public peace by standing forward to aid the execution of the more important laws of criminal justice. If the defamatory matter respected some vice or infirmity, moral or natural, or even a crime, pardoned or satisfied by punishment, the defamation, though true, was punished.[1]

§ 10. **The Institutes of Justinian.**— "Injuria autem committitur, non solum cum quis pugno pulsatus, aut fustibus cæsus, vel etiam verberatus erit; sed et si cui convitium factum fuerit; sive cujus bona, quasi debitorus, qui nihil deberet, possessa fuerint ab eo, qui intelligebat, nihil eum sibi debere; vel si quis ad infamiam alicujus libellum aut carmen — aut historiam — scripserit, composuerit, ediderit, dolove malo fecerit, quo quid eorum fierit; sive quis matrem familias aut pretextatum pretextatamve, absectatus fuerit; sive cujus pudicitia at, tentata esse dicetur: et denique, aliis plurimis modis admitti injuriam, manifestum est."

Translation: An injury may be done not only by beating and wounding, but also by slanderous language, by seizing the goods of a man, as if he were a debtor, when the person who

[1] Holt on Libel, 23.

seized them well knew that nothing was due him; by writing a defamatory libel, poem or history; or by maliciously causing another so to do; also by continually soliciting the chastity of a boy, girl or woman of reputation, and by various other means too numerous to be specified.[1] Justinian has classed libels and defamations among private injuries of the highest degree.

§ 11. **Edict of Valentinian and Valens.**—In his collection of the Roman laws, the most perfect form which the civil law assumed, the constitutions of Constantine *de famosis libellis* were severed from the *corpus juris civilis*. But in the 9th book of the code, title 36, the following edict of the emperors Valentinian and Valens is incorporated with the laws of Justinian:

"Si quis famosum libellum, sive domo, sive in publico: vel in quocunque loco, ignarus repererit, aut corrumpat prius quam alter inveniat, aut nulli confiteatur inventum. Si vero non statim easdem chartulas corruperit, vel igne consumpserit, sed earum vim manifestaverit, SCIAT se, quod auctorem hujusmodi delicti capitali sententiæ subjugandum. Sane, si quis devotionis suæ, ac salutis publicæ custodian gerat, nomen suum profiteatur, et quæ per famosum libellum persequenda putaverit, ore proprio edicat, ita ut absque ulla trepidatione accedat, sciens quidem quod si adsertionibus suis veri fides fuerit opitulata, laudem maximam et præmium a nostra clementia consequetur; sin vero ninime vera obstenderit, capitali pœna plectetur."

Translation: If any one shall unwittingly discover a libel, whether at home or in public, or in any place whatever, either let him destroy it before any one else finds it, or let him confide to no one the fact that he found it. But if he does not immediately destroy said writings or consume them by fire, but shall make known their purport, LET HIM KNOW that he himself will be subject to capital sentence as the author of such offense. Certainly, if any one has regard for his own welfare and the public safety, let him declare his name and say from his own mouth what he thinks was sought after by the libel, so that he may come without any fear, knowing indeed that if by his declarations faith in the truth shall be promoted, he shall obtain the greatest praise and reward from

[1] Justinian Inst., lib. IV, tit. 4; Cooper's Justinian, 319.

our clemency; but if he shall conceal the truth in the least respect, he shall be punished by death.

The term *famosis libellis* was almost exclusively given to that species of libel which affected the credit or tranquillity of the commonwealth. The design of this constitution, therefore, was to bring forward public accusers, and to destroy those ambulatory libels, or rather menaces, which injured the peace of families, and were probably the means of extortion amongst the delatores. This species of libel rather corresponded with the offense known in our laws by the title of threatening letters or threats to extort money. The severity against this species of libel must not be confounded with the civil law of libel understood according to the term of libel amongst us. This was not the *famosum carmen* or *scripta injuria*. It was that kind of crime which every community has justly considered as constituting a capital offense.[1]

With respect to ordinary libels and contumelious words, the proceeding in the age of Justinian was either matter of public prosecution or private action. The laws of the Twelve Tables, and most of the *senatus consulta de injuriis*, were now become obsolete. The plaintiffs recovered in proportion to the measure of their injuries; and, according to Justinian, "secundum gradum dignitatis, vitæque honestatem, crescit aut minuitur æstimatio injuriæ."[2]

§ 12. **The Difficulties of the Civil Law.**—There is great difficulty in examining any branch of the civil law. Notwithstanding the care of Justinian, there is scarcely a title in the Pandects in which one positive and unalterable rule of judgment is laid down. The subject, and every possible circumstance of it, are foreseen and provided for with a wonderful sagacity; but the rule has so many qualifications and so many exceptions that the title becomes rather a dissertation upon laws than a rule of practical justice. It is obviously impossible for any human foresight to follow the infinitely possible combinations of human actions. This possible variety is in fact a genus, of which all the species must be individuals. Hence, the voluminous code of our own laws and of every free state. The Roman lawyers, endeavoring at the same perfection, and having greater obstacles to encounter in the uncir-

[1] Holt on Libel, 27. [2] Just. Inst., lib. IV, tit. 4.

cumscribed power of the prince, have expanded their collection to the same magnitude. They honestly endeavored to foresee and provide for everything, in order that in everything they might have a rule to oppose to the will or interpretation of the prince.[1]

§ 13. **The Roman Law of Libel.**— In Roman law there are many instances given in which a man's reputation was assailed, not by words, but by acts. For example:

(i) By refusing to accept a solvent person as surety for a debt, intending thereby to impute that he is insolvent. (D., 2, 8, 5, 1.)

(ii) By claiming a debt that is not due, or seizing a man's goods for a fictitious debt, with intent to injure his credit. (Gai., III, 220; Just. Inst., IV, iv, 1; D., 47, 10, 15, 33.)

(iii) By claiming a person as your slave, knowing him to be free. (D., 47, 10, 12, 22.)

(iv) By forcing your way into the house of another. (D., 47, 10, 23, 44.)

(v) By persistently following about a matron or young girl respectably dressed, such constant pursuit being an imputation on their chastity. (Gai., III, 220; Just. Inst., IV, iv, 1; D., 47, 10, 15, 15–22.)

(vi) By needlessly fleeing for refuge to the statue of the emperor, thereby making it appear that some one was unlawfully oppressing you. (D., 48, 16, 28, 7.) Though it is difficult to see in this case how it was determined who was the right plaintiff.[2]

The law of libel varied in Rome with the government. This law, under the Decemviri and Sylla, we have already explained. After the death of Sylla, Julius Cæsar seems to have engrafted upon the laws *læsæ majestatis* some of the laws of Sylla relating to the defamation of public authorities. Satire, however, was not much checked till the conclusion of the reign of Augustus, who restrained it for the sake of some favorites.

When libels became once more a part of the crime *læsæ majestatis* they ceased to have the accuracy of any distinct offense. Thus, Cremutius Cordus, in the reign of Tiberius, was condemned for having called Cassius the last of the Romans. During the reign of the latter emperors libelers were

[1] Holt on Libel, 26.

[2] Odgers on L. & S., 14.

occasionally restrained by severe punishment or tolerated by the indolent clemency of the prince. Under Titus almost all libelers were exempt from punishments; that is to say, they were no longer exposed to the penalties *læsæ majestatis*. Under Domitian they were hunted down; but they revived under Nerva and the Antonines. Constantine pursued them with vigor, and under the mask of a war against libelers waged a persecution against a religious sect — the Donatists. Valens and Valentinian considered libelers to be more odious than hordes of barbarians. Theodosius, with a magnanimity more to be praised than imitated, held them in contempt.

Under the latter emperors the injuries of reputation, like all other injuries, had a more precise rule of estimation. In cases of scandal, or libels not imputing capital crimes, the prætor gave damages according to the quality of the injury and the dignity of the person injured; and, unless the charge were of that kind which the state had an interest in punishing, the truth was no vindication. At the same time it was competent to the offender to negative the imputation of malice.[1]

The Roman law had at least the merit of simplicity. By it an intention to injure the plaintiff was essential to the action for the injury.[2] It never presumed malice; the plaintiff had to prove that the defendant expressly intended to impair his good name. For example, if an astrologer or soothsayer, in the *bona fide* practice of his art, denounced A. as a thief when he was an honest man, A. had no action; for the astrologer had only committed an honest mistake. But it would be otherwise if the soothsayer had not really believed in his art, but had pretended, after some jugglery, to arrive at A.'s name from motives of private enmity.[3] That being so, unless there was some evidence of malice the plaintiff was in every case nonsuited. On express malice proved the plaintiff recovered. Even the fact that the libel was contained in a petition sent to the emperor was no protection.[4] If a prefect or other official in the course of his duty charged a man with crime, he was not liable to an action if he did so in the belief that the charge was true, and without any malicious intention of pub-

[1] Gomes. 3, resol. 6, n. 2; Myns. 4, obs. 4; Gail. 2, obs. 99; Covarr. 1, resol. 11, n. 6 and 7.

[2] D., 47, 10, 3, 3 and 4.

[3] D., 47, 10, 15, 13.

[4] D., 47, 10, 15, 29.

licly defaming the man; but if, in a sudden quarrel, he made the charge in the heat of the moment, and without any ground for the accusation, then he would be liable to an action when his term of office had expired.[1] The adversaries in litigation were of course allowed great latitude — a certain amount of mutual defamation being essential to the conduct of the case, and so not malicious; but even here moderation had to be observed.[2]

THE LAW OF ENGLAND.

§ 14. **Ruins of the Roman Law.**— It would be impossible to trace any particular usage or part of the common law of England to its original source, and, even if it were possible to do so, it would serve but little purpose. It is sufficient to say that the ruins of the civil law and the Roman system have furnished the bulk of the materials out of which nearly all the codes of modern Europe have been formed.

The customs of the ancient Britons were engrafted on the Roman law, and perhaps the original energy of that code was in some degree restored by the vigor of the new stock. The Roman law, as is well known, was at one time administered in England under the most celebrated of Roman lawyers. It was one of the maxims of Roman policy to admit the laws of all conquered nations, and to change only so much of the ancient usages as might be inconsistent with their own national code.

§ 15. **Under Alfred and Edgar.**— Before the Conquest the common law had settled into a compendious system. It is reasonable to believe that Alfred had accomplished such a mixture of the rules and principles of the civil law as was adapted to the manners of his age with such of the Saxon usages which, though issuing from the woods of the north, had the stamp of a noble freedom. Researches, likewise, give every reason to suppose that the piety of Alfred induced him to incorporate in his code much of the divine law, and to correct the moral law as given to the Jews by the more perfect charity of the Christian system.[3] A persuasion of this kind, per-

[1] Rescript to Victorinus, A. D. 290; Krueger's Codex, ed. 1877, p. 855.

[2] Pauli Sent. V, iv, 15.

[3] Mirror., 301; Selden on Law and Gov., 5th ed., 60.

haps, induced Coke to declare, and Sir Matthew Hale to repeat, that Christianity was part of the common law of England.[1]

The laws took very early notice of slander as an injury to the individual and an offense against the public peace. Libel, the more enlarged form of the abuse of speech, was scarcely noticed, because in a rude and unlettered age it was scarcely known; as, indeed, it could not be the crime of an illiterate people.

King Alfred commanded that the forger of slander should have his tongue cut out, unless he redeemed it by the price of his head. "Si quis publicum mendacium confingat, et ille in eo firmetur, nulla levi re hoc emendet, sed lingua ei excidatur, nec minori pretio redimi liceat, quam juxta capitis æstimatione."[2]

There is a law of Edgar to the same purpose,[3] and Canutus, the Dane, re-established the laws of Alfred and Edgar with the same severity. "Et si quis alterum injuria diffamare velit, ut alterutum vel pecunia vel vita ei diminuatur, si tunc alter eam refellere possit, perdat linguam suam, nisi illam capitis æstimatione redimere velit."[4]

In cases of this kind it was perhaps expected that the subject of the slander should be false; and as few could write and not many read, the offense which is formally called libel must have been rare.

§ 16. **Under the Norman Kings — Bracton.** — In the administration of criminal justice, a mildness borrowed from the civil law superseded the former Gothic barbarity with respect to punishments. Bracton, who wrote in the reign of Henry III., repeats the rule and language of the common law as marking off the offense of libel, assigning it, however, that rank in the class of injuries which it maintains to this day. The words of Bracton are nearly the same as those of Justinian in his Institutes:

"Fit autem injuria, non solum cum quis pugno percussus

[1] 2 Inst., 220; Ventris, 293; Holt on Libel, 32.

[2] Wilk. Leg. Ang. Sax., 41, pl. 28; Lamb. Sax. Laws, 29, pl. 28; Mirror., 301; Selden, Discourse on Law and Gov., 5th ed., 60.

[3] Lamb, Sax. Laws, 64, pl. 4, Wilkins Ac.

[4] Wilk. Leg. Ang.-Sax., 136, pl. 15; Lamb. Sax. Laws, 110, pl. 15.

fuerit, verberatus, vulneratus, vel fustibus cæsus, verum cum ei convitium dictum, fuerit, vel de eo factum carmen famosum, et hujusmodi."[1]

Though this be the language of the civil law, and is recorded by Bracton as the received common law of England at his time, Sir Matthew Hale says of him as an authority: "The book itself in the beginning seems to borrow its method from the civil law. But the greatest part of the substance is either of the course of proceedings in the law known to the author, or of resolutions and decisions in the courts of king's bench and common bench, and before justices itinerant."[2]

§ 17. **In the Year Books.**— There is not much to be found in the year books and the ancient reporters with regard to libels, as it was not till the invention of printing that the offense could become common. The action of slander, which is the same in principle, makes an earlier appearance; but no action for scandalous words appears to have been brought before the reign of Edward III.; and so rare was this action even then, that we find but one in the whole reign of that prince.

There were but three actions for words in the twenty-two years of Edward IV.; one only in the reign of Henry VII. In the long reign of Henry VIII. there were but five. But in the time of Elizabeth, as learning increased, they began to multiply. We find in Coke's Reports, volume 4, seventeen adjudged cases on this subject.[3]

The people of England in that age were a military people. The offices of the law were in a great measure superseded by the imagined obligations of chivalry. It was a point of honor with every one to be sufficient for his own defense, and to assert and avenge his honor and personal rights by his sword.

§ 18. **The Statute of Westminster.**— The first notice which the statute law takes of the offense of slander after the time of Bracton is by the statute of Westminster 1st. The reason of this act is stated in the preamble: "Forasmuch as there have been oftentimes found in the country devisers of tales, whereby discord, or occasion of discord, hath many times arisen between the king and his people or great men of the realm, as had lately been experienced in the reign of Henry

[1] Bracton, fol. 155.
[2] Hist. of Com. Law, vol. 1, p. 270.
[3] March. Act for Sland., 4.

III., therefore it was commanded that from henceforth no one be so hardy as to tell or publish any false news or tales whereby discord, or occasion of discord or slander, may grow between the king and his people or the great men of the realm; and whoever does so shall be taken up and kept in prison until he has brought into court the first author of the tale." This, from the nature of the thing, became the severest punishment that could well be devised, as it might amount to perpetual imprisonment.

§ 19. **The Statutes of Richard II.**— The next statute is that of the 7th Richard II., *de scandalis magnatum.*

The two statutes against the spreaders of false rumors are said to have been procured by the Duke of Lancaster, who was in little favor with the people, and, at the time of the insurrections among the Villains, had been distinguished as a principal object of their fury. The first of these is Stat. 2 Richard II., stat. 1, ch. 5. The design of this act will be best understood from the preamble: "Of the devisers of false news, and of horrible and false lies of prelates, dukes, earls and barons, and other nobles and great men of the realm, and also of the chancellor, treasurer, clerk of the privy seal, steward of the king's house, justices of the one bench or of the other, and of other great officers of the realm, or of the things which by the said persons were never spoken or done or thought, in great slander of them, and whereby debates or discord might arise betwixt them, or between them and the commons, and great mischief to the realm." These were the objects meant to be aimed at by this statute, and it was enacted that none under grievous pain be so hardy as to devise, speak or tell any false news, lies or other false things of the above-mentioned persons, whereof discord or slander might arise within the realm.[1]

Those who offended therein were to be liable to the statute of Westm., 1st, above mentioned, which directs such offender to be taken and imprisoned till he has found the person by whom the speech was moved; but this not being likely to produce the effect intended, it was enacted by statute 12 Rich. II., ch. 11, that, should he not be able to find such person, he should

[1] *Vide* Black., vol. IV, 148, in notes; Holt on Libel, 35.

be punished by advice of the council, notwithstanding the statutes.

The occasion of the act de Scan. Mag. is mentioned in Cotton's Abridgment of the Records of the Tower.[1] The design of the act was to prevent those imminent dangers which might be occasioned by false slanders of the peers and great officers of the kingdom. The parts of the act are three: first, reciting the offense and mischief, designating the evil effects, and appointing a penalty. In substance this statute creates no new offense, and prohibits nothing but what was prohibited by the common law before; but, in respect to the dignity of the persons for whose protection it was made, it comprehends within its penalties the less offensive modes and terms of slander, of which the common law took no specific cognizance, and marks out a new proceeding to redress them. The offenses to be punished by this act are *mala in se*, and against the moral law. The scope of the act, therefore, was not only to punish such things as import a great scandal in themselves, or such for which an action lay at the common law, but also such reports as were anywise contemptuous towards the persons of peers and the great men of the realm, and brought them into disgrace with the commons. Secondly, the statute inflicts no new punishment on the offender; for, at the common law, any person for such offenses as are therein described might have been fined and imprisoned, either upon indictment or information brought against him, and no other punishment is given by the statute but imprisonment. Even at the common law, scandal of a peer might be punished by pillory and imprisonment.[2] Thirdly, it appears that *scandalum magnatum*, as all other slander, was an offense at common law, but aggravated, in the estimation of the peerage, by an act of parliament, which obliges the plaintiff now, upon the statute, to prosecute *tam pro domino rege quam pro seipso*, which he could not do at the common law.[3]

In the early cases it has been held that if an action of *scandalum magnatum* be brought upon this statute, the defendant cannot justify; because it is brought *qui tam*, etc., and the

[1] Cott., fol. 173, num. 9, 10, and 2 Coke, 125; 12 Coke, 37; 7 Coke, 59; Mod., 181. Lamb's Case.

[2] Atkyn's Just., 2 Mod., 162; 5

[3] Holt on Libel, 37.

king is concerned. But the defendant might explain the words, and insist upon some circumstance from the occasion of speaking them. But the rule was inflexible that if true they could not be published, because the statute was to prevent discords.[1]

§ 20. **Libels of the Star Chamber.**— The court of star chamber was a kind of court of equity administering criminal justice, abhorrent from the principles of the constitution in its form, but, when honestly administered, a most useful subsidiary irregularity. So much of chivalry still remained in its time that the authority and connections of the nobles were too powerful for the ordinary course of the law. But in the high dignity of this court the most elevated offender found his peer. In its records the earliest cases of libel are to be found.[2] Holt denominates the star chamber a court of criminal equity, and, acting in this character, he says "it gave a body and distinct shape to what previously existed in fainter lines perhaps, and more in principle than in received practice in the common law." The popular writers have taken their character of this court rather from its abuses in violent times than from the course of its ordinary practice in the tranquil periods of English history. It has been condemned from its contradiction to abstract principles, and from a defective knowledge of its effects and mischiefs. In wanting juries it appeared to want everything. We are apt to forget that, in the infinite variety of human means and actions, a movement is sometimes best procured by oblique forces; and that an instrument of despotism may be made auxiliary even to the best purposes of liberty of this court.[3]

Perhaps it is unfair to form our judgment upon the acts of former times on the principles and practices of the present age. Nothing would be so odious as a star chamber under our present system of judges and juries. But might there not have been some period of the history of the human race in which the superior learning of the high officers of church and state, and the collected authority and splendor of the nobles immediately attached to the court of a king, were a better safeguard for the public peace than the juries of a barbarous age, or their independence at a time when every peer was the sovereign of

[1] Freem., 221; Poph., 67; Lord Raym., 879; 4 Bac. Abridg., 408; Bull, N. P., 2.

[2] Holt on Libel, 38.

[3] Coke's 4th Inst., 65, ch. 5.

his vicinage? Be that as it may, this court has still, after the lapse of centuries, a most unsavory reputation. In that part of the Institutes in which Coke treats of the star chamber, he says that the main cognizance of the offense of libel was taken almost into the particular keeping of that court as the heinousness of the crime, and the peculiar contumacy of the offenders seemed to require a tribunal of more than common dignity. The punishments of this court, he says, were likewise adapted to the mischief of the offense, being imprisonment, pillory, fine, whipping, loss of ears and brands in the face.[1] But we must avoid falling into an erroneous opinion, too prevalent with some writers, that the star chamber was the inventor of this legal notion of libel, and that, by a kind of forced construction in the nature of an equitable fiction, it appended it to the reason of the common law. The star chamber grounded, in pretext at least, all its right and authority in the common law. It exercised its jurisdiction in libels as a part of that common law. It assisted and concurred with the other courts of the king in administering the law upon this offense.[2] It is scarcely necessary to produce instances of the concurrent cognizance of the common law over the offense of libel. The commissions of oyer and terminer, almost as old as our statute law, give authority to inquire *de illicitis verborum propalationibus*.[3]

It is therefore an error to give the star chamber the merit or demerit of the present notion of libel. The star chamber adopted only the language and notions of the common law. The usurpation of that court was, in fact, a usurpation of jurisdiction, not of law.

While this court was in the fullness of its authority the courts of common law never failed to take cognizance of any cases of libel and scandal that came before them. Lord Coke enumerates offenders sentenced by the common-law courts to fine and imprisonment for libel and slander.

It is the purpose of another part of this work to inquire what is and what is not a libel. Like every other general offense the nature of which lies in description and not in definition, it has been variously construed in various times; being a mere legal reason, and therefore variable not only according

[1] Holt on Libel, 40.
[2] Coke's 3d Inst., 220.
[3] Queen v. Langley, 2 Ld. Raymond, 1060; 12 Coke Reps., 13; 2d Inst., 228.

to all the circumstances of the times, but according to the abilities and information of the judges. In ignorant and despotic times it had not the same limits and precision as in the days of liberty and science. It is unreasonable to object to our present tempered and corrected notion of libel that, in another form, it was at one time an instrument of tyranny and extortion in the star chamber.

§ 21. **Justices of the Peace.**— In the constitution of the more subordinate office of justice of the peace the law did not omit to give them charge over scandal and libel; and,[1] by the express words of their commission, gives them power to hear and determine the offense of libel.[2] Lord Mansfield says that libels are contained within the commissions of the justices of the peace.

§ 22. **The Rights of Personal Security Include those of Reputation.**— It is a maxim of the common law that there is no right without a legal remedy. The comprehensive remedy of the action on the case in civil injuries, and indictment in wrongs of a public nature, founded on principles of common law and justice, is every day applied in cases of private fraud and misdemeanors. It is no objection that the act never occurred before. The law is presumed to have willed it in principle if not in the individual case; to have willed it in the end if not in the means. The wise provision of the Stat. West. 2, cap. 24, for the writ of *casu consimili* is founded upon this principle with respect to civil injuries *prima impressionis*. Whatever be the mode of wrong, a remedy shall go forth to correct it. This is one of the glories of the English law. So with offenses which concern the public. Whatever is indecent, whatever has a tendency to disturb the peace and tranquillity of the community, whatever is of evil example or contagious disorder, whatever is *contra bonos mores, civis, si non hominis*, is comprehended within the large reason and remedy of the common law, the objects of which are the well-being and due peace and order of the family of the state.

§ 23. **Concluding Remarks.**— We have shown the law against defamation to have extended centuries back; and, as

[1] 34 Edw. III., ch. 1.
[2] 2 Hawk. P. C., vol. 2, ch. 8, 60; 1 Lev., 139; 1 Sid., 271; 2 Wills., 160; King v. Ripsal, 1 Black. Rep., 368.

there is nothing to contradict, but everything to confirm it, the law will suppose it time immemorial. The main effective mode of libeling (writing) is certainly immemorial, and writing no sooner commenced than the abuse grew up with it; and therefore in legal intendment, as explained by constant practice, the law to restrain it. We have the same authority for the law of libel that we have for the most important maxims of the common law, whether relating to our liberties or property. A succession of precedents, beginning in distant ages, forms the common law. They prove the law not only by the practice, but by the acknowledgment and submission implied in the uniformity of such practice. Doubtless it is the reason of a precedent, and not the precedent itself, which obliges; but when precedents for the punishments of a particular offense are found in numbers, and in all seasons of the constitutions, their reasonableness and conformity with the rule of the common law are to be deemed, as it were, written in their constancy, and ought not to be captiously questioned or put to their vindication. The law of defamation, as we have shown, is likewise to be collected from ancient text-writers, whose works are to be regarded as authority, not only as containing the rule of the common law derived from records and adjudged cases, but as embodying those traditions and usages of which no records now exist.[1]

AMERICAN LAW OF DEFAMATION.

§ 24. **The History of the American Law of Defamation** must always be identical with the English law. But few cases of special interest to the reader are found in the earlier books. The first case of newspaper libel adjudicated in the colonial courts was that of The King v. Zenger, tried at New York in August, 1735. Zenger, who was a German, had established a newspaper called the "Weekly Journal" in opposition to the "Gazette," the government organ, and the only other paper in the colony. His paper, the "Journal," contained frequent and somewhat severe attacks upon the administration of the colonial government and the governor, William Crosby. The grand jury refused to return indictments against the offending

[1] Holt on Libel, 44.

editor. But the attorney-general exhibited an information charging him with criminal libel. One of the articles upon which the information was predicated was the following: "The people of this city and province think, as matters now stand, that their liberties and properties are precarious, and that slavery is likely to be entailed on them and their posterity if some past things be not amended."

Another one of the offensive articles, quoting from a man who had removed from New York to Philadelphia, was as follows:

"We see men's deeds destroyed, judges arbitrarily displaced, new courts erected without the consent of the legislature — by which, it seems to me, trials by juries are taken away when a governor pleases; men of known estates denied their votes contrary to the received practice, the best expositor of any law. Who is there in that province that can call anything his own, or enjoy any liberty longer than those in the administration will condescend to let them do it? — for which reason I left it, as I believe more will."

In default of bail Zenger was committed to the common jail, where he remained eight months awaiting his trial. The colonial council ordered the papers containing the offensive articles to be burned by the common hangman. At the trial Zenger, having employed as his counsel James Alexander and William Smith, entered upon a vigorous defense. An exception was taken by them to the legality of the commissions under which the judges held their office; but the court refused to entertain the exception or to listen to any argument upon it, and ordered the names of the excepting counsel to be stricken from the rolls of attorneys. Andrew Hamilton, a famous lawyer of Philadelphia, was then engaged for the defense, and the trial proceeded. By the rule of the common law evidence of the truth of the alleged libels could not be admitted; and, as the defendant could not deny the publication, no witnesses were produced in his behalf. The object of the court appears to have been to induce the jury to return a special verdict finding the defendant guilty of publishing the articles, leaving the question as to whether or not they were libelous to the court; but the jury, after listening to the able and fearless arguments of Mr. Hamilton, in which he ap-

pealed to them to be the witnesses of the truth of the charges which the defendant had been denied the privilege of proving, disregarded the direction of the court and returned a general verdict of not guilty, leaving nothing for the court to do but to discharge the prisoner.[1] In speaking of the effect of this verdict, Merrill, in his hand-book for the press on newspaper libel, says: "The verdict was received by the spectators in the court room with cheers. The chief justice warned them to be silent, but the cheers were vigorously renewed. The able attorney who had served without fee was given an entertainment, and the common council presented him with the freedom of the city for 'the remarkable service done by him to the city and colony by his learning and generous defense of the rights of mankind and the liberty of the press.' When he started on his return to Philadelphia, a salute was fired in his honor on the banks of the Hudson."[2] The result of the case, according to Gouverneur Morris, was the dawn of that liberty which afterwards revolutionized America.[3]

§ 25. **An Early Colonial Statute** enacted May 14, 1645, appears upon the records of the colony of Massachusetts Bay, in the following terms:

"It is therefore ordered, y^{t} every p.son of y^{e} age of discretion w^{ch} is accounted 14 yeares, who shall wittingly & willingly, make or publish any lye w^{ch} may be p.nicious to y^{e} publicke weale, or tending to y^{e} damage or injury of any p.ticul^{r} p.son or wth intent to deceive & abuse y^{e} people by false newes or reports & y^{e} same, duely p.ved in any co^{r}t or before any one ma^{trate} (who hath hereby pow^{r} granted to heare & determine all offenses against y^{e} lawe) such p.son shalbe punished after y^{e} manner: For y^{e} first offence 10^{s}, or, if y^{e} p.ty be unable to pay y^{e} same, then to sit so long in y^{e} stocks as y^{e} said co^{r}t or magistrate shall appoint not exceeding two houres; for y^{e} second offence, whereof any shalbe legally convicted y^{e} sume of 20^{s}, or, if y^{e} p.ty be unable to pay, y^{n} to be whiped upon y^{e} naked body not exceed^{g} ten stripes."[4]

In *New Hampshire* a provincial statute, enacted in 1701, provided that if any person of the age of fourteen years or upwards should wittingly or willingly make or publish any

[1] Chandler's Am. Crim. Trials, 205.
[2] Merrill's Newspaper Libel, 17.
[3] Hudson's Journalism in U. S., 81.
[4] Merrill's Newspaper Libel, 11.

lie or libel tending to the defamation or damage of any particular person, or make or spread any false news or reports, with intent to abuse and deceive others, such person should, on conviction before one or more justices of the peace, be fined, according to the degree of the offense, not exceeding twenty shillings for the first offense, and find sureties for his good behavior.[1]

[1] Prov. Laws N. H., 17; State v. Burnham, 9 N. H., 40.

CHAPTER II.

EARLY ENGLISH AUTHORITIES.

§ 1. The Earlier English Authorities upon the Law of Defamation.— In the examination of the cases upon the law of defamation to be found in the older English reports, some care must be taken to ascertain the state of the criminal law under which the decisions were rendered.

§ 2. The Subject Illustrated.—

For example: We find it was held in 1602 that no action lay for saying "Master Barnham did burn my barn with his own hands;" for at that date it was not felony to burn a barn unless it were either full of corn or parcel of a mansion-house; and defendant had not stated that his barn was either. Barnham's Case, 4 Rep., 20; Yelv., 21.

And in 1602 it was held not actionable to say: "Thou hast received stolen swine, and thou knowest they were stolen;" for receiving is not a common-law offense, unless it amounts to comforting and assisting the felon as an accessory after the fact. But since 3 Wm. & Mary, ch. 9, sec. 4, and 4 Geo. I., ch. 11, such words are clearly actionable. Dawes v. Bolton or Boughton, Cro. Eliz., 888; 1 Roll. Abr., 68; Cox v. Humphrey, Cro. Eliz., 889; Odgers on L. & S., 60.

In Queen Elizabeth's time it was held that no action lay for saying "He keeps a bawdy-house;" "for by the common law he is not punishable, but by the custom of London; and therefore this action ought to have been sued in the spiritual court." (Glanvile dissenting.) Anon. (1598), Cro. Eliz., 643; Noy, 73.

But by 1606 the opinion of Glanvile prevailed, and such words were held actionable; "the keeping of a brothel-house is inquirable in the leet, and so a temporal offense." Thorne v. Alice Durham (1606), Noy, 117; Grove and wife v. Hart (1752), Sayer, 33; B. N. P., 7.

In many earlier cases such words as "She is a witch" were held actionable, the statutes 1 Jac. I., ch. 11, being then in force. But that statute is now repealed by the 9 Geo. II., ch. 5, sec. 3; which also expressly provides that no action shall lie for charging another with witchcraft, sorcery or any such offense. Rogers v. Gravat, Cro. Eliz., 571; Dacy v. Clinch, Sid., 53.

So long as the penal statutes against Roman Catholics were in force it was actionable to say "He goes to mass," or "He harbored his son knowing him to be a Romish priest." Walden v. Mitchell, 2 Ventr., 265; Smith v. Flynt, Cro. Jac., 300.

And so long as the 18 Eliz., ch. 3, was in force, it was actionable to charge a woman with being the mother, a man with being the putative father, of a bastard child, chargeable to the parish. Anne Davis' Case, 4 Rep., 17; 2 Salk., 694; 1 Roll. Abr., 38; Salter v. Browne, Cro. Car., 436; 1 Roll. Abr., 37.

It was not apparently clear law till the present century (R. v. Higgins (1801), 2 East, 5; R. v. Phillips (1805), 6 East, 464) that it was a misdemeanor to solicit another to commit a crime, although the person solicited did nothing in consequence. Hence, in the following cases, words were held not to be actionable, because no overt act was alleged to have followed the solicitation. They would be held actionable now. Sir Edward Bray v. Andrews (1564), Moore, 63; Eaton v. Allen (1599), 4 Rep., 16; Cro. Eliz., 684; Sir Harbert Crofts v. Brown (1617), 3 Buls., 167.

It was formerly the custom of the city of London, of the borough of Southwark, and also, it is said, of the city of Bristol, to cart whores. Hence, to call a woman a "whore" or "strumpet" in one of those cities is actionable, if the action be brought in the city courts, which take notice of their own customs without proof. But no action will lie in the superior courts at Westminster for such words, because such custom has never been certified by the recorder, and would now be difficult to prove. Oxford et ux. v. Cross (1599), 4 Rep., 18; Hassell v. Capcot (1639), 1 Vin. Abr., 395; 1 Roll. Abr., 36; Cook v. Wingfield, 1 Str., 555; Roberts v. Herbert, Sid., 97; 1 Keble, 418; Stainton et ux. v. Jones, 2 Selw. N. P., 1205 (13th ed.); 1 Dougl., 380, n.; Theyer v. Eastwick, 4 Burr., 2032; Brand and wife v. Roberts and wife, 4 Burr., 2418; Vicars v. Worth, 1 Str., 471; Odgers on L. & S., 61.

CHAPTER III.

THE AMERICAN LAW OF DEFAMATION.

§ 1. Defamation Defined and Classified — Written Defamation, Libel — Oral Defamation, Slander — But Different Methods of Accomplishing the Same Wrong.

2. Libel — Definitions — Discussion of the Subject.

3. Other Definitions — Addison, Bentham, Chief Justice Booth, British Encyclopedia, Blatchford, J., Bouvier, Capel Loft, Sir Edward Coke, Justice Daniel, Alexander Hamilton, Sargeant Hawkins, Hillard, Holt on Libel, Lord C. J. Holt, Minshæi, Chief Justice Parsons, Russell on Crimes, Sell's Dictionary of the World's Press, Judge Story — Conclusion.

4. Slander Defined — The Lexicographers: Bouvier's Law Dictionary — Nature of the Accusation — The Falsity of the Charge — The Mode of Publication — The Occasion — The Malice or Motive. Definitions: Bacon's Abridgment, Jacob's Law Dictionary, Abbott's Law Dictionary, Rapalje and Lawrence's Law Dictionary, Brown, Burrill, Wharton, Tomlin.

Slander Defined — The Commentators: Blackstone, Hillard, Kent — Conclusion.

5. Slanderous Words Classified.

1. Words falsely spoken of a person which impute to the party the commission of some criminal offense involving moral turpitude, for which the party, if the charge is true, may be indicted and punished.

2. Words falsely spoken of a person which impute that the party is infected with some contagious disease, where, if the charge is true, it would exclude the party from society.

3. Defamatory words falsely spoken of a person which impute to the party unfitness to perform the duties of an office or an employment of profit, or the want of integrity in the discharge of the duties of such an office or employment.

4. Defamatory words falsely spoken of a party which prejudice such party in his or her profession or trade.

5. Defamatory words falsely spoken of a person, which, though not in themselves actionable, occasion the party special damage.

§ 1. **Defamation Defined and Classified.**— By defamation is understood a false publication calculated to bring a person into disrepute. By the common law it has been divided into two classes: (1) *Written Defamation — Libel.* (2) *Oral Defamation — Slander.*

(1) *Libel* is defamation published by means of writing, printing pictures, images or anything that is the object of sight.

(2) *Slander* is defamation without legal excuse, published orally, by words spoken, being the object of the sense of hearing. Both libel and slander are but different methods of accomplishing the same wrong, differing mainly in the manner of publication.[1]

§ 2. (1) **Libel—Definition—Discussion of the Subject.**—A malicious defamation of any person by printing, writing, signs or pictures tending to blacken the memory of the dead, with intent to provoke the living, or injure the reputation of the living, provoke him to wrath or expose him to hatred, contempt or ridicule, is the definition given by Judge Peters in the case of The State v. Avery,[2] in a prosecution for the criminal offense by indictment. In a civil action for damages the same judge laid down in substantially the same language the following definition: "A libel is a malicious defamation, expressed in print or writing, or by signs or pictures tending to blacken the memory of the dead, with an intent to provoke the living, or to injure the reputation of one who is alive, and thereby expose him to public hatred, contempt or ridicule.[3] In Vermont it has been defined as a publication which renders a person ridiculous merely, and exposes him to contempt, which tends to render his situation in society uncomfortable and irksome, which reflects a moral turpitude on the party and holds him up as a dishonest and mischievous member of society, and describes him in a scurrilous and ignominious point of view, which tends to impair his standing in society as a man of rectitude and principle, or unfit for the society and intercourse of honest and honorable men.[4] In Delaware, after an elaborate discussion, it was decided that written slander to be actionable must impute something which tends to disgrace a man, lower him in or exclude him from society or bring him into contempt or ridicule; and that the court must be able to say from the publication itself, or such explanations as it may admit of, that it does contain such an imputation and has legally such a tendency; but mere general abuse and

[1] Cooley on Torts, 1st ed., 193.

[2] 7 Conn., 267. See, also, Morey v. Morning Journal, 9 L. R. A., 621; 123 N. Y., 207.

[3] Hillhouse v. Dunning, 6 Conn., 407.

[4] Colby v. Reynolds, 6 Vt., 489.

scurrility, however ill-natured and vexatious, is no more actionable when written than spoken, if it does not convey a degrading charge or imputation.[1] In referring to this case Chief Justice Booth held a libel to be a malicious publication in printing, writing, signs and pictures imputing to another something which has a tendency to injure his reputation, to disgrace or degrade him in society, lower him in the esteem and opinion of the world, or bring him into public hatred, contempt or ridicule.[2] By the criminal code of Illinois a libel is defined to be a malicious defamation, expressed either by printing or by signs or pictures or the like, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue or reputation, or publish the natural defects of one who is alive, and thereby to expose him to public hatred, contempt, ridicule or financial injury.[3]

§ 3. **Other Definitions.** —

Addison: "All publications injurious to private character or credit of another are libelous."[4]

American Encyclopedia: "A libel is any published defamation."

Bentham: "A libel is anything of which any one thinks proper to complain."[5] "A libel is anything published upon any matter of anybody which any one was pleased to dislike."

Blackford, J.: A publication, to be a libel, must tend to injure the plaintiff's reputation and expose him to public hatred, contempt and ridicule.[6]

Chief Justice Booth: A libel is a malicious publication in printing, writing, signs or pictures, imputing to another something which has a tendency to injure his reputation, to disgrace or degrade him in society, and lower him in the esteem and the opinion of the world, or to bring him into public hatred, contempt or ridicule.[7]

British Encyclopedia: Libel, a word which has many differ-

[1] Rice v. Simmons, 2 Harrington, 417.

[2] Layton v. Harris, 3 Harrington, 406.

[3] Revised Statutes of Illinois of 1887, 411.

[4] Addison on Wrongs, McNally v. Oldham, 8 Law Times Rep., N. S., 604.

[5] Prefix to Report of Finnerty's Trial.

[6] Armentrout v. Moranda, 8 Blackf., 426.

[7] State v. Jeandell, 5 Harr. (Del.), 475; Morey v. Morning Journal, 9 L. R. A., 621; 123 N. Y., 207.

ent meanings, but is chiefly known in this country as the name of a department of the law which, from incidental circumstances, has come to include the naturally distinct heads of written slander, sedition and outrage against religion.

Bouvier's Law Dictionary: (1) A malicious defamation, expressed either in printing or writing, or by signs or pictures, tending to blacken the memory of one who is dead, with intent to provoke the living or the reputation of one who is alive, and to expose him to public hatred, contempt or ridicule. (2) A censorious or ridiculous writing, picture or sign made with a malicious or mischievous intent towards government, magistrates or individuals.— *Hamilton.*

Capel Loft: A libel is a malicious publication tending to the disrepute of an individual, the breach of the peace, the seditious violation of the good order of government.[1]

Sir Edward Coke: Every infamous libel is either in writing or without writing. A scandalous libel in writing is when an epigram, rhyme or other writing is composed or published to the scandal or contumely of another, by which his fame or dignity may be prejudiced.[2]

Justice Daniel: Every publication by writing, printing or painting which charges or imputes to any person that which renders him liable to punishment, or which is calculated to make him infamous, odious or ridiculous, is, *prima facie*, a libel, and implies malice in the publisher.[3]

Alexander Hamilton: A libel is a censorious or ridiculing writing, picture or sign made with a mischievous and malicious intent towards government, magistrates or individuals.[4]

Hawkin's Pleas of the Crown: In a strict sense it [libel] is taken for a malicious defamation, expressed either in printing or writing; in a larger sense, the notion of libel may be applied to any defamation whatsoever, expressed either by signs or pictures, as by affixing up a gallows at a man's door, or by painting him in a shameful and ignominious manner.[5]

[1] Capel Loft's Essay on Libels, 1785, p. 6.

[2] 5 Coke Reports, 125; 3 Barnewall & Cres., 33, 34.

[3] White v. Nichols, 3 How. (U. S.), 266.

[4] Hamilton, arg., People v. Crosswell, 3 Johns. C., 354; Steele v. Southwick, 9 Johns., 214; Cooper v. Greeley, 1 Den., 347.

[5] Hawkins' Pl. Cr., 8th ed., 542; Morey v. Morning Journal, 9 L. R. A., 621; 123 N. Y., 207.

Hilliard: A publication is a libel which tends to injure one's reputation in the common estimation of mankind, to throw contumely or reflect shame or disgrace upon him, or hold him up as an object of hatred, scorn, ridicule and contempt, although it imputes no crime liable to be punished with infamy, or to prejudice him in his employment. So every publication by writing, printing or painting, which charges or imputes to any person that which renders him liable to punishment, or which is calculated to make him infamous or odious or ridiculous, is, *prima facie*, a libel.[1]

Holt on Libel: "Everything, therefore, written of another which holds him up to scorn and ridicule, that might reasonably (that is, according to our natural passions) be considered as provoking him to a breach of the peace, is a libel."[2]

Lord C. J. Holt said that scandalous matter was not necessary to make a libel. It was enough if the defendant induced an ill opinion to be had of the plaintiff, or made him contemptible and ridiculous. So, according to the doctrine laid down,[3] the publishing anything concerning another which renders him ridiculous, or tends to hinder mankind from associating or having intercourse with him, is actionable.[4]

Minshæi: Libel, a criminous report of any man cast abroad or otherwise unlawfully published in writing, but then, for difference sake, it is called an infamous libel—*famosus libellus.*[5]

Chief Justice Parsons: A libel is a malicious publication, expressed either in printing or writing, or by signs and pictures, tending either to blacken the memory of one dead, or the reputation of one who is alive, and expose him to public hatred, contempt or ridicule.[6]

Russell on Crimes: A libel has been usually treated of as scandal, written or expressed by symbols. Libel may be said to be a technical word, deriving its meaning rather from its use than its etymology.[7]

[1] 1 Hilliard on Torts, ch. vii, § 13.
[2] Holt on Libel, 213.
[3] Cropp v. Tilney, 3 Salk., 226.
[4] Villars v. Mousley, 2 Wils., 403.
[5] Minshæi, Guide into the Tongues, London, 1627.
[6] Commonwealth v. Clapp, 4 Mass., 162, 168; Root v. King, 7 Cow., 613.
[7] Russell's Treatise of Crimes and Misdemeanors, ed. 1819, p. 308.

Sell's Dictionary of the World's Press, London, 1887: Words or pictures which expose a person to hatred or contempt; which tend to injure him in his profession or trade or cause him to be shunned by his neighbors; which impute to him any crime, dishonesty or immorality, or unfitness for any office or position which he fills or aspires to fill; want of skill or knowledge requisite for his profession; or which impute to a merchant insolvency or embarrassment, past, present or probable.[1]

Story, J.: Any publication the tendency of which is to degrade and injure another person, or to bring him into contempt, hatred or ridicule, or which accuses him of a crime punishable by law, or of an act odious and disgraceful in society, is a libel.[2]

In conclusion, it may be said that any publication, expressed either by printing or writing or by signs, pictures or effigies or the like, which tends to injure one's reputation in the common estimation of mankind, to throw contumely, shame or disgrace upon him, or which tends to hold him up to scorn, ridicule or contempt, or which is calculated to render him infamous, odious or ridiculous, is *prima facie* a libel, and implies malice in its publication.[3] So, also, is any publication injurious to private character,[4] or that reflects upon his character,[5] or that injures social character,[6] or that induces an ill opinion,[7] or that imports a bad reputation;[8] and so with all defamatory words injurious in their nature.[9]

§ 4. (2) **Slander Defined.**—The following definitions are taken from the leading lexicographers and commentators of the common law:

FIRST — THE LEXICOGRAPHERS.

2 Bouvier's Law Dictionary, 528: The defaming a man in his reputation by speaking or writing words which affect his life, office or trade, which tend to his loss of preferment in

[1] Sell's Dict. World's Press, 1887, p. 72; Merrill's Newspaper Libel, 40.

[2] Dexter v. Spear, 4 Mason, 115.

[3] Hill on Torts, 226; Add. on Torts, 777; White v. Nichols, 3 How. (U. S.), 266; Cramer v. Noonan, 4 Wis., 231; Lansing v. Carpenter, 9 Wis., 540.

[4] Add. on Torts, 776; Dunn v. Winters, 2 Humph., 512; Milton v. State, 3 Humph., 389.

[5] Johnson v. Stebbins, 5 Ind., 364; O'Brien v. Clement, 15 M. & W., 435.

[6] 1 Am. Leading Cases, 138.

[7] Hillhouse v. Dunning, 6 Conn., 391.

[8] Greely v. Cooper, 1 Denio, 347.

[9] Chaddock v. Briggs, 13 Mass., 238.

marriage or service, or in his inheritance, or which occasion any particular damage.

Verbal slander may be considered with reference to (1) *The nature of the accusation;* (2) *The falsity of the charge;* (3) *The mode of publication;* (4) *The occasion;* (5) *The malice or motive.*

Nature of the accusation. (1) Actionable words are of two descriptions: first, those actionable in themselves, without proof of special damages; and, secondly, those actionable only in respect of some actual consequential damages. Words of the first description must impute (1) the guilt of some offense for which the party, if guilty, might be indicted and punished by the criminal courts; as to call a person a "traitor," "thief," "highwayman," or to say that he is guilty of "perjury," "forgery," "murder," or the like; and although the imputation of guilt be general without stating the particulars of the pretended crime, it is actionable;[1] (2) that the party has a disease or distemper which renders him unfit for society; (3) unfitness in an officer who holds an office to which profit or emolument is attached either in respect of morals or inability to discharge the duties of the office;[2] (4) the want of integrity or capacity, whether mental or pecuniary, in the conduct of a profession, trade or business in which the party is engaged, as to accuse an attorney or an artist of inability, inattention or want of integrity, or a clergyman of being a drunkard.[3]

Of the second class are words which are actionable only in respect of special damages sustained by the party slandered, though the law will not permit in these cases the inference of damage. Yet when the damage has actually been sustained

[1] Walker v. Winn, 8 Mass., 248; Widrig v. Ayer, 13 Johns., 124; Minors v. Seeford, Cro. Jac., 114; Burton v. Tobin, Cro. Jac., 143; Holt v. Scholefield, D. & E., 6 T. R., 694; Walden v. Mitchell, 2 Vent. R., 266; Morris v. Langdale, 2 New Reps., 284; Andres v. Koppenheafer, 3 Serg. & Raw. (Penn.), 255; Walton v. Singleton, 7 Serg. & Raw. (Penn.), 449; McMillan v. Birch, 1 Binn., 178; McClurg v. Ross, 5 Binn., 218; Brown v. Lamberton, 2 Binn., 34.

[2] Graves v. Blanchett, 1 Salk., 695; Action sur Case, Roll. Abr., 65; Phillips v. Jansen, 2 Esp. R., 624; The Case de Libellis Famosis, 3 Co., 125; Aston v. Balgrave, 1 Strange, 617; Aston v. Balgrave, 2 Ld. Raymond, 1369.

[3] 1 Mallory's Modern Entries, 244; Onslow v. Horne, 2 Wils., 187; Onslow v. Horne, 2 Bl. Rep., 750; McMillan v. Birch, 1 Binn. (Penn.), 178.

the party aggrieved may support an action for the publication of an untruth,[1] unless the averment be made for the assertion of a supposed claim; but the action lies if maliciously spoken.[2]

(2) *The charge must be false.* The falsity of the accusation is to be implied till the contrary is shown. *Exception:* The instance of a master making an unfavorable representation of his servant upon application for his character seems to be an exception, in that case there being a presumption from the occasion of the speaking that the words are true.[3]

(3) *The slander must be published* — that is, communicated to a third person, and if verbal, then in a language which he understands; otherwise the plaintiff's reputation is not impaired.[4]

(4) *To render words actionable they must be utterred without legal occasion.* On some occasions it is justifiable to utter slander of another; in others it is excusable provided it be uttered without express malice. It is justifiable for an attorney to use scandalous expressions in support of his client's cause and which are pertinent thereto. Members of congress and of other legislative assemblies cannot be called to account for anything said in debate.[5]

(5) *Malice is essential* to the support of an action for slanderous words. But malice in general is to be presumed until the contrary is proved,[6] except in those cases where the occasion *prima facie* excuses the publication.[7]

Bacon's Abridgment. Slander is the publishing of words in writing or by speaking, by reason of which the person to

[1] Sheperd v. Wakeman, 1 Sid., 79; Williams v. Linfords, 2 Leon., 111.

[2] Com. Dig., Action on the Case for Defamation, D., 30; Bac. Abr., Slander; 1 Rolle, Abr., 86; Craft v. Boite, 1 Saund., 242; Hartley v. Herring, D. & E., 8 T. R., 130.

[3] The Case de Libellis Famosis, 3 Coke R., 125; Thornton v. Jebson, Hob., 140; Maitland v. Goldney, 2 East, 436; Craft v. Boite, 1 Saund., 242; Weatherstone v. Hawkins, D. & E., 1 T. R., 111.

[4] Robbins v. Franks, Cro. Eliz., 857; Craft v. Boite, 1 Saund., 242.

[5] The King v. Crury, 1 M. & S., 280; Harding v. Greening, 1 Holt R., 531; Hodgen v. Scarlett, 1 B. & A., 232; Kean v. McLaughlin, 2 Serg. & Raw. (Penn.), 469; Bac. Abr., Slander, D., 4; Rolle, Abr., 87; 1 Vin. Abr., 540.

[6] Bromage v. Prosser, 4 B. & C., 247; Craft v. Boite, 1 Saund., 242, n. 2; Weatherstone v. Hawkins, D. & E., 1 T. R., 111; Harman v. Taffenden, 1 East, 563; Maitland v. Goldney, 2 East, 436; 2 New R., 335.

[7] McAlmont v. McClellan, 14 Serg. & Raw. (Penn.), 359; Bromage v. Prosser, 4 B. & C., 247; Starkie on Slander, 201.

whom they relate becomes liable to suffer some corporal punishment or to sustain some damage.[1]

6 Jacob's Law Dictionary, 99: The maliciously defaming of a man in his reputation, profession or livelihood by words.

2 Abbott's Law Dictionary, 482: Aspersion by word of mouth; oral defamation; words uttered falsely and maliciously by which the reputation of another is injured.

2 Rapalje and Lawrence's Law Dictionary, 1198: A false and malicious statement concerning a person made by word of mouth, giving rise to a right of action for damages.

Brown's Law Dictionary, 328: The malicious defamation of a man with respect to his character or his trade, profession or occupation by words of mouth.

2 Burrill's Law Dictionary, 471: Defamation by words spoken; the utterance of false, malicious and defamatory words, tending to damage and derogation of another.

Wharton's Law Dictionary, 699: The maliciously defaming of a person in his reputation, profession or livelihood by words.

3 Tomlin's Law Dictionary, 408: The maliciously defaming of a man in his reputation, profession or livelihood by words.

SECOND — THE COMMENTATORS.

3 Blackstone's Commentaries, 123: An injury affecting a man's reputation or good name by malicious, scandalous and slanderous words, as if a man utter any slander or false tale of another, which may endanger him in law by impeaching him of some heinous crime, as to say that a man hath poisoned another or is perjured; or which may exclude him from society, as to charge him with having an infectious disease; or which may impair or hurt his trade or livelihood, as to call a tradesman a bankrupt, a physician a quack, or a lawyer a knave.

1 Hilliard on Torts, 243: Slander is defined as the imputation: 1. Of some temporal offense for which the party might be indicted and punished in the temporal courts. 2. Of an existing contagious disorder tending to exclude the party from society. 3. An unfitness or inability to perform the duties of an office of honor. 4. Words prejudicing a person in his lucrative profession or trade. 5. Any untrue words occasioning actual damage.

[1] 9 Bacon's Abridgment, title Slander; Morey v. Morning Journal, 9 L. R. A., 621; 123 N. Y., 207.

2 Kent's Commentaries, 16: The act of falsely and maliciously charging another with the commission of some public offense, criminal in itself and indictable, and subjecting the party to an infamous punishment or involving moral turpitude, or the breach of some public trust, or with any matter in relation to his particular trade or vocation, and which, if true, would render him unworthy of employment; or lastly, with any other matter or thing by which special injury is sustained.

In conclusion, it may be said definitions of libel and slander afford but little aid in disposing of the questions ordinarily involved in these controversies, unless it becomes necessary to define the difference between oral and written defamation, or to prescribe a criterion to determine, in cases where special damage is claimed, whether the injury alleged naturally flows from the speaking of the words set forth in the declaration. The different definitions of slander have been given from different lexicographers and commentators on the subject; but it will be sufficient to say that oral slander as a cause of action may be divided into five classes, as follows:

§ 5. **Slanderous Words Classified.**[1]—

Class 1. Words falsely spoken of a person which impute to the party the commission of some criminal offense involving moral turpitude, for which the party, if the charge is true, may be indicted and punished.

Class 2. Words falsely spoken of a person which impute that the party is infected with some contagious disease, where, if the charge is true, it would exclude the party from society.

Class 3. Defamatory words falsely spoken of a person, which impute to the party unfitness to perform the duties of an office or an employment of profit, or the want of integrity in the discharge of the duties of such an office or employment.

Class 4. Defamatory words falsely spoken of a party which prejudice such party in his or her profession or trade.

Class 5. Defamatory words falsely spoken of a person which, though not in themselves actionable, occasion the party special damage.

[1] Pollard v. Lyon, 91 U. S., 225; Warnoc v. Circle, 29 Grat. (Va.), 197; Chapin v. Lee, 18 Neb., 440; Morey v. Morning Journal, 9 L. R. A., 621; 123 N. Y., 207.

CHAPTER IV.

LIBELS — DEFAMATION BY WRITING, PRINTING, PICTURES, EFFIGIES AND OTHER REPRESENTATIONS.

LIBELS CLASSIFIED.

I. Libels which Impute to a Person the Commission of a Crime.

II. Libels which Have a Tendency to Injure a Person in His Office, Profession, Calling or Trade.

III. Libels which Hold a Person up to Scorn and Ridicule.

§ 1. **Libels.**— Everything printed or written which reflects on the character of another, and is published without lawful justification or excuse, is a libel, whatever the intention may have been.[1] The words need not necessarily impute disgraceful conduct to the plaintiff; it is sufficient if they render him contemptible or ridiculous.[2]

Any written words are defamatory which impute to the plaintiff that he has been guilty of any crime, fraud, dishonesty, immorality, vice or dishonorable conduct, or has been accused or suspected of any such misconduct; or which suggest that the plaintiff is suffering from any infectious disorder; or which have a tendency to injure him in his office, profession, calling or trade. And so, too, are all words which hold the plaintiff up to contempt, hatred, scorn or ridicule, and which, by thus engendering an evil opinion of him in the minds of right-thinking men, tend to deprive him of friendly intercourse and society.

It need not necessarily be in writing or printing. Any caricature or scandalous painting or effigy will constitute a libel;[3] but it must be something permanent in its nature — not fleeting, as are spoken words.[4]

§ 2. **Illustrations — American Cases.**—

1. A Wisconsin Case: *Massuere v. Dickens*, 70 Wis., 83; 35 N. W. Rep., 349.

Massuere brought an action for a libel against Dickens for the following publication:

"*Massuere's 'Card' Analyzed.*— I notice in the 'Republican and Leader' of November 26th a 'card' (?) from W. P. Massuere referring to the recognition for the heroic services of John Kline in the late fire, in which he ungentlemanly and maliciously reflects upon the honor and manhood of myself. In self-protection I desire to state that the proximity of my buildings and lumber to the fire and other business houses necessitated the saving of my property to protect the town. Had my buildings burned, no power

[1] O'Brien v. Clement, 15 M. & W., 435; Miller v. Butler et al., 6 Cush., 60 Mass., 71.

[2] Cropp v. Tilney, 3 Salk., 236; Villers v. Monsley, 2 Wils., 403; Watson v. Trask, 6 Ohio, 531; Bradley v. Cramer, 59 Wis., 309; 18 N. W. Rep., 269; Folkard's Starkie, § 154; State v. Spear, 13 R. I., 324; Cooper v. Greely, 1 Denio (N. Y.), 359; Cox v. Lee, L. R., 4 Exch., 284; Odgers on L. & S., 20; Whitney v. Janesville Gazette, 5 Biss., 330; Tonini v. Cevasco, 114 Cal., 266.

[3] 5 Rep., 125*b*; Anon., 11 Mod., 99; Austin v. Culpepper, 2 Show., 313; Skin., 123; Jeffries v. Duncombe, 11 East, 226; Du Bost v. Beresford, 2 Camp., 511.

[4] Odgers on L. & S., 20; Morey v. Morning Journal, 9 L. R. A., 621; 123 N. Y., 207.

at our command could have saved the entire village from destruction. One of the very first to have gone is the concern in which Mr. Massuere is interested. Hence the fight was made for very many others, and not for me alone, as Mr. M. seems unprincipled enough to reflect. In regard to raising money to replace the coat said to have been lost by Mr. Kline, it appears that Mr. Kline went to Mr. Massuere to purchase a coat immediately after the fire; no coat could be found suitable in his stock, and they together went over to Bohrie Bros. & Maurer's, where one was obtained. The presentation of the coat to Mr. Kline, *gratis*, was only a just recognition of his services and creditable to the gentlemen who contributed. But the solicitation was done by some one, probably by Massuere, very silently. He never solicited from me, nor even mentioned the subject to me in any way; hence I had no chance to contribute to that particular fund. But I feel confident that upon a comparison of time it will be found that I had handed to Mr. Kline a money consideration before a cent was subscribed by any man for a coat, and I think a sum very nearly the value of the coat; hence not wholly devoid of appreciation for valiant services. This much to the public in defense of my honor, and I know 'tis sufficient to the fair-minded — certainly to those who may know the situation. Now to Mr. Massuere I desire to frankly say your stab is unprovoked and unmerited. I resent it as an act on your part devoid of principle, honor and manhood. In no respect do I stand in your shadow, or that of any other man in this community, in response to merited charity or public enterprise. Considering your low, mean, dirty, uncalled-for thrust, you must lose all self-respect, and I denounce you as only fit to be classed with that repulsive order of creation, the *Mephitis Americana*. If your ignorance is as limited as your sense of manhood, honor and decency appears to be, you will be unable to comprehend the appellation applied to you, and to save you the further humiliation of seeking light from your neighbors I will translate for your benefit: SKUNK — a thing as repulsive to the finer sensibilities of man as your low insinuations and business practices are to your fellow-townsmen.

"[Signed] R. L. DICKENS."

The card therein referred to is as follows:

"A CARD.— Mr. J. Kline, of Waumandee, happened to be in town at the time of the fire and took hold like a good fellow, and during the time lost his coat. He stood in the intense heat, and through his help with others saved the hardware store of R. L. Dickens. Through the contributions of Proctor Bros., John Maurer, Emil Maurer, Dr. G. N. Hidershide, John Dressendorfer, Peterson, Massuere & Co., Tim Selk and J. M. Fertig a coat was bought and thanks returned to John for his help.

"[Signed] W. P. MASSUERE."

The defendant's answer consists, in effect, of denials, admissions and matters in mitigation of damages. On the trial the jury returned a verdict in favor of the plaintiff for $1,000. Thereupon the defendant moved upon the minutes of the court to set aside the verdict and for a new trial. On the plaintiff's filing a remission of $500 from the verdict the court overruled the motion, and judgment was entered in favor of the plaintiff for damages, costs and disbursements. On appeal it was held that the article was libelous in itself.

2. An Indiana Case: *Prosser v. Callis*, 117 Ind., 105, 19 N. E. Rep., 735. On the 22d day of August, 1885, E. W. Challis, editor and manager of the "Weekly Gazette," published the following article:

"At last, after many days of weary waiting and particular prodding, the county dads came out with a statement pretending to show the financial condition of Morgan county. Such a statement! It cannot be understood even by a Philadelphia lawyer. One big item of expenditure — the cost of building the bridge at Mooresville — amounting to $15,000, is entirely left out of the calculation. We expect there may be other omissions of the same character, but have no time to search them out for this issue. Now if such an important item as this is omitted, while the statement is sworn to as correct, there is every reason to believe that the whole statement is a piece of financial botchwork, patched up to ease popular clamor. If an officer will swear to one lie he will swear to another." George W. Prosser, county auditor, the officer referred to, brought his action for libel. A demurrer being sustained to the declaration an appeal was taken to the supreme court, where the decision was reversed and the article held to be a libel.

3. A New York Case: *Purdy v. Rochester Printing Co.*, 26 Hun, 206. The Rochester Printing Company published the following article:

"*A narrow escape from being buried alive.* A well-to-do farmer found stiff and cold by the road-side; he is supposed to have been frozen to death; a coroner takes charge of the case and impanels a jury; the inquest interrupted by a physician, who declares the man to be alive; animation restored.

"About 9 o'clock last Friday a stiffened body was found in the highway opposite the residence of John Morehouse, about two miles north of Seneca Falls. To all appearances the man was frozen; the limbs were rigid; the face was pale; the eyes had a glassy look, and there were no signs of life. Mr. Morehouse placed the supposed corpse in a wagon and conveyed it to Seneca Falls, where he delivered it to the police. It was placed in Mr. Metcalf's store, and Coroner Purdy was notified. A case of this kind always attracts a crowd. The people gathered and scanned the face of the supposed dead man. Every one pronounced him dead — frozen to death. He was recognized as John Hammell, a farmer living two and a half miles south of the village. Coroner Purdy arrived, summoned a jury, and began to inquire according to law how and by what means the man then and there lying dead came to his death. Dr. Lester looked at the supposed remains, and, after a careful examination, said the man was alive. They laughed at him, but he insisted so strongly that life was still within the stiffened body that Nicholas Durnir, a brother-in-law of the deceased, caused the body to be removed to his store. The coroner's inquest was thus interrupted, and the inquest and perhaps a funeral was averted. It was about 11 A. M. that Dr. Lester commenced his work of restoring life. . . . By 9 o'clock Saturday morning consciousness was fully restored, and although his fingers, toes, nose and ears are badly frozen, he will recover. Mr. Hammell can thank Dr. Lester for the fact that the coroner's jury did not return a verdict that he came to his death from exposure, and that he was not placed in a coffin and buried alive, and that his family and friends

were not called upon to mourn his unfortunate death." Purdy, the coroner, a physician and surgeon, practicing his profession, brought an action for libel against the printing company. The judge, at the circuit court, after hearing all the evidence, directed a verdict for the defendant on the ground that the publication was not libelous in itself and there was no proof of express malice. On appeal in the supreme court the finding was reversed and the article held to be libelous in itself.

4. A Massachusetts Case: *Clark v. Binney*, 2 Pick., 112.

Amos Binney, the defendant, published a pamphlet entitled "Documents relative to the investigation, by order of the secretary of the navy, of the official conduct of Amos Binney, etc. Published by the accused." The plaintiff was a witness before the commissioners appointed to make the investigation, and Binney published his testimony with the following remarks: "I am extremely loath to impute to Mr. Clark or Mr. Scott, his partner, improper motives in regard to the false accusation against me; yet I cannot refrain from the remark that if their motives have not been unworthy of honest men, their conduct in furnishing materials to feed the flame of calumny, which has raged to the most unheard-of degree, has been such as to merit the reprobation of every man having a particle of virtue or honor in his whole composition. They have both much to repent of for the groundless and loose insinuations they have propagated against me." *Held* to be a libel, and a verdict for $1,000 was sustained.

§ 3. What is Libelous — Illustrations — Digest of American Cases.—

I. Generally.

1. A libel is a censorious or ridiculing writing, picture or sign made with a mischievous and malicious intent towards government, magistrates or individuals. Per Hamilton. People v. Croswell, 3 Johns. C., 337, 354; Steele v. Southwick, 9 Johns., 214; Cooper v. Greeley, 1 Den., 347.

A libel is a malicious defamation, made public either by printing, writing, signs or pictures, tending to blacken the memory of one who is dead, or the reputation of one who is living, and expose him to public hatred, contempt or ridicule. Root v. King, 7 Cow., 613.

Every publication by writing, printing or painting, which charges or imputes to any person that which renders him liable to punishment, or which is calculated to make him infamous, odious or ridiculous, is *prima facie* a libel, and implies malice in the publisher. White v. Nichols, 3 How. (U. S.), 266.

A libel is a miscellaneous publication in printing, signs or pictures, imputing to another something that has a tendency to injure his reputation; to disgrace or to degrade him in society, and lower him in the esteem and opinion of the world, or to bring him into public hatred, contempt or ridicule. Torrance v. Hurst, 1 Miss. (Walk.). 403; Obaugh v. Finn, 4 Ark., 110; Com. v. Clapp, 4 Mass., 163; State v. Jeandell, 5 Harr. (Del.), 475; Armentrout v. Moranda, 8 Blackf. (Ind.), 426; Newbrough v. Curry, Wright (Ohio), 47; Lansing v. Carpenter, 9 Wis., 540.

A censorious or ridiculing writing, picture or sign, made with a mis-

chievous and malicious intent towards government, magistrates or individuals. Steele v. Southwick, 9 Johns. (N. Y.), 214; State v. Farley, 4 McCord (S. C.), 317.

2. A publication charging the plaintiff, as agent of certain fruit-growers, with corruptly failing properly to exhibit their fruit at a fair and entering it as his own, is a libel, if false, as calculated to expose him to obloquy. Betner v. Holt, 70 Cal., 270.

Words fairly imputing to a physician a failure to discover the presence of diphtheria until long after it should have been discovered are libelous in themselves. Gauvreau v. Superior Publishing Co., 62 Wis., 403.

3. To say of a woman that "she is like an old sheep and has twins at every litter," that "she stinks like old cheese," that "her teeth are like an old goat's," that "she is like an old ewe," etc., is libelous in itself. McMurry v. Martin, 26 Mo. App., 437.

4. A letter from A. to B. about C., "I was unfortunate enough to have him in my employ at one time as a book-keeper. He is a liar. I would not believe him under oath," — was *held* libelous in each of its three sentences. Hake v. Brames, 95 Ind., 161.

5. Want of an intention to vilify does not render an objectionable publication any the less a libel. And a publication is not excused by the publisher's ignorance that it contains libelous matter. Curtis v. Mussey, 6 Gray (Mass.), 261. But see Smith v. Ashley, 11 Met. (Mass.), 367.

6. To charge a commissioner in bankruptcy with being a misanthropist, a partisan, stripping the unfortunate debtors of every cent, and then depriving them of the benefit of the act, etc., is libelous; and, to make out a justification of the charge, the defendant must show that the plaintiff, as commissioner, wilfully perverted the law to such oppressive purposes. Riggs v. Denniston, 3 Johnson's Cases, 198.

7. A communication concerning a discharged superintendent of the defendant's factory, in effect charging embezzlement, unfitness for the position, extravagance and impracticability, was held to be a libel in itself. Manner v. Simpson, 13 Daly (N. Y.), 156.

8. Calling one a "hoary-headed filcher" is libelous. Crooker v. Hadley, 102 Ind., 416.

To charge a woman with illegitimacy is libelous in itself. Shelby v. Sun Printing Asso., etc., 88 Hun (N. Y.), 474.

It is a libel for a hotel-keeper to write the word "frod" after a guest's name in his register. State v. Fitzgerald, 20 Mo. App., 408.

9. Defendant sent to a newspaper, as an advertisement, a false statement that he wanted the plaintiff to pay a bill. The publisher put it among other "wants," one of which called for a "deadhead." A third person cut the advertisement out, pasted it on a postal card, and sent it to a young woman engaged to be married to the plaintiff. In an action it was held to be a libel, and that it was a question of fact whether the sending of the postal card was a natural consequence of the publication. Zier v. Hofflin, 33 Minn., 66; 53 Am. Rep., 9.

10. Any publication the tendency of which is to degrade and injure another person, or to bring him into contempt, hatred or ridicule, or which accuses him of crime punishable by law, or of an act odious and disgrace-

ful in society, is a libel. Dexter v. Spear, 4 Mass., 115; Adams v. Lawson, 17 Gratt. (Va.), 250; Towville v. Neace, Dudley (S. C.), 304.

11. It is a libel to publish an article stating that a person has been deprived of the chief ordinance of the church to which he belongs. McConkle v. Binns, 5 Binn. (Pa.), 340.

12. The wilful publication of injurious statements involves the design to produce whatever injury must necessarily follow; and when done purposely, knowingly, and for no good purpose or justifiable end, it is malicious in the sight of the law, even if done without any actual personal ill-will. Maclean v. Scieffs, 54 Wis., 217; 17 N. W. Rep., 815.

13. A publication which in effect implies that a judge on the bench is in partnership with his son, a lawyer, and in that capacity receives compensation from parties to suits in which the judge sits, is a libel. Royce v. Maloney, 58 Vt., 437.

14. In order to constitute a libel for which an action may be sustained, the publication need not import a criminal charge; it is sufficient if it tends to subject the party to whom it refers to ridicule or contempt. Miller v. Butler, 6 Cush. (Mass.), 71.

15. Printed slander is a higher offense than merely speaking the defamatory words. Whitney v. Janesville Gazette, 5 Biss., 330.

16. A publication containing statements holding a person up to scorn or ridicule, and which degrade and disgrace him in the eyes of men, is libelous in itself. Bergman v. Jones, 94 N. Y., 51. Thus, one who falsely writes and publishes a statement that a certain newspaper "is alleged to have been started for the purpose of plunder" is guilty of a libel. Hort v. Townsend, 67 How. (N. Y.) Pr., 88.

17. Words which have a direct tendency to injure a person in reputation, to degrade and disgrace him in society, and to bring him into public contempt and ridicule, are libelous. Carey v. Allen, 89 Wis., 482.

18. A publication referring to the plaintiff and charging that he "seems to have coveted his late partner's cattle," and that he started for the city with the cattle, "and an officer was put upon his trail," was held libelous, though not directly charging larceny. Bain v. Myrick, 88 Ind., 137.

19. A publication ironically charging the plaintiff with insanity is a libel. Southwick v. Stevens, 10 Johns. (N. Y.), 443.

20. The false and malicious publication of an obituary notice of a person living. McBride v. Ellis, 9 Rich. (S. C.), 313.

21. To write concerning a man, "look upon him as a rascal, and have watched him for many years," is a libel. Williams v. Carnes, 4 Humph. (Tenn.), 9. So to write of a man "he has put in circulation a false, scandalous and scurrilous report." Colby v. Reynolds, 6 Vt., 489. And so to publish of a man that he is a miserable fellow; that it is impossible for a newspaper article to injure to the extent of six cents; that the community could hardly despise him worse than they do now. Brown v. Remington, 7 Wis., 462.

22. A false and malicious writing containing an insinuation that a person has been guilty of perjury is a libel. Dillhouse v. Dunning, 6 Conn., 391; Mallerich v. Mertz, 19 La. Ann., 194; Howse v. Stanford, 4 Sneed (Tenn.), 520.

23. To publish in writing an expression of a belief that one has committed a felony is actionable in itself; and the fact that the reasons for the belief are also given will not affect the question, unless the reasons explain away the charge. Johnson v. St. L. Dispatch Co., 2 Mo. App., 565.

24. The publication of a statement that one has been dismissed for alleged thefts, followed by a comment that the rascal ought to feel thankful to get off so cheaply, is libelous. Dwyer v. Fireman's Journal Co., 11 Daly (N. Y.), 248; Ryer v. Fireman's Journal Co., id., 251.

25. In an advertisement notifying the public not to harbor or trust the advertiser's wife on his account, defamatory words in regard to the wife are not privileged; and where the jury has found that defendant did not have reasonable and probable cause to believe the matter published to be substantially true, and that in publishing it he was actuated by malice towards plaintiff, under instructions that the burden was on plaintiff to prove defendant's knowledge of the falsity, the defense of privilege fails. Smith v. Smith (Mich.), 41 N. W. Rep., 499.

26. A statement that a person is fit for a lunatic asylum is, nevertheless, libelous, because it is made by a physician as his professional opinion, it not being made to a person to whom it was his duty to make it. Perkins v. Mitchell, 31 Barb. (N. Y.), 461.

27. Where a resolution was adopted by a county medical society in New York, and entered among their proceedings, expelling a member on the ground that he did not possess the requisite qualifications, and obtained his admission by false pretenses, it was held that the resolution was a libel; the proceedings of the society in the case being without justification, and that the member introducing the resolution was liable for publishing it. Fawcett v. Charles, 13 Wend. (N. Y.), 473.

28. The publication of false and malicious statements about a church member, accusing him of disturbing the peace of the church by circulating false statements about the pastor and censuring him therefor is a libel. Over v. Hildebrand, 92 Ind., 19.

29. Charging a newspaper publisher with being a party to a secret conclave, in which he sold the support and advocacy of his paper to a certain corporation for a large sum of money, is actionable in itself. Fitch v. De Young, 66 Cal. 339, 5 Pac. Rep., 364.

30. It is libelous to write and publish that a child is illegitimate. Shelby v. Sun Printing Association, 38 Hun (45 N. Y. Supr. Ct.), 474. So to write and publish of a man that a certain notorious prostitute is "under his patronage or protection." More v. Bennett, 48 N. Y. (3 Sickel), 472. So an obituary notice of a living person may be a libel. McBride v. Ellis, 9 Mich., 313. And words charging that the plaintiff "will not sue in a particular county, because he is known there," are libelous. Cooper v. Greeley, 1 Denio (N. Y.), 347.

31. A statement that a general passenger agent of a railroad company "has been growing rich by making his local ticket agents, or some of them, divide their commission with him" is libelous. Shattuck v. McArthur, 25 Fed. Rep., 133.

32. A publication stating that the plaintiff is about to commence a suit for a libel, but that he will not like to bring it to trial in a particular county

because he is known there, is libelous. Such a publication amounts to the charge that the plaintiff is of bad repute in the county referred to, and for that reason would not like to bring the issue to trial in that county. Cooper v. Greeley & McElrath, 1 Denio, 347.

33. It is libelous to charge that a citizen who was a member of a political party at a nominating convention of such party offered, from the influence of a bribe, a resolution that no nomination of a candidate for a particular office should be made. Hand v. Winton, 38 N. J. L., 122.

34. It has been held libelous to publish of a man in writing or print "he is a hog." Solonson v. Peterson, 64 Wis., 198; 25 N. W. Rep., 14. Or to call an attorney a "shyster." Gribble v. Pioneer Press Co., 34 Minn., 342; 25 N. W. Rep., 710. To call a man a "skunk." Massuere v. Dickens, 70 Wis., 83; 35 N. W. Rep., 349. To publish of a woman, "She acted like a cat, purring and mewing and crawling about like a cat, and trying to catch rats." Stewart v. Swift, 76 Ga., 280. To publish of the grand worthy chief templar in a temperance organization that he was "an arch hypocrite and scoundrel." Finch v. Vidquain, 11 Neb., 280; 9 N. W. Rep., 43. To charge a person with smuggling goods into the country. Stillwell v. Barter, 19 Wend. (N. Y.), 487. To charge a person with being "a drunkard," "a cuckold," "a tory." Giles v. Stole, 6 Ga., 276. To assail the integrity or capacity of a judge. Robbins v. Treadway, 2 J. J. Marsh. (Ky.), 540. To charge that "B. would put his name to anything that T. would request him to sign that would prejudice D.'s character." Duncan v. Brown, 15 B. Monroe (Ky.), 186. To write of a person that "he is thought no more of than a horse-thief and a counterfeiter." Nelson v. Musgrave, 10 Mo., 648. To call a man a liar, a scoundrel, a cheat and a swindler. Com. v. Clapp, 4 Mass., 163. To write of a person that he voted twice at an election for lieutenant-governor. Walker v. Winn, 8 Mass., 248. To designate an editor of a neighboring newspaper "an ill-natured manikin," "a mouse most magnanimous," "a vermin small." Child v. Homer, 30 Mass., 510.

35. A publication speaking of a man's "clutch on his friends, which caused them to trust him and get left," and which states in substance that he had left the city under a cloud, had collected a bill due to his employers, which he secreted until another attempted to collect it, that he borrowed what money he could from his friends, and left with an unpaid board bill, is libelous in itself, because it not only imputes fraud and dishonesty in other respects, but plainly imports embezzlement in the collection of the bill. Iron Age Pub. Co. v. Crudup 85 Ala., 519, 5 So. Rep., 332.

II. Publication in Newspapers.

1. The proprietor of a newspaper is liable for a libel published or circulated in his paper, though published in his absence and without his knowledge, by an agent to whom he had given express instructions to publish nothing exceptionable, personal or abusive which might be brought in by the authors. Dun v. Hall, 1 Ind., 344.

2. A party who communicates a statement of facts to the reporter of a newspaper, directing its publication, thereby causing a libel to be published, cannot escape conviction because he did not write and publish the same himself. Clay v. The People, 86 Ill., 147.

3. A newspaper advertisement describing a horse as stolen, and stating "the thief is believed to be one William H. Simmons, of Belle Plaine," is libelous. Simmons v. Holster, 13 Minn., 249.

4. A. was a witness in a suit between B. and C., and C. afterwards printed and published of A.: "'Our army swore terribly in Flanders,' said Uncle Toby; and if Toby was here now he might say the same of some modern swearers; the man [meaning A.] is no slouch at swearing to an old story." It was held that these words, if they did not import a charge of perjury in the legal sense, yet they were libelous, as they held the plaintiff up to contempt, etc. Steele v. Southwick, 9 Johns. (N. Y.), 214.

5. The following paragraph published in a newspaper was held to be a libel:

"To W. L. T.: You are hereby notified that I have made application for a homestead, and the same will come on for hearing at the ordinary's office Dec. 15, 1876. L. K. W.

"N. B.—Take notice, merchants and community generally, the thieves [innuendo meaning plaintiff] are refusing to pay for rations. W. L. T." Tillmore v. Willis, 61 Ga., 433.

6. And so, too, the following:

"Never go into a lawsuit with A. M. [the plaintiff] so long as he may be the owner of those books that beat S. R. C., and whoever they might be brought up against, for M. is a chiefest among ten thousand and the one altogether lovely on the swear. We begin to believe that old K. is no bug-eater if he is a man-eater: for we met Mr. M. under the fish last week in a suit on a plain promissory note for $585, and he came very near swearing us into his debt. If Beecher is really desirous of laying out T. Tilton in his suit now in progress in New York city, let him send for our friend M." Gabe v. McGinnis, 68 Ind., 538.

7. A sensational newspaper article which set forth that the plaintiff was living in extreme poverty and destitution, which was false, and was maliciously published with the intention of injuring the plaintiff's good name, was held to be a libel. Moffatt v. Caldwell, 5 Thomp. & C. (N. Y.), 256; 3 Hun, 26.

8. Words published in a newspaper which tend to impeach the honesty and integrity of jurors in their office are libelous; and a publication which denounces a verdict as infamous, and declares: "We cannot express the contempt which should be felt for these twelve men who have thus not only offended public opinion, but have done injustice to their own oaths," is directed against the jurors individually. Byers v. Martin, 2 Col. T., 605.

9. In a newspaper article describing the means by which the stock of a worthless silver mine was by a fraudulent scheme sold for a large sum, it was stated that the plaintiff had been employed to prepare the mine by plastering and engrafting silver ore on the limestone rock while armed men guarded the entrance to the mine. It was also stated that the plaintiff was an expert in preparing a mine in this way, and that his services in this regard were as valuable as those of the person through whose influence and standing the stock of the company was sold. On demurrer it was held that without the aid of any extraneous matter the article was libelous, as charging the plaintiff with having knowingly aided in a swindling enterprise. Williams v. Godkin, 5 Daly (N. Y.), 499

10. In an action by R. against A. for libel, there was evidence that A. was the publisher of the Leavenworth "Times," containing an article: "Who is Ed. Russell, in whose eyes swindling is no crime? He is secretary of the bankrupt Kansas Insurance Company, and less than two years ago he was state commissioner of insurance, and certified under his oath of office that this bankrupt concern was a sound and solvent insurance company, while he knew it was at that very time hopelessly bankrupt. He was forced to leave the office of commissioner of insurance because the Leavenworth 'Times" exposed his official crookedness, and compelled him to disgorge $8,000 of the state's money." *Held*, that it was immaterial that R. was not in any such office when the article was published, and that the article would be presumed to be false and without sufficient excuse until the contrary be shown. Russell v. Anthony, 21 Kan., 450.

11. The publication of false and malicious statements about a church member, accusing him of disturbing the peace of the church by circulating false statements about the pastor, and censuring him therefor, is actionable in itself. Over v. Hildebrand, 92 Ind., 19. And so is the publication of the suicide of a man, falsely charging in effect that it was induced by the exactions of his wife, and by her fraudulent conduct in taking wages for her son which he had not earned. Bradley v. Cramer, 59 Wis., 309; 48 Am. Rep., 511.

12. A newspaper article stating that a chairman of a county committee of a political party "has descended from the high calling of a clergyman to the recognized champion and professional defender of prostitutes and the lowest grade of criminals who throng the audience halls of our police courts. . . . The money of the ring, of the prostitute, of the libertine and burglar, is all alike to him if he is duly intent on making money," was held libelous in itself and not privileged. The publishers, failing to establish its truth, must respond in damages. Barr v. Moore, 87 Penn. St., 385.

13. To publish in a weekly newspaper an article in the following words: "*To whom it may concern:* This is to certify that the members of the Seventh-day Adventist church living in the vicinity of Logan, Iowa, did withdraw the hand of fellowship from Daniel Call at a church meeting held in Logan, Iowa, on the 5th day of January, 1879, believing him to be utterly unworthy of their confidence as a christian. We desire our fellowmen to understand that we consider him a mass of immoral character, and not worthy of a place in any church of Jesus Christ. His presence at our meetings is not desired by us until we have clear evidence of a decided change in his character.

"T. D. LARABEE, Elder,
"W. S. BECK, Deacon,
"N. A. BECK, Clerk,"

was held by the supreme court of Iowa to be a libel in itself, for which the law presumes damages. Call v. Larabee et al., 60 Iowa, 312; 14 N. W. Rep., 237.

14. Communications or publications which upon proper occasions are qualifiedly privileged are not privileged when made by persons actuated by malice. Defamatory words in a notice forbidding all persons from trusting or harboring a wife on the husband's account are evidence of malice, and not privileged. It is no excuse or defense for publishing a libelous no-

tice forbidding credit to a woman on her husband's account that defendant caused it to be published and paid for by direction of the husband, who was his son. Published words charging a wife with deserting her husband in his sickness are libelous in themselves. Smith v. Smith, 73 Mich., 445, 3 L. R. A., 52, 41 N. W. Rep., 499.

15. An action was brought for an alleged libel published in the Oconomowoc "Local," in the main charge of which the plaintiff was spoken of as the "King of the Norwegians — a character so mystical and eccentric that any one would be interested to hear from him. He takes us back to the time when the star of human progress was just risen above the dark horizon of human ignorance; when the king of Babylon was changed into an ox and lived on grass. But let us doubt such things no longer when I tell you that at the present time this great king, in whose veins courses the blood of the ancient viking, has turned into an enormous swine, which lives on lame horses, etc. He still retains the faculty of speech. Great sympathy is felt for him by all the Norwegians all over the world, who keep sending him lame horses. Doctors say there is no hope for his recovery, and he will probably remain a swine the rest of his days." Of it Judge Orton said: "The precise precedent of this libel may not be found in the books, but it clearly falls within the rule of all cases in which the libel contains a gross imputation upon the character and conduct of the plaintiff, tending to bring him into ridicule and contempt." The article was held libelous in itself. Solverson v. Peterson, 64 Wis., 198; 25 N. W. Rep., 14.

17. An article in a newspaper, purporting to be a voluntary interview with a reporter of a newspaper, representing plaintiff as having stated to the reporter that her mother, having been bitten by a cat, was afflicted with a disease akin to hydrophobia; that she dreaded the approach of water, suffered extreme pain, and was much swollen; that she acted like a cat, purring and mewing and crawling about like a cat, and trying to catch rats, and did other similar acts; and that she was almost miraculously cured of this disease by taking a certain medicine sold by defendants, who procured the publication of the article, is libelous, and the plaintiff may maintain an action thereon. Publication of anything which tends to hold a person up to contempt and ridicule is libelous and actionable. Stewart v. Swift Specific Co., 76 Ga., 280.

18. A publication accusing a man of slaughtering and selling for food animals which he knows to be diseased, without making their condition known to his customers, is libelous *per se*. Young v. Kuhn, 71 Tex., 645, 9 S. W. Rep., 830.

19. It is libelous to falsely publish that a certain witness in a case, "whose idea of an oath appeared in yesterday's 'Times,' was arrested after his evidence was taken, . . . on account of his criminal evidence," and that, in default of bail, he was committed to jail, though no particular crime is charged. Godshalk v. Metzgar, 23 W. N. C., 541, 17 Atl. Rep., 215.

20. An article in a newspaper stating that defendant had been informed that plaintiff had stolen a horse, and that he was capable of being accessory in a burglary that had been committed, is libelous *per se*. Rosewater v. Hoffman, 24 Neb., 232, 38 N. W. Rep., 857.

21. A publication charging persons with confederating to mismanage the

affairs of a company, so as to destroy the value of its stock and injure tne other shareholders, is actionable *per se*. Wallis v. Walker, 73 Tex., 8, 11 S. W. Rep., 123.

22. A publication stating that a man has been arrested "on account of his criminal evidence" in a certain case is libelous. Godshalk v. Metzgar (Pa.), 23 W. N. C., 541.

23. The following article which appeared in the "Daily Inter Ocean," Chicago, was held to be a libel: "Recognizing the fact that many of the best students are not the richest, several years ago an association was formed to aid deserving young ladies in pursuit of knowledge. They bought and fitted up a house located convenient to the University and Woman's College, known as the College Cottage. At one time this institution was known among the students' community by the appropriate though not elegant name of 'Obadiah's Hash House.' For several years one O. H. acted as treasurer for the society, asking no fee for the time he spent in looking after the financial affairs of the association. So long as he held the office he refused to give an itemized account of moneys received and expended, but at the close of each year reported the society his debtor by one hundred or two hundred dollars. Last year this respected treasurer was invited to resign, and his place was filled by another. Since that time the cottage has been repainted, connected with a sewer and partly refurnished; the price of board was reduced; and food of a better quality supplied. Their receipts were no larger during the year than usual. They have also been involved in a lawsuit on account of the deeds of their former treasurer. But at the close of the last school year they had about one hundred dollars left in the treasury. The ladies of the association are now repairing the cottage for next term; the house can accommodate about twenty-five. They have already had a large number of applicants." Huse v. Inter Ocean Pub. Co., 12 Brad. (Ill.), 627.

24. The following article published in the Boston "Sunday Herald" was held to be a libel (special damage ensuing) on the Cardiff giant: "The sale of the Cardiff giant, so called, at New Orleans, for the small price of $8, recalls the palmy days of that ingenious humbug. We well remember the learned remarks made by connoisseurs in this city when it was exhibited in a vacant store quite near our office. While the vulgar herd only looked on in silence, seeing a colossal figure which excited their curiosity, but which they did not attempt to explain, the Harvard professors and other learned men traced its pedigree by their knowledge of artistic history, and constructed theories as to its origin, which at once displayed their erudition and helped to advertise the show. But our professors and learned men were not the only victims of the sell. A distinguished professor of Yale discussed learnedly upon it in the Galaxy magazine. He demonstrated beyond a doubt that the statue was authentic, that it was antique, and that it was a colossal monolith. He ciphered it down that it was a Phœnician image of the god of Baal, and found no difficulty in proving to his own satisfaction that it was brought to America by a Phœnician party of adventurers who sailed in one of the ships of Tarshish, and that it was buried by the idolaters to save it from desecration by the hordes of savages who overpowered and destroyed the Phœnicians. He accounted for several marks

and symbols upon the image which were unmistakably Phœnician. Not long afterwards the man who brought the colossal monolith to light confessed that it was a fraud, and the learned gentlemen who had indorsed its authenticity were left as naked as the statue itself." Gott v. Pulsifer, 122 Mass., 235.

25. A publication charging that a county auditor had made a statement of the financial condition of the county which was false in omitting an item of $15,000, and that it was suspected to be false in other particulars, and there was every reason to believe it a piece of financial botchwork patched up to ease popular clamor; that it was sworn to, and that an officer who would swear to one lie would swear to another, is libelous if the charges are false. Prosser v. Callis, 117 Ind., 105, 19 N. E. Rep., 735.

26. A newspaper publication charging that a breach of promise suit was about to be brought against plaintiff is libelous *per se*, plaintiff being at the time and for a number of years before having been a married man with a family; and it is immaterial that the publication does not show him to be a married man, and that it does not appear to have been within defendant's knowledge. Morey v. Morning Journal, 123 N. Y., 207.

27. A newspaper has no right to publish the contents of an *ex parte* affidavit made to obtain the plaintiff's arrest on a criminal process unless the charge contained in the affidavit is true. Cincinnati, etc., Co. v. Timberlake, 10 Ohio St., 548.

28. The following words were printed and published of a witness in a certain cause: "'Our army swore terribly in Flanders,' said Uncle Toby; and if Toby were here now he might say the same of some modern swearers; the man [meaning the witness] is no slouch at swearing to an old story." And it was held if they did not import a charge of perjury in the legal sense they were still libelous, as they held the witness up to contempt and ridicule as being so thoughtless or so criminal as to be regardless of the obligation of an oath, and therefore utterly unworthy of credit. Steele v. Southwick, 9 Johns. (N. Y.), 214.

29. A publication stating that the plaintiff is about to commence a suit for a libel, but that he will not like to bring it in a certain county because he is known there, is libelous. Cooper v. Greely, 1 Den. (N. Y.), 347.

30. A publication is libelous which holds the plaintiff up to the public as wanting in the characteristics and qualities of a merchant of integrity and honor, although it appears that the publication related to the plaintiff's conduct in a transaction which was unlawful, if he acted in conformity to what he supposed to be the law and usage in similar cases. Chenery v. Goodrich, 98 Mass., 224.

31. In Massachusetts the editor and publisher of a newspaper is answerable in law, if its contents are libelous, unless the libelous matter was inserted by some one without his order and against his will. Commonwealth v. Kneeland, Thatch. Cr. Cas., 346.

32. An editor copying a libelous article from another paper and giving his authority, expressing his disbelief of some of the charges, but neither affirming nor denying the libelous charges, may be guilty of libel, and that whether malice be shown or not. Hotchkiss v. Oliphant, 2 Hill (N. Y.), 510.

III. Publications in Books and Pamphlets, etc.

1. A declaration for libel alleged that the defendant, with intent to cause it to be believed that the plaintiff, R. W., a bookseller in Montreal, had attempted to defraud the revenue laws of the United States, and to bring the plaintiff into hatred, contempt and ridicule, published a pamphlet, a copy whereof was annexed to the declaration. The pamphlet, which advocated the substitution of a specific duty for an *ad valorem* duty on imported books, stated that no appraiser could be familiar with the value of different books; that accordingly English books were entered at the New York custom-house at a nominal valuation; that "some bolder spirits, impatient of the chances of detection in our principal ports, devised a simple plan" of shipping books into Canada and thence introducing them through some obscure port of entry on the border where the ignorance of the officials presumably offered an opportunity of fraud; that one or two cases would serve to show the *modus operandi* of these transactions: That a Montreal auctioneer, by a prearranged plan, entered a large lot of books at a port of entry on the Canada border under a sworn invoice, on which they were greatly undervalued; and that they were seized by the revenue officers. It continued thus: "A somewhat similar but smaller transaction recently came to light. A Mr. W., who does a small book business in Montreal, has been in the habit of shipping English books into the United States. According to his own statement he received intimations that trouble was in store for him, and accordingly he took the precaution to assemble his principal clerks, in the presence of a witness, and give them the very suggestive instructions that invoices were thereafter to be made out honestly, both as to prices and contents. Notwithstanding this praiseworthy effort to repress the smuggling instincts of his employees, his very next shipment, consisting of nineteen cases of 'samples,' were seized on the ground of undervaluation and because a considerable number of books were not even borne upon the invoices. Mr. W. thereupon, as an injured innocent, complains that he is the victim of a conspiracy set on foot by envious booksellers." *Held*, on demurrer, that the pamphlet was a libel. Worthington v. Houghton, 109 Mass., 481.

IV. Posting Placards, Handbills, Notices, etc.

1. Two placards were placed near together on a piece of furniture standing in front of a store, one with the words "this was taken back from Dr. Woodling, as he would not pay for it; for sale at a bargain," and the other with the words, "Moral: beware of dead beats." *Held*, that the two read together, as they were undoubtedly intended to, constitute a gross libel, and are clearly defamatory on their face. Woodling v. Knickerbocker et al., 31 Minn., 268; 17 N. W. Rep., 386.

V. Entries Made in Books of Corporations, Associations, etc.

1. The following words written in a church book, "a report raised and circulated by A. B. against brother C., stating that he made him pay a note twice, and proved by A. B. to be false," were held to be libelous. Shelton v. Nance, 7 B. Mon. (Ky.), 128.

2. A county medical society has not the power to expel or remove a

member for the reason that he did not possess the requisite qualifications, and obtained his admission by false pretenses. In such a case the society is without jurisdiction, and a resolution adopted and entered among its proceedings expelling a member for such cause is a libel, and the member introducing it is liable to an action. Fawcett v. Charles, 13 Wend. (N. Y.), 473.

8. The words "this company, for good and sufficient reasons, has resolved to dismiss D. D. Maynard from its service," when entered on its books by an insurance company, and published concerning one of its agents, are not libelous *per se*, but may sustain an action for libel upon a complaint which properly avers that the words were intended by the defendant to be understood as imputing wrong-doing to the plaintiffs, and that they were in fact so understood by those who read them. A complaint upon such words sufficiently avers that the words were intended by the defendant to be understood, and were understood by those who read them, to impute dishonor to the plaintiff, if it avers that the defendant, intending to injure the plaintiff, falsely and maliciously published the libelous words, thereby meaning and wishing to have it understood that the plaintiff was dishonest; and that the libel was read by the acquaintances of the plaintiff and business men, who, by reason thereof, are unwilling to employ the plaintiff, and believe that he is dishonest and unfit to be trusted. Maynard v. Fireman's Fund Ins. Co., 47 Cal., 207.

VI. Letters, etc.

1. Although a letter be written in good faith as a confidential communication for the purpose of obtaining information to which the writer is properly entitled, yet if it contain comments of a slanderous nature, referring to an individual concerning whom no information was expected or desired, and foreign to the avowed object for which it was written, it will be libelous. Cole v. Wilson, 18 B. Mon. (Ky.), 212.

2. Where a member of a school district wrote a letter to the school committee accusing a teacher of a want of chastity and remonstrating against her appointment, it was held that the communication was libelous if shown to have been made with express malice or without probable cause. Bodwell v. Osgood, 3 Pick. (Mass.), 379.

3. Defendant wrote a letter charging plaintiff, substantially, with selling poisonous and impure milk. It was held that, this being a misdemeanor, the words were actionable *per se;* but that, even if the facts stated did not necessarily show the milk to be impure, if they cast such a suspicion on it that cheese factories refused to buy it, special damage was shown. Brooks v. Harrison, 91 N. Y., 83.

4. If A. writes a libelous letter in B.'s name to C., it is a libel upon B. as well as upon C. if it contains any language which would subject B., had he written it, to public hatred and contempt. State v. Hollon, 12 Lea (Tenn.), 482.

5. Where a letter contained the following words: "It is wondered at how he can live in more than ordinary style, as he does, while having merely the honorable receipts of his agency to live upon," and other portions of the letter accused him of charging unusual rates, it was properly

left to the jury to say whether it contained a charge of embezzlement or larceny. Edwards v. Chandler, 14 Mich., 471.

6. Under code of Virginia, 1873, chapter 145, section 2, providing that "all words which from their usual construction and common acceptation are construed as insults, and tend to violence and breach of the peace, shall be actionable," a letter sent to a neighbor's wife, falsely intimating that she has invited the writer to meet her, and proposing a private interview on a street corner at night, or in his office on the Sabbath day, constitutes a good cause of action. Rolland v. Batchelder 84 Va., 664, 5 S. E. Rep., 695.

VII. Effigies, etc.

1. An effigy bearing the words, "By George, the old liar," hung upon a tree in front of the prosecutor's place of business, and intended, and understood by his neighbors to be intended, to represent him, is a libel. Johnson v. Commonwealth (Pa.), 14 Atl. Rep., 425.

VIII. General Digest of English Cases.

1. It is libelous to write and publish of a man that he is "the most artful scoundrel that ever existed," "is in every person's debt," that "his ruin cannot be long delayed," that "he is not deserving of the slightest commiseration" (Rutherford v. Evans, 6 Bing., 451; 8 L. J. (O. S.), C. P., 86); "a dishonest man" (*Per cur.* in Austin v. Culpepper, Skin., 124; 2 Show., 314); "a mere man of straw" (Eaton v. Johns, 1 Dowl., N. S., 602); "an itchy old toad" (Villers v. Monsley, 2 Wils., 403); "a desperate adventurer," association with whom "would inevitably cover" a gentleman "with ridicule and disrepute" (Wakley v. Healey, 7 C. B., 591; 18 L. J., C. P., 241); that "he grossly insulted two ladies" (Clement v. Chivis, 9 B. & C., 172; 4 M. & R., 127); that "he is unfit to be trusted with money" (Cheese v. Scales, 10 M. & W., 488; 12 L. J., Ex., 13; 6 Jur., 958); that "he is insolvent and cannot pay his debts" (Metropolitan Omnibus Co. v. Hawkins, 4 H. & N., 87; 28 L. J., Ex., 201; 5 Jur. (N. S.), 226; 7 W. R., 265; 32 L. T. (O. S.), 281); that "he was once in difficulties," though it is stated that such difficulties are now at an end (Cox v. Lee, L. R., 4 Ex., 284; 38 L. J., Ex., 219); "an infernal villain" (Bell v. Stone, 1 B. & P., 331); "an impostor" (Cooke v. Hughes, R. & M., 112; Campbell v. Spottiswoode, 3 B. & S., 769; 32 L. J., Q. B., 185; 9 Jur. (N. S.), 1069; 11 W. R., 569; 8 L. T., 201); "a great defaulter" (Warman v. Hine, 1 Jur., 820); "a hypocrite" (Thorley v. Lord Kerry, 4 Taunt., 355; 3 Camp., 214, n.); "a frozen snake" (Hoare v. Silverlock (No. 1, 1848), 12 Q. B., 624; 17 L. J., Q. B., 306; 12 Jur., 695); "a rogue and a rascal" (Per Gould, J., in Villers v. Monsley, 2 Wils., 403).

2. It is libelous to write of a lady applying for relief to a charitable society that her claims are unworthy, and that she spends all the money given her by the benevolent in printing circulars filled with abuse of the society's secretary (Hoare v. Silverlock (No. 1, 1848), 12 Q. B., 624; 17 L. J., Q. B., 306; 12 Jur., 695); to charge the plaintiff with having published a libel (Brookes v. Tichborne, 5 Exch., 929; 20 L. J., Ex., 69; 14 Jur., 1122); so to state in writing that the plaintiff is insane, or that her mind is affected, is libelous, if false (Morgan v. Lingen, 8 L. T., 800); for the manager of a

private lunatic asylum to write of a lady, "I have been to her house this morning and seen her. I think it my duty to inform you it is imperative that immediate steps to secure her should be taken" (Weldon v. Winslow, Times for March 14-19, 1884).

3. Ironical praise may be a libel; *e. g.*, calling an attorney "an honest lawyer" (Boydell v. Jones, 4 M. & W., 446; 7 Dowl., 210; 1 H. & H., 408; Sir Baptist Hicks' Case, Hob., 215; Poph., 139); that he is "at the head of a gang of swindlers," that he is "a common informer, and has been guilty of deceiving and defrauding divers persons with whom he had dealings" (I'Anson v. Stuart, 1 T. R., 748; 2 Smith's L. C. (6th ed.), 57; R. v. Saunders, Sir Thos. Raym., 201); that the plaintiff sought admission to a club and was black-balled, and bolted the next morning without paying his debts (O'Brien v. Clement, 16 M. & W., 159: 16 L. J., Ex., 76; 4 D. & L., 343); to write and publish of a landlord that he put in a distress in order to help his insolvent tenant to defraud his creditors (Haire v. Wilson, 9 B. & C., 643; 4 M. & R., 605); for a defendant to write a letter charging his sister with having unnecessarily made him a party to a chancery suit, and adding, "It is a pleasure to her to put me to all the expense she can" (Fray v. Fray, 17 C. B., N. S., 603; 34 L. J., C. P., 45; 10 Jur. (N. S.). 1153); to impute to a Presbyterian "gross intolerance" in not allowing his hearse to be used at the funeral of his Roman Catholic servant (Teacy v. McKenna, Ir. R., 4 C. L., 374). It is *prima facie* libelous to charge the plaintiff with ingratitude, even though the facts on which the charge is based be stated, and they do not bear it out (Cox v. Lee, L. R., 4 Ex., 284; 38 L. J., Ex., 219); to state in a newspaper of a young nobleman that he drove over a lady and killed her and yet attended a public ball that very evening (although this only amounts to a charge of unfeeling conduct) (Churchill v. Hunt, 1 Chit., 480; 2 B. & A., 685); to write and publish of a lady of high rank that she has her photograph taken incessantly, morning, noon and night, and receives a commission on the sale of such photographs (R. v. Rosenberg, Times for Oct. 27, 28, 1879); to impute or imply that a grand jury have found a true bill against the plaintiff for any crime (Harvey v. French, 1 Cr. & M., 11); to publish a highly-colored account of judicial proceedings, mixed with the reporter's own observations and conclusions upon what passed in court, containing an insinuation that the plaintiff had committed perjury (Stiles v. Nokes, 7 East, 493; same case *sub nomine* Carr v. Jones, 3 Smith, 491); to write and publish of the editor of a paper that he is "a convicted felon" and "a felon editor," even although the fact is that he was convicted of felony, and underwent a term of imprisonment with hard labor (Leyman v. Latimer and others, 3 Ex. D., 15, 352; 46 L. J., Ex., 765; 47 L. J., Ex., 470; 25 W. R., 751; 26 W. R., 305; 37 L. T., 360. 819); to write about the plaintiff's "defalcations" (Bruton v. Downes, 1 F. & F., 668); to call a manufacturer a "truckmaster," for this implies that he has been guilty of practices in contravention of the Truck Act (Homer v. Taunton, 5 H. & N., 661; 29 L. J., Ex., 318; 8 W. R., 499; 2 L. T., 512.)

4. It is libelous to write and publish of the plaintiff the following words: "Digby has had a tolerable run of luck. He keeps a well-spread side-board, but I always consider myself in a family hotel when my legs are under his

table, for the bill is sure to come in sooner or later, though I rarely dabble in the mysteries of *écarté* or any other game. The fellow is as deep as Crockford, and as knowing as the Marquis. I do dislike this leg-al profession" (Digby v. Thompson and another, 4 B. & Ad., 821; 1 N. & M., 485); to write and publish of a clergyman that he poisoned foxes on the estate of Sir M. S., in a fox-hunting county, and had been hung up in effigy in consequence of such "dastardly behavior" (R. v. Cooper, 8 Q. B., 533; 15 L. J., Q. B., 206: Foulger v. Newcomb, L. R., 2 Ex., 327; 36 L. J., Ex., 169; 15 W. R., 1181; 16 L. T., 595); to publish in a newspaper a story of the plaintiff calculated to make him ludicrous, though he had previously told the same story of himself. Cook v. Ward, 6 Bing., 409; 4 M. & P., 99.

5. But it is not defamatory to write of another that he is "Man Friday" (Forbes v. King, 1 Dowl., 672; 2 L. J., Ex., 109); for, as Lord Denman, C. J., observes in Hoare v. Silverlock (No. 1, 1848), 12 Q. B., 626; 17 L. J., Q. B., 308: "That imputed no crime at all. The 'Man Friday,' we all know, was a very respectable man, although a black man, and black men have not been denounced as criminals yet." The law is otherwise in the United States. King v. Wood, 1 N. & M. (S. C.), 184.

6. It is a libel to write and publish of a married man that his conduct towards his wife is so cruel that she was compelled to summon him before the magistrates (Hakewell v. Ingram, 2 C. L. Rep. (1854), p. 1397); "to paint a man playing at cudgels with his wife." Per Lord Holt, C. J., in Anon., 11 Mod., 99. See Du Bost v. Beresford, 2 Camp., 511.

7. It is a libel on a married lady to assert that her husband is petitioning for a divorce from her. R. v. Leng, 34 J. P., 309.

8. It is a libel for a husband to publish in writing that A. has committed adultery with his wife. Per Kelly, C. B., in Brown v. Brine, 1 Ex. D., 5; 45 L. J., Ex., 129; 24 W. R., 177; 33 L. T., 703.

9. It is libelous to charge in writing a man with having cheated at dice or on the turf, although all gambling and horse-racing transactions are illegal or at least void. Greville v. Chapman, 5 Q. B., 731; 13 L. J., Q. B., 172; 8 Jur., 189; D. & M., 553; Yrisarri v. Clement, 3 Bing., 432; 11 Moore, 308; 2 C. & P., 223.

10. It is libelous to call a man a "black-leg" or a "black sheep." But there should be an averment that these words mean a person guilty of habitually cheating and defrauding others. M'Gregor v. Gregory, 11 M. & W., 287; 12 L. J., Ex., 204; 2 Dowl. (N. S.), 769; O'Brien v. Clement, 16 M. & W., 166; 16 L. J., Ex., 77. And see Barnett v. Allen, 1 F. & F., 125; 27 L. J., Ex., 412; 4 Jur. (N. S.), 488; 3 H. & N., 376.

11. The court of exchequer chamber thought the words "If Mrs. W. chooses to entertain the duke of Brunswick she does what very few will do," a libel on the duke. Gregory v. The Queen (No. 1), 15 Q. B., 957; 15 Jur., 743; 5 Cox, C. C., 247.

12. Where the defendant posted up in a public club-room the following notice: "The Rev. J. Robinson and Mr. J. K., inhabitants of this town, not being persons that the proprietors and annual subscribers think it proper to associate with, are excluded this room," this was held no libel (*sed quære*). Robinson v. Jermyn, 1 Price, 11; Odgers on L. & S., 23.

§ 4. What is Not Libelous — Illustrations.—

DIGEST OF AMERICAN CASES.

1. A publication speaking of "the remarkable letter of W., giving his so-called reasons for falsely asserting that L.'s nomination was secured by corrupt means," is not libelous. The words "falsely asserting," when taken in connection with the subject-matter, mean no more than that the proposition which W. attempted to prove was false; that is, that the conclusion or inference which he drew was not justified by the facts, and do not constitute an attack on his veracity. Walker v. Hawley, 56 Conn., 559.

2. The word "crank" has no necessary defamatory meaning; and for a newspaper to publish an item that a certain pamphlet written by a lawyer who was also the author of a text-book on the law of patents was "the effusion of a crank" is not actionable without a charge in the declaration of the alleged defamatory meaning of the word by an appropriate innuendo, and an averment and proof of special damage. Walker v. Tribune Co., 29 Fed. Rep., 827.

3. An order by a railroad company to its agents as follows: "You are instructed to ship no lumber or merchandise of any description to Mr. J. L. Allen . . . except when all freight and charges are paid," and a request to a connecting road to make a like order, does not constitute libel; there being no malice imputed. Allen v. Cape Fear & Y. V. R'y Co. (N. C.), 6 S. E. Rep., 105.

4. If a publication does not contain a libelous charge, no action will lie therefor, no matter what its author intended. Mosier v. Stoll (Ind.), 20 N. E. Rep., 752.

5. Where a member of a church has consented that the church should investigate any complaint which might be preferred against him in writing by a person not a member, it was held that the complaint would not be libelous unless shown to have been made without probable cause or as a pretense or cover for the design of slandering. Remington v. Condon, 2 Pick. (Mass.), 310; Bradly v. Heath, 12 Pick. (Mass.), 163.

6. Where the editor of a sectarian newspaper publishes an obituary notice, in which it is stated that the deceased never used profane language, the intention of the notice being to promote certain religious views, it is the right of the editor of another sectarian newspaper, if he believes such notice to be injurious, to state in his newspaper that the deceased was a profane swearer, if such was the case, and if such statement was made simply to counteract what is believed to be the mischief of the notice. Com. v. Batchelder, Thach. Mass. Cr. Cas., 191.

7. A publication which states that a certain firm unfairly procured a lease of certain premises, and then characterizes the transaction with epithets, is not a libel in itself. Donaghue v. Goffy, 53 Conn., 43.

8. Where a plaintiff demands a bill of particulars he cannot base an action for a libel upon anything contained in it. Puzel v. Tausey, 52 N. Y. Super. Ct., 79.

9. In Dakota it seems that words charging one with making false affidavits do not necessarily charge perjury, and will not in themselves support an action for libel. Casselman v. Windslip, 3 Dak., 292.

10. A publication signed by the defendant, which in effect charges that, because he had quit buying of plaintiff, plaintiff had procured a lease of the premises, whereof defendant was a tenant at will, and had turned defendant out, and that because of such contract no one would do business with plaintiff, is not a libel in itself, and plaintiff can recover nothing without proof of special damages. Donaghue v. Goffy, 54 Conn., 257.

11. In a suit against a railroad company the complaint stated that the company had sent notices to its agents instructing them to receive no freight from the plaintiff unless the charges were prepaid, and that this order was enforced against the plaintiff alone and not against other shippers of freight. *Held*, that no cause of action was stated. Allen v. Cape Fear & Yadkin Valley R. R. Co., 100 N. C., 397.

12. It is not libelous in itself to charge that a person without consideration has obtained notes from one whose mental condition incapacitated him from business. Trimble v. Anderson, 79 Ala., 514.

13. It is not libelous in itself to charge a grain dealer with reducing the price of grain by entering into a combination. Adsom v. Piper, 66 Iowa, 694.

14. If the employer of a large number of men posts a notice declaring that any employee who trades with a certain merchant will be discharged, there being nothing libelous in the notice, no action lies by the merchant, however injurious and malicious the notice may be. [Freeman and Turner, JJ., dissenting.] Payne v. Western & Atlantic R. R. Co., 13 Lea (Tenn.), 507; S. C., 49 Am. Rep., 666.

15. Libel cannot be predicated of a circular of a commercial agency which in itself contains nothing libelous, but which requests a call at the office of the agency for an explanation. Kingsbury v. Bradstreet Co., 35 Hun (N. Y.), 212.

16. In a suit for libel it appeared that defendant, at a hearing before the governor, presented to him and to three other persons copies of a pamphlet prepared by a third person and bearing upon the matter in hand. This pamphlet contained a reflection upon plaintiff's character — plaintiff's name, however, not being given. There was no express malice, and defendant was ignorant of the precise contents of the pamphlet. *Held*, that the action was not maintainable. Woods v. Wiman, 47 Hun (N. Y.), 362.

17. A. expressed an opinion, founded on the statement of others, that B. had maliciously killed his horse, and was arraigned therefor by B. before the church. In self-defense A. produced the certificates of the individuals upon whose authority he made the statement. In a suit for libel it was held that in the absence of proof of notice the action would not lie. Dum v. Winters, 2 Humph. (Tenn.), 512.

18. The publication in a newspaper of an article charging that a public dinner provided by the plaintiff, a caterer, was bad, and "the cigars vile, and the wines not much better," even if untrue, does not attack the individual, and is not actionable, where the plaintiff does not prove special damage. Dooling v. Budget Pub. Co., 144 Mass., 258, 10 N. E. Rep., 809.

19. It is not libelous to publish of a professional man "that he has removed his office to his house to save expense." In order to maintain an action for libel it must appear that the plaintiff has sustained some special

loss or damage resulting from the publication complained of, or the charge itself must be such that the court can legally presume that the party has been injured in his reputation or business, or subjected to public scandal, in consequence thereof. Stewart v. Minnesota Tribune Co., 40 Minn., 101, 41 N. W. Rep., 457.

20. A complaint setting out as libelous a statement that the legislature had passed a law prohibiting baby-farming, and that a copy of it had been served on plaintiff, with a notification by a certain society that he must comply with its terms; that he at once made an application for a license to baby-farm to the board of health, and the society as promptly interposed a protest, does not state a cause of action, as the alleged libel does not charge that plaintiff was ever engaged in baby-farming. Ramscar v. Gerry, 1 N. Y. S., 635.

21. Where the language in an alleged libelous charge is in itself so vague and uncertain that it could not have been intended to be used in reference to any particular person or persons, it is not actionable. Petsch v. St. Paul Dispatch Printing Co., 40 Minn., 291, 41 N. W. Rep., 1034.

22. When an alleged libelous publication consists of several epithets, defendant may be permitted to disclaim any intention to apply certain of the epithets to plaintiff, and to justify the others. Arnott v. Standard Ass'n, 57 Conn., 86, 3 L. R. A., 69.

23. Plaintiff purchased goods of defendant's agent and advertised them for sale. Defendant inserted in another paper, published in the same town, an advertisement as follows: "Caution. An opinion of Shaw knit hose should not be formed from the navy-blue stockings advertised as first quality by Messrs. B. & Co. [plaintiff] at twelve and one-half cents, since we sold that firm some lots which were damaged in the dye-house." *Held*, that the language of defendant's advertisement, giving to it its natural signification, was not libelous. Boynton v. Shaw Stocking Co., 146 Mass., 219.

24. Where an action was brought for maliciously defaming the plaintiff in a petition to the legislature for redress complaining of the attorney-general, it appeared that the defendant had reasonable and probable cause of complaint, though the charge was not well founded in fact. It was held an action for libel would not lie. Reed v. Delorme, 2 Brev. (S. C.), 76.

25. It is not libelous to publish of a professional man "that he has removed his office to his house to save expense." Stewart v. Minnesota Tribune Co., 40 Minn., 101, 41 N. W. Rep., 457.

26. Plaintiff, during a political campaign, published a letter with the purpose of proving that a candidate for governor had procured his nomination by improper practices. Defendants published an article in their newspaper alluding to the letter as "that remarkable letter of [plaintiff], giving his so-called reasons for falsely asserting that Mr. [L.'s] nomination was secured by corrupt means." *Held*, that the defendants' article did not impute wilful misstatement of a fact to plaintiff, but that it amounted to no more than the assertion that plaintiff's conclusions in said letters were erroneous, and hence was not libelous. Walker v. Hawley, 56 Conn., 559, 16 Atl. Rep., 674.

27. A banker when remitting the proceeds of a note sent to him for collection appended to his letter the words "Confidential. Had to hold over for a few days for the accommodation of L. & H.," who were the makers.

In a suit it was held that the words have not necessarily an injurious meaning. Lewis v. Chapman, 16 N. Y., 369.

28. A notice in a newspaper advising applicants for board at a specified street and number to "inform themselves before locating there as to table, attention and characteristics of the proprietors" is not libelous on its face. Wallace v. Bennett, 1 Abb. (N. Y.) N. Cas., 478.

29. The defendant, who was the editor of a newspaper, was owing the plaintiff some money upon the award of arbitrators, in speaking of which and of the plaintiff in his paper he said: "The money will be forthcoming on the last day allowed by the award; but we are not disposed to allow him to put it into Wall street for shaving purposes before that period." The article was adjudged not to be a libel. Stone v. Cooper, 2 Den. (N. Y.), 293.

30. An affidavit made before a magistrate to enforce the law against a person accused therein of a crime does not subject the accuser to an action for libel, though the affidavit be false and insufficient to effect its object. Hartsock v. Reddick, 6 Blackf. (Ind.), 255.

31. For the words the "Mississippi bard foameth," published in a newspaper, the person alluded to could not maintain an action for libel without an allegation and proof that the words were used in a defamatory sense. Kinyon v. Palmer, 18 Iowa, 377.

32. The term "blackmailing" is not necessarily libelous, and its construction is a question for the jury. Edsall v. Brooks, 3 Rob. (N. Y.), 284.

33. It has been held not to be libelous to charge a judge with improprieties which would be no cause of impeachment or address to remove him. Robbins v. Treadway, 2 J. J. Marsh. (Ky.), 540. In Maryland, to impute a crime punishable only by fine, though the statute authorizes commitment for non-payment of the fine. Wagaman v. Byers, 17 Md., 183. To publish of a druggist: "the above druggist, in the city of Detroit, refusing to contribute his mite with his fellow-merchants for watering Jefferson avenue, I have concluded to water said avenue in front of Pierre Feller's store for the week ending June 27, 1846." People v. Jerome, 1 Mich., 142. To charge a person with having "forged words and sentiments for Silas Wright which he never uttered." Cramer v. Noonan, 4 Wis., 231. It has been held not to be libelous to call a man a "crank." Walker v. Tribune Co., 29 Fed. Rep., 827. Or to charge a man with bribing voters in Indiana. Heilman v. Shanklin, 60 Ind., 424.

34. It has been held not to be libelous to publish of a professional man, "He has removed his office to his house to save expense." Stewart v. Minn. Trib. Co. (Minn.), 41 N. W. Rep., 457. Or where the defendant, a cashier of a bank, in returning a draft wrote, "We return unpaid draft of J. V. V. P. for $11. He pays no attention to notices." Platto v. Geilfuss, 47 Wis., 491; 2 N. W. Rep., 1135.

35. Where the defendant, a retail seller of liquor, issues a circular to other retail sellers of his town, charging that plaintiffs, wholesale sellers of liquors, being vexed by his having ceased to buy from them, overbid him in the matter of a lease and turned him out of his place of business, plaintiffs, in the absence of special damages, have no cause of action. Donaghue v. Gaffy, 54 Conn., 257, 7 Atl. Rep., 552.

36. The words "wanted E. B. Z., M. D., to pay a drug bill" are not libel-

ous on their face, but may become so from circumstances under which they are published. Zier v. Hoflin, 33 Minn., 60; 21 N. W. Rep., 862.

37. It is no libel upon a dealer in coal in L. who had advertised genuine Franklin coal for sale to publish the following advertisement: "*Caution.* The subscribers, the only shippers of the true and original Franklin coal, notice that other coal dealers in L. than our agent J. S. advertise Franklin coal. We take this method in cautioning the public of buying of other parties than J. S. if they hope to get the genuine article, as we have neither sold nor shipped any Franklin coal to any party in L. except our agent J. S." Boynton v. Remington, 3 Allen (Mass.), 397.

38. Where, in a sentence of excommunication from a church read by the pastor on Sunday, in the presence and hearing of the congregation, it was recited that the offender had "clearly violated the seventh commandment," and in a subsequent part of the sentence it was declared "that this church does now as always bear its solemn testimony against the sin of fornication and uncleanness," it was held that the charge of violating the seventh commandment did not import the crime of adultery in its legal and technical sense as an indictable offense, and was not libelous. Farnsworth v. Storrs, 5 Cush. (Mass.), 412.

39. Where two persons were charged in a bill in equity with having fraudulently altered certain instruments without specifying the person who did it, it was held in an action of slander by one of the parties against the complainaints in the bill in equity that either of the parties charged might sue, but that the charge in the bill was not a libel. Forbes v. Johnson, 11 B. Mon. (Ky.), 48.

40. The plaintiff, a physician, prepared for publication an account of a surgical operation performed by him, and, by an error on the part of the printer, he was described as having performed the operation of removing a "pottytuber" from the "hypogostroom" of a Mr. Smith. There was no evidence to show that the alteration was the result of inattention or malice. It was held that it could not be made the basis of damages for an action for malicious libel brought by the writer of the article. Sullings v. Shakespeare 46 Mich., 408, 9 N. W. Rep., 451.

Digest of English Cases.

1. It has been held not to be libelous to write and publish of the plaintiff words implying that he endeavored to suppress dissension and discourage sedition in Ireland; for, though such words might injure him in the minds of criminals and rebels, they would not tend to lower him in the estimation of right-thinking men. Mawe v. Pigott, Ir. R., 4 C. L., 54. And see Clay v. Roberts, 9 Jur. (N. S.), 580; 11 W. R., 649; 8 L. T., 397. So a notice sent by a landlord to his tenants: "Messrs. Henty & Sons hereby give notice that they will not receive in payment any checks drawn on any of the branches of the Capital and Counties Bank," is not defamatory. Capital and Counties Bank v. Henty & Sons (H. L.), 7 App. Cas., 741; 52 L. J., Q. B., 232; 31 W. R., 157; 47 L. T., 662; 47 J. P., 214.

2. The plaintiff was a certificated art master, and had been master at the Walsall Science and Art Institute. His engagement there ceased in June, 1874, and he then started and became master of another school which was

called "The Walsall Government School of Art," and was opened in August. In September the following advertisement appeared in the Walsall "Observer," signed by the defendants as chairman, treasurer and secretary of the institute respectively: "Walsall Science and Art Institute. The public are informed that Mr. Mulligan's connection with the institute has ceased, and that he is not authorized to receive subscriptions on its behalf." *Held*, that this was no libel; and that no innuendo could make it so; for the words were not capable of a defamatory meaning. Mulligan v. Cole, L. R., 10 Q. B., 549; 44 L. J., Q. B., 153; 33 L. T., 12.

3. It is not libelous to publish in a newspaper that the plaintiff has sued his mother-in-law in the county court (Cox v. Cooper, 12 W. R., 75; 9 L. T., 329); or to send a circular to the members of a certain society stating that the plaintiffs are not proper persons "to be proposed to be balloted for as members thereof." Goldstein v. Foss, 6 B. & C., 154 (Ex. Ch.); 4 Bing., 489; 2 C. & P., 252; 2 Y. & J., 146; 1 M. & P., 402.

4. It is not libelous to print and circulate a handbill: "B. Oakley, of Chillington, Game and Rabbit Destroyer, and his wife, the seller of the same in country and town," unless it be averred and proved that the words imputed some illegal or improper slaughter or sale of game or rabbits (R. v. James Yates, 12 Cox, C. C., 233); or to write and publish in the "Times:" "We are requested to state that the honorary secretary of the Tichborne Defense Fund is not and never was a captain in the royal artillery, as he has been erroneously described," for these words do not impute that the plaintiff had so represented himself. Hunt v. Goodlake, 43 L. J., C. P., 54; 29 L. T., 472.

5. Defendant posted up several placards which ran thus: "W. Gee, Solicitor, Bishop's Stortford. To be sold by auction, if not previously disposed of by private contract, a debt of the above, amounting to £3,197, due upon partnership and mortgage transactions." Bramwell, B., told the jury that in his opinion this was no libel, "because it was not libelous to publish of another that he owed money," and the jury returned a verdict of not guilty. R. v. Coghlan, 4 F. & F., 316.

LIBELS CLASSIFIED.

§ 5. **(1) Libels on Private Persons.**— No man can reasonably set his own character at a higher estimation than the law puts upon it. Acting in the same spirit in which in all criminal cases it presupposes a party innocent till proved to be guilty, it takes the honesty and morality of every member of the community as a reasonable presumption; and therefore, deeming his good character as a part of his personal rights, will not suffer him to be molested or assailed therein, except in the same manner by which his property may be divested — that is, by due judgment and conviction of law.

No man has a right of being at once the accuser and judge of another; or of measuring out the degree of punishment in reproachful accusation which his passions may deem an imputed crime to merit.

Written defamation has already been explained to be the injurious detraction of any one by writing or equivalent symbols; in the language of Lord Coke, *scriptis aut sine scriptis.* The word libel is a technical word — a word which derives its meaning rather from its use than its etymology. It was observed by Lord Camden:[1] "There is no other name but that of libel applicable to the offense of libeling, and we know the offense specifically by that name as we know the offenses of horse-stealing, forgery, etc., by the names which the law has annexed to them."[2]

Libels affecting the character of private persons may be classified according to their objects:

I. Libels which impute to a person the commission of a crime.

II. Libels which have a tendency to injure him in his office, profession, calling or trade.

III. Libels which hold him up to scorn and ridicule, and to feelings of contempt or execration, impair him in the enjoyment of general society, and injure those imperfect rights of friendly intercourse and mutual benevolence which man has with respect to man.

I. Libels which impute to a person the commission of a crime.

§ 6. **The Subject Defined.**— Any publication which imputes to a person the commission of a criminal offense, which will, in case the imputation or charge is true, subject the party charged to punishment for a crime involving moral turpitude, or subject such party to an infamous punishment, is actionable in itself when published orally, and hence when expressed otherwise than by oral language is a libel.[3]

§ 7. **Illustrations.**—

DIGEST OF ENGLISH CASES.

1. Writings, in order to be libelous under this head, must distinctly impute crimes and misdemeanors which are recognized as such and are punishable by law; as to charge a man with felony. Buller, N. P., p. 9.

[1] The King v. Wilkes, 2 Wilson, 151.
[2] Holt on Libel, 188.
[3] Brooker v. Coffin, 5 Johns. (N. Y.), 190; Cooley on Torts, 146; White v. Nichols, 44 U. S. (3 How.), 266; 4 Black. Com., 150; Herman v. Bradstreet Co., 19 Mo. App., 227; Legg v. Dunleavy, 80 Mo., 558; Whitney v. Janesville Gazette, 5 Biss., 331; People v. Stephens, 4 L. R. A., 845; 79 Cal., 428; Broughton v. McGrew, 5 L. R. A., 406; 39 Fed. Rep., 672; Nissen v. Cramer, 104 N. C., 574.

2. Thus, for example, no action will lie for publishing of any man that he is forsworn, unless it be added that he was so forsworn in a judicial proceeding; though the allegation of perjury is the same in both cases, but in the one it is recognized as a crime by the law, and in the other is mere moral depravity. But the allegation in writings of the words "he is perjured" is libelous; for these words, being the legal term for the crime, shall be intended to mean that he is forsworn in a judicial proceeding. 4 Rep., 15; 2 Bulst., 150; 3 Inst., 156; Holt v. Scholfield, 6 T. R., 691; Holt on Libel, 189.

3. It was holden that an action for a libel could not be maintained for exhibiting a bill to the queen (petitions to the sovereign being at that time in the ordinary course of legal proceeding) charging the plaintiff to have recovered 400*l.* of the defendant by perjury, forgery and cozening. "Because," said the court, "the queen is the fountain of justice, and all her subjects may lawfully resort to her to complain; but if they will divulge the contents to the disgrace of the person, it is actionable." Hare v. Mellor, 3 Lev., 138, pl. 187.

4. It may be laid down, therefore, as the law in all cases that the allegation of any act which the law recognizes and punishes as a crime is libelous. But, on the other hand, the allegation of acts which, though crimes, are not so recognized by the law, or the allegation of them in such a manner that the terms employed do not meet the legal designation of the crime, are not libels, at least under this head. Thus, an action does not lie for publishing these words of J. S.: "He has delivered false evidence and untruths in his answer to a bill in chancery;" for as some things in a bill in chancery are not material to the matter in dispute between the parties, it is no perjury, although such things be not truly answered. 1 Roll. Abr., 70; 3 Inst., 167; Holt on Libel, 189.

II. Libels which have a tendency to injure a person in his office, profession, calling or trade.

§ 8. **The General Doctrine.**—Every man has a right to the fruits of his industry, and by a fair reputation and character in his particular business to the means of making his industry fruitful. At common law, therefore, an action lies for words which slander a man in his trade, or defame him in an honest calling; as, to say of a merchant or tradesman he is a bankrupt.[1] So to charge a man with deceit in his trade, or other malpractice.[2] But words not actionable in themselves did not become actionable when spoken of a man in his trade, unless it were shown, by a colloquium or special averment, that they touched him therein.[3]

In regard to defamation which affects a man in his trade, the same rule applies to written as to parol slander; though

[1] 1 Rol., 61, pl. 35, 40.
[2] 1 Rol., 59, 63.
[3] Ray., 75.

defamation, when written, may be actionable under certain circumstances, when the same words, if spoken, would not.[1]

§ 9. **Libels on Persons in Office.**— It is libelous to impute to any one holding an office that he has been guilty of improper conduct in that office, or has been actuated by wicked, corrupt or selfish motives, or is incompetent for the post. So it is libelous to impute to a member of any of the learned professions that he does not possess the technical knowledge necessary for the proper practice of such profession, or that he has been guilty of professional misconduct. And it is not necessary, as it is in cases of slander, that the person libeled should at the time still hold that office or exercise that profession; it is actionable to impute past misconduct when in office.[2]

§ 10. **Illustration.**—

AN OLD ENGLISH CASE (1731).

In an action upon the case for a libel, the plaintiff declared that he had obtained a patent to be gunsmith to his royal highness. the Prince of Wales, and that it having been advertised in one of the public newspapers, called the "Craftsman," that he had the honor of making for and presenting to his royal highness a gun of two feet six inches long in the barrel, which would carry as far as guns of a foot longer in the barrel, made by any other person of that trade; that it was so much approved that the plaintiff had the honor of kissing his royal highness' hand; and that the defendant falsely and maliciously, and with an intent to scandalize the plaintiff in his art and profession, did, 4th January, 1741, in the said public paper, publish and advertise of the plaintiff, concerning his art and profession, *inter alia*, to this purpose: "Whereas there was an account lately in the 'Craftsman,' of Mr. John Harman, gunsmith, his making guns of two feet six inches in barrel, to exceed any made by others of a foot longer (with whom it is supposed he is in fee), this is to advise all gentlemen to be cautious, the said gunsmith not daring to engage with any other artist in town, nor even did he make any experiments but out of a leather gun, as any gentleman may be informed at the Cross Guns in Long-Acre," being the defendant's shop, by which the plaintiff lost several customers, to his damage. After not guilty pleaded, there was a verdict for plaintiff, and 50*l.* damages. It was moved, in arrest of judgment, that the advertisement in the newspaper was no libel, and that, if one tradesman will pretend to be a greater artist than others, it is lawful for them to support their credit in the same way; and the court held that, though the defendant or any other of the trade might

[1] Holt on Libel, 217.

[2] Cramer v. Riggs, 17 Wend. (N. Y.), 209; Russell v. Anthony, 21 Kan., 450; Parmiter v. Coupland, 6 M. & W., 108; Boydell v. Jones, 4 M. & W., 446; Warman v. Hine, 1 Jur., 820; Goodburne v. Bowman, 9 Bing., 532; Field v. Colson, 93 Ky., 347; Rea v. Wood, 105 Cal., 314; Atwater v. Morning News Co., 67 Conn., 504; Alexander v. Jenkins, 1 Q. B., 797; Sillars v. Collier, 151 Mass., 50; Randall v. Evening News, 79 Mich., 266; Bourreseau v. Evening Journal, 63 Mich., 425; Cotulla v. Kerr, 74 Tex., 89.

counter-advertise what was published of the plaintiff, viz., that he could do more than any other man of the trade, yet that should have been done without any general reflections on him in the way of his business; that the defendant had not contained himself within these bounds, for that the advice to all gentlemen to be cautious was a reflection on his honesty, as if he would deceive the world by a fictitious advertisement, and had a plain tendency to discourage people from dealing with him; and the allegation that he would not engage with any other artist in town was setting him below the rest of his trade, and calling him a bungler in general terms, and not relative to the precedent matter; it was charging the plaintiff with being the last of his trade, for the words not daring to engage, etc., stand independent of the words next following, viz.: nor did he ever make the said experiment, etc., so that he was charged generally with the want of skill; that the words, except out of a leather gun, was charging him with a lie, the word gun being vulgarly used for a lie, and gunner for a liar; and that therefore the words were libelous; the plaintiff had judgment, the court being of opinion that it tended to discredit him in his business. Easter Term, 4 Geo. II., 1731; 2 Stra., 888, 899; Barnard, K. B., 289, 439; Fitzgib., 121, pl. 6; 253, pl. 2; 3 Bac. Abr., 491, 492; 4 Bac. Abr., 494; Harman v. Delany.

§ 11. **Distinction between Libel and Slander.**—In cases of slander in England there is a curious distinction drawn between offices of profit merely and offices of honor, such as that of justice of the peace; and it has been held that merely to impute incompetency or want of ability, as distinct from a want of integrity or impartiality, to a justice of the peace is not actionable. There is no authority, however, for supposing that an action for libel would not lie if such words were printed and published.[1]

§ 12. **Illustrations.**—

DIGEST OF AMERICAN CASES.

1. It is libelous to publish of an attorney for a city that he abandoned his client's cause by resigning his office, in the midst of litigation brought on by his advice, to the damage of his client. Hetherington v. Sterry, 28 Kan., 426; 49 Am. Rep., 169.

2. A publication imputing to one corrupt conduct in his office of senator is libelous, though made after his term of office had expired. Cramer v. Riggs, 17 Wend., 209.

3. A publication charging a brewer with filthy and disgusting practices in preparing his malt is libelous. White v. Delavan, 17 Wend., 49; Ryckman v. Delavan, 25 Wend., 186.

4. To charge a counselor at law with offering himself as a witness, in order to divulge the secrets of his client, is libelous; and it is not a sufficient justification that he disclosed matters communicated to him by his client

[1] Odgers on L. & S., 26, 71.

which had no relation or pertinency to the cause in which he was engaged. The secrets of his client which he counsels he is bound to keep, and the communications and instructions of the client relating to the management or defense of his case. Riggs v. Denniston, 3 Johnson's Cases, 198.

5. To publish of one, in his capacity as a juror, that he agreed with another juror to stake the decision of the amount of damages to be given in a cause then under consideration upon a game of draughts, is libelous. Com. v. Wright, 2 Cush. (56 Mass.), 46.

6. A newspaper publication, "the rascally conduct of P. B., mayor of the city of H., and his pimps, in arresting and fining men on the most frivolous pretexts, would not be tolerated in any other town in northern Indiana; there will be some Lynch law put in force one of these days," is libelous. State v. De Long, 88 Ind., 312.

7. Representing the lieutenant-governor as being in a state of beastly intoxication while in the discharge of his duty in the senate, an object of loathing and disgust, etc., is libelous. Root v. King, 7 Cow., 613; aff'd, p. r., 4 Wend., 113.

8. A letter stating that the writer had been applied to by an advertising agent to insert in a certain paper the advertisement of the person addressed, and have had to decline it, but will be glad to receive it "direct, or through any responsible agency," conveys the idea that the agency in question is not responsible, and is actionable. McDonald v. Lord et al., 27 Ill. App., 111.

9. A publication in a newspaper that, upon a certain person being arrested for rape, and being brought before A., "Squire A., after his style of dispensing justice, converts the case into assault and battery and discharges the offender. . . We presume that Mr. A. had an eye to the costs, . . . and accordingly rendered his decision to suit his own convenience," was *held* to be libelous. State v. Lyon, 89 N. C., 568.

10. And it is libelous to publish to the injury of a newspaper reporter an untrue statement showing that he has violated confidence by tale-bearing. Tryon v. Evening News, 89 Mich., 636.

11. And a publication which charges that a person while formerly holding the office of sealer of weights and measures and inspector of scales for a certain city "tampered with" or "doctored" such weights and measures and scales, for the purpose of increasing the fees of his office, is *prima facie* libelous as tending to bring him into public hatred or contempt. Eviston v. Cramer, 47 Wis., 659.

12. A newspaper publication which stated that a state senator voted against his party and received from the other party, in consideration of his vote, a profitable contract is libelous in itself. (Stone, J., dissenting.) Negly v. Farrow, 60 Md., 158.

13. A publication purporting to give information as to the credit of a mercantile firm, and charging one member thereof with dishonesty, is libelous, and an action will lie by the partners for the injury to the business and credit of the firm. Taylor v. Church, 1 E. D. Smith (N. Y.), 279.

14. It is proper to refuse to charge that the words that plaintiff is suffering from overwork, and his mental condition is not good, and that there has been trouble in the affairs of the bank (of which plaintiff is teller) co-

casioned by plaintiff's mental derangement, and that his statements when he was probably not responsible for them have caused bad rumors, are libelous *per se;* the court having charged that if their tendency was to injure plaintiff in his profession they are libelous. Moore v. Francis, 3 N. Y. S., 162.

§ 13. Illustrations.—

DIGEST OF ENGLISH CASES.

1. The trustees of a charity can sue jointly for a libelous letter published in a newspaper imputing to them improper management of the charity funds. Booth v. Briscoe (C. A.), 2 Q. B. D., 496; 25 W. R., 838.

2. It is libelous to charge an overseer of a parish with "oppressive conduct" towards the paupers." Woodard v. Dowsing, 2 M. & Ry., 74.

3. A placard stating of a certain overseer that when out of office he advocated low rates, when in office he advocated high rates, and that the defendant would not trust him with £5 of his property, is a libel. Cheese v. Scales, 10 M. & W., 488.

4. It is libelous to accuse a vestry clerk of having in any way misapplied the money of the parish (May v. Brown, 3 B. & C., 113); or to charge a guardian of the poor with having been during the preceding year "a great defaulter" in his account (Warman v. Hine, 1 Jur., 820); or to charge the clerk to the justices of a borough with corruption (Blagg v. Sturt, 10 Q. B., 899; 16 L. J., Q. B., 39; 11 Jur., 101); or to impute habitual drunkenness and neglect of his duties to a certificated master mariner (Coxhead v. Richards, 2 C. B., 569; 15 L. J., C. P., 278; 10 Jur., 984; Harwood v. Green, 3 C. & P., 141; Irwin v. Brandwood, 2 H. & C., 960; 33 L. J., Ex., 257; 10 Jur. (N. S.), 370; 12 W. R., 438; 9 L. T., 772; Hamon v. Falle, 4 App. Cas., 247; 48 L. J., P. C., 45); or to write and publish of a Protestant archbishop that he attempted to convert a Catholic priest by offers of money and of preferment in the Church of England and Ireland (Archbishop of Tuan v. Robeson, 5 Bing., 17; 2 M. & P., 32); or to write and publish of an ex-mayor and a justice of the peace that during his mayoralty he was guilty of partiality and corruption, and displayed ignorance of his duties; and this notwithstanding the public nature of the offices he held (Parmiter v. Coupland, 6 M. & W., 105; 9 L. J., Ex., 202; 4 Jur., 701; Goodburne v. Bowman, 9 Bing., 532); or to write and publish of a clergyman that he came to the performance of divine service in a towering passion, and that his conduct is calculated to make infidels of his congregation (Walker v. Brogden, 19 C. B. (N. S.), 65; 11 Jur. (N. S.), 671; 13 W. R., 809; 12 L. T., 495; Gathercole v. Miall, 15 M. & W., 319; 15 L. J., Ex., 179; 10 Jur., 337. But see Kelly v. Tinling, L. R., 1 Q. B., 699; 35 L. J., Q. B., 231; 12 Jur. (N. S.), 940; 14 W. R., 51; 13 L. T., 255); or to write and publish of a dissenting minister: "A serious misunderstanding has recently taken place amongst the Independent Dissenters of Great Marlow and their pastor, in consequence of some personal invectives publicly thrown from the pulpit by the latter against a young lady of distinguished merit and spotless reputation. We understand, however, that the matter is to be taken up seriously.—*Buck's Chronicle.*" Edwards v. Bell, 1 Bing., 403.

Of Barristers.

1. To write and publish falsely of a barrister that he edited the third edition of a law book is actionable, if the book is proved to be full of inaccuracies which would seriously prejudice the plaintiff's reputation. Archbold v. Sweet, 1 Moo. & Rob., 162; 5 C. & P., 219. Or of a barrister that he is "a quack lawyer and a mountebank" and "an impostor," is actionable. Wakley v. Healey, 7 C. B., 591; 18 L. J., C. P., 241; Sir W. Garrow's Case, 3 Chit. Crim. L., 884. It is libelous to compare the conduct of an attorney in a particular case to that of the celebrated firm of Quirk, Gammon & Snap in "Ten Thousand a Year." Woodgate v. Ridout, 4 F. &. F., 202.

2. A correct report in the "Observer" of certain legal proceedings was headed "Shameful conduct of an attorney." *Held*, that the heading was a libel, even though all that followed was protected. Clement v. Lewis, 3 Br. & Bing., 297; 3 B. & Ald., 702; 7 Moore, 200.

3. An information was granted for these words written to the mayor of Richmond: "I am sure you will not be persuaded from doing justice by any little arts of your own clerk, whose consummate malice and wickedness against me and my family will make him do anything, be it ever so vile." R. v. Waite, 1 Wils., 22; Cory v. Bond, 2 F. & F., 241.

4. Words complained of: "If you will be misled by an attorney who only considers his own interest, you will have to repent it: you may think, when you have once ordered your attorney to write to Mr. Giles, he would not do any more without your further orders, but if you once set him about it, he will go to any length without further orders." *Held*, a libel on the attorney who had been employed to write to Mr. Giles. Godson v. Home, 1 Br. & Bing., 7; 3 Moore, 223.

5. The libel complained of was headed, "How Lawyer B. treats his clients," followed by a report of a particular case in which one client of Lawyer B.'s had been badly treated. That particular case was proved to be correctly reported, but this was held insufficient to justify the heading, which implied that Lawyer B. generally treated his clients badly. Bishop v. Latimer, 4 L. T., 775.

6. Libel complained of, that the plaintiff, a proctor, had three times been suspended from practice for extortion. Proof that he had once been so suspended was held insufficient. Clarkson v. Lawson, 6 Bing., 266, 587; 3 M. & P., 605; 4 M. & P., 356; Blake v. Stevens and others, 4 F. & F., 232; 11 L. T., 543.

7. It is libelous to impute to a solicitor "disgraceful conduct" in having at an election disclosed confidential communications made to him professionally. Moore v. Terrell, 4 B. & Ad., 870; 1 N. & M., 559. But it is not a libel to say of a solicitor that he was admitted in 1879, when he was admitted in 1869. Raven v. Stevens, 3 Times L. R., 67.

Of Medical Men.

1. To advertise falsely that certain quack medicines were prepared by a physician of eminence is a libel upon such physician. Clark v. Freeman, 11 Beav., 112; 17 L. J., Ch., 142; 12 Jur., 149.

2. It is libelous to describe a medical practitioner in print as "the Harley Street Quack, Physician Extraordinary to several ladies of distinction." Long v. Chubb, 5 C. & P., 55; Wells v. Webber, 2 F. & F., 715; Hunter v. Sharpe, 4 F. & F., 983; 15 L. T., 421; 30 J. P., 149. But it is no libel to

write and publish of a physician that he has met homœopathists in consultation; although it be averred in the declaration that to do so would be a breach of professional etiquette. Clay v. Roberts, 9 Jur. (N. S.), 530; 11 W. R., 649; 8 L. T., 397.

OF NEWSPAPER MEN.

1. It is libelous to impute to the editor and proprietor of a newspaper that, in advocating the sacred cause of the dissemination of Christianity among the Chinese, he was an impostor, anxious only to put money into his own pocket by extending the circulation of his paper; and that he had published a fictitious subscription list with a view to induce people to contribute (Campbell v. Spottiswoode, 3 B. & S., 769; 32 L. J., Q. B., 185; 9 Jur. (N. S.), 1069; 11 W. R., 569; 8 L. T., 201); and so to call the editor of a newspaper "a libelous journalist" (Wakley v. Cooke & Healey, 4 Exch., 511; 19 L. J., Ex., 91); or to write and publish that a newspaper has a separate page devoted to the advertisements of usurers and quack doctors, and that the editor takes respectable advertisements at a cheaper rate if the advertisers will consent to their appearing in that page. Russell v. Webster, 23 W. R., 69. But it is not libelous for one newspaper to call another "the most vulgar, ignorant and scurrilous journal ever published in Great Britain;" but it is libelous to add, "it is the lowest now in circulation; and we submit the fact to the consideration of advertisers;" for that affects the sale of the paper and the profits to be made by advertising. Heriot v. Stuart, 1 Esp., 437.

§ 14. **Libels on Merchants and Traders.**— Any written words are libelous which impeach the credit of any merchant or trader by imputing to him bankruptcy, insolvency, or even embarrassment, either past, present or future, or which impute to him fraud, or dishonesty or any mean and dishonorable trickery in the conduct of his business, or which in any other manner are prejudicial to him in the way of his employment or trade. "The law has always been very tender of the reputation of tradesmen, and therefore words spoken of them in the way of their trade will bear an action that will not be actionable in the case of another person; and, if bare words are so, it will be stronger in the case of a libel in the public newspaper, which is so diffusive."[1]

§ 15. **Illustrations.**—

DIGEST OF AMERICAN CASES.

1. To publish of a tradesman that he is in the hands of the sheriff is a libel. Herman v. Bradstreet Co., 19 Mo. App., 227.

[1] *Per curiam* in Harman v. Delany, 2 Str., 898; 1 Barnard., 289; Fitz., 121; Chenery v. Goodrich, 98 Mass., 224; Boynton v. Shaw Stocking Co., 146 Mass., 219; Newbold v. Bradstreet, 57 Md., 38; Newell v. Howe, 31 Minn., 235; State v. Armstrong, 106 Mo., 395; Brown v. Vannaman, 85 Wis., 451; Arrow Steamship Co. v. Bennett, 73 Hun, 81; Nettles v. Somervell, 6 Tex. Civ. App., 627; Gaither v. Advertiser Co., 102 Ala., 458; McKenzie v. Denver Times, 3 Colo. App., 554; Continental Nat. Bank v. Bowdre, 92 Tenn., 723; Tarlton v. Lagarde, 46 La. Ann., 1368.

2. A publication purporting to give information as to the credit and standing of a mercantile firm, and charging one member thereof with dishonesty, is a libel, and an action will lie by the partners for an injury to the business and credit of the firm. Taylor v. Church, 1 E. D. Smith (N. Y.), 279.

DIGEST OF ENGLISH CASES.

1. It is libelous to advertise that a certain optician is "a licensed hawker" and "a quack in spectacle secrets." Keyzor and another v. Newcomb, 1 F. & F., 559.

2. It is a libel to write and publish of a licensed victualer that his license has been refused, as it suggests that he had committed some breach of the licensing laws. Bignell v. Buzzard, 3 H. & N., 217; 27 L. J., Ex., 355.

3. It is libelous to write and publish of the plaintiff that he regularly or purposely supplied bad and unwholesome water to ships, whereby the passengers were made ill. Solomon v. Lawson, 8 Q. B., 823; 15 L. J., Q. B., 253; 10 Jur., 796; Barnard v. Salter, W. N., 1872. p. 140. But for one tradesman merely to puff up his own goods and decry those of his rival is no libel, unless fraud or dishonesty be imputed. Evans v. Harlow, 5 Q. B., 624; 13 L. J., Q. B., 120; 8 Jur., 571; D. & M., 507.

4. The printers of a newspaper, by a mistake in setting up in type the announcements from the "London Gazette," placed the name of the plaintiff's firm under the heading "First Meeting under the Bankruptcy Act" instead of under "Dissolutions of Partnership." An ample apology was inserted in the next issue; no damage was proved to have followed to the plaintiff, and there was no suggestion of any malice. In an action for libel against the proprietors of the paper, the jury awarded the plaintiff £50 damages. *Held*, that the publication was libelous, and that the damages awarded were not excessive. Shepheard v. Whitaker, L. R., 10 C. P., 502; 32 L. T., 402.

5. The defendant published an advertisement in these words: "Whereas, there was an account in the 'Craftsman' of John Harman, gunsmith, making guns of two feet six inches to exceed any made by others, of a foot longer (with whom it is supposed he is in fee), this is to advise all gentlemen to be cautious, the said gunsmith not daring to engage with any artist in town, nor ever did make such an experiment (except out of a leather gun), as any gentlemen may be satisfied of at the Cross Guns in Long-Acre." *Held* a libel on the plaintiff in the way of his trade. Verdict for the plaintiff. Damages £50. Harman v. Delaney, 2 Stra., 898; 1 Barnard, 289, 483: Fitz., 121.

6. Plaintiffs alleged that they were manufacturers of bags, and had manufactured a bag which they called the "Bag of Bags," and that the defendant printed and published, concerning the plaintiffs in the way of their business, the words following: "As we have not seen the Bag of Bags, we cannot say that it is useful, or that it is portable, or that it is elegant. All these it may be, but the only point we can deal with is the title, which we think very silly, very slangy, and very vulgar; and which has been forced upon the notice of the public *ad nauseam*." On demurrer, Lush, J., held that the words could not be deemed libelous, either upon the plaintiffs or

upon their mode of conducting their business. But Mellor and Hannem, JJ., thought that it was a question for the jury whether the words went beyond the limits of fair criticism, and whether or not they were intended to disparage the plaintiffs in the conduct of their business. Jenner v. A'Beckett, L. R., 7 Q. B., 11; 41 L. J., Q. B., 14; 20 W. R., 181; 25 L. T., 464.

7. The plaintiff alleged that he carried on the trade of an engineer, and sold in the way of his trade goods called "self-acting tallow syphons or lubricators," and that the defendant published of him in his said trade and as such inventor, as follows: "This is to caution parties employing steam power from a person offering what he calls self-acting tallow syphons or lubricators, stating that he is the sole inventor, manufacturer and patentee, thereby monopolizing high prices at the expense of the public. R. Harlow [the defendant] takes this opportunity of saying that such a patent does not exist, and that he has to offer an improved lubricator, which dispenses with the necessity of using more than one to a steam-engine, thereby constituting a saving of fifty per cent. over every other kind yet offered to the public. Those who have already adopted the lubricators against which R. H. would caution will find that the tallow is wasted instead of being effectually employed as professed." It was held no libel on the plaintiff, either generally or in the way of his trade, but only a libel on the lubricators, and therefore not actionable without proof of special damage. Evans v. Harlow, 5 Q. B., 624; 13 L. J., Q. B., 120; 8 Jur., 571; D. & M., 507. So where one tradesman merely asserts that his own goods are superior to those of some other tradesman, no action lies unless the words be published falsely and maliciously and special damage has ensued. Young v. Macrae, 3 B. & S., 264; 32 L. J., Q. B., 6; 11 W. R., 63; 9 Jur. (N. S.), 539; 7 L. T., 354; Western Counties Manure Co. v. Lawes Chemical Manure Co., L. R., 9 Ex., 218; 43 L. J., Ex., 171; 23 W. R., 5.

8. A libel on the management of a newspaper is a libel on its proprietors, jointly, in the way of their trade, and therefore actionable without special damage. Russell v. Webster, 23 W. R., 59. To write and publish that a ship is unseaworthy may be a libel on its owner. "It is like saying of an innkeeper that his wine or his tea is poisoned." Ingram v. Lawson, 6 Bing. N. C., 212; 8 Se., 471, 478; 4 Jur., 151; 9 C. & P., 326. To advertise falsely that certain quack medicines were prepared by an eminent physician is a libel upon such physician (Clark v. Freeman, 11 Beav., 112; 17 L. J., Ch., 142; 12 Jur., 149); or to falsely impute to a bookseller that he publishes immoral or absurd poems (Tabart v. Tipper, 1 Camp., 350).

9. It is libelous falsely to write and publish of professional vocalists that they had advertised themselves to sing at certain music halls songs which they have no right to sing in public. Hart v. Wall, 2 C. P. D., 146; 46 L. J., C. P., 227; 25 W. R., 373. But comments, however severe, on the advertisements or handbills of a tradesman will not be libelous if the jury find that they are fair and temperate comments, not wholly undeserved, on a matter to which the public attention was expressly invited by the plaintiff. Paris v. Levy, 9 C. B. (N. S.), 342; 30 L. J., C. P., 11; 9 W. R., 71; 3 L. T., 324; 2 F. & F., 71; Morrison v. Harmer, 3 Bing. N. C., 759; 4 Scott, 524; 3 Hodges, 108; Odgers on L. & S., 32.

III. Libels which hold a man up to scorn and ridicule, and to feelings of contempt or execration, impair him in the enjoyment of general society, and injure those imperfect rights of friendly intercourse and mutual benevolence which man has with respect to man.

§ 16. **The Law Stated.**— It is chiefly in this branch of libels that the action for words spoken and for words written substantially differ. The common law in respect to our natural passions gives no action for mere defamatory words, which it considers as transitory abuse, and not having substance and body enough to constitute an injury by affecting the reputation. It confines, therefore, the action for slander to such of the grosser kind of words as impute positive crimes, or, by charging a man with contagious disorders, tend to expel him from society; and to words which injure him in his profession and calling. It does not consider words amounting to a breach of the peace, and therefore gives neither indictment nor information for unwritten slander except in the case of seditious language, or words reflecting on a magistrate in the immediate execution of his office.

The reason of the law in this distinction is simple enough. It was necessary to punish the grosser and more palpable injuries, and it was equally convenient to pass over the less. The law, therefore, by classifying the greater injuries establishes this distinction and adheres to it closely in practice. This reason, however, ceases when the words by being written can no longer be considered as the results of transitory passion or venial levity, but therein gain the shape and efficacy of a mischievous malignity.[1]

The act of writing is in itself an act of deliberation, and the instrument of a permanent mischief. What before was mere *convitium* of the civil law, and contumely, grew into a deliberate charge and accusation. The law, therefore, both with respect to the public peace and the prevention of private injury, allowed an indictment and information as well as an action on the case for words written, which it denied to words spoken.[2]

As every person desires to appear agreeable in life, and must be highly provoked by such ridiculous representations as tend

[1] Holt on Libel, 222.

[2] 2 Salk., 697; 3 Salk., 190; Holt, Rep., 654; Holt on Libel, 223.

to lessen him in the esteem of the world, and, by the sure effect of ridicule, to cast a shade upon his talents and virtues, it has been holden that not only charges of a flagrant nature and which reflect a moral turpitude on the party are libelous, but also such as set him in a scurrilous and ignominious light; for these reflections equally create ill blood, and provoke the parties to acts of revenge and breaches of the peace.

Everything, therefore, written of another which holds him up to scorn and ridicule that might reasonably (that is, according to our natural passions) be considered as provoking him to a breach of the peace is a libel.[1]

And, in the same manner, all such written abuse as may be fairly intended to impair him in the enjoyment of society, or to throw a contempt on him which might affect his general fortune and comfort, is a positive injury, and therefore the subject of an action on the case.

§ 17. Illustrations.—

DIGEST OF AMERICAN CASES.

1. To state in writing that a man "has turned into an enormous swine and lives on lame horses," and "will probably remain a swine the rest of his days," is a libel. Solverson v. Peterson, 64 Wis., 198; 54 Am. Rep., 607.

2. To publish of a man that he is a miserable fellow; that it is impossible for a newspaper article to injure him to the extent of six cents; the community would honestly despise him worse than they do now, is a libel. Brown v. Remmington, 7 Wis., 462.

3. To write concerning a man, "I look upon him as a rascal, and have watched him for many years," is a libel. Williams v. Cairns, 4 Humph. (Tenn.), 9.

DIGEST OF ENGLISH CASES.

1. "Scandalous matter is not necessary to make a libel. It is enough if the defendant induce an ill opinion to be had of the plaintiff, or to make him contemptible or ridiculous." Per Lord Holt. Cross v. Tilney, 3 Salk., 226.

2. To say of any man he is a dishonest man is not actionable, but to publish so or put it upon posts is actionable. Skinner, 124.

3. C. forges an order of chancery, in which were several defamatory expressions against the plaintiff, and at the end draws a pillory and subscribes it for Sir J. H. and his forsworn witnesses by him suborned. This is but

[1] Gallup v. Belmont, 62 Hun, 618; Galveston, etc., Ry. Co. v. Smith, 81 Tex., 479; Allen v. News Pub. Co., 81 Wis., 120; Cerveny v. News Co., 139 Ill., 345; Piper v. Woolman, 43 Neb., 280; Pfitzinger v. Dubs, 64 Fed. Rep., 696; Byram v. Aikin, 67 N. W. Rep., 807; State v. Mason, 26 Or., 273; Bidwell v. Rademacher, 11 Ind. App., 218.

one complicated act, and an action will lie. Sir John Austin v. Col. Culpeper, 2 Shower, 313.

4. An action was brought for dispersing a paper accusing a gentleman that he should say, "he could see no probability of the war ending with France till the little gentleman on the other side of the water was restored to his rights" — innuendo, the Prince of Wales. Per Holt, C. J. A man may justify in an action on the case for words or for a libel, *secus* in an indictment. In case upon a libel it is sufficient if the matter is reflecting; as, to paint a man playing at cudgels with his wife. Brown v. Dyer, 11 Mod., 99.

5. Where a ticket was delivered by a person to a minister after sermon, wherein he desired him to take notice that offenses passed now without control from the civil magistrate, and to quicken the civil magistrate to do his duty, etc., this was holden to be a libel, because it tended to spread a general contempt upon the magistrates, though no magistrates in particular were mentioned. Sid., 219; Keb., 773; Holt on Libel, 224.

6. An action upon the case lies against the defendant for maliciously writing and publishing a libel upon the plaintiff in the words following, viz.:

"Old Villars, so strong of brimstone you smell,
As if not long since you had got out of hell;
But this damnable smell I no longer can bear:
Therefore I desire you would come no more here;
You old stinking, old nasty, old itchy, old toad,
If you come any more you shall pay for your board;
You'll therefore take this as a warning from me,
And never enter the doors while they belong to J. P."

It was holden that an action would lie for publishing it or for publishing anything in writing which tends to render another ridiculous. Villars v. Monsley, 2 Wils., 403.

7. As the case of Villars v. Monsley has become a somewhat noted case on this question, a more extended account of it may not be inappropriate: The defendant pleaded not guilty; and a verdict being found for the plaintiff, and sixpence damages, it was moved in arrest of judgment that this was not such a libel for which an action would lie. *Sed per curiam:* This is such a libel for which an action well lies. We must take it to have been proved at the trial that it was published by the defendant maliciously; and if any man deliberately and maliciously publishes anything in writing concerning another which renders him ridiculous or tends to hinder mankind from associating or having intercourse with him, an action well lies against such publisher. There is no difference between this and the cases of the leprosy and plague; and it is admitted that an action lies in those cases. The writ *de leproso amovendo* is not taken away, although the distemper is almost driven away by cleanliness, or new-invented remedies: the party must have the distemper to such a degree before the writ shall be granted, which commands the sheriff to remove him without delay, *ad locum solitarium habitandem ibidem prout moris est ne per communem conversationem suam hominibus damnum vel periculem eveniat quovismodo.* Registrum Brevium, 267, 6. The degree of leprosy is not material: if you say he has the leprosy it is sufficient, and the action lies. The reason of that case applies to this; the itch may be communicated by the air without con-

tact: it is said to be occasioned by animalculæ in the skin, and must be cured by outward application; nobody will eat, drink or have any intercourse with a person who has the itch, and stinks of brimstone, therefore this libel is actionable, and judgment must be for the plaintiff. Though for saying a man has the itch, without more, perhaps an action would not lie without other malevolent circumstances; for there is a distinction between libels and words. A libel is punishable, both criminally and by action, when speaking the words would not be punishable either way. For speaking the words rogue and rascal of any one an action will not lie; but if those words were written and published of any one an action will lie. If one man should say of another that he has the itch, without more, an action would not lie; but if he should write those words of another, and publish them maliciously as in the present case, no doubt but the action well lies. Judgment for the plaintiff *per tot. cur.* without granting any rule to show cause. Villars v. Monsley, Easter Term, 9 Geo. III., C. B., 2 Wils., 403.

8. On the trial of an action on the case for defamation, it appeared that the defendant had written the following letter of and concerning the plaintiff: "After the communication I had with your son in your absence, I but little thought you would have been made the dupe of one of the most infernal villains that ever disgraced human nature; but I suppose you were deceived by those whom you thought well of, and whom he will deceive if they will give him an opportunity. I am told they are respectable, and how they can be connected with him is the most astonishing thing to me. Mr. H. writes me you called upon him [meaning the plaintiff] on the subject of your account, for which the villain gave you his note at five months." The declaration stated that the plaintiff had sustained special damages, and the plaintiff having failed in proving the special damage laid, Macdonald, C. B., was of opinion that the letter, unsupported by proof of special damage, was not actionable, and directed a verdict for the defendant. The counsel for the plaintiff, however, contending that the letter itself was actionable, the chief baron asked the jury what damage they would give, supposing the plaintiff entitled to a verdict in point of law? The jury answered, one shilling. Afterwards, on a motion to set aside the verdict for the defendant, and to enter a verdict for the plaintiff for one shilling, the court were clearly of opinion that any words, written and published, throwing contumely on the party (5 Co., 125, 6), were actionable, and made the rule absolute. Bell v. Stone, Mich. Term, 39 Geo. III., C. B.; 1 Pul. & Bos., 331.

9. In a special action on the case the plaintiff declares that he is an hackney coachman, and the defendant, with intent to disgrace him, did ride Skimmington, and describes how, thereby surmising that his wife had beaten him, and, by reason thereof, persons who formerly used him refused to come into his coach, *ad damnum*. Upon not guilty it was found for the plaintiff, and, upon motion in arrest of judgment, judgment was *quod querens nil capiat per billam*. Ram., 401; Trin., 32 Car. 3, B. R., Mason v. Jennings.

10. Carrying a fellow about with horns, and bowing at B.'s door, is actionable. 2 Show., 314, citing Sir William Bolton v. Dean.

11. A letter written to a third person, calling the plaintiff "a villain," was held actionable without proof of special damage. Bell v. Stone, 1 Pul. & Bos., 331.

§ 18. **(2) Libels on Official Persons and Candidates for Office.** While it cannot be said that the law upon this subject is very well settled in the United States, it seems clear that when a man consents to be a candidate for a public office conferred by the election of the people, he must be considered as putting his character in issue so far as it may relate to his fitness and qualifications for the office, and publications of the truth on this subject, with the honest intention of informing the people, are not libels. It would be unreasonable to conclude that the publication of truths which it is the interest of the people to know should be an offense against the law. For the same reason the publication of falsehood and calumny against public officers or candidates for public offices is an offense most dangerous to the people and deserves punishment, because the people may be deceived and reject the best citizens, to their great injury.[1] One may in good faith publish the truth concerning a public officer; but if he states that which is false and aspersive, he is liable therefor, however good his motives may be;[2] and the same is true whether the party defamed be an officer or a candidate for an office elective or appointive.[3]

§ 19. **Illustrations.—**

DIGEST OF AMERICAN CASES.

1. It was held to be a libel where a public officer published in a report of an official investigation into his conduct the following comments upon the testimony of a witness before the commissioners of inquiry: "I am extremely loath to impute to the witness or his partner improper motives in regard to the false accusations against me, yet I cannot refrain from the remark that, if their motives have not been unworthy of honest men, their

[1] Sillars v. Collier, 151 Mass., 50; Randall v. Evening News, 79 Mich., 266; Cotulla v. Kerr, 74 Tex., 89; Bourreseau v. Detroit Evening Journal, 63 Mich., 425; Alexander v. Jenkins, 1 Q. B., 797; Field v. Colson, 93 Ky., 347: Rea v. Wood, 105 Cal., 114; Wood v. Boyle, 117 Penn. St., 620; Parsons, C. J., Com. v. Clapp, 4 Mass., 163; Wheaton v. Beecher, 66 Mich., 307; Lewis v. Few, 5 Johns. (N. Y.), 1; Root v. King, 7 Cow. (N. Y.), 613; Seely v. Blair, Wright (Penn.), 358, 683; Brewer v. Weakly, 2 Overt. (Tenn.), 99; Barr v. Moore, 83 Pa. St., 385; Sweeney v. Baker, 13 W. Va., 158.

[2] Hamilton v. Eno, 81 N. Y., 116; Baily v. Kal. Pub. Co., 40 Mich., 257.

[3] Wheaton v. Beecher, 66 Mich., 307, 33 N. W. Rep., 504. See Privileged Communications.

conduct in furnishing materials to feed the flame of calumny has been such as to merit the reprobation of every man having a particle of virtue or honor. They have both much to repent of for the groundless and base insinuations they have propagated against me." Clark v. Binney, 2 Pick. (Mass.), 113.

2. It is libelous to print and publish of a man who had been a member of the convention which formed the constitution of the state that while in the convention he "openly avowed the opinion that government had no more right to provide by law for the support of the worship of the Supreme Being than for the support of the worship of the devil." Stow v. Converse, 3 Conn., 325.

3. An action for libel lies on a communication to the head of a department of the government charging a subordinate officer with peculation and fraud, where he is subject to removal by the officer to whom the communication is addressed. Howard v. Thompson, 21 Wend. (N. Y.), 319.

4. An action lies for the publishing of an article imputing to a party corrupt conduct in his character as a member of the legislature, although it be published after he has gone out of office. Cramer v. Riggs, 17 Wend. (N. Y.), 209.

5. An address to the people, published by order of a meeting of citizens, and signed by the chairman, containing false and slanderous charges against a candidate at an election, is a libel. Lewis v. Fenn, Anth. (N. Y.), 75.

6. A publication concerning a candidate for an elective office which charges that he bartered a public improvement in which his constituency were interested for a charter of a bank to himself and his associates, and that if elected he would be an unfaithful representative; that he would by criminal indifference or treachery retard or prevent the construction of such improvement in order to accomplish selfish, sinister and dishonest purposes, is libelous. Powers v. Dubois, 17 Wend. (N. Y.), 63.

7. A publication alleging that a person, being an influential politician of the city of Albany, had been paid $5,000 in cash for procuring the appointment by the governor of an inspector of food in the city of New York, and that large sums had been paid to him for other lucrative offices, is libelous. Weed v. Foster, 11 Barb. (N. Y.), 203.

8. To publish of a member of congress that "he is a fawning sycophant, a misrepresentative in congress and a groveling office-seeker," and that "he has abandoned his post in congress in pursuit of an office," is libelous. Thomas v. Croswell, 7 Johns. (N. Y.), 264.

9. A newspaper report was headed by the words "Blackmailing by a policeman," and stated that the plaintiff, who was a policeman, had been dismissed from his office on charges of "blackmail." It appeared that the plaintiff had been dismissed for accepting voluntary gifts of money from persons to whom he had rendered official services without giving notice thereof to the police commissioners, as required by the regulations of the police department; but the report was held to be a libel. Edsall v. Brooks, 2 Rob. (N. Y.), 29.

10. The publication in a newspaper: "The Hurricane Vote.—Again we have to chronicle the most atrocious corruption, intimidation and fraud in the Hurricane Island vote, for which David Tillson is without doubt responsible, as he was last year," was held libelous without extrinsic averments to com-

municate its precise import or allegation of special damage. Tillson v. Robbins, 68 Me., 295.

11. A publication charging that a person, while formerly holding the office of sealer of weights and measures and inspector of scales for a city, tampered with or doctored such weights, measures and scales for the purpose of increasing the fees of his office, is *prima facie* libelous as tending to bring the accused into public hatred and contempt. Eviston v. Cramer, 47 Wis., 659.

12. It is libelous to publish of an attorney for a city that he abandoned his client's cause by resigning his office in the midst of litigation brought on by his advice, to the damage of his client. Hetherington v. Sterry, 28 Kan., 426; 42 Am. Rep., 169.

13. In an action by R. against A. for libel there was evidence that A. was the publisher of the Leavenworth "Times," containing an article: "Who is Ed. Russell, in whose eyes swindling is no crime? He is secretary of the bankrupt Kansas Insurance Company, and less than two years ago he was state commissioner of insurance, and certified under his oath of office that this bankrupt concern was a sound and solvent insurance company, while he knew at that very time it was hopelessly insolvent. He was forced to leave the office of commissioner of insurance because the Leavenworth 'Times' exposed his official crookedness and compelled him to disgorge $8,000 of the state's money." It was held that it was immaterial that R. was not in any such office when the article was published, and that the article would be presumed to be false and without sufficient excuse until the contrary was shown. Russell v. Anthony, 21 Kan., 450.

14. P. was a coroner, and also known to the public as a physician. A newspaper article stating in effect that he had held an inquest on a man supposing him to be dead, when he was in fact alive, and would have been pronounced dead and buried alive but for the arrival of another physician who discovered the man to be alive and resuscitated him, was held to be libelous, though it did not state that P. was a physician. Purdy v. The Rochester Printing Co., 26 Hun (N. Y.), 206. But it is not libelous to allege of a man in charge of a public office that his wife was given work in the office and paid for it in her maiden name, unless some extrinsic matter makes it become so. Bell v. Sun Printing Co., 42 N. Y. Sup. Ct., 567; 3 Abb. (N. Y.) N. Cas., 157.

CHAPTER V.

SLANDER — ORAL DEFAMATION.

§ 1. **Slander Defined.**— The defaming of a person in his or her reputation by speaking words which affect his or her life, office, profession or trade, or which tend to his or her special damage.

Oral defamation consists of two classes:

I. *Words actionable in themselves.* In this class are included:

(1) Words imputing the guilt or commission of some criminal offense involving moral turpitude and infamous punishment.[1]

(2) Words imputing the existence of some contagious disease.

(3) Words imputing unfitness in an officer who holds an office of profit or emolument, either in respect of morals or inability to discharge the duties thereof.

(4) Words imputing a want of integrity or capacity, whether mental or pecuniary, in the conduct of a profession, trade or business.

(5) Words imputing a want of chastity or the commission of adultery or fornication.

II. *Words not actionable in themselves*, but which become so when followed by some special damage. In this class are included all defamatory words which occasion a party loss or damage.[2]

§ 2. **Illustrations.**—

DIGEST OF AMERICAN CASES.

(1) *Words held actionable in themselves.*

1. Words imputing a crime are actionable whether they expose the party to be prosecuted or convicted. Deford v. Miller, 3 Pa., 103.

[1] Brooker v. Coffin, 5 Johns. (N. Y.), 190.

[2] Bouvier's Dictionary, title Slander; Hardin v. Harshfield (Ky.), 12 S. W. Rep., 779.

2. To charge a person with the commission of an infamous offense, the *corpus* of which never existed, is actionable. Colbert v. Caldwell, 3 Grant (Pa.) Cas., 181.

3. Any accusation is actionable that would bring disgrace on the person accused, and that charges an offense which, if proved, would subject the accused to a punishment, though not such as is known in the books technically as ignominious. Zelif v. Jennings, 61 Tex., 458.

4. If words in their ordinary acceptation would naturally and presumably be understood as imputing a charge of crime they are actionable in themselves. Stroebel v. Whitney, 31 Minn., 384.

5. Words spoken of a person, charging him with having committed an indictable offense, involving moral turpitude, are actionable *per se;* and this though the offense be a mere misdemeanor, unknown to the common law. Accordingly, where the words laid in the declaration were: "You have removed my landmark, and cursed is he that removeth his neighbor's landmark," they were held actionable without any allegation of special damages. Young v. Miller, 3 Hill, 21.

6. To say of a person holding the office of justice of the peace, "Gore perjured himself in deciding the suit of Whitcomb against me, and I will be damned if I will believe him under oath; for he has decided against me contrary to all law and evidence, and it is the G—d d—est erroneous decision I ever saw any justice give, and it was a damned outrage, and it was done for spite," is actionable. The words charge the plaintiff with having violated his official oath, and with having made a corrupt and malicious decision against the defendant. Gore v. Blethen, 21 Minn., 80.

7. Plaintiff was occupying the position of grand worthy chief templar in a temperance organization, and also that of secretary of the State Temperance Alliance, and constantly engaged in the duties connected therewith. Defendants, as the petition alleged, falsely and maliciously published of him that he was "a seducer of innocent girls," and instanced an attempt on his part to debauch and ruin a young school-girl, who was at the time a member of his own household. Also, that he was "an arch hypocrite and scoundrel, who was simply using his talents for money-making purposes, and not through any sincerity in the cause in which he is laboring." *Held*, that each of these charges was actionable *per se*. Finch v. Vifquain, 11 Neb., 280.

8. Words are actionable *per se* only where the offense imputed by them is one for which the party is liable to indictment and punishment, either at common law or by the statute. Davis v. Sladden, 17 Oreg., 259, 21 Pac. Rep., 140.

9. The terms "cheat" and "swindler" are not actionable unless spoken of the plaintiff in relation to his business. Odiorne v. Bacon, 6 Cush. (60 Mass.), 185.

10. Words spoken by defendant saying that plaintiff poisoned his cattle with Paris green — that they were poisoned from a pail that had bran and poison in it which plaintiff put there — will sustain an action for slander when aided by an innuendo charging that the poisoning was intentional. Vickers v. Stoneman, 73 Mich., 419, 41 N. W. Rep., 495.

11. To charge that plaintiff "stole and destroyed my sister's will and

other papers" is slanderous. Penal Code of New York, section 110, declaring that one who, knowing that a paper may be required in evidence, wilfully destroys it to prevent its production, is guilty of a misdemeanor; and sections 528, 718, making any article of value, contract, thing in action or written instrument, by which any pecuniary obligation or interest in property is created, transferred, increased, diminished, etc., the subject of larceny. The charge imputing theft will be presumed to have been made in reference to papers that may be the subject of larceny. Collyer v. Collyer, 50 Hun, 422, 3 N. Y. S., 310.

12. Words spoken, that one "used" his daughter, are capable of the meaning ascribed to them by the innuendoes in a complaint for slander, that he committed adultery and incest with her; and words, in connection with them, when spoken by the daughter's husband, that "the children are not mine; they are from him," may mean that the husband disclaimed the paternity of his wife's children, and asserted that they were from plaintiff. Guth v. Lubach, 73 Wis., 131, 40 N. W. Rep., 681.

13. A charge that a butcher slaughters and sells diseased and unwholesome meats is *per se* actionable. Young v. Kuhn, 71 Tex., 645.

14. Under the existing social habits and prejudices, charging a white man with being a negro is calculated to inflict injury and damage, and such charge was recognized as actionable slander by the court, under the constitution of Louisiana of 1868. Toye v. McMahon, 21 La. Ann., 308; Spotorno v. Fourichon, 40 La. Ann., 423, 4 So. Rep., 71.

15. Utterances to different persons to the effect that plaintiff, a physician, was no doctor; that his treatment would kill a patient, and that persons employing him would murder their own families thereby, are actionable *per se*. Cruikshank v. Gorden, 118 N. Y., 178, 23 N. E. Rep., 457.

16. Where plaintiff was an election inspector, and defendant, speaking of him, said: "He counted for B. four votes that were cast for E. It is true; there is no doubt about it," the language might be fairly construed to import a crime, and is actionable as such. Ellsworth v. Hayes, 71 Wis., 427.

17. Words spoken of a person, "He knows how she came to her death. He killed her. He is to blame for her death. There was foul play there," may fairly be considered to impute a crime, and are actionable *per se*. Words spoken of another, "He killed her by his bad conduct, and I think he knows more about her being drowned than anybody else. He is to blame for it," do not import a killing in a criminal sense, and are not actionable *per se*. Thomas v. Blasdale, 147 Mass., 438, 18 N. E. Rep., 214.

18. Charging that a person is a thief is equivalent to charging that she has been guilty of the crime of larceny, and is actionable *per se*. In an action for slander for imputing to plaintiff that she was a "thief," where there is clear evidence that such words had been spoken by defendant, it is not error to charge that, if any one or more of the sets of words charged in the declaration, imputing to plaintiff that she was a "thief," were spoken by defendant of plaintiff, the jury shall find for plaintiff, even though the declaration contains other sets of words which did not so impute, and which are not actionable *per se*. Stumer v. Pitchman, 124 Ill., 250, 15 N. E. Rep., 757.

19. Words charging one with letting a house for purposes of prostitution

are actionable *per se*, as imputing a crime, under code of Iowa, section 4015, providing that one who lets a house for purposes of prostitution, or permits it to be used for that purpose, is punishable by a fine. Haeley v. Gregg, 74 Iowa, 563, 38 N. W. Rep., 416.

20. In an action for slander, the defense being justification, where the words spoken were: "For some months back I have missed things from my laundry — gentlemen's wear. Jennie [the plaintiff] has stolen them, and I have come to search your house," — an instruction that the words were such that the law presumed malice from their use, and that they were actionable *per se*, was correct. Bell v. Fernald, 71 Mich., 267.

21. The words, "You are a bitch and a whore; you visit the Halfway House, and got your dress there," impute the offense of fornication to an unmarried woman, and in Rhode Island are actionable *per se*, since the offense, if proved, may subject the party to ignominious punishment. Kelly v. Flaherty, 16 R. I., 234, 14 Atl. Rep., 876.

22. To charge orally against a minister that he has retained for his own use the whole or part of collections made by him for foreign missions is actionable. McLeod v. McLeod (Super. Ct.), 4 Montreal L. Rep., 343.

23. Words charging a wife with deserting her husband in his sickness are actionable *per se*, in connection with words forbidding all persons to give her harbor or trust on her husband's account. Smith v. Smith, 73 Mich., 445, 41 N. W. Rep., 499.

24. Words imputing the commission of the crime of fornication are actionable *per se*, on the ground that the crime involves moral turpitude. Page v. Merwin, 54 Conn., 426, 8 Atl. Rep., 675.

25. The word "malicious," in defining the intent with which a slander is spoken, is not to be considered in the sense of spite or hatred against a person, but as meaning that the party is actuated by improper and indirect motives other than the interest of the public. Words spoken of a butcher charging him with slaughtering diseased cattle for sale for human food are actionable *per se*. Blumhardt v. Rohr, 70 Md., 328, 17 Atl. Rep., 266.

26. In Massachusetts an action lies for calling a woman a drunkard. Brown and wife v. Nickerson, 5 Gray (71 Mass.), 1.

27. It is not necessary that the words in terms should charge a crime. If such is the necessary inference, taking the words altogether and in their popular meaning, they are actionable. Morgan v. Livingston, 2 Rich. (S. C.), 578.

28. To call a business man a defrauder, and to tell him that all he has he accumulated by defrauding, is actionable. Noeninger v. Vogt, 88 Mo., 589.

29. The words "he stole my corn" are actionable in themselves. Hoag v. Cooley, 33 Kan., 387.

30. One may be liable for publishing a slander although he says he does not believe it. Nor is he to be excused by the fact that when he repeated it he was in a passion. Finch v. Finch, 21 S. C., 342.

31. When spoken words charged to be slanderous are not actionable in themselves it must appear that they were used and understood in an actionable sense. Niderer v. Hall, 67 Cal., 79.

32. The words "He sent two loads of his store goods to the Black Hills with his mule teams, and started a store and then set fire to and burned his

store building to get the insurance," are actionable in themselves. West v. Hanrahan, 28 Minn., 385.

33. In an action brought by one partner against another the words "These books (the firm books of the parties) must be in court, for he is a swindler and thief and stole $8,000 from me," were held to charge the commission of a crime and therefore actionable in themselves. Stern v. Katz, 38 Wis., 136.

34. To say that a minister of the gospel collected money for a particular purpose, and embezzled it for his own wrongful uses, and that he is unfit to be a minister, is actionable without proof of special damages. Franklin v. Browne, 67 Ga., 272; Elsas v. Browne, 68 Ga., 117.

35. Words charging that a person has been in the penitentiary of another state are actionable. Words actionable as slanderous are not the less so for being preceded by the words "if reports be true," the proof of which, in addition to the words alleged, is not a variance. A repetition of slanderous words is actionable, unless the party give the name of his informer at the time, and repeat them at a justifiable occasion. Smith v. Stewart, 5 Pa. St., 372.

(2) *Words held not actionable in themselves.*

1. No action lies for orally imputing insanity to a person (in this case an attorney) without an averment and proof of special damages. Joannes v. Burt, 88 Mass., 236.

2. For one competitor for a prize in a shooting contest to say of another who claimed to have scored a certain number of points that he did not score so many, that he was "bluffing," that he "had tried a bluff game before" and was a swindler, and that he had swindled, is not actionable without special damages, as no crime or attempt to commit crime is charged thereby. Eislie v. Walther, 4 N. Y. S., 385, 24 N. Y. S. Rep., 122.

2a. The words "you have took my money and have it" are not actionable in themselves, as they do not necessarily impute larceny. Christol v. Craig, 80 Mo., 367.

3. And so is a charge that a supervising architect gave a person work for a commission. Legg v. Dunleavey, 80 Mo., 558; 52 Am. Rep., 512.

4. The words "A. got drunk and came home with some powders and tried to get his wife to take them, but she refused and sent for Doctor B., and he said they were arsenic and poison, and if she had taken any of them they would have killed her; A. tried to poison his wife," were held not to be actionable in themselves. Rock v. McClarnon, 95 Ind., 415.

5. The defendant's wife, a stockholder in a street railway company, informed her husband that she had heard persons boast that a car of the company driven by the plaintiff was "a good dead-head car for them," and the defendant informed the foreman of the company, who thereupon, without investigation or notice, dismissed the plaintiff. *Held*, that an action of slander would not lie, there being no proof of actual malice. Haney v. Frost, 34 La. Ann., 1146; S. C., 44 Am. Rep., 461.

6. To charge a physician with malpractice has been held not actionable if it be shown that the word was not used in its technical sense. Rodgers v. Kline, 56 Miss., 808.

8. Spoken words must impute an offense for which corporal punishment may be inflicted in the first instance; a mere assault is not such an offense in Vermont. Billings v. Wing, 7 Vt., 444.

9. A cheating which does not affect the public, and may be guarded against by common prudence, is not indictable; the words importing a charge of such cheating are not actionable. Weierbach v. Trone, 2 Watts & S. (Pa.), 408.

10. To constitute oral slander the words must impute to the plaintiff the commission of an infamous offense — an offense where the conviction and punishment for its commission involve moral turpitude and social degradation. A misdemeanor punishable only by fine or imprisonment is not infamous. McKee v. Wilson, 87 N. C., 300.

11. To say, "W. stole windows from J.'s house," was held not to be actionable in itself as imputing a charge of larceny or an act of malicious mischief upon real estate, though it seems to be otherwise where the charge was simply "W. stole J.'s windows." Wing v. Wing, 66 Me., 62.

12. To call one "a bogus peddler" is not actionable without averring that those words have acquired a sense which implies a crime; for example, passing counterfeit money with an intent to defraud, and where used in that sense. Pike v. Van Wormer, 5 How. (N. Y.) Pr., 171; 6 id., 99.

13. An action will not lie, in Pennsylvania, for words spoken in another state when the offense charged would not be indictable in the other state. Barclay v. Thompson, 2 Penn., 148.

14. An action for slander does not lie for a criminal charge made by an affidavit before a magistrate; the plaintiff's remedy being by an action for malicious prosecution or arrest, or for maliciously suing out a search-warrant. Sanders v. Rollinson, 2 Strobh. (S. C.), 447.

15. To charge a man with purchasing liquor, not being a crime in Iowa, is not actionable in itself. Sterling v. Ingenheimer, 69 Iowa, 210.

16. A complaint for slander charging that, "on the night the ballot-boxes were stolen from the sheriff's office, defendant was up town, and saw plaintiff sitting on the court-house steps at 9 o'clock at night," intending to create an impression that plaintiff stole the boxes, *held* demurrable as not imputing any offense. Long v. Musgrove, 75 Ala., 158.

CHAPTER VI.

IMPUTATION OF CRIME.

I. Analysis of the Subject.

II. Particular Offenses.

Defamatory words falsely spoken of a person which impute to the party the commission of some criminal offense involving moral turpitude, for which the party, if the charge is true, may be indicted and punished, are actionable in themselves.[1]

§ 1. **Historical Review of the Law.**— "The action for scandalous words," says Starkie, "though of high antiquity, was formerly so little resorted to, that between the first and fifth years of the reign of Edward the Third not more than three instances occurred.[2] From the commencement of the reign of Elizabeth, such actions, especially for words containing an imputation of crime, began to multiply with great rapidity — a circumstance chiefly attributable to the increasing encouragement which they met with in the English courts. No settled rule ascertaining their limits seems, however, to have been established at any early period, and the mass of conflicting decisions to be met with in the English reports exhibits convincing marks of the precarious and fluctuating principles on which they were grounded. A struggle between two opposite inconveniences seems to have created this wavering in the minds of the judges. The fear of encouraging a spirit of idle and vexatious[3] litigation, by affording too great a facility to this species of action, was contrasted with the mischief resulting to the public peace from refusing legal redress to the party whose reputation had been slandered — every day's experience teaching that the remedy denied by our courts would most surely be pursued by acts of personal violence. Accordingly it appears that as the former or latter of these considerations preponderated a more rigid or relaxed rule of decision was adopted by the judges.

Out of two hundred successive cases taken at random in Croke's reports of cases in the reign of Elizabeth, fifteen consist of actions for words — a proportion somewhat greater than that of one in fourteen. If, upon the average, it be supposed that each individual case of the two classes occupied the same time, it will follow that one day out of every fourteen must have been devoted by the court to this fruitful subject of litigation.[4]

[1] Houston v. Woolley, 37 Mo. App., 15; Savoie v. Scanlan, 43 La. Ann., 967.

[2] Coke, C. J., 3 Bulstrode, 167.

[3] 6 Modern R., 24.

[4] Starkie on Slander, 12, note.

§ 2. **The Earlier English Cases — The General Rules — Edward's Case.**— The defendant had charged the plaintiff with having attempted to burn the defendant's house, and the court were of opinion that the charge was actionable, assigning generally as the reason that "by such speech the plaintiff's good name is impaired."[1]

§ 3. **Stanhope's Case.**— The words were, "M. Stanhope hath but one manor, and that he hath gotten by swearing and forswearing;" and Wray, C. J., said "that though slanders and false imputations are to be suppressed, because many times '*a verbis ad verbera perventum est*,' yet," he said, "that the judges had resolved that actions for scandals should not be maintained by any strained construction or argument, nor any favor given to support them; forasmuch as in these days they more abound than in times past, and the intemperance and malice of men increase, *et malitiis hominum est obviandum:* and in our books *actiones pro scandalis sunt rarissimæ;* and such as are brought are for words of eminent slanders and of great import."[2]

§ 4. **Smale's Case — The Rule Laid Down.**— The words were, "thou wert forsworn, and I can prove it." Upon motion in arrest of judgment, Williams, J., said "this rule is to be observed as touching words which are actionable; that is to say, where the words spoken do tend to the infamy, discredit or disgrace of the party, there the words shall be actionable." And the rule was affirmed by the court.[3]

Yet so little was this rule regarded that, in the very next case which occurred, where the words were "thou werst in gaol for robbing such an one on the highway," the court differed in opinion; and Fennêr, J., held that if one saith of another "thou art as big a thief as any in Warwick gaol," *none being there in prison*, the words would not be actionable, but otherwise *had a felon been there at the time.*

§ 5. **Sir Harbert Crofts' Case.**— The words were "Sir H. C. keepeth men to rob me." Upon giving judgment for the defendant, Coke, C. J., said: "We will not give more favor unto actions on the case for words than of necessity we ought to do

[1] Croke's R. Eliz., 6.
[2] Stanhope v. Blith, 4 Coke R., 15.
[3] Smale v. Hammon, 1 Bulstrode, 45.

where the words are not apparently scandalous, these actions being now too frequent."[1]

§ 6. **Chief Justice Holt's Rule.**— In the early part of the reign of Queen Anne, Chief Justice Holt observed that "it was not worth while to be learned on the subject; but whenever any words tended to take away a man's reputation, he would encourage actions for them, because so doing would much contribute to the preservation of the peace."[2] And in another report of the same case he is stated to have said: "I remember a story told by Mr. Justice Twisden, of a man that had brought an action for scandalous words spoken of him; and, upon a motion made in arrest of judgment, the judgment was arrested, and the plaintiff being in the court at the time said that, if he had thought he should not have recovered, he would have cut the defendant's throat."[3]

Another Rule.— The same learned judge, in a case somewhat subsequent to the former, is reported to have said that, "to make words actionable in themselves, it is necessary to charge some scandalous crime by them."[4]

§ 7. **Ogden's Case.**— The defendant said to the plaintiff, "Thou art one of those that stole my Lord Shaftsbury's deer." The court held "that words to be of themselves actionable, without regard to the person or foreign help, must either endanger the party's life, or subject him to infamous punishment, and that it is not sufficient that the party may be fined and imprisoned, for that if any one be found guilty of any common trespass he shall be fined and imprisoned; and yet that no one will assert that to say one has committed a trespass will bear an action, or that at least the thing charged upon the plaintiff must be scandalous." And in the same case it was held that, where the penalty for an offense by a statute was of a pecuniary nature, an imputation of such an offense would not be actionable; even though in default of payment the statute should direct the offender to be set in the pillory, this was only for want of money, and not the direct penalty given by the statute.[5]

[1] Crofts v. Brown, 3 Bulstrode, 167.
[2] Lord Raymond, 959.
[3] Baker v. Pierce, Holt, 654; 6 Mod., 24.
[4] Walmesly v. Russell, 6 Mod., 200.
[5] Ogden v. Turner, 6 Mod., 104.

§ 8. **Button's Case—Hale's and Twisden's Rule.**—Fortescue, Justice, observed: "It was the rule of Holt, C. J., to make words actionable whenever they sound to the disreputation of the person of whom they were spoken; and this rule was also Hale's and Twisden's rule, and I think it a very good rule."[1]

The ground of an action for words in the absence of specific damage seems to have been the immediate tendency in the words themselves to produce damage to the person of whom they are spoken, in which case presumption supplies the place of actual proof. The immediate and obvious inconveniences resulting from a charge of crime are the party's degradation in society and his exposure to criminal liability. In the former case, the presumption is that he has lost the benefit of intercourse with society; in the latter, that he is placed in jeopardy, and that the suspicion excited by the report may produce a temporary deprivation of his liberty until his innocence can be made manifest.[2]

§ 9. **The English Rule — Words Imputing a Crime.**— Spoken words which impute that the plaintiff has been guilty of a crime punishable with imprisonment are actionable without proof of special damages. But if the offense imputed be only punishable by penalty or fine the words will not be actionable without proof of special damages.[3]

There has been considerable fluctuation of opinion in the English as well as in the American courts as to the exact limits of this rule. In Queen Elizabeth's days some judges considered that words were actionable which imputed to the plaintiff conduct which would be sufficient ground for binding him over to good behavior.[4] In Queen Anne's reign, on the other hand, Holt, C. J.,[5] lays it down that every charge of treason or felony is actionable, but not every charge of misdemeanor — only of such as entail a "scandalous" and "infamous" punishment. It may be presumed, however, that this would include all indictable misdemeanors except such semi-civil proceedings as

[1] Button v. Heyward, 8 Mod., 24.

[2] Starkie on Slander, 16, 17.

[3] Odgers on Libel and Slander, 54; Webb v. Beavan, 11 Q. B. D., 609; 52 L. J., Q. B., 544; 49 L. T., 201; 47 J. P., 488.

[4] Bray v. Andrews (1564), Moore, 63; Lady Cockaine's Case (1586), Cro. Eliz., 49; Tibbott v. Haynes (1590), Cro. Eliz., 191.

[5] Ogden v. Turner, 6 Mod., 104; Holt, 40; 2 Salk., 696.

an indictment for the obstruction or non-repair of a highway.[1] Starkie says: "It appears to be clearly established that 'no charge upon the plaintiff, however foul, will be actionable without special damage, unless it be of an offense punishable in a temporal court of criminal jurisdiction.'"[2]

It has been the usual practice to state that words which impute an indictable offense are actionable without proof of special damage, as all indictable offenses are or may be punishable with imprisonment. But there are at the present day in England and in the United States many offenses which are not indictable, and yet are punishable summarily with imprisonment in the first instance; so the above appears a more accurate statement of the law.

§ 10. **The American Rule.**— Judge Cooley, in his treatise on the law of torts, says: "It is agreed upon all hands that it is not always *prima facie* actionable to impute to one an act which is subject to indictment and punishment." Importance in the law of defamation is attached to the inherent nature of the indictable act, and also to the punishment which the law assigns to it. In the leading case of Brooker v. Coffin, 5 Johnson's Reports (N. Y.), 190, decided by Judge Spencer in 1809, the following was given as the test: "In case the charge, if true, will subject the party charged to an indictment for a crime involving moral turpitude, or subject him to an infamous punishment, then the words will be in themselves actionable."[3] And this test has been accepted and applied so often and so generally that it may now be accepted as settled law.[4]

[1] Odgers, Libel and Slander, 54.

[2] Starkie on Slander, 22.

[3] Cooley on Torts (ed. 1880), 190; Cox v. Bunker, Morris, 269; McCuen v. Ludlam, 17 N. J., 12; Roberts v. Ramsey, 86 Ga., 432; Hess v. Sparks, 44 Kan., 465; Harman v. Cundiff, 82 Va., 239; Frolich v. McKiernan, 84 Cal., 177; Ayres v. Toulmin, 74 Mich., 44; Savoie v. Scanlan, 43 La. Ann., 967; Stallings v. Whittaker, 55 Ark., 494; Ranson v. McCurley, 140 Ill., 626; Belo v. Fuller, 84 Tex., 450; Lowe v. Herald Co., 6 Utah, 175; Hofflund v. Journal Co., 88 Wis., 369; World Pub. Co. v. Mullen, 43 Neb., 126; Clugston v. Garretson, 103 Cal., 441; Childers v. San Jose Mercury Printing & Publishing Co., 105 Cal., 284; Booker v. State, 100 Ala., 30; Upton v. Hume, 24 Or., 420; Phibault v. Sessions, 101 Mich., 279; Post Pub. Co. v. Moloney, 50 Ohio St., 71; Field v. Colson, 93 Ky., 347; Webster v. Sharpe, 116 N. C., 466; Hacket v. Publishing Co., 18 R. I., 589.

[4] Davis v. Brown, 27 Ohio St., 326; Montgomery v. Dooley, 3 Wis., 709; Filber v. Dauterman, 26 Wis., 520; Dial v. Holton, 6 Ohio St., 228; Olfele v. Wright, 17 Ohio St., 238; Burton v. Burton, 3 Iowa, 316; Gage v. Shelton, 3 Rich., 242; Kinney v. Hosea, 3 Harr., 77; Coburn v. Harwood, Minor,

§ 11. **Extent of the Rule.**— This rule includes all felonies and such misdemeanors as involve moral turpitude and which are indictable or otherwise punishable. As has already been said, there may be some impropriety in supposing that a violation of any existing law is not in some degree immoral and discreditable; and although the long catalogue of crimes defined in the criminal code exhibits guilt in an almost infinite variety of shades, yet it is clear that this immorality and guilt exist in different and well-defined degrees. Moral turpitude implies vileness of principle and extreme depravity. It is evident that a charge of having committed an assault and battery is not within the rule,[1] while other misdemeanors of such nature and character as imply a high degree of moral turpitude are included.[2] "This element of moral turpitude," said Lowrie, J., in a Pennsylvania case,[3] "is necessarily adaptive; for it is itself defined by the state of public morals, and thus far fits the action to be at all times accommodated to the common sense of the community."

§ 12. **Moral Turpitude Defined.**— The adjective word "moral," in the ordinary sense as applied to the law of libel and slander, signifies any manner or custom relating to or according to the received and customary rule of right and duty between man and man; relating to or in accordance with morality or morals; or relating to the private and social duties of men as distinct from civil responsibilities; relating to a law as right or wrong, conceived of as obligatory in its own nature, and not depending on human laws.[4] The term turpitude is derived from the Latin word *turpitudo*, foul, vile, base. In its ordinary acceptation it signifies moral baseness or vileness, depravity or enormity.[5] Moral turpitude may therefore

93; Perdue v. Bennett, Minor, 138; Hilhouse v. Peck, 2 Stew. & Por., 395; Johnston v. Morrow, 9 Porter, 525; Taylor v. Kneeland, 1 Doug. (Mich.), 67; Beck v. Stitzel, 21 Penn. St. R., 522; Billings v. Wing, 7 Vt., 439; The State v. Burroughs, 2 Halst., 426; 1 Amer. Lead. Cas., 113, 3d ed.; Burtch v. Nickerson, 17 Johns., 219; Van Ness v. Hamilton, 19 Johns., 367; Gibbs v. Dewey, 5 Cow., 503; Demarest v. Haring, 6 Cow., 88; Crawford v. Wilson, 4 Barb., 504; Alexander v. Alexander, 9 Wend., 141; Hoag v. Hatch, 23 Conn., 590; Andres v. Hoppenheafer, 3 Serg. & R., 255; Todd v. Rough, 10 Serg. & R., 18; McCuen v. Ludlam, 2 Harr. (N. J.), 12; Johnson v. Shields, 1 Dutcher, 118; Giddens v. Mirk, 4 Ga., 360.

[1] Dudley v. Horn, 21 Ala., 879; Billings v. Wing, 7 Vt., 439.

[2] See Smith v. Smith, 2 Sneed, 473.

[3] Beck v. Stitzel, 21 Penn. St., 522.

[4] Worcester's Dictionary, 936.

[5] Worcester's Dictionary, 1557.

be defined as an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellow-men or to society in general, contrary to the accepted and customary rule of right and duty between man and man.

§ 13. **General Illustrations — Digest of American Cases.—**

1. "Words spoken of a private person are only actionable when they contain a plain imputation not merely of some indictable offense, but one of an infamous character, or subject to an infamous and disgraceful punishment." Klumph v. Dunn, 66 Penn. St., 141.

2. It is not sufficient that they impute to a person merely the violation of a penal or criminal law, but that they charge him with a crime which involves moral turpitude, or would subject him to an infamous punishment. Hoag v. Hatch, 23 Conn., 585, 590.

3. "The general current of decisions warrants us in saying that, to render words actionable *per se* on the ground that they impute criminality to the plaintiff, they must, 1st, be such as charge him with an indictable offense; and 2d, the offense charged must involve a high degree of moral turpitude, or subject the offender to infamous punishment." Hollingsworth v. Shaw, 19 Ohio St., 430, 433.

4. "You have altered the marks of four of my hogs" were held in themselves actionable, as they charge an act involving moral turpitude, and an indictable offense, although the punishment must be infamous. Perdue v. Burnett, Minor (Ala.), 138.

5. They must convey a charge of some act criminal in itself and indictable as such, and subject the party to an infamous punishment or some offense involving moral turpitude. McCuen v. Ludlam, 17 N. J., 12.

6. In a slander suit it appeared that defendant sold paints to plaintiff under a condition that plaintiff should not add anything to them, and that plaintiff had violated his agreement. *Held*, that an action of slander founded on defendant's statement that plaintiff had adulterated the paints could not be maintained. Lynch v. Febiger, 39 La. Ann., 336.

7. Some cases go further, and seem to require that, in order to render the charge actionable *per se*, the act imputed shall not only be subject to an infamous punishment, but also involve moral turpitude. Thus, in Redway v. Gray, 31 Vt., 292, 298, the court, through Poland, J., say: "We think that in addition to the offense charged being punished corporally, it must impute moral turpitude; and the true reason why assaults and breaches of the peace and violations of the liquor law are not such offenses as make words charging them actionable is because they do not necessarily and in the legal sense imply moral turpitude. The offense of larceny does necessarily impute it; and there is no distinction between grand and petty larceny in this respect." Cooley on Torts, 198.

8. The defendant prosecuted the plaintiff for a felony. Before commencing the prosecution he stated the crime to a constable, informing him that he wished him to serve the process; but the process was not brought to this constable. The plaintiff was discharged on the examination. *Held*, that this was slander by the defendant. After the examination and acquittal of the plaintiff the defendant repeated the charge, and urged its

truth to several persons who were present at the examination. This was also held to be slander, and was not to be excused because spoken to persons who were so present. Burlingame v. Burlingame, 8 Cow. (N. Y.), 141.

9. An action lies for charging the plaintiff with a crime the prosecution of which has been barred by the statute of limitations, and in such action the defendant may justify and prove the truth of his allegations.

10. An action lies for charging the plaintiff with a crime committed in another state, although the plaintiff would not be amenable to justice in the state in which the action was brought. Van Aukin v. Westfall, 14 Johns. (N. Y.), 233.

11. An action may be brought for the charge of a crime, though not couched in direct and positive terms. Gorham v. Ives, 2 Wend. (N. Y.), 534; Sewell v. Catlin, 3 id., 291; Gibson v. Williams, 4 id., 320.

11a. In an action for a charge of felony made in reference to a transaction in itself innocent, and so understood by several persons, *held* that, as it was fairly to be understood that others were present who did not understand it, and as the words were spoken without explanation, the action was maintainable. Phillips v. Barker, 7 Wend. (N. Y.), 439.

12. Words, to be actionable, must either have produced a temporal loss to the plaintiff in special damage sustained, or they must convey a charge of some act criminal in itself and indictable as such, and subjecting the party to infamous punishment, or some offense involving moral turpitude. McCuen v. Ludlam, 17 N. J. L. (2 Har.), 12; Hoag v. Hatch, 23 Conn., 585.

13. The allegation that a crime has been committed, with an assertion of belief that a particular person committed it, is equivalent to a positive charge against that person. Miller v. Miller, 8 Johns. (N. Y.), 74, 77.

14. A charge that the plaintiff had poisoned the defendant's horse is not actionable. In an action for such words the court refused to direct the jury that if the horse was alive the words were not actionable, the same being irrelevant to the issue. Chaplin v. Cruikshanks, 2 Har. & J. (Md.), 247.

15. In an action for slander the words charged to have been spoken were, "You are a rogue, and I can prove you cheated M. S. out of $100." It was held that the words were not in themselves actionable. Winter v. Sumvalt, 3 Har. & J. (Md.), 38.

16. Where words accusing the plaintiff of a felony were spoken to a justice on an application for a warrant for felony, the question whether they were actionable or not depends upon the question whether they were made in good faith or not, and that question should be left to the jury. Bunton v. Worley, 4 Bibb (Ky.), 38.

17. Words which, unconnected with the subject on which they were spoken, import felony, but with the colloquium do not import it, are not actionable. Brite v. Gill, 2 T. B. Mon. (Ky.), 65.

18. A charge of poisoning the defendant's cow is actionable in Iowa. Burton v. Burton, 3 Iowa, 316.

19. In an action for slander it was held that if the facts stated by the defendant at the time of the publication of the alleged slander, and the acts of which the defendant accused the plaintiff, constituted a trespass only, the defendant would not be liable, although characterizing the facts by the use of the word "stole." McCaleb v. Smith, 22 Iowa, 242.

20. Words amounting to a charge that the plaintiff had committed a penitentiary offense, but that he was insane when he committed it, are not actionable. Abrams v. Smith, 8 Blackf. (Ind.), 95.

21. A voter is liable to an action for slander who falsely accuses a town-clerk moderator of a town meeting, though in open town meeting, of fraudulently destroying a vote. Dodds v. Henry, 9 Mass., 262.

22. Spoken words, in order to be actionable, should import in themselves a charge of some punishable offense, or an imputation of some disgraceful disease, or be spoken in relation to some trade or occupation in which the party slandered is injured. But they will be taken in their natural meaning and acceptation, and not in *mitiori sensu*. Chaddock v. Briggs, 13 Mass., 248, 252.

23. Words spoken by one person of another which do not charge a crime upon him are not actionable. Wyant v. Smith, 5 Blackf. (Ind.), 293; Brite v. Gill, 2 T. B. Mon. (Ky.), 65; McClurg v. Ross, 5 Binn. (Pa.), 218; Lukehart v. Byerly, 53 Pa. St., 418.

24. Words actionable in themselves are not so when spoken of a transaction not amounting to the crime charged, if known to the hearers to be so spoken. Palmer v. Anderson, 33 Ala., 78.

§ 14. Digest of English Cases.—

1. The defendant said to the plaintiff in the presence of others: "Thou art a sheep-stealing rogue, and farmer Parker told me so." *Held*, that an action lay. It was urged that the plaintiff ought not to have judgment, because it was not averred that farmer Parker did not tell the defendant so: but the court was of opinion that such an averment was unnecessary, it being quite immaterial whether farmer Parker did or did not tell the defendant so. Gardiner v. Atwater, Say., 265; Lewes v. Walter, 3 Bulstr., 225; Cro. Jac., 406, 413; Rolle's Rep., 444; Meggs v. Griffith, Cro. Eliz., 400; Moore, 408; Read's Case, Cro. Eliz., 645.

2. To say "I believe that will to be a rank forgery" may be a slander on the solicitor who prepared it and attested the signature. Seaman v. Netherclift, 1 C. P. D., 540; 45 L. J., C. P., 798; 24 W. R., 884; 34 L. T., 878.

3. To state that criminal proceedings are about to be taken against the plaintiff (*e. g.*, that the attorney-general had directed a certain attorney to prosecute him for perjury) is actionable, although the speaker does not expressly assert that the plaintiff is guilty of the charge. Roberts v. Camden, 9 East, 93; Tempest v. Chambers, 1 Stark., 67.

4. To say of a clerk, "He cozened his master," is actionable, though the defendant did not expressly state that the cozening was done in the execution of the clerk's official duties; that will be intended. Reignald's Case, Cro. Car., 563; Reeve v. Holgate, 2 Lev., 62.

5. "I think in my conscience, if Sir John might have his will, he would kill the king;" for this is a charge of compassing the king's death. Sidnam v. Mayo, 1 Roll. Rep., 427; Cro. Jac., 407; Peake v. Oldham, Cowp., 275; 2 Wm. Bl., 959.

6. "Thou art a corn-stealer;" in spite of the objection "that it might be that the corn was growing, and so no felony." Anon., Cro. Eliz., 563. So where the defendant, on hearing that his barns were burnt down, said:

"I cannot imagine who it should be but the Lord Sturton." Lord Sturton v. Chaffin (1563), Moore, 142.

7. "He has become so inflated with self-importance by the few hundreds made in my service — God only knows whether honestly or otherwise;" for this is an insinuation of embezzlement. Clegg v. Laffer, 3 Moore & Sc., 727; 10 Bing., 250.

8. "Thou art forsworn in a court of record, and that I will prove!" was held sufficient; though it was argued after verdict that he might only have been talking in the court-house and so forsworn himself; but the court held that the words would naturally mean forsworn while giving evidence in some judicial proceeding in a court of record. Ceely v. Hoskins, Cro. Car., 509.

9. To say "He robbed John White" is *prima facie* clearly actionable. But the defendant may show, if he can, that that is not the sense in which the words were fairly understood by by-standers who listened to the whole conversation, though previously unacquainted with the matter to which the words sued on relate. Tomlinson v. Brittlebank, 4 B. & Adol., 630; 1 Nev. & Man., 455; Hankinson v. Bilby, 16 M. & W., 442; 2 C. & K., 440; Martin v. Loei, 2 F. & F., 654. But the words "He has defrauded a mealman of a roan horse" *held* not to imply a criminal act of fraud; as it is not stated that the mealman was induced to part with his property by means of any false pretense. Richardson v. Allen, 2 Chit., 657; Needham v. Dowling, 15 L. J., C. P., 9.

§ 15. **The Substantial Cause of the Action.**— In the light of modern decisions the *gravamen* of the action for slander seems to be the risk of social degradation rather than the risk of punishment. The rule to test the question whether the charge complained of imputes an infamous crime is always resorted to to ascertain whether it be a social degradation, and not whether the risk of punishment is incurred. The numerous cases in our reports where the words impute a crime and at the same time state a pardon or acquittal, and the established precedents always complaining of the loss of character and never of the risk of punishment, seem to settle this question beyond dispute.[1] It is clearly established, however, that no charge will be actionable without special damage, unless it imputes a crime or misdemeanor involving moral turpitude, and for which a presentment will lie.[2]

[1] Shipp v. McGraw, 3 Murphy, 463; Eastland v. Caldwell, 2 Bibb, 23; Smith v. Stewart, 5 Barr, 372; Beck v. Stitzel, 21 Pa. St., 522; Heard on L. & S., 13.

[2] Widrig v. Oyer, 13 Johnson, 124; Van Ness v. Hamilton, 19 id., 349; Demarest v. Haring, 6 Cowen, 76, 88; Case v. Buckley, 15 Wendell, 327; Crawford v. Wilson, 4 Barbour, 504; Quinn v. O'Gara, 2 Smith (N. Y.), 388; Hoag v. Hatch, 23 Connecticut,

§ 16. **The Doctrine Stated by Judge Cooley.**— It has been sometimes supposed that the reason for holding an imputation of an indictable offense slanderous was that it imperiled the party and exposed him to the risk of prosecution and punishment; but the authorities are not consistent with this view. The charge of criminal conduct for which punishment has been inflicted, or which has been pardoned, or a prosecution for which is barred by the statute of limitations, will nevertheless support the action under corresponding circumstances to those which would support one where the charge, if true, would still subject the party to punishment.[1] It was held in Illinois that a child too young to be punished for a crime might nevertheless maintain an action for slander against a person charging her with it.[2]

I. ANALYSIS OF THE SUBJECT.

§ 17. **Character of the Crime Imputed — Nature of the Offense.**— The charge must clearly impute an offense which would subject the party charged to an indictment for a crime involving moral turpitude, or subject him to an infamous punishment, although it need not state the charge with all the precision of an indictment. If merely fraud, dishonesty, immorality or vice be imputed, no action lies without proof of special damage. And even where words of specific import are employed, such as "thief" or "traitor," still no action lies if the defendant can satisfy the jury that they were not intended to impute crime, but merely as general terms of abuse, and meant no more than "rogue" or "scoundrel," and were so understood by all who heard them. But if the by-standers reasonably understand the words as definitely charging the plaintiff with the commission of a crime, an action lies.[3]

585; Andres v. Koppenheafer, 3 Sergeant & Rawle, 255; Todd v. Rough, 10 id., 18; McCuen v. Ludlam, 2 Harrison, 12; Johnson v. Shields, 1 Dutcher, 116; Giddens v. Mirk, 4 Georgia, 364; Gage v. Shelton, 3 Richardson, 249; Kinney v. Hosea, 3 Harrington, 77; Coburn v. Harwood, Minor, 93; Perdue v. Burnett, id., 138; Hillhouse v. Peck, 2 Stewart & Porter, 395; Johnston v. Morrow, 9 Porter, 525; Taylor v. Kneeland, 1 Doug. (Mich.), 67; 2 Kent's Comm., 16.

[1] Cooley on Torts, 200; Smith v. Stewart, 5 Penn. St., 372; Holley v. Burgess, 9 Ala., 728; Van Aukin v. Westfall, 14 Johns., 233; Krebs v. Oliver, 12 Gray, 239; Shipp v. McGraw, 3 Murph., 463.

[2] Stewart v. Howe, 17 Ill., 71.

[3] Cooley on Torts, 1st ed., 196; Brooker v. Coffin, 5 Johns. (N. Y.),

Words which are not actionable in themselves may nevertheless express a criminal charge by reason of their allusion to some extrinsic matter or circumstance, or of their being used and understood in a different sense from their natural meaning, and so become actionable in fact.[1]

§ 18. **Illustrations — Digest of American Cases.—**

1. As it is a felony under the statutes of the United States to fail to efface internal revenue stamps on barrels of distilled spirits after they are emptied, it is therefore a libel to publish in a newspaper that it is informed that a person is under indictment for so failing to efface the stamps. Jones v. Townsend, 21 Fla., 431; 58 Am. Rep., 676.

1a. In an action for slander, the words charged were "you are a thief;" you are a damned thief." The words proved were "you are a thief; you stole hoop-poles and saw-logs from Delancey's and Judge Meyer's land." The judge before whom the cause was tried left it to the jury to decide whether by the words proved the defendant meant to charge the plaintiff with taking timber or hoop-poles already cut down, in which case it would be a charge of felony, or whether they were meant only to charge the plaintiff with cutting down and carrying away timber to make hoop-poles, in which case it would amount to a trespass only, and the words would not then be actionable; and the jury having found a verdict for the defendant the court refused to set it aside. Dexter v. Taber, 12 Johns., 239.

1b. "You will steal, and I can prove it," will be taken to import a charge that the party had stolen, and may be so laid with an innuendo. Cornelius v. Van Slyck, 21 Wend., 70.

1c. Charging the plaintiff with having kept a bawdy-house is actionable of itself, that being an indictable offense and involving moral turpitude. Martin v. Stilwell, 13 Johns., 275; Bush v. Prosser, 13 Barb., 221.

1d. To say of a woman, "she procured or took medicines to kill the bastard child she was like to have, and she did kill or poison the bastard child she was like to have," etc., is actionable. Widrig v. Oyer, 13 Johns., 124.

2. The complaint charged the speaking of these words: "You have sworn false under oath. You have lied under oath," without any colloquium connecting them with a judicial trial or proceeding. *Held* bad, as not imputing perjury. But, "You have sworn false when under oath, and if you had your deserts you would have been dealt with in the time of it," do, it seems, import a charge of the commission of that crime. Phincle v. Vaughan, 12 Barb., 215.

3. The words, "You get your living by sneaking about when other people are asleep;" "What did you do with the sheep you killed?" "Did you eat it?" "It was like the beef you got negroes to bring to you at night;" "Where did you get the little wild shoats you always have in your pen?" "You are an infernal roguish rascal," — were held actionable as containing a charge of larceny in more instances than one. Morgan v. Livingston, 2 Rich. (S. C.), 573.

190; Smith v. Smith, 2 Sneed (Tenn.), 473; McAnally v. Williams, 3 Sneed (Tenn.), 26; Freeman v. Sanderson, 123 Ind., 264; Elmer v. Fessenden, 151 Mass., 359; Wimer v. Allbaugh, 78 Iowa, 79.

[1] Hays v. Mitchell, 7 Blackf. (Ind.), 117.

4. It is slander falsely to say of a postmaster that he broke open or destroyed mail matter; and a complaint need not allege that the act is made a crime by the federal law. Harris v. Terry, 98 N. C., 131.

5. Words charging what would constitute the statutory crime of public indecency are actionable in themselves. Seller v. Jenkins, 97 Ind., 430.

6. Whether words charging an offense are slanderous in themselves does not depend on the law of the state where they are spoken, but on that of the state where the act is alleged to have taken place. Dufresne v. Weise, 46 Wis., 290.

7. *It has been held actionable without proof of special damages to call a man* "a hog thief" in South Carolina (Hogg v. Wilson, 1 N. & M. (S. C.), 216); "a bloody thief" (Fisher v. Rottereau, 2 McCord (S. C.), 189); "a thieving puppy" (Little v. Barlow, 26 Ga., 423; Pierson v. Steortz, 1 Morr. (Iowa), 136). But to call a person a thief is not actionable, unless the term is used with the intent to impute a crime which the law will presume, however, if the contrary intent is not shown. McKee v. Ingalls, 4 Scam. (Ill.), 30.

8. Where the word "thief," though capable of a felonious signification, was neither used by the defendant nor understood by the by-standers as charging the plaintiff with larceny, it is not actionable. Quinn v. O'Gara, 2 E. D. Smith (N. Y.), 388.

9. And so, too, it has been held actionable to say of a person "he is a bogus peddler" (Pike v. Van Wormer, 6 How. Pr., 101); "he is a knave" (Harding v. Brooks, 5 Pick., 244); "he is a dealer in counterfeit money" (Pike v. Van Wormer, 6 How. Pr., 99); "he is a receiver of stolen goods" (Dias v. Short, 16 How. Pr., 322); "he killed a horse" (Gage v. Shelton, 3 Rich., 242); "he poisoned my cow" (Burton v. Burton, 3 Iowa, 316); "you are a vagrant" (Miles v. Oldfield, 4 Yeates (Penn.), 423).

10. *But it has been held not to be actionable* to say of another, "a man that would do that would steal." Stees v. Kemble, 27 Penn. St., 112.

11. The words "you hooked my geese" are not actionable in themselves; but they as well as other words may become so by expressing a criminal charge by reason of their allusion to some extrinsic fact, or of their being used and understood in a different sense from their natural meaning. Hays v. Mitchell, 7 Blackf. (Ind.), 117.

12. The words "I believe you will steal" do not of themselves imply a charge of larceny committed in the past, and are not actionable in themselves; but it is competent to show that the words spoken, under the peculiar circumstances attending their utterance, express a charge of crime committed, in which case they become actionable. Bays v. Hunt, 60 Iowa, 251; 14 N. W. Rep., 785.

13. B. spoke of A.: "A. and B. and one C. sat down to gamble in a house in D., and while there C. took out of his pocket-book a $5 bill and proposed to bet $1 at that time; after the bill was put down on a chance, it was missing, and search was made for it, but it could not be found, whereupon the parties agreed to submit to a search, which was accordingly made, but the bill was not found. After the search one of the parties proposed to look out of doors for the money, and accordingly all of the parties went out of the house to search for it, and near the window they found a pocket-book with the clasp unfastened and in it the bill belonging to C. C. took out the bill

and handed the pocket-book to A., who took it and said, 'Boys, don't tell this on me, for if you do it will ruin me.'" It was held that the words did not charge a larceny. Prichard v. Lloyd, 2 Ind., 154.

§ 19. **Digest of English Cases.**—

1. To say "I have been robbed of three dozen winches; you bought two, one at 8*s.*, one at 2*s.*; you knew well when you bought them that they cost me three times as much making as you gave for them, and that they could not have been honestly come by," is a sufficient charge of receiving stolen goods, knowing them to have been stolen. An indictment which merely alleged that the prisoner knew the goods were not honestly come by would be bad. R. v. Wilson, 2 Mood. C. C., 52; Alfred v. Farlow, 8 Q. B., 854; 15 L. J., Q. B., 258; 10 Jur., 714. And to say "you forged my name" is actionable, although it is not stated to what deed or instrument. Jones v. Herne, 2 Wils., 87.

2. To say that a man is "forsworn" or "has taken a false oath" is not a sufficiently definite charge of perjury; for there is no reference to any judicial proceeding. But to say "thou art forsworn in a court of record" is a sufficient charge of perjury; for this will be taken to mean that he was forsworn while giving evidence in a court of record before the lawfully appointed judge thereof on some point material to the issue before him. Stanhope v. Blith, 4 Rep., 15; Holt v. Scholefield, 6 T. R., 691; Ceely v. Hoskins, Cro. Car., 509. To say of another "he has defrauded a mealman of a roan horse" was held not to imply a criminal act of fraud; as it was not stated that the mealman was induced to part with his property by means of any false pretense. Richardson v. Allen, 2 Chit., 657; Needham v. Dowling, 15 L. J., C. P., 9.

3. And it is not sufficient to call a person "a cheat" (Savage v. Robery, 2 Salk., 693; Mod., 398; Davis v. Miller et ux., 2 Str., 1169), "a swindler" (Savile v. Jardine, 2 H. Bl., 531; Black v. Hunt, 2 L. R., Ir., 10; Ward v. Weeks, 7 Bing., 211; 4 M. & P., 796), "a rogue," "rascal," "villain," etc. (Stanhope v. Blith, 4 Rep., 15), "a runagate" (Cockaine v. Hopkins, 2 Lev., 214), "a cozener" (Brunkard v. Segar, Cro. Jac., 427; Hutt., 13; 1 Vin. Abr., 427), "a common filcher" (Goodale v. Castle, Cro. Eliz., 554), or "a welcher" (Blackman v. Bryant, 27 L. T., 491; Barnett v. Allen, 3 H. & N., 876; 27 L. J., Ex., 412; 1 F. & F., 125; 4 Jur. (N. S.), 488). As the words do not necessarily contain an imputation of the commission of a criminal offense, they are not actionable without proof of special damage. But the term "welcher" is actionable if the jury are satisfied the word means "one who takes money from those who make bets with him, intending to keep such money for himself and never to part with it again." Williams v. Magyer, "Times" for March 1, 1883.

§ 20. **Imputations Containing No Definite Charge, Merely a Suspicion.**— Where the imputation contains no definite charge of crime, but merely discloses a suspicion existing in the mind of the defendant, no action lies without proof of special damage;[1] and yet it seems the words must be spoken

[1] Com. Dig., Act. for Def., F., 13; Haight v. Hoyt, 19 N. Y., 468; Hodg- Dickey v. Andrews, 33 Vt., 55; son v. Scarlett, 1 B. & Ald., 233.

upon some privileged occasion, for it is immaterial what was in the speaker's mind. The question to be determined is, How did the hearers or by-standers understand the words?

§ 21. **Illustrations — Digest of American Cases.—**

1. It has been held not to be actionable to express a supposition or belief that a person went to a certain place for the purpose of persuading another to commit adultery with him. Dickey v. Andrews, 32 Vt., 55.

2. "I believe you will steal." These words were held not to imply of themselves a charge of larceny committed in the past, and therefore not actionable in themselves; but it is competent to show that under the peculiar circumstances attending this utterance they did, in fact, express a charge of crime committed. Bays v. Hunt, 60 Iowa, 251; 14 N. W. Rep., 785.

3. But it has been held actionable for one to say he supposed another guilty of a crime. Dickey v. Andrews, 32 Vt., 55. And so to say, "My watch has been stolen in M.'s bar-room, and I have reason to believe T. took it, and that her mother concealed it," has been held to amount to charges of larceny and concealment and to be actionable. Miller v. Miller, 8 Johns. (N. Y.), 74, 77. And so to say, "I will venture anything he has stolen my book." Nye v. Otis, 8 Mass., 122.

4. To say of another, "I believe A. burnt the camp ground," is actionable. Gideau v. Mirk, 4 Ga., 64. So to say, "I have every reason to believe he burnt the barn," and "I believe he burnt the barn." Logan v. Steele, 1 Bibb (Ky.), 593.

§ 22. **Digest of English Cases.—**

1. "I have a suspicion that you and Bone have robbed my house, and therefore I take you into custody." At the trial, Pollock, C. B., told the jury that if they found that the defendant meant to impute to the plaintiff an absolute charge of felony, in such case the plaintiff was entitled to the verdict; but, on the other hand, if they should think that he imputed a mere suspicion of felony, the defendant would be entitled to the verdict. Verdict for defendant. *Held*, that the direction and the verdict were right. Tozer v. Mashford, 6 Ex., 539; 20 L. J., Ex., 225.

2. The clerk of the crown for the Island of Grenada said of the plaintiff: "He lies here under suspicion of having murdered a man named Emanuel Vancrossen, at the Spout, some years ago," and also, "Haven't you heard that Charles Simmons is suspected of having murdered one Vancrossen, his brother-in-law? A proclamation offering a reward for the apprehension of the murderer is now in my office, and there is only one link wanting to complete the case." *Held*, that this amounted at the most to words of mere suspicion, and that no action lay. Simmons v. Mitchell, 6 App. Cas., 156; 50 L. J., P. C., 11; 29 W. R., 401; 43 L. T., 710; 45 J. P., 237.

3. The words, "She ought to have been transported," were held not actionable on the ground that they expressed only the opinion of the speaker. Hancock v. Winter, 7 Taunt., 205.

4. It was held not to be actionable to say of another, "He is a great rogue, and deserves to be hung as well as Gale," who was condemned to be hanged, for the reason that the words show opinion merely, and perhaps the speaker might not think that Gale deserved hanging. Bush v. Smith,

2 Jones, 157. And so of one, "I will take him to Bow street [a police station] on a charge of forgery." Harrison v. King, 4 Price, 46; 7 Taunt., 431.

5. But it was held actionable to say "two dyers have gone off, and for aught I know Harrison will be so too, within this time twelve month," and yet they seem to be no more than the expression of an opinion. Harrison v. Thornborough, 10 Mod., 11. And so, too, to say, "All is not well with D. V.; they are many merchants who have lately failed, and expect no otherwise of D. V." 3 Salk., 326. And so it is actionable to say "I am thoroughly convinced you are guilty of the death of D. D." Peake v. Oldham, Cooper, 275; 2 W. Black., 960.

6. It is actionable to say "I think he is a horse-stealer." Stitch v. Wisedome, Cro. Eliz., 348. And so it is to say, "He ought to be hanged as much as A." A. having been hanged, this was held to amount to a charge of an offense which deserved hanging, and actionable. Reed v. Ambridge, 6 Car. & P., 308. See Davis v. Nook, 1 Stark. Cas., 372. And so it has been held to say of another, "If you had your deserts you had been hanged before now." Dawn's Case, Cro. Eliz., 62. To say "He hath deserved his ears to be nailed to the pillory." Jenkinson v. Mayne, Cro. Eliz., 384.

§ 23. **Degrees of the Offense — Words Imputing Offenses Punishable by Fines and Penalties Only.**— If the offense imputed be punishable by a fine or penalty, words charging its commission are, as a general rule, actionable in themselves. The rule is not uniform, however. In some states it is held that words to be actionable must impute not only an indictable offense, but one for which corporal punishment may be inflicted as the immediate penalty.[1]

§ 24. **Illustrations — Digest of American Cases.**—

1. Charging one with a crime punishable by indictment and involving moral turpitude, though it be but a misdemeanor, as removing landmarks (2 R. S. N. Y., 695, sec. 32), is actionable *per se*. Young v. Miller, 3 Hill, 21.

2. The words, "You have altered the marks of four of my hogs," are in themselves actionable, as they charge an act involving moral turpitude, and an indictable offense, although the punishment may not be infamous. Perdue v. Burnett, Minor (Ala.), 138.

3. Words charging a person with knowingly watering milk taken to a butter or cheese factory are actionable in themselves under the statutes of Wisconsin making such an act punishable by fine and imprisonment. Geary v. Bennett, 53 Wis., 444; 10 N. W. Rep., 602. But words which impute trespass, assault, battery and the like are not actionable in themselves although punishable by indictment. Smith v. Smith, 2 Sneed, 478; Dudley v. Horn, 21 Ala., 379; Billings v. Wing, 7 Vt., 444.

§ 25. **Digest of English Cases.**—

1. Words which merely impute a criminal intention not yet put into action are not actionable. Guilty thoughts are not a crime. But as soon as

[1] Lemous v. Wells, 78 Ky., 117.

any step is taken to carry out such intention, as soon as any overt act is done, an attempt to commit a crime has been made; and every attempt to commit an indictable offense is at common law a misdemeanor and in itself indictable. R. v. Scofield (1784), Caldecott, 397. To impute such an attempt is therefore clearly actionable. Harrison v. Stratton, 4 Esp., 217.

2. Where the words impute merely a trespass in pursuit of game, punishable primarily by fine alone, no action lies without proof of special damage, although imprisonment in the pillory may be inflicted in default of payment of the fine. 3 Wm. & M., ch. 10; Ogden v. Turner (1705), 6 Mod., 104; Salk., 696; Holt, 40.

3. Defendant charged plaintiff with a breach of the ninth by-law of the Great Western Railway Company, which is punishable with a penalty of 40s. only. Field, J., held that no action lay. Preston v. De Windt, Times for July 7, 1884.

4. Where the words imputed an offense against the fishery acts, punishable only by fine and forfeiture of the nets and instruments used, *held*, that no action lay without proof of special damage. McCabe v. Foot, 18 Ir. Jur. (vol. XI, N. S.), 287; 15 L. T., 115. But words imputing to a licensed victualer that he had been guilty of an offense against the licensing acts would be actionable, as spoken of him in the way of his trade; and so would words spoken of a dairyman or grocer falsely alleging that he had been convicted under the sale of food and drugs act of 1875. Odgers on Libel and Slander, 54.

§ 26. **The Imputation as Relates to the Time of the Commission of the Offense Charged.**— It is not necessary that the words should accuse the plaintiff of some fresh, undiscovered crime, so as to put him in jeopardy or cause his arrest. If such consequences have followed, they may be alleged as special damage; but where such consequences are impossible, the words are still actionable. Thus, to call a man a returned convict, or otherwise to falsely impute that he has been tried and convicted of a criminal offense, is actionable without special damage. For it is at least quite as injurious to the plaintiff's reputation to say that he has been in fact convicted as to say that he will be or ought to be convicted. Many think that such statements should be actionable, even when true, if they are maliciously or unnecessarily volunteered.[1]

§ 27. **Illustrations — Digest of American Cases.**—

1. The action of slander for charging one with the commission of an offense is not barred because the statute which created the offense has been repealed. French v. Creath, Breese (Ill.), 31.

2. To show malice, publications made more than the statutory period before the action was commenced and made after it was commenced may be proved. Morgan v. Livingston, 2 Rich. (S. C.), 573.

3. An action of slander lies for charging a person with a crime the prose-

[1] Odgers on Slander and Libel, 58.

cution of which has been barred by the statute of limitations, and in such an action the defendant may justify and prove the truth of his allegation, notwithstanding the criminal prosecution may be barred. Van Aukin v. Westfall, 14 Johns. (N. Y.), 233.

4. To show damage it is competent to prove the speaking of the same words charged in the complaint at a period so long prior that the statutes of limitation would be a bar to an action. A repetition of words, imputing the same charge alleged in the complaint to have been made, may be proved to have been spoken at any time before the commencement of the action, but words imputing a different charge may not be; nor can the same words be proved to have been uttered after the commencement of the action. Diston v. Rose, 69 N. Y., 122. But see Prince v. Esterwood, 45 Iowa, 640.

§ 28. **Digest of English Cases.**—

1. It is actionable as imputing crime to say of a person that "He was a thief and stole my gold." It was argued here that "was" denotes time past; so that it may have been when he was a child, and therefore no larceny; or in the time of Queen Elizabeth, since when there had been divers general pardons. *Sed per cur.:* "It is a great scandal to be once a thief; for *pœna potest redimi, culpa perennis erit.*" Boston v. Tatam, Cro. Jac., 623.

2. It is actionable to call a man a "thief" or "felon," even though he once committed larceny, if after conviction he was pardoned either under the great seal or by some general statute of pardon. Cuddington v. Wilkins, Hobart, 67, 81; 2 Hawk. P. C., ch. 37, § 48; Leyman v. Latimer and others, 3 Ex. D., 15, 352; 46 L. J., Ex., 765; 47 L. J., Ex., 470; 25 W. R., 751; 26 W. R., 305; 37 L. T., 360, 819.

3. He "was in Winchester gaol and tried for his life, and would have been hanged had it not been for Leggat, for breaking open the granary of farmer A. and stealing his bacon." Carpenter v. Tarrant, Cas. temp. Hardwicke, 339.

4. "He had been in Launceston gaol and was burnt in the hand for coining." Gainford v. Tuke, Cro. Jac., 536.

5. And to say of a man falsely, "He is a returned convict." Fowler v. Dowdney, 2 M. & Rob., 119; Bell v. Byrne, 13 East, 554.

§ 29. **Imputation as to Place of Commission — Charge of a Crime Committed Out of the State.**— Upon the principle that the actual cause in an action for defamation is social degradation, and as it can be of no consequence, as respects the injury to the reputation of the party accused, where the offense is alleged to have been committed, as a legal sequence it follows that a charge of having committed an indictable crime involving moral turpitude, out of the state where the words are spoken or where the action is brought, is actionable.[1] But

[1] Van Aukin v. Westfall, 14 Johns. 463; Wall v. Haskins, 5 Iredell, 177; (N. Y.), 233; Poe v. Greerer, 3 Sneed, Heard on L. & S., 45; Kribs v. 664; Shipp v. McGraw, 3 Murphey, Oliver, 78 Mass., 239

it must be borne in mind that, unless the offense charged is a crime at common law, the burden of proof is upon the plaintiff to show that it is an offense indictable by the law of the state in which it is charged to have been committed. If the offense charged is not punishable in the state where it is alleged to have been committed, it has been held that the action cannot be maintained, and this even though the offense is indictable where the words complained of are spoken or the action is brought.[1] The right to bring the action being transitory, the liability follows the defendant wherever he goes, And so it has been held that words spoken in another state, imputing a crime indictable at common law, or by a statute shown by the plaintiff to exist in the state where the offense is said to have been committed, are actionable, and an action for the same may be brought wherever the parties may be found.[2]

§ 30. **The Charge May be General.**— A general charge of felony is actionable though it does not specify any particular crime.[3]

§ 31. **Illustrations — Digest of American Cases.**—

1. A general charge of forgery, though it appear it was intended, not as a charge of felony, but of forgery of a name to a petition to the legislature for a grant of land, is actionable; for, as explained, it imputes a punishable misdemeanor. Alexander v. Alexander, 9 Wend., 141.

2. Saying that A., on a certain trial, handed papers to one of the jury, and that he ran away or the judge would have put him in prison for it, or that he handed papers to the jury to influence or bribe them, imputes embracery, and is slander *per se*. Gibbs v. Dewey, 5 Cow., 503.

3. If the words import a charge that the plaintiff burnt his barn, with intent to defraud the insurers, it is not necessary to aver that the barn was insured, nor to prove that it was insured. Case v. Buckley, 15 Wend. (N. Y.), 327.

4. Words calculated to induce the hearers to suspect that the plaintiff was guilty of the crime alleged are actionable. Drummond v. Leslie, 5 Blackf. (Ind.), 453.

5. Saying of a man that "he is a rogue and villain; that he has ruined many families, and that the curses of widows and children are on him; that he had wronged the defendant's father's estate, and cheated the defendant's brother T.," was held actionable, though the plaintiff stated in his declaration that he was a merchant at the time, and it was proved that he was not a merchant. Marshall v. Addison, 4 Har. & M. (Md.), 537.

[1] Barclay v. Thompson, 2 Penn., 148.

[2] Stout v. Wood, 1 Blackf., 71; Offut v. Earlywine, 4 id., 460.

[3] Drummond v. Leslie, 5 Blackf. (Ind.), 453; Webster v. Sharpe, 116 N. C., 466; Herzog v. Campbell, 47 Neb., 370.

6. But to say of the plaintiff "that he or somebody has altered the credit or indorsement on a note from a larger to a less sum, and that the note would speak for itself," is not actionable, as the charge is not positive, but in the disjunctive. Ingalls v. Allen, 1 Ill. (Breese), 233.

7. To charge a person with intent to commit a crime is not actionable. M'Kee v. Ingalls, 5 Ill. (4 Scam.), 30; Wilson v. Tatum, 8 Jones (N. C.), L., 300; Seaton v. Cordray, Wright (Ohio), 101.

8. The charge of "packing a jury" imports the improper and corrupt selection of a jury sworn and impaneled for the trial of a cause. Mix v. Woodward, 12 Conn., 262.

9. To utter words imputing a crime is actionable, although the crime could not be committed by the party charged with it, unless the fact is known or disclosed to the hearer. Carter v. Andrews, 16 Pick. (Mass.), 1.

10. Where words apparently charging a crime are used, it is proper to instruct the jury that the words are actionable in themselves if uttered with intent to charge a crime. St. Martin v. Desnoyer, 1 Minn., 156.

§ 32. **Digest of English Cases.**—

1. "I will lock you up in Gloucester gaol next week. I know enough to put you there." Webb v. Beavan, 11 Q. B. D., 609; 52 L. J., Q. B., 544; 49 L. T., 201; 47 J. P., 488.

2. "If you had had your deserts, you would have been hanged before now." Donne's Case, Cro. Eliz., 62.

3. "He deserves to have his ears nailed to the pillory." Jenkinson v. Mayne, Cro. Eliz., 384; 1 Vin. Abr., 415.

4. "You have committed an act for which I can transport you." Curtis v. Curtis, 10 Bing., 477; 3 M. & Scott, 819; 4 M. & Scott, 337.

5. "You have done many things for which you ought to be hanged, and I will have you hanged." Francis v. Roose, 3 M. & W., 191; 1 H. & H., 36.

6. "I have got a warrant for Tempest. I will advertise a reward for twenty guineas to apprehend him. I shall transport him for felony," were properly found by the jury to amount to a substantial charge of felony. Tempest v. Chambers, 1 Stark., 67.

7. An action lies for these words: "Many an honester man has been hanged and a robbery hath been committed, and I think he was at it; and I think he is a horse-stealer." Stich v. Wisedome, Cro. Eliz., 348.

8. And for these: "I think in my conscience, if Sir John might have his will, he would kill the king." Sidnam v. Mayo, 1 Roll. Rep., 427; Cro. Jac., 407; Peake v. Oldham, Cowp., 275; 2 Wm. Bl., 959.

§ 33. **The Imputation of Impossible Offenses.**—If a crime imputed be one of which a person could not by any possibility be guilty, and all who heard the imputation knew that he could not by any possibility be guilty thereof, no action lies, for the plaintiff is never in jeopardy, nor is his reputation in any way impaired; for the words must be construed as the bystanders understand them.[1] The words will be considered ac-

[1] Carter v. Andrews, 33 Mass., 1; 2 Bing., 402; Williams v. Stott, 1 C. Buller's N. P., 5; Jackson v. Adams, & M., 675.

tionable, however, in all cases where they are calculated to induce the hearers to believe or understand that the person referred to has been guilty of the commission of a criminal offense.[1]

§ 34. Illustrations — Digest of American Cases.—

1. In a Massachusetts case the words complained of were, "We offer you these books at a disadvantage, for the library has been plundered by Deacon James G. Carter of this town." The occasion was the public sale at auction of the books of the Reading Room Library, a voluntary association of persons, of whom the plaintiff Carter was one. It was contended on the part of the defendant that the words were not actionable, because the proprietors of the reading room were tenants in common of the books, and that the taking of the books by one member, though it might be contrary to the rules, was no larceny. It was held that had the words charged as defamatory alluded to this circumstance, so that any hearer would have had the explanation along with the charge, there would have been much force in the argument. Carter v. Andrews, 33 Mass., 1.

2. In Illinois, where by a statutory enactment no infant under the age of ten years can be found guilty of any crime or misdemeanor, the charge was concerning a girl of nine years: "She stole my money;" "She is a smart little thief." It was held that, notwithstanding the impossibility of a conviction for larceny, she could by her next friend maintain an action for slander. R. S. Ill. 1887, 482, § 283; Stewart v. Howe, 17 Ill., 71.

§ 35. Digest of English Cases.—

1. It is no slander to say of a church-warden that he stole the bell-ropes of his parish church, for they are officially his property, and a man cannot steal his own goods. Jackson v. Adams, 2 Bing. N. C., 402; 2 Scott, 599; 1 Hodges, 339. So it is not actionable for A. to charge a man who is not A.'s clerk or servant with embezzling A.'s money, for no indictment for embezzlement would lie. Williams v. Stott, 1 C. & M., 675; 3 Tyrw., 688.

2. Where the words complained of were, "Thou hast killed my wife," and every one who heard them knew at the time that defendant's wife was still alive, they could not therefore understand the word "kill" to mean "murder." Snag v. Gee, 4 Rep., 16, as explained by Parke, B., in Heming v. Power, 10 M. & W., 569. And see Web v. Poor, Cro. Eliz., 569; Talbot v. Case, Cro. Eliz., 823; Dacy v. Clinch, Sid., 53; Jacob v. Mills, 1 Ventr., 117; Cro. Jac., 343. But where a married woman said, "You stole my faggots," and it was argued for the defendant that a married woman could not own faggots, and therefore no one could steal faggots of her, the court construed the words according to common sense and ordinary usage to mean, "You stole my husband's faggots." Stamp and wife v. White and wife, Cro. Jac., 600; Charnel's Case, Cro. Eliz., 279.

[1] Carter v. Andrews, 33 Mass., 1; Stewart v. Howe, 17 Ill., 71; Beckett v. Sterrett, 4 Blackf. (Ind.), 499; Freeman v. Sanderson, 123 Ind., 264; Elmer v. Fessenden, 151 Mass., 359; Wimer v. Allbaugh, 78 Iowa, 79; Blackburn v. Clark (Ky.), 41 S. W. Rep. 430.

II. PARTICULAR OFFENSES.

§ 36. **Larceny — The Offense Defined.**— Larceny is the wrongful or fraudulent taking and carrying away without color of right the personal property of another from any place with a felonious intent to convert it to the taker's use and make it his own property without the consent of the owner.[1]

The characteristics of the offense are:

(1) The wrongful taking. By which it is distinguished from all offenses in the nature of embezzlements or breaches of trusts consequent upon a lawful possession of the property.

(2) The removal or carrying away. The act by which the offense is consummated and by which it is distinguished from that class of offenses commonly known as obtaining goods under false pretenses, cheats and extortions.

(3) The criminal intent to deprive the owner of his property. By which the offense is distinguished from a mere trespass to personal property.[2]

§ 37. (1) **The Wrongful Taking.**— To charge a person with taking with felonious intent any property which can be the subject of larceny is actionable. So words imputing the stealing of bell-ropes generally are actionable without proof of special damages; but to charge a person with stealing the bell-ropes of the church of which he is the church-warden was held not to be actionable in itself, because as such warden he was in the lawful possession of the property of the church.[3] In the progress of society, however, such distinctions become ridiculous, and in many of the states are abolished by statutory enactments. In Illinois it is provided by statute that whoever embezzles or fraudulently converts to his own use, or secretes with intent to embezzle or fraudulently convert to his own use, money, goods or property delivered to him, which may be the subject of larceny, or any part thereof, shall be deemed guilty of larceny.[4]

§ 38. (2) **The Carrying Away.**— According to the definitions of this offense the property stolen must be carried away;

[1] Russell on Crimes, 123; Rapalje & L., Law Dic., 728.

[2] Regina v. Thurborn, 1 Denison, 387.

[3] Hall v. Adkins, 59 Mo., 144; Jackson v. Adams, 2 Bing. N. C., 402.

[4] R. S. Ill. 1887, 446; Kibbs v. The People, 81 Ill., 589.

but it is not necessary that it be retained in the possession of the thief or that it be removed from the owner's premises. The rule is that any removal, however slight, of the entire article, which is not attached either to the soil or to any other thing not removed, is sufficient, while nothing short of this will do.[1]

For example: Where the defendant lifted a bag he meant to steal from the bottom of the boot of a coach, but, before he got it completely above the space it had occupied, was detected; yet, every part of it having been raised from where the particular part had lain, the carrying away was held to be complete.[2] And where a thief at an inn ordered another's horse to be led out, and it was done, the leading out was held to be a sufficient carrying away in law.[3] And so also where the prisoner, receiving gas of a gas company, diverted some of it to his burners without its passing through the meter to be measured, the means employed being to use a pipe running directly from the entrance to the exit pipe.

On the other hand, it was decided not to be a sufficient carrying away where a person who was in a wagon set a long bale upon its end, and cut the wrapper all the way down, yet was apprehended before he had taken anything out of the bale.[4] And where goods in a shop were tied to a string, fastened at one end to the counter, a thief who carried them as far away as the string would permit was held not to have committed larceny, because of their being thus attached. Where a purse, fastened in this way to a bunch of keys, was taken from the pocket, while the keys remained in the pocket, it was held there was no carrying away, since there was no complete severance from the person. The reason given in these cases is that the prisoner's control over the thing was not for an instant perfect; if it had been it would have been sufficient, even though the control had the next instant been lost.[5]

§ 39. **(3) The Criminal Intent.**— The commission of this offense requires a concurrence with the act of two intents: (1) a general intent to do the trespass; and (2) a particular in-

[1] 2 Bishop, Criminal Law, § 804.
[2] Rex v. Walsh, 1 Moody, 14.
[3] 2 East's Pleas of the Crown, 556.
[4] Rex v. Cherry, 1 Leach, 236; 2 East's Pleas of the Crown, 556.
[5] See 2 Bishop's Crim. Law, §§ 804–807.

tent. Commonly, however, when speaking of the intent in this offense the particular intent is meant. This intent is called felonious.

For example: Where the taking is by a mere careless trespass; as, if the sheep of A. stray from the flock of A. into the flock of B., and B. drives it along with his flock, or by pure mistake shears it, this is not a felony; but if he knows it to be another's, and marks it with his mark, this is an evidence of the felonious intent.

Says Bishop, in his Criminal Law, concerning this particular intent: "Almost the only point beyond controversy is that its aim must be to deprive the general or special owner of his entire ownership, in distinction from any partial or temporary interest in the property."

For example: If one takes a horse, however wrongfully, merely to use and return it; as, if an indentured servant, to escape from service, rides away his master's horse, not intending to deprive the master of his ownership in the horse; or if the wrong-doer leads the animal from a stable which he enters at night, and rides it many miles to a tavern and leaves it, his purpose being simply to do this, without any intent to return it, such person does not commit larceny. And it has been held where one employed in a tannery clandestinely removed some skins of leather from the warehouse to another part of the premises, for the purpose of delivering them to the foreman and getting paid for them as his own work, the transaction was held not to constitute this offense. It would have been otherwise if the intent had been to sell the skins to the owner; for then there would have been an intended appropriation of the entire property, instead of the interest in it, which consists in having done labor thereon.[1]

§ 40. **Larceny Restricted to Personal Property.**—Under the rules of the common law prevailing in many of the states larceny is restricted to personal property. Real estate, in consequence of its stable nature, cannot be the subject of this offense under the rules of the common law; and the same rules extend to everything adhering to the realty or to the soil.[2] So that if a person, even with felonious intent, severs and carries

[1] 2 Bishop's Crim. Law, §§ 862, 863. [2] Jackson v. The State, 11 Ohio St., 104; State v. Hall, 5 Harr. (Del.), 492.

away a tree or apples from a tree, or grass or grain standing in a field,[1] or copper or lead or anything attached to any building or to the soil, he does not, at least by the rules of the common law, commit this offense, but is guilty only of a trespass.[2]

Shaw, C. J.: The natural and most obvious import of the word "steal" is that of felonious taking of property, or larceny; but it may be qualified by the context. As if one says of another "he stole apples from my trees," it imputes a trespass, and not a felony, and the words are not actionable. But if he says "he stole apples from my cellar," it imputes a felonious taking, and the words are actionable.[3]

§ 41. **Statutory Modifications of the Rule.**— It must be borne in mind, however, that the rules of the common law have been in many of our states materially changed by statutory enactments. In Illinois it is provided by statute that whoever by trespass, with intent to steal, takes and carries away anything which is parcel of the realty, or annexed thereto, the property of another, of some value, against his will, shall be guilty of such larceny as he would be guilty of if such property were personal property.[4]

§ 42. **A General Rule of the Common Law.**— It may be laid down as a general rule of the common law that whatever is not attached to the soil or to the realty is personal property in the sense which makes it the subject of larceny.

§ 43. **Wild Animals, etc.**— By the common law unreclaimed and unconfined animals could not be the subject of larceny. Thus, a charge of stealing a sable caught in a trap in the woods while it remained in the trap,[5] or a charge of stealing wild bees remaining in a tree where they had hived, although confined in such tree by the owner of the land on which the tree stands.[6]

§ 44. **Modification by Statutory Enactments.**— Here again it must be borne in mind that these seemingly technical rules of the common law are in many states modified by the statutes. In Illinois, as an instance, we find it declared by the statute that "whoever, without the consent of the owner and

[1] Comfort v. Fulton, 39 Barb. (N. Y.), 56.

[2] 2 Bishop, Criminal Law, § 763.

[3] Dunnel v. Fiske, 11 Met. (52 Mass.), 554.

[4] R. S. Ill. 1887, 463.

[5] Norton v. Ladd, 5 N. H., 203.

[6] Wallis v. Mease, 3 Binney, 546; Gillett v. Mason, 7 John. (N. Y.), 16.

with a felonious intent, takes any beast or bird ordinarily kept in a state of confinement, and not the subject of larceny at common law, shall be deemed guilty of larceny."[1]

§ 45. **The Import of the Word "Steal."**— The material and most obvious import of the word is that of the felonious taking of property, or larceny.[2] Worcester gives to it the following definition: "To take and carry away feloniously or unlawfully, as the property of another; to take without right; to take by theft; to purloin; to pilfer; to filch; to practice theft; to take anything feloniously."[3]

§ 46. **Other Words.**— "Pilfering,"[4] "thief,"[5] "thieving person,"[6] "knave,"[7] and other like ambiguous terms, when used in a general way, and unexplained, have been considered as imputing the crime of larceny.

§ 47. **The Moral Effect of the Charge.**— The right to acquire and hold property is one of the fundamental principles of civilized society. This right has been guarded by law in different degrees in all ages of the world. In the days when the children of Israel toiled in the Wilderness, the Almighty trod upon the quaking hills and wrote, with fingers of fire, "Thou shalt not steal." Larceny of goods is an offense against the right to acquire and hold. It strikes at the foundation of society. And so odious has it been deemed in all ages of the world that it has been, until modern times, almost universally punished with death. The word "thief" has become an opprobrious epithet, which needs no innuendo to explain its meaning — a term of reproach. The person who has so little regard for the rights of others as to be guilty of this offense must be regarded as an outlaw. The effect of the charge of guilt is to degrade; and hence, if false, the imputation becomes in the law a very serious wrong.

§ 48. **Words Imputing the Commission of this Offense.**— The following words, phrases and sentences charging the commission of the crime of larceny have been held actionable in themselves without proof of special damage:

(1) *American cases:* "You G—d d—d lying, thieving son of

[1] R. S. Ill. 1887, 463.

[2] Dunnel v. Fiske, 11 Met. (Mass.), 551.

[3] Worcester's Dict., 1409.

[4] Beckett v. Sterrett, 4 Blackf., 499.

[5] Carter v. Andrews, 16 Pick., 1; Gaines v. Belding, 56 Ark., 100; 19 S. W. Rep., 236.

[6] Alley v. Neeley, 5 Blackf., 200.

[7] Harding v. Brooks, 5 Pick., 244.

a bitch."[1] "He is a thief."[2] "You are a thieving fellow; you stole and run away."[3] "You will steal, and I can prove it."[4] "My table-cloths are gone; 'if you will bring them back I will say nothing about it.' You have got them. My husband has gone down town to get a warrant against you to search your house for the table-cloths and imprison you."[5] "J. O'D——, the old scoundrel, came down and stole my bull, and I can prove it; and if he don't come down and settle up, I will put him through, and will make him pay dear for taking him away."[6] "For some months back I have missed things from my laundry — gentlemen's wear. Jennie has stolen them, and I have come to search your house."[7] "He gets his living by thieving."[8] "He was whipped for stealing hogs."[9] "He is a thieving puppy."[10] "He is a thief. He stole my wheat and ground it, and sold the flour to the Indians."[11] "He stole corn, and I can prove it; I sent my corn to his mill and weighed it on its return, and it was lacking."[12] "I saw him take corn from A.'s crib twice, and look around to see if any person saw him measuring."[13] "There is the man who stole my horse and fetched him home this morning."[14] "I will venture anything he has stolen my book."[15] "Dr. K. was imprisoned many years in the penitentiary in Germany for larceny."[16] "My watch has been stolen in M.'s bar-room, and I have reason to believe that T. took it, and that her mother concealed it."[17] "You are a thief; you are a d—d thief."[18]

[1] Reynolds v. Ross, 42 Ind., 387.

[2] McNamara v. Shannon, 8 Bush (Ky.), 557; Roberts v. Ramsey, 86 Ga., 432.

[3] Alley v. Neeley, 5 Blackf. (Ind.), 200.

[4] Cornelius v. Van Slyck, 21 Wend. (N. Y.), 70. But see Bays v. Hunt, 60 Iowa, 251; 14 N. W. Rep., 785.

[5] Hess v. Fackler, 25 Iowa, 10.

[6] O'Donnell v. Hastings, 68 Iowa, 271; 26 N. W. Rep., 433.

[7] Bell v. Fernald, 71 Mich., 267.

[8] Rutherford v. Moore, 1 Cranch, C. Ct., 388.

[9] Hooley v. Burgess, 9 Ala., 728.

[10] Pierson v. Steortz, 1 Mor. (Iowa), 136; Little v. Barlow, 26 Ga., 423.

[11] Parker v. Lewis, 2 Greene (Iowa), 311.

[12] Hume v. Arrasmith, 1 Bibb (Ky.), 165.

[13] James v. McDowell, 4 Bibb (Ky.), 188.

[14] Bonner v. Boyd, 3 Har. & J. (Md.), 278.

[15] Nye v. Ottis, 8 Mass., 122.

[16] Krebs v. Oliver, 12 Gray (Mass.), 239.

[17] Miller v. Miller, 8 Johns. (N. Y.), 74, 77.

[18] Stumes v. Pitchman, 22 Ill. App., 399; 15 N. E. Rep., 757; Miller v. Johnson, 79 Ill., 58; Van Aiken v. Caler, 48 Barb. (N. Y.), 58; Quigley v. McKee, 12 Or., 22; 53 Am. Rep., 320.

The word "thief" is not actionable unless it is intended by its use to impute the commission of larceny, but the law will presume such an intent unless the contrary is shown.[1] "Tell him he is riding a stolen horse, and has a stolen watch in his pocket."[2] "You get your living by sneaking wheat when other people are asleep." "What did you do with the sheep you killed — did you eat it?" "It was like the beef you got negroes to bring you at night." "Where did you get the little wild shoats you always have in your pen?" "You are an infernal roguish rascal."[3] "A. stole a watch; he went to Gray's shop for a watch; demanded a gold watch; Gray told him to take it; he did so; the owner came for the watch; Gray sent word to him to send it back, which he did. If that be not stealing, what do you call it?"[4]

(2) *English cases:* "I charge J. S. with felony in taking my money out of my pocket."[5] "He is a thief of everything."[6] "He was put in the round-house for stealing ducks at Crowland."[7] "For thou hast stolen my corn."[8] "You stole my box-wood, and I will prove it."[9]

§ 49. **Words Held Not to Impute the Commission of Larceny.**— The following words, phrases and sentences have been held not to impute the commission of the offense:

American cases: "You as good as stole the canoe."[10] "A man that would do that would steal."[11] "I believe you will steal," or, "You will steal."[12] "You are a rogue, and your master has upheld you in stealing from your cradle up."[13] "You are either a thief or you got the book from a thief."[14] "He seems to have coveted his late partner's cattle. He started for the city with the cattle and an officer was put upon his trail."[15]

[1] McKee v. Ingalls, 4 Scam. (Ill.), 30.
[2] Davis v. Johnson, 2 Bailey (S. C.), 579.
[3] Morgan v. Livingston, 2 Rich. (S. C.), 573.
[4] Mayson v. Sheppard, 12 Rich. (S. C.), 254.
[5] Baker v. Pierce, Lord Raymond, 959.
[6] Morgan v. Williams, Strange 142.
[7] Beaver v. Hides, 2 Wils., 300.
[8] Foster v. Browning, Cro. Eliz., 688; 4 B. & Ad., 630.
[9] Baker v. Pierce, 6 Mod., 23.
[10] Stokes v. Arey, 8 Johns., 46.
[11] Stees v. Kemble, 27 Penn. St., 112.
[12] Bays v. Hunt, 60 Iowa, 251; 14 N. W. Rep., 785. But see Cornelius v. Van Slyck, 21 Wend. (N. Y.), 70.
[13] McCurry v. McCurry, 82 N. C., 296.
[14] Blackwell v. Smith, 8 Mo. App., 43.
[15] Bain v. Myrick, 88 Ind., 137.

§ 50. **Perjury — The Offense Defined.**— The wilful giving, under oath, in a judicial proceeding or course of justice, of false testimony material to the issue or point of inquiry. The definition in its popular acceptation by no means denotes its legal signification. The characteristic of the offense is not the violation of the religious obligation of another, but the injury done to the administration of public justice. There is a broad line of distinction between the compound offense of false swearing to a material point in a judicial proceeding, which is legal perjury, and that of simple false swearing for fiscal or other general purposes, which is often inaccurately termed perjury. The question whether words are actionable in themselves, as necessarily imputing a charge of perjury, depends upon whether it appears from the words themselves, or from circumstances connected with them and properly averred in the declaration, that the charge related to an oath in some judicial proceeding, or necessarily conveyed to the mind of the hearer an imputation of perjury as above defined.[1] In the absence of statutory enactments it is impossible that any person by falsely taking an oath can be guilty of legal perjury unless the oath is taken in a judicial proceeding.[2]

§ 51. **The General Rule.**— Words making a general charge of perjury have always been held to be actionable in themselves;[3] and so with all charges of false swearing when it necessarily conveys to the mind of the hearers the imputation of perjury.

For example: The following words have been held actionable in themselves: "He has sworn false to my injury six or seven hundred dollars."[4] "He has sworn to a lie and done it meaningly, to cut my throat."[5] "You swore false at the trial of your brother John."[6] "He has sworn falsely, and I will attend to the grand jury respecting it."[7] "You swore to a lie before the grand jury."[8] "I cannot enjoy myself in a meeting with Sherwood, for he has sworn false and I can prove it; and if you do not believe it you can go to 'Squire Bossett's

[1] 2 Bish. Crim. Law, § 1015.
[2] Heard on L. & S., § 34.
[3] Yelverton (Am. ed.), 28, note; Hopkins v. Beedle, 1 Caines, 347.
[4] Jacobs v. Fyler, 3 Hill (N. Y.), 572.
[5] Coons v. Robinson, 3 Barb., 625.
[6] Fowle v. Robbins, 12 Mass., 498.
[7] Gilman v. Lowell, 8 Wend., 573.
[8] Perselly v. Bacon, 20 Mo., 330. See, also, Upton v. Hume, 24 Or., 420; Gudger v. Penland, 108 N. C., 593.

and see it in a suit between James L. Sherwood, plaintiff, and Richard P. Brown, defendant."[1]

§ 52. **False Swearing.**— But to charge a person with false swearing or with having sworn falsely is not actionable unless the charge is made of and concerning a proceeding in a court of competent jurisdiction; and the declaration or statement of the claim upon such words must contain a proper colloquium concerning the proceeding, and must aver that the words were spoken in relation to it.[2]

The law illustrated: The law is well illustrated in a New York case (Wood v. Clark, 2 Johns., 10). The words in question were: "He has sworn falsely; he has taken a false oath against me in 'Squire Jamison's court." Tompkins, J., in delivering the opinion of the court, said: "These words are not actionable unless they must necessarily be understood as conveying a charge of perjury. This is not to be collected from them, because it does not appear [in the declaration] that Jamison had any authority to hold a court known in law, or to act judicially, or to administer an oath, and therefore a charge of having taken a false oath before him does not necessarily impute any crime for which a person may be indicted and punished. Even if the court referred to by the words were known and recognized by this court, there is no colloquium of any cause there depending, without which the declaration is insufficient, for the words may have been spoken in common discourse. The rule in relation to these and similar words is that, where one person calls another a perjured man, it shall be intended that the same was in a court of justice, and to have a necessary reference to it; but for a charge of false swearing, no action lies unless the declaration shows that the speaking of the words had a reference to a judicial court or proceeding.[3]

§ 53. **The Colloquium a Substantive Part of the Cause of Action.**— The averment of the statement of the claim, the colloquium of the declaration in reference to the judicial proceed-

[1] Sherwood v. Chase, 11 Wend., 38.

[2] Holt v. Scholefield, 6 Term, 691; Hall v. Weedon, 8 Dowling & Ryland, 140; Vaughan v. Havens, 8 Johns., 109; Hopkins v. Beedle, 1 Caines, 347; Crookshank v. Gray, 20 Johns., 344; Stafford v. Green, 1 id., 505.

[3] Wood v. Clark, 2 Johns. (N. Y.), 10.

ings, or extrinsic circumstances in reference to which the words are alleged to have been spoken, is a substantive part of the cause of action, and must be proved as laid.[1]

§ 54. **The Materiality of the Testimony.**— It is, as a general rule, a presumption of law that whatever a witness has sworn to in a judicial proceeding is material to the question or questions involved; and when he is charged with having sworn falsely in such proceeding the charge imports perjury. The injury done consists in the fact that the defendant has ostensibly charged the plaintiff with the crime of perjury. The hearers so understand it, and they cannot be presumed to know anything of what actually transpired in the proceeding to affect the materiality of the plaintiff's testimony or to qualify the real nature of the falsehood imputed. No hearer can presume that he had been telling an idle story, having no connection with the cause, for no court would listen to such a story; and therefore the charge must be interpreted as one of perjury.[2]

§ 55. **Conclusion — Words Imputing Perjury.**— The rule in relation to such words is, when one person calls another a perjured man, it shall be intended that the same was in a court of justice and to have a necessary reference to it; but for a charge of false swearing no action lies at common law, unless the declaration alleges a proper colloquium, and the proof shows that the speaking of the words had reference to a judicial court or proceeding.[3] The reason for the rule is that not all false swearing is perjury at common law. Swearing to a lie does not necessarily imply that the party has, in the judgment of the law, perjured himself. It may mean that he has sworn to a falsehood without being conscious at the time that it was falsehood. Actionable words are those which convey the charge of perjury in a clear and unequivocal manner.[4] Thus, to say a person has sworn falsely is not actionable without setting out the

[1] Aldrich v. Brown, 11 Wend., 596; Emery v. Miller, 1 Denio, 208; Coons v. Robinson, 3 Barb., 625.

[2] Jacobs v. Fyler, 3 Hill (N. Y.), 572, 574; Butterfield v. Buffum, 9 N. H., 156, 163; Stone v. Clark, 21 Pick. (Mass.), 51; Tenney v. Clement, 10 N. H., 52, 58.

[3] Ward v. Clark, 2 John. (N. Y.), 10; Croford v. Bliss, 2 Bulstrode, 150; Core v. Norton, Yelverton, 28.

[4] Hopkins v. Beedle, 1 Caines (N. Y.), 347.

colloquium, as it may be a mere voluntary oath, which would not constitute perjury;[1] but it is otherwise to say of a person, "He committed perjury."

§ 56. **Words Charging the Commission of the Offense.**— The following words, phrases and sentences have been held to amount to an imputation of the commission of this offense, and to be actionable:

(1) *Without a colloquium — American cases:* "You swore to a lie before the grand jury."[2] "I believe you swear false; it is false what you say," spoken to a witness while giving testimony in a justice's court; or "that is false; I believe it is false," spoken at the trial.[3] "He is perjured."[4] "You swore to a lie, for which you would stand indicted."[5] "I would not swear to what C. has for the town or the county. P. is honestly mistaken, but C. is wilful."[6] "He has sworn to a lie and done it meaningly, to cut my throat."[7] "He has sworn to a damned lie, and I will put him through for it if it costs me all I am worth."[8]

"You swore to a —— —— lie last spring in that case about the poor-house farm, and I can prove it." *Foster, J.:* "This language would seem to be in itself actionable, as amounting to an accusation of the crime of perjury, without the aid of any colloquia or averments of extrinsic facts in explanation of the circumstances under which it was uttered. In such a case the materiality of the false testimony with which the party is charged may well be presumed in the absence of anything to show that it was known or understood to relate to an immaterial matter at the time by those in whose presence the accusation was made."[9]

Words charging a party with having "committed perjury" are actionable in themselves.[10]

[1] Power v. Miller, 2 McCord (S. C.), 220.

[2] Perselly v. Bacon, 20 Mo., 330.

[3] Cole v. Grant, 18 N. J. L. (3 Harr.), 327.

[4] Hopkins v. Beedle, 1 Caines (N. Y.), 347.

[5] Pelton v. Ward, 3 Caines (N. Y.), 73.

[6] Walrath v. Nellis, 17 How. Pr. (N. Y.), 72.

[7] Coons v. Robinson, 3 Barb. (N. Y.), 625.

[8] Crone v. Angell, 14 Mich., 340.

[9] Wood v. Southwick, 97 Mass., 354; Butterfield v. Buffam, 9 N. H., 156.

[10] Crone v. Angell, 14 Mich., 340; Gube v. McGinnis, 68 Ind., 538; Cole v. Grant, 3 Harr., 327; Bricker v. Potts, 12 Penn. St., 200; Wood v.

English cases: "He is under a charge of a prosecution for perjury; G. W. [an attorney] had the attorney-general's directions to prosecute him for perjury."[1]

To say that a man is "forsworn" or "has taken a false oath" is not a sufficiently definite charge of perjury; for there is no reference to any judicial proceeding. But to say "Thou art forsworn in a court of record" is a sufficient charge of perjury; for this will be taken to mean that he was forsworn while giving evidence in a court of record before the lawfully appointed judge thereof on some point material to the issue before him.[2]

(2) *With a colloquium — American cases:* "He swore false before 'Squire Andrews, and I can prove it," without a colloquium of its being in a cause pending, is not actionable.[3]

A charge of false swearing is not made actionable *per se* by the slanderer's intentionally refraining from stating before what court or magistrate, and in what suit, the imputed false swearing occurred. "He swore to a lie, and I can prove it; but I am not liable, because I have not stated in what suit he testified;" "M. swore false, and I can prove it; but I will not tell before what justice he testified." These words are not actionable of themselves.[4]

A., speaking with reference to a complaint preferred by him before the grand jury against B., said that "he went before the grand jury and asked them if they wanted any more witnesses, and they said they had witnesses enough to satisfy them." *Held* actionable if he thereby meant to impute the crime in question to B."[5] And so words charging one with having "sworn a lie on a trial before 'Squire T." are actionable with a colloquium that T. was a justice of the peace.[6]

It is not actionable in itself to say of a person "He swore to a lie;" but the charge in fact may be actionable, for it may have reference to a judicial proceeding in which the party is

Southwick, 97 Mass., 354; Pelton v. Ward, 3 Caines (N. Y.), 347; Ring v. Wheeler, 7 Cow. (N. Y.), 725.

[1] Roberts v. Camden, 9 East, 93; Holt v. Scholefield, 6 T. R., 691; Ceely v. Hoskins, Cro. Car., 509.

[2] Stanhope v. Blith (1585), 4 Rep., 15; Holt v. Scholefield, 6 T. R., 691; Ceely v. Hoskins, Cro. Car., 509.

[3] Stafford v. Green, 1 Johns., 505.

[4] Muchler v. Mulhollen, Lalor, 263.

[5] Rundell v. Butler, 7 Barb., 260.

[6] Canterbury v. Hill, 4 Stew. & P. (Ala.), 224.

charged with having sworn falsely. To make the charge slanderous the declaration must contain a colloquium, with proper references to the proceeding in which the alleged false swearing is charged to have occurred.[1]

Words charging a party with having "sworn to a lie," no reference being made to a judicial proceeding, are not actionable in themselves.[2]

§ 57. **General Illustrations — Digest of American Cases.—**

1. Words charging perjury are actionable in themselves. Lee v. Robertson, 1 Stew. (Ala.), 138; Carlock v. Spencer, 7 Ark., 12; Eccles v. Shannon, 4 Harr. (Del.), 193; Rhinehart v. Potts, 7 Ired. (N. C.) L., 403; Newbit v. Statuck, 35 Me., 315.

2. *It has been held a sufficient charge of perjury without proof of special damage* to say of a person, "You swore false at the trial of your brother." Fowle v. Robbins, 12 Mass., 498. To say "A. swore to a lie on the trial of" a certain action, naming it. Ramey v. Thornbury, 7 B. Monroe (Ky.), 475. So to say, "He swore to a damned lie, and I will put him through for it if it costs me all I am worth." Crone v. Angell, 14 Mich., 340. So, "You swore to a lie before the grand jury." Perselly v. Bacon, 20 Mo., 330.

3. "You swore to a lie, for which you now stand indicted." Pelton v. Ward. 3 Cai. (N. Y.), 73. "He swore falsely before 'Squire A., and I can prove it." Safford v. Grau, 1 Johns. (N. Y.), 505.

4. Words charging a person with having sworn falsely before the grand jury in an alleged proceeding are actionable though such proceeding was never had; or, if had, such person was never examined as a witness therein. Holt v. Turpin, 78 Ky., 433.

5. To say of a witness, while giving his testimony in a judicial proceeding, "That is a lie;" "I believe you swore false;" "It is false what you say," if done maliciously and with a view to defame the witness, is actionable. Mower v. Watson, 11 Vt., 536; Kean v. McLaughlin, 2 Serg. & R., 469; Cole v. Grant, 18 N. J. L. (3 Harr.), 327; McLaing v. Wetmore, 6 Johns. (N. Y.), 82.

6. *But it has been held insufficient* to say, "He said I swore false and swore to a lie," with an innuendo, meaning that the said J. committed perjury, that he had taken a false oath before a magistrate, because the words were not actionable of themselves, and were not made so by the innuendo. Sheely v. Biggs, 2 Harr. & J. (Md.), 363.

[1] Barger v. Barger, 18 Penn. St., 489; Bonner v. McPhail, 31 Barb. (N. Y.), 106; Shinlaub v. Ammerman, 7 Ind., 347; Mebane v. Sellers, 3 Jones (N. C.), 199; Watson v. Hampton, 2 Bibb (Ky.), 319; Vaugh v. Havens, 8 Johns. (N. Y.), 109; Morgan v. Livingston, 2 Rich. (S. C.), 573.

[2] Hopkins v. Beedle, 1 Cai. (N. Y.), 347; Bonner v. McPhail, 31 Barb. (N. Y.), 106; Pegram v. Stoltz, 76 N. C., 349; Barger v. Barger, 18 Penn. St., 489; Shinlaub v. Ammerman, 7 Ind., 347; Ham v. Wickline, 26 Ohio St., 81; Mebane v. Sellers, 3 Jones (N. C.), L., 199; Watson v. Hampton, 2 Bibb (Ky.), 319.

7. Words charging a person with swearing to falsities before a justice are not actionable. Robertson v. Lea, 1 Stew. (Ala.), 141. So the words, "If I had sworn to what you did I would have sworn to a lie," do not of themselves import a charge of perjury. Beswick v. Chappel, 8 B. Monroe (Ky.), 486.

8. The words "he has sworn false" are not actionable where the colloquium is concerning an extrajudicial affidavit. Straffer v. Kintzee, 1 Binn. (Pa.), 537. Or to say of one "he swore to a lie before the church sessions, and I can prove it," is no slander. Horney v. Boies, 1 Pa., 13.

9. *What is a court of competent jurisdiction.*—The registers and receivers of the different land offices are constituted by the acts of congress a tribunal to settle controversies relating to claims to pre-emption rights, and therefore an oath administered in such a controversy before the register alone is extrajudicial; and, as perjury cannot be predicated upon such evidence, an action for slander cannot be maintained for a charge of false swearing in such a proceeding. Hall v. Montgomery, 8 Ala., 510.

10. Words charging a person with perjury before an ecclesiastical tribunal are actionable in themselves. Chapman v. Gillett, 2 Conn., 40. But where a person who had testified under oath before the processioners was accused of swearing falsely, it was held that the action of slander could not be maintained, because the processioners had no legal authority to administer the oath. Dalton v. Higgins, 34 Ga., 433.

11. Slander will lie on an accusation of perjury in a criminal cause, although the complaint therein was too defective for an irrevocable judgment. Wood v. Southwick, 97 Mass., 354.

12. An arbitration is so far a judicial proceeding under the laws of Tennessee that false swearing in such a proceeding is perjury, and an action of slander may be maintained on a charge of swearing falsely in such a proceeding. Moore v. Horner, 4 Sneed (Tenn.), 491.

13. Slander will not lie for charging a witness with perjury while testifying before arbitrators if after the oath is administered and new matters in controversy are submitted, and the charge is made in reference to what is said by the witness after such addition of parties and matters. Bullock v. Com., 4 Wend. (N. Y.), 531.

14. To charge a party with swearing false in an affidavit made to obtain a warrant from a justice of the peace is actionable if the affidavit contains any material fact proper to be submitted to the justice on such application, although the affidavit might not be sufficient to justify the issuing of the warrant. Dayton v. Rockwell, 11 Wend. (N. Y.), 140.

15. Words are actionable which imply in the ordinary import that a false oath was taken in a judicial proceeding, though no such proceeding existed. Bricker v. Potts, 12 Penn. St., 200.

16. If a justice of the peace issues a state warrant on an insufficient affidavit, and the party accused on being arrested proceeds to trial before the justice without objection, the insufficiency of the affidavit will not render the proceedings *coram non judice;* and to charge a witness with swearing falsely on such a trial is actionable. Henry v. Hamilton, 7 Blackf. (Ind.), 506.

17. *Materiality of the testimony.*—If one person charges another with

swearing falsely in a trial in court in relation to a particular matter, and that matter was not material, an action cannot be maintained. Darling v. Banks, 14 Ill., 46.

§ 58. **The Offense under Statutes.**— Besides the offense of perjury at common law, false swearing under a variety of circumstances, differing widely from each other in degrees of criminality, has been declared by numerous statutes to be perjury and punishable as such. These statutes do not seem to be founded upon any general principle, and consequently they describe in nearly every particular case a distinct offense, to which the appellation of perjury is given. With few exceptions they are all drawn with a total disregard of the peculiar characteristics of the offense at common law, and its obvious distinction from mere false swearing. Words imputing the commission of the statutory offense are actionable in themselves.

§ 59. **The Imputation under Statutes — Statutory Slander.**— It seems to be a very harsh rule of law which permits a person to charge another with the commission of the crime of perjury with impunity because the words were not spoken of some judicial proceeding, and it has evidently been the design of the legislatures of several states to suppress this species of defamation by competent statutory enactments. By a statute of Illinois it is deemed to be slander and actionable to charge any person with swearing falsely, or with having sworn falsely, or for using, uttering or publishing words of, to or concerning any person which, in their common acceptation, amount to such charge, whether the words be spoken in conservation of and concerning a judicial proceeding or not.[1] In the absence of similar enactments, the settled rule of law is that to charge a person with having sworn falsely is not actionable unless it refers to some swearing in a judicial proceeding.

§ 60. **Homicide — The Offense Defined.**— The unlawful killing of a human being in the peace of the people with malice aforethought, either express or implied.

(1) It is felonious where death is caused by an act done with the intention to cause death or bodily harm, or which is commonly known to be likely to cause death or bodily harm, and when such act has no legal justification or excuse.

[1] R. S. Ill. 1887, 1216.

(2) When death is caused by an omission, amounting to culpable negligence, to discharge a duty tending to the preservation of life, whether such omission is or is not accompanied by an intention to cause death or bodily harm.

(3) When death is caused by an unlawful act.[1]

§ 61. **The Moral Effect of the Charge.**— Felonious homicide was said by Sir William Blackstone to be the highest crime against the law of nature that man is capable of committing. Of crimes injurious to both private persons and the public, the principal and most important is the offense of taking away life, the immediate gift of the Creator, and of which, therefore, no man can be entitled to deprive another but in some manner expressly commanded in or evidently deducible from those laws which He has given us — the divine laws, either of nature or revelation. Although the offense has something of the heroic in its nature when compared to insignificant or minor offenses, the murderer has in all ages of the world been looked upon by civilized society as the enemy of his race — a being to be shunned in mortal terror and to be abhorred above all things. Hence, it may well be said the moral effect of the charge is to place the person to whom it is imputed under the suspicion of his fellow-men and companions in society. As a murderer, the word expresses the idea as well as words can — a man upon whom the revengeful though invisible hand of God is lifted; the mark of Cain upon his brow.

§ 62. **Words Imputing the Commission of the Offense.**— The following words, sentences and phrases have been held to sufficiently charge the commission of the offense:

(1) *American cases:* The words, "He knows how she came to her death. He killed her. He is to blame for her death. There was foul play there," impute a crime. But the words, "He killed her by his bad conduct, and I think he knows more about her being drowned than anybody else," import no charge of criminal homicide by themselves, and are not actionable without explanatory averments.[2]

Words charging homicide generally, without a charge that it was felonious, are actionable in themselves.[3] So are the

[1] Steph. Crim. Dig., 143; Rapalje & Lawrence, Law Dict., 614.

[2] Thomas v. Blasdale (Mass.), 18 N. E. Rep., 214.

[3] Taylor v. Casey, Minor (Ala.), 258. See, also, Republican Pub. Co. v. Miner, 3 Colo. App., 568.

words, "They have killed my son and are trying to cheat me out of my land." "In room of her trying to help him she seemed to do all she could to hurry him out of the world." [1]

Any words spoken with intent to convey, and which reasonably convey, the impression that a person has robbed parties and then murdered them are actionable.[2]

An action lies for charging one with murder, and the plaintiff may recover though it is shown that the person alleged to have been murdered is still alive, provided the by-standers understood from the slander that he had been murdered.[3] So the words, "You have killed A.—you have poisoned him," are actionable, though at the time they were spoken A. was really living in a distant part of the country.[4] And where A. said to B., "You have killed one negro and nearly killed another," it was held that these words being capable of two constructions, it should be left to the jury to decide whether they were used in a defamatory sense or otherwise.[5]

(2) *English cases:* "He broke his father's ribs, of which he died; he may be hanged for the murder." [6] "Thou hast killed A." [7] "He dispatched his wife and will dispatch me too." [8] "He killed my wife." [9] "Thou didst do murder." [10] "Thou hast killed thy master's cook." [11] "I am thoroughly convinced that you are guilty of the death of Daniel Dolly; and rather than you should want a hangman, I will be your executioner,—" [12] have all been held to be sufficient imputations of the commission of the offense.

But it is not sufficient to say: "Hext seeks my life," because he may seek his life lawfully upon just cause.[13] "He was the cause of the death of Dowland's child," because a man might innocently cause the death of another by accident or

[1] O'Connor v. O'Connor, 24 Ind., 218.
[2] Harrison v. Findlay, 23 Ind., 265.
[3] Sugart v. Carter, 1 Dev. & B. (N. C.) L., 8.
[4] Eckart v. Wilson, 10 Serg. & R., 44.
[5] Hays v. Hays, Humph. (Tenn.), 402.
[6] Philips v. Kingston, 1 Vent., 117.
[7] 2 Mod. Ca., 24.
[8] 1 And., 120.
[9] Cro. Eliz., 823.
[10] 1 Roll., 72, 1, 15.
[11] Cooper v. Smith, Cro. Jac., 423; 1 Roll. Abr., 77.
[12] Peake v. Oldham, Cowp., 275; 2 Wm. Bl., 959.
[13] Hext v. Yeomans, 4 Rep., 15.

misfortune.[1] "Thou wouldst have killed me," for here a murderous intention only is imputed.[2]

§ 63. **Manslaughter Defined.**— Closely allied to the crime of homicide is that of manslaughter. It is defined in its most general sense as the unlawful killing of a human being, without malice expressed or implied, and without any mixture of deliberation whatever. It must be voluntary, upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible, or involuntary in the commission of an unlawful act without due caution or circumspection. The distinctions between these offenses are in some cases very difficult of application and extremely technical.

§ 64. **Words Charging the Commission of the Offense.**— The following words, phrases and sentences have been held in England to impute the commission of the crime of manslaughter, and as such actionable without proof of special damages:

It was alleged that the defendant, intending it to be believed that the plaintiff had been guilty of murder or manslaughter in a colloquium of and concerning the death of plaintiff's wife, used these words: "I think the present business ought to have the most rigid inquiry, for he murdered his first wife; that is, he administered, improperly, medicines to her for a certain complaint, which was the cause of her death."[3] "He killed my child; it was the saline injection that did it."[4]

§ 65. **Abortion — The Offense Defined.**—A miscarriage is the premature expulsion of the fœtus from the uterus before the period of gestation is completed. The offense of producing or attempting to produce an abortion, by administering drugs or by other means, is defined and its punishment prescribed by statutory enactments in the several states and in England;[5] though it does not seem to have been an offense at common law.

§ 66. **The Moral Effect of the Charge.**— Criminal abortion is an offense which strikes at the foundations of society. The abortionist is a Herod in the household, and with all Christian

[1] Miller v. Buckdon, 2 Buls., 10.
[2] Dr. Poe's Case, 1 Vin. Abr., 440, cited in 2 Buls., 206.
[3] Ford v. Primrose, 5 D. & R., 287.
[4] Edsall v. Russell, 4 M. & G., 1090; 2 Dowl. (N. S.), 641; 5 Scott, N. R., 801; 12 L. J., C. P., 4; 6 Jur., 996.
[5] 1 Rapalje & Lawrence, Law Dict., 5; Wellman v. Sun Print Pub. Co., 66 Hun, 331.

people must ever be regarded with contempt and shame. To charge a person with the commission or with an attempt to commit the offense is actionable without proof of special damage.

§ 67. **Words Imputing the Commission of this Offense.**— The following words, phrases and sentences charging the commission of the crime of abortion have been held actionable in themselves:

American cases: "E. H. has destroyed a child, and I can prove it. She tried to get medicine from Dr. C. to produce an abortion, and he refused to let her have medicine. She then tried everything she could and failed until the last resort, and that was lifting a large ladder, and that done the work. I will have her out of the church, and the grand jury will take it up and she will be sent to the penitentiary, where all such persons ought to be."[1] "You have administered to your daughter pills to drive off the child."[2] "I believe he has got Mrs. B—— down there; I am perfectly satisfied in my own mind that she is down there, and is pretty sick; and that is what B. is running down there so much for; he knocked her up; her time has come around, and he is down there getting a child away from her. He is procuring an abortion upon her."[3] To say of a woman, "She procured or took medicine or poison to kill the bastard child she was like to have; and she did kill or poison the bastard child she was like to have," is actionable.[4]

As mailing a circular advertising articles for preventing conception and procuring abortion is an indictable offense, charging such mailing is slanderous in itself.[5] And so is charging a person with being an abortionist.[6]

§ 68. **Accessory — Words Imputing the Offense.**—After an allegation imputing the commission of a felony to A. by night, in which he was discovered and driven off, there was added an allegation: "When I drove him off I saw B. standing at the road holding a torch for him." It was held that the words

[1] Hatfield v. Gano, 15 Iowa, 177.
[2] Filber v. Dautermann, 26 Wis., 518.
[3] Butler v. Wood, 10 How. (N. Y.), 222.
[4] Widrig v. Oyer, 13 Johns. (N. Y.), 124.
[5] Halstead v. Nelson, 36 Hun, 149.
[6] De Pew v. Robinson, 95 Ind., 109.

import a criminal participation by B. in the offense, and are actionable in themselves at the suit of B.[1]

§ 69. **Arson — The Offense Defined at Common Law.**— The act of unlawfully and maliciously burning the house of another person.[2] At the present day there is no distinction between arson and the crime of unlawfully and maliciously setting fire to a place of worship, a building used in farming, trade or manufacture, a stack of hay or wood, a ship, a mine of coal, or a public or *quasi* public building.[3] In many of the states this offense is defined and the penalty prescribed by statutory enactments. The crime consists in the destroying of the property of another through the agency of fire.[4]

§ 70. **Words Imputing the Commission of the Offense.**— The following words, phrases and sentences charging the commission of the crime of arson have been held to be actionable in themselves:

American cases: "It is the general opinion of the people in J.'s neighborhood that he burnt C.'s gin-house. I can prove that J. burnt the gin-house of C. by H. J. was in a condition about the gin-house, previous to the burning of it, which caused every person in the settlement to believe J. did burn the house."[5] "I have every reason to believe he burnt the barn. I believe he burnt the barn."[6] "Some time ago Mr. Norris' stables were burnt and I lost my horse, and public opinion says you was the author of it, and what public opinion says I believe to be true," spoken by one person to another is a sufficient charge imputing the crime of arson — provided, of course, that the burning of the stables alluded to was arson.[7] "I believe A. burnt the camp ground."[8] To maliciously charge a person with wilfully burning a school-house, the property of another, is actionable in itself. But where the declaration

[1] Hooper v. Martin, 54 Ga., 648.

[2] 2 Russell on Crimes, 896.

[3] 1 Rapalje & Lawrence, Law Dict., 80.

[4] People v. Henderson, 1 Park. Cr. (N. Y.), 560; Davis v. Carey, 8 Pa. Co. Ct. R., 578; 28 W. N. C., 10; Ellington v. Taylor, 46 La. Ann., 371.

[5] Waters v. Jones, 3 Port. (Ala.), 442.

[6] Logan v. Steel, 1 Bibb (Ky.), 593.

[7] Gray v. Shelton, 3 Rich. (S. C.), 242.

[8] Giddins v. Mirk, 4 Ga., 364.

stated that the defendant maliciously said of the plaintiff: "He burnt the school-house" (innuendo), "the school-house of the defendant," or "you burnt the school-house," or the plaintiff, by name, "burnt the school-house," with the same innuendo. On a motion in arrest of judgment it was held that the words did not in themselves necessarily convey the meaning that the plaintiff had wilfully burned the house, and that the declaration was insufficient.[1]

English cases: It was held in 1602 that no action lay for saying "Master Barham did burn my barn with his own hands;" for at that date it was not felony to burn a barn unless it were either full of corn or parcel of a mansion-house; and defendant has not stated that his barn was either.[2]

§ 71. **Attempts to Commit Offenses.**—An attempt to commit a crime is a misdemeanor at common law.[3] The effect of the imputation of the commission of this offense must depend very much upon the state of the law in those jurisdictions where the imputation is made.

American cases: In Alabama the words "W. J. B. tried to steal Tobe Ready's hog, but he could not do it,"[4] was held actionable.

Words imputing to one an attempt to procure a miscarriage, not within the exceptions of the statute, are actionable in themselves.[5]

English cases: "You have sought to murder me. I can prove it."[6] "She would have cut her husband's throat, and did attempt to do it."[7]

But the following was held to be insufficient: "Thou wouldst have killed me."[8] "Sir Harbert Crofts keepeth men to rob me."[9] "He would have robbed me."[10] For here no overt act is charged, and mere intention is not criminal.[11]

[1] James v. Hungerford, 4 Gill & J. (Md.), 402; McKee v. Ingalls, 4 Scam., 30; Seaton v. Codray, Wright, 101; Wilson v. Tatum, 8 Jones (N. C.) L., 300.

[2] Barham's Case, 4 Rep., 20; Yelv., 21.

[3] Bishop's Crim. Law, § 683.

[4] Berdeaux v. Davis, 58 Ala., 611.

[5] Bissell v. Cornell, 24 Wend., 354.

[6] Preston v. Pinder, Cro. Eliz., 309.

[7] Scott v. Hellior, Lane, 98; 1 Vin. Abr., 440.

[8] Dr. Poe's Case, cited in Murrey's Case, 2 Buls., 206; 1 Vin. Abr., 440.

[9] Sir Harbert Crofts v. Brown, 3 Buls., 167.

[10] Stoner v. Audely, Cro. Eliz., 250.

[11] Eaton v. Allen, 4 Rep., 16 b; Cro. Eliz., 684.

§ 72. **Keeping a Bawdy-house.**— Whatever may have been the earlier decisions it is now well settled in England that it is actionable, without proof of special damages, to charge a person with keeping a bawdy-house.[1]

American cases: The defendant sent a stranger to the house of the plaintiff, saying to him at the time: "It is a house of ill-fame, and kept by a whore named Mrs. Burns."[2] "He keeps a bad house, and not a proper place of resort; he keeps bad girls there," taken in their natural and obvious sense, impute the keeping of a house of ill-fame and are actionable.[3]

English cases: "You are a nuisance to live beside of. You are a bawd, and your house is no better than a bawdy-house."[4]

§ 73. **Bigamy — The Offense Defined.**— The act of a person who, having a legal husband or wife living, wilfully goes through the form of a marriage with another person. But a person marrying again during the life-time of the wife or husband will not be held guilty of this offense in cases where the wife or husband has been continually absent for seven years, and has not been known by the person so marrying to have been alive during that time.[5]

§ 74. **Words Imputing the Commission of this Offense.**— The following words, phrases and sentences charging the commission of the crime of bigamy have been held actionable in themselves:

American cases: "He was married to a woman [naming her] and kept her till he got sick of her, and then sent her away, he having all this time two wives."[6]

English cases: Mrs. Heming was sister to Mr. Alleyne. The defendant said: "It has been ascertained beyond all doubt that Mr. Alleyne and Mrs. Heming are not brother and sister, but man and wife." *Held*, that it was open to the jury to construe this as a charge of bigamy as well as of incest.[7]

[1] Brayne v. Cooper, 5 M. & W., 249; Huckle v. Reynolds, 7 Com. Bench, N. S., 114; 8 Com. Bench, 142; Allsop v. Allsop, 5 H. & N., 534; Perkins v. Scott, 1 H. & Colt., 153; Martin v. Stillwell, 13 Johns. (N. Y.), 275; McClean v. N. Y. Press Co., 19 N. Y. S., 262.

[2] Griffin v. Moore, 43 Md., 246.

[3] Fitzgerald v. Robinson, 112 Mass., 371.

[4] Huckle v. Reynolds, 7 C. B. (N. S.), 114.

[5] 1 Rapalje & Lawrence, Law Dict., 125; 3 Russell on Crimes, 264; 4 Steph. Com., 279.

[6] Parker v. Meader, 32 Vt., 300.

[7] Heming et ux. v. Power, 10 M. & W., 564.

A declaration stated that the defendant, intending to charge the plaintiff with the crime of bigamy, and to bring him into danger of legal punishment, published the false and malicious libel following, that is to say: "TEN GUINEAS REWARD. Whereas, by a letter lately received from the West Indies an event is stated to be announced by a newspaper, that can only be investigated by these means: this is to request that if any printer or other person can ascertain that James Delaney, Esq. [the plaintiff], some years since residing at Cork, late lieutenant in the North Lincoln militia, was married previous to 9 o'clock in the morning of the 10th of August, 1799, they will give notice to —— Jones [the defendant], No. 14, Duke street, St. James', and they shall receive the reward."

There was no innuendo that the defendant meant thereby to insinuate and have it understood that the plaintiff had been and was married before the time mentioned in the advertisement, and had another wife then living; he being then married to one Elizabeth Weston, his present wife.

The defense relied upon and given in evidence was that this advertisement had been inserted by the authority of the plaintiff's wife, for the purpose of discovering whether the plaintiff had another wife living.

Lord Ellenborough: "This paper is relied upon as necessarily carrying with it the imputation that the plaintiff was guilty of bigamy. You must be of opinion that it does carry such imputation before you can find a verdict for the plaintiff, as that meaning is necessary to make the paper a libel at all. The plaintiff's counsel contend that you are to take into your consideration only whether the advertisement conveys a libelous charge against the plaintiff or not. I am of a different opinion. I conceive the law to be that though that which is spoken or written may be injurious to the character of the party, yet if done *bona fide*, as with a view of investigating a fact, in which the party making it is interested, it is not libelous. If, therefore, this investigation were set on foot and this advertisement published by the plaintiff's wife, either from anxiety to know whether she was legally the wife of the plaintiff, or whether he had another wife living when he married her, though that is done through the medium of imputing bigamy to the plaintiff, it is justifiable; but in such a case it

is necessary for the defendant who publishes the libel to show that he published it under such authority and with such a view. The jury are therefore first to say whether the advertisement imputes a charge of bigamy to the plaintiff; and if they think it does, then to inquire whether the libel was published with a view by the wife of fairly finding out a fact respecting her husband, in which she was materially interested. If it was so, the publication is not a libel, and the defendant is entitled to a verdict."[1]

The jury found a verdict for the defendant.

§ 75. **Blackmailing — Statutory Offense.**— The words "The blackmailing crowd in West Twenty-fifth street had better beware. Cautions 51 and 53," published of the plaintiff, who kept a boarding-house at these numbers, was held to impute the commission of the offense under the laws of New York.[2]

§ 76. **Bribery — The Offense Defined.**— A bribe is a gift or offer of a gift made to some public officer in order to influence or reward him in respect of or in relation to any business having been, being or about to be transacted before him in his office; and bribery is the offense committed by the person who gives or offers the bribe and by the officer who accepts it.[3]

At elections it is the offense of giving, offering or promising any money or other valuable consideration in order to induce a voter, or person supposed to be a voter, to vote or refrain from voting, or as a reward for his having voted or refrained from voting.[4]

§ 77. **Bribery of Voters — Statutory Offense — Libel.**— To publish of a candidate for office, "A remarkable and unparalleled case is presented in this congressional district: It is a man running for congress, not on any platform or any well-defined issue before the people, but simply on beer and bribery, and, what is more remarkable still, he has hopes of succeeding. A candidate for a high and responsible office, one who in the halls of congress will represent and express the

[1] Delany v. Jones, 4 Esp. N. P. R., 191.

[2] Robertson v. Bennett, 1 Abb. N. C., 476; Edsall v. Brooks, 2 Robt. (N. Y.), 29; 3 id., 284; Hess v. Sparks, 44 Kan., 465; Mitchell v. Sharon, 59 Fed. Rep., 980.

[3] Rapalje & Lawrence, Law Dict., 152; Russell on Crimes, 318.

[4] 2 Wheel. Am. C. L., 498, n.; Rapalje & Lawrence, Law Dict., 152; Field v. Colson, 93 Ky., 347; Boehmer v. Detroit Free Press, 94 Mich., 7; Booker v. State, 100 Ala., 30.

wishes of thirty thousand voters, is to be placed there simply through the influence of beer and money; or, more properly speaking — for it reduces itself to that — through beer and bribery," has been held to be actionable without proof of special damage.[1]

§ 78. **Burglary — The Offense Defined at Common Law.**— The felonious and forcible breaking and entering a dwelling-house in the night-time with intent to commit a felony therein. The execution of the criminal intent is immaterial. The breaking and entering may be actual or constructive — actual where a door or window is opened; constructive, where the entrance is obtained by threats or fraud, or by collusion with some person in the house.[2]

In the several states there are various enactments concerning this offense which modify to some extent the common-law definition. In some states it may be committed in the day-time equally as well as by night.[3]

§ 79. **The Moral Effect of the Charge.**— As was said under the head of larceny, the right to acquire and hold property is one of the fundamental principles upon which every civilized society rests; and so is the right to be secure in our habitations from the attacks of thieves who break in and steal. This offense, says Sir Matthew Hale,[4] specially concerns the habitation of man, to which the laws of England have a very special regard. So much so and so far has the law been carried in this respect in England, and also in America, that no real breaking or entry is required to constitute the offense — provided, of course, the criminal intent is present. It may be constructive, as by unfastening a window or door and opening it,[5] or by opening a window and putting the hand inside. This crime is something more than an aggravated form of larceny, and in law it is always considered a much more serious offense.

A person who is guilty of burglary, or who has a criminal instinct or tendency to commit the offense, is to be regarded as a most dangerous member of society. Hence the charge is

[1] Heilman v. Shanklin, 60 Ind., 424.

[2] 2 Russell on Crimes, 2; Bishop, Crim. Law.

[3] 1 Rapalje & Lawrence, Law Dict., 158; R. S. Ill. 1887, 434.

[4] 1 Hale's Pleas of the Crown, 547.

[5] Com. v. Stevenson, 8 Pick. (Mass.), 354; Rex v. McKenney, Jebbs' Case, 99.

a serious one to be made, and if made maliciously and falsely the imputation must be regarded in law as much more serious than that of larceny.

§ 80. **Words Imputing the Commission of this Offense.**— The following words, phrases and sentences have been held actionable in themselves as imputing the commission of burglary:

American cases: "He broke into my house and robbed it;" "he entered my house and stole my money and my son's money;" "my son Herbert saw him in the house and saw him rob it, and will testify to it."[1]

§ 81. **Embracery Defined.**— Embracery is an attempt by either party or by a stranger to corrupt or influence a jury, or to incline them to favor one side by gifts or promises or persuasions, or by instructing them in the cause, or in any other way except by opening and enforcing the evidence by counsel at the trial. It is an offense at common law and under the statute.[2] To say of a man "he handed papers to influence or bribe the jury," or "he handed papers to influence or bribe the jury to bring me in guilty," is actionable as imputing the commission of this offense.[3]

§ 82. **Cheating — The Offense Defined.**— The act of fraudulently obtaining the property of another by any deceitful practice not amounting to felony, but of such a nature that it affects or may directly affect the public at large.[4] The term "cheating" is synonymous with "swindling."[5] The following words have been held to impute the commission of this and kindred offenses: "You had better go to Tom McW. and pay him back the twenty dollars you got from him by false pretenses."[6] "He has cheated her out of her money. He says he paid twenty-six dollars for her at the insane asylum, but I have found out he only paid twenty dollars." "It is rumored in the congregation that you had cheated the girl."[7]

[1] Eames v. Whittaker, 123 Mass., 342.

[2] Gibbs v. Dewey, 5 Cow. (N. Y.), 503; 3 Bac. Abr., 785; 1 Hawkins, P. C., ch. 85; 4 Black. Com., 140.

[3] Gibbs v. Dewey, 5 Cow. (N. Y.), 503.

[4] 1 Rapalje & Lawrence, Law. Dict., 201.

[5] Com. v. Andrews, 2 Mass., 408.

[6] Lafollett v. McCarthy, 18 Brad. (Ill.), 87.

[7] Bihler v. Gockley, 18 Brad. (Ill.), 496. See, also, Graetes v. Hogan, 2 Ind. App., 193; Frolich v. McKiernan, 84 Cal., 177; McCauley v. Elrod (Ky.), 27 S. W. Rep., 867.

§ 83. **Counterfeiting — The Offense Defined.**— The act of making or importing bogus coin resembling the genuine, intended to pass as such, or altering the genuine coin so as to make the same resemble and pass for coin of a higher denomination.

§ 84. **Words Imputing the Commission of the Offense.**— The following words charging the commission of the offense have been held actionable in themselves: "You are a counterfeiter," because they impute an offense punishable with infamous punishment.[1]

§ 85. **Embezzlement — The Offense Defined.**— The commission of larceny by a clerk, agent or other servant of the property in his custody by reason of his employment. It is a species of larceny, and the term is applicable to cases of furtive and fraudulent appropriation by clerks, servants or carriers of property coming into their possession by virtue of their employment. It is distinguished from larceny, properly so called, as being committed in respect of property which is not at the time in the actual possession of the owner.[2] In many of the states this offense is more specifically defined by statutory enactments.

§ 86. **Words Imputing the Commission of the Offense.**— The following words have been held sufficient to impute the commission of the crime of embezzlement, and are actionable without proof of special damages:

American cases: "He has sold the property of the company and pocketed the money," spoken of a person in his capacity as director and superintendent of a company.[3] "A young man employed as director and collector by A. H. G. has disappeared with some of his employer's funds, and the police have been notified," published in a newspaper.[4] Where it is shown that the words spoken by the defendant in an action for slander of the plaintiff were "that he stole two or three thousand dollars from the defendant's brother in the

[1] Howard v. Stephenson, 2 Treadw. (S. C.), 408.

[2] People v. Burr, 41 How. (N. Y.), 294; 4 Black. Com., 220; 1 Burrill, Law Dict., 415; Barbour's Crim. Law, 149; Chap'n v. Lee, 18 Neb., 440; 25 N. W. Rep., 609; Hackett v. Providence Tel. Co., 18 R. I., 589.

[3] Johnson v. Shields, 1 Dutcher (N. J.), 116.

[4] Mallory v. Pioneer Press Co., 34 Minn., 521; 26 N. W. Rep. 904.

state of Ohio," the mere statement in connection with such words that the plaintiff was in business with defendant's brother, or was a clerk for him when he stole the money, would be no explanation of the offensive words, and would not reduce the crime charged from larceny to the common-law offense of embezzlement without the further explanation that the money charged to have been stolen was received from the sale of goods and appropriated by him.[1]

English cases: "You are a rogue and a villain; and what have you done with the commoner's money you embezzled?"[2]

§ 87. **Forgery — The Offense Defined.** — The act of doing one of the following things with intent to defraud:

(1) To make a document purporting to be what it is not.

(2) To alter a document without authority in such a manner that if the alteration had been authorized it would have altered the legal effect of the document.

(3) To sign a document in the name of a person without his authority, whether such name is or is not the same as that of the person signing it.

(4) To sign a document in the name of any fictitious person alleged to exist.

(5) To sign a document in a name represented as being the name of a different person from that of the person signing it, and intended to be mistaken for the name of the former.

(6) To sign a document in the name of a person personated by the person signing, if the effect of the document depends upon the identity between the person signing it and the person whom he professes to be.[3]

§ 88. **Under Statutes.** — In the United States this offense is punished by statutory penalties, but there are many things which may be the subject of forgery and do not come within the meaning of these statutes. As applicable to such things the subject of forgery is taken up by the common law, by which the false and fraudulent making of any written instrument with intent to prejudice any public or private right is designated as a criminal act and punished as such;[4] and hence the

[1] Upham v. Dickenson, 50 Ill., 97.
[2] Williams v. Scott, 1 C. & M., 675; 3 Tyrw., 688.
[3] 2 Russell on Crimes, 618; 1 Rapalje & Lawrence, Law Dict., 537.
[4] Com. v. Ayer, 3 Cush. (Mass.), 150, Reg. v. Sharman, 6 Cox, C. C., 312.

imputation of the false and fraudulent making of any such instrument or the general charge of forgery is actionable in itself.[1] As a general rule, however, the charge of the forging of any writing which is genuine would not operate as the foundation of another person's liability or to the prejudice of any public or private right, and is not actionable.[2]

American cases: In slander the word "forgery" does not necessarily mean a felonious forgery, for which alone an action lies. The charging of a person with forging a name to a petition to the legislature to procure lands is slanderous.[3] So words charging a person with having forged a deposition are actionable.[4] But charging that the defendant signed a note as surety for the plaintiff, and afterward denied having signed it, does not import a charge of forgery against the plaintiff.[5]

English cases: In the English courts the following words have been held a sufficient charge of forgery: "This is a counterfeit warrant made by Mr. Stone."[6] "Thou hast forged a privy seal and a commission." *Per cur.:* "'A commission' shall be intended the king's commission, under the privy seal."[7] "You forged my name," although it is not stated to what deed or instrument.[8]

§ 89. **Gaming — Keeping a Gambling-house — The Offense Defined.** — The word "gamble," as defined by the lexicographers, means "to game or play for money." In common parlance a gambler is one who follows or practices games of chance or skill with the expectation and purpose of thereby winning money or other property. To say of a man that he keeps a gambling place or a gambling den imputes that he keeps a place at which gambling is practiced, and includes the idea that the place is resorted to for that purpose. All such gaming is illegal. A charge of that kind conveys a criminal imputation, and is actionable without proof of special damages.

[1] Nichols v. Hays, 13 Conn., 155; Andrews v. Woodmansee, 15 Wend., 232; Barnes v. Crawford, 115 N. C., 76.

[2] Jackson v. Weisiger, 2 B. Monroe (Ky.), 214.

[3] Alexander v. Alexander, 9 Wend., 141.

[4] Atkinson v. Reading, 5 Blackf. (Ind.), 39.

[5] Andrews v. Woodmansee, 15 Wend., 232.

[6] Stone v. Smalcombe, Cro. Jac., 648.

[7] Baal v. Baggerly, Cro. Car., 326.

[8] Jones v. Herne, 2 Wils., 87, overruling Anon., 3 Leon., 231; 1 Roll. Abr., 65.

The words "B. keeps a gambling hell. B. makes his money easy. He keeps a gambling place. My husband don't visit B.'s gambling den,"[1] have been held to impute the commission of this offense.

§ 90. **Incest — The Offense Defined.** — The carnal knowledge of persons within the degree of kindred in which marriage is prohibited. In the United States it is punished by fine and imprisonment.

§ 91. **Moral Effect of the Charge.** — It rests with the positive law to determine the degrees of relationship within which carnal intercourse becomes unlawful; for, although marriages between persons nearly related are clearly opposed to the law of nature, it is difficult to fix the point at which they cease to be so. With rare exceptions all civilized nations have agreed in regarding marriage between those lineally related as unnatural and offensive; but beyond this point rules and opinions have been various. Of the writers who have argued this question, Mr. Taylor, in his work on the Roman law, holds that it is not with the case of lineal relationship alone that the law of nature is concerned; that in proportion as other relatives approach in nearness to the paternal is fraternal relation. Marriages between them are to be more or less severely denounced; and, finally, that the first point at which intermarriage between kindred is consistent with propriety is that of the fourth degree, as fixed by the civil law. By this rule the Roman law permitted the marriage of the children of brothers and sisters.[2] So did the Levitical laws;[3] and this was the rule of the Roman church until the time of Pope Alexander II. The rule of the Roman law is generally observed also in the positive law systems of modern states. In England and in nearly all of the United States the marriage of cousins is certainly lawful, and not an uncommon practice, though of late much attention has been paid to the subject, and powerful arguments resting upon unquestionable and significant facts have been urged against such marriages.[4] In Illinois the marriages of first cousins are declared by the statute to be incestuous and prohibited.[5] The moral effect of the imputation of this offense

[1] Buckley v. O'Niel, 113 Mass., 193.
[2] Institutes, I, 10.
[3] Levit., ch. 18: 6–20; Numbers, ch. 36: 10–11.
[4] 9 American Encyclopedia, 473.
[5] R. S. Ill. 1887, p. 873.

differs greatly according to the location and degree of consanguinity existing between the parties. In most of the states to falsely charge a man with having married his cousin would not be actionable at all, while in Illinois, where marriages between cousins of the first degree are declared incestuous and void, it would undoubtedly be slander. But what can be more degrading than the imputation of a person sustaining impure relations with a sister — and this, too, notwithstanding the form of marriage may have been celebrated between them?

§ 92. **Words Imputing the Commission of this Offense.**— The following words, phrases and sentences have been held actionable in themselves:

American cases: "My father-in-law has used my wife for eleven years. The children are not mine; they are from him."[1]

English cases: Mrs. Heming was sister to Mr. Alleyne. The defendant said: "It has been ascertained beyond all doubt that Mr. Alleyne and Mrs. Heming are not brother and sister, but man and wife." *Held*, that it was open to the jury to construe this as a charge of bigamy as well as of incest.[2]

§ 93. **Kidnaping — The Offense Defined at Common Law.**— The forcible and unlawful abduction and conveying away of a man, woman or child from his or her home without his or her will or consent, and sending such person away with intent to deprive him or her of some right.[3] Under the statutes of New York, which define the offense substantially as at common law, a publication in these words was held to impute the offense and to be libelous.

A northern freeman enslaved by northern hands. November 30, 1836, Peter John Lee, a free colored man, of Westchester county, N. Y., was kidnaped by Tobias Boudinot, E. R. Waddy, John Lyon and Daniel D. Nash, of New York city, and hurried away from his wife and children into slavery. One went up to shake hands with him, while the others used the gag and chain. See "Emancipator," March 16 and May 4, 1837. This is not a rare case. Many northern freemen have been enslaved, in some cases under color of law.[4]

[1] Guth v. Lubach, 40 N. W. Rep. (Wis.), 681.

[2] Heming and wife v. Power, 10 M. & W., 564.

[3] 1 Bouvier's Law Dict., 690.

[4] Nash v. Benedict, 25 Wend. (N. Y.), 645.

§ 94. **Libel — The Offense Defined.**— In its most general sense, a published writing, picture or similar production, of such a nature as to immediately tend to occasion mischief to the public, or to injure the character of an individual.[1]

To falsely charge another with being the author of a libel has been held actionable, as imputing an offense involving moral turpitude.[2]

For example: "What is a woman that makes a libel? She is a dirty creature, and that is you. You have made a libel, and I will prove it."[3]

§ 95. **Rape — The Offense Defined.**—

Bishop: The having of unlawful carnal knowledge by man of a woman, forcibly and against her will.[4]

Blackstone: The carnal knowledge of a woman, forcibly and against her will.[5]

Lord Coke: Rape is where a man hath carnal knowledge of a woman by force and against her will.[6] It is a felony by the common law.[7]

Sir Matthew Hale: The carnal knowledge of any woman above the age of ten years against her will, and of a woman-child under the age of ten years with or against her will.

Hawkins: "It seems that rape is an offense in having unlawful and carnal knowledge of a woman by force and against her will."[8]

§ 96. **Moral Effect of the Charge.**— Every civilized nation, ancient and modern, has declared by its criminal codes its abhorrence of this offense, and affixed to its commission the severest punishments. By the Mosaic law to ravish a damsel who was betrothed to another was held to be an offense punishable with death; and in case of one not betrothed the offender was compelled to take the damsel to wife and pay the father a fine of fifty shekels. By the civil law rape was punishable by death and confiscation of goods. The civilians,

[1] 2 Rapalje's & Lawrence, Law Dict., 752.

[2] Boogher v. Knapp, 8 Mo. App., 591. See, also, Divens v. Meredith (Ind.), 47 N. E. Rep., 143.

[3] Andreas v. Koppenheafer, 3 Serg. & Raw. (Penn.), 255.

[4] 2 Bishop, Crim. Law, § 1113.

[5] 4 Black. Com., 210.

[6] Coke, 2 Inst., 180.

[7] 1 Hale's Pleas of the Crown, 628.

[8] 1 Hawkins' Pleas of the Crown, Curw. ed., p. 123, § 2.

however, made no distinction between rape, as defined by the common law of England, of which force and want of consent are the characteristic elements, and seduction without force, of which the common law takes no cognizance. Under this law the unlawful carnal knowledge of a woman with her consent was punished in the same way as if obtained forcibly and against her will. This is said to have been so because the Romans entertained so high an opinion of the chastity of their women they would not presume them to be capable of a violation of it unless induced by evil acts and solicitations; and in order to more effectually secure them from danger, they made a violation of the chastity of their women, however consummated, equally a crime in the man, and visited its penalties upon him alone. By the Saxons rape was considered as a felony and punished with death, though the woman (if single) might redeem the offender from execution if she was willing to accept him in marriage. But William the Conqueror, probably deeming the punishment of death too severe, changed it to castration and loss of the eyes. By the statutes of George IV. and Victoria it was made a non-capital felony, punishable by transportation for life. In this country, although the punishment varies somewhat in the different states, it is by all treated as a felony and punished either by death, imprisonment for life or for some term of years.[1] Sir Matthew Hale said it was a most detestable crime, and therefore ought severely and impartially to be punished with death.[2]

§ 97. **Words Imputing the Commission of this Offense.**— The following words, phrases and sentences charging the commission of the crime of rape have been held actionable in themselves:

English cases: "He would have been hanged for a rape but it cost him all the money in his purse."[3] In another case for the words, "Thou hast ravished a woman; and I will make thee stand in a white sheet," it was held no action would lie, because it appeared from the latter words that the speaker only intended to impute the commission of such an offense as was punishable in the spiritual courts.[4]

[1] 13 American Encyclopedia, 761.
[2] 1 Hale's Pleas of the Crown, 635.
[3] Redfern v. Todel, Cro. Eliz., 589.
[4] Ridges v. Mills, Cro. Jac., 666.

§ 98. **Robbery — The Offense Defined.**— The felonious and violent taking away from the person of another goods or money to any value;[1] larceny committed by violence from the person of one put in fear.[2] The word robbery has but one legal sense. *Prima facie* it means an unlawful taking with violence, and must be so understood, unless it appears from the context or is shown by the defendant that it is meant in some other sense; for example, the words "you robbed W." are actionable in themselves.[3] Here the law acknowledges but one meaning, and that is the worst. The effect of a colloquium or innuendo can only be to show that the words were used in a sense inferior to that which must, *prima facie*, be presumed.[4]

§ 99. **Moral Effect of the Charge.**— Robbery has always been considered a crime of a very aggravated nature, and especially so when committed with deadly and dangerous weapons. It was formerly punished with rigor and severity. Until comparatively recent times it was punished with death in this country as well as in England, and so even in cases where the value of the property taken, if unaccompanied by violence, would have been petit larceny only. This was the rule of the common law; but the progress of civilization, which has restricted capital punishment, has modified the penalty for robbery as a general thing to imprisonment for life, or for a term of years, according to the circumstances of the offense. Robbery is an aggravated form of larceny. While the thief has been in all ages of the world a subject of contempt, the robber has been held both in contempt and in fear — an outlaw of society, an enemy of civilization. The charge in its moral effect must be even more degrading than that of larceny.

§ 100. **Words Imputing the Commission of this Offense.**— The following words, phrases and sentences charging the commission of the crime of robbery have been held to be actionable in themselves:

(1) *American cases:* In a suit for slander, where the complaint alleged that the defendant had said that the plaintiff "had a roll of money at a certain place, a short time after the death of my father, and this was the money that he was

[1] 1 Hawkins, P. C., Curw. ed., 212. [2] 2 Bish. Crim. Law, § 1156; Com. v. Clifford, 8 Cush. (Mass.), 415. [3] Slowman v. Dutton, 10 Bingham, 402. [4] Heard on L. & S., 88.

robbed of," it was held a sufficient imputation of crime.[1] But the words, "You did rob the town of St. Cloud. You are a public robber," are not actionable, for the crime of robbery cannot be committed against a town.[2] So to say of the treasurer of a Masonic lodge, "He has robbed the treasury of a sum of money and bought a farm with it," imputes no more than a breach of trust and is not actionable.[3]

(2) *English cases:* "He is a thief, and robbed me of my bricks."[4] "You robbed me, for I found the thing you have done it with."[5] "You robbed White."[6] To say "I have been robbed of three dozen winches; you bought two, one at 3*s.*, and one at 2*s.*; you knew well when you bought them that they cost me three times as much making as you gave for them, and that they could not have been honestly come by," is a sufficient charge of receiving stolen goods, knowing them to have been stolen.[7]

§ 101. **Sodomy—Bestiality—Buggery—The Crime against Nature — The Offense Defined.**— The carnal copulation by human beings with each other against the order of nature or with a beast. It is an offense at common law, but there is some doubt whether it is a felony or misdemeanor under the common law of this country. In most of the states it is punishable under statutes. It may be committed between two persons, both of whom may consent; so it may be between husband and wife. So two men or a boy and a man may commit it; or by a man or woman with a beast.[8] Though it was held in England that the offense could not be committed by a man with an animal of the fowl kind, because the fowl did not come under the term "beast."[9]

§ 102. **Moral Effect of the Charge.**— If any crime, says Bacon, deserves to be punished in a more exemplary manner, this one certainly does. Other crimes may be prejudicial to society, but this one strikes at its being. A person who has

[1] Hutts v. Hutts, 51 Ind., 581.
[2] McCarta v. Barrett, 12 Minn., 494.
[3] Allen v. Spillman, 12 Pick. (Mass.), 101.
[4] Slowman v. Dutton, 10 Bing., 402.
[5] Rowcliff v. Edmonds, 7 Mees. & Wel., 12.
[6] Tomlinson v. Brittleback, 1 N. & M., 455.
[7] Alfred v. Farlow, 8 Q. B., 854; 15 L. J., Q. B., 258; 10 Jur., 714.
[8] 2 Bish. Crim. Law, §§ 1191-1193.
[9] Regina v. Jellyman, 8 Car. & P., 604.

been guilty of so abusing his faculties will not be likely afterwards to have a proper regard for the opposite sex. The tendency is to deprave the appetite and produce in the person insensibility to the most ecstatic pleasure which human nature is capable of enjoying — the society of women. By the Levitical law, not only the person guilty of the offense was decreed to suffer death, but the beast was also put to death. This is said to have been ordained not because the beast had offended, but for the reason that the Divine Author of the Levitical law, to make mankind sensible how detestable this crime was in His sight, would have every creature put to death which had contributed to its commission. Formerly in England the offense was deemed of a nature so heinous that the delicacy of the common law would not permit it to be named in the indictment. The tendency of the imputation is to degrade the person charged both morally and socially, and forever brand him with unpardonable infamy and disgrace — a social outlaw; and hence the charge, if unfounded and maliciously made, must be regarded as one of the most grievous wrongs known to the law of our land.[1]

§ 103. **Words Imputing the Commission of this Offense.**— The following words, phrases and sentences charging the commission of the crime of sodomy have been held actionable in themselves:

(1) *American cases:* To say "She had intercourse with a beast;"[2] or to say of one "He has been with a sow;"[3] or "When you see M. C. say 'dog,' whistle or howl, and that will make her drop her feathers." "M. C. killed the dog. She had been caught in the act with the dog, and the dog died from the effect of it." "There was a tale started to the effect that M. C. had been intimate with a dog and it killed the dog."[4] "My son Rial saw him ravishing a cow." But it was held not actionable to say "He was seen foul of a cow." "Rial that morning caught him foul of a brute," because the statement does not warrant the innuendo that he was guilty of the crime of bestiality.[5]

[1] 9 Bac. Abr., 158; Puff., Law of Nature and Nations, b. 2, ch. 3, § 3.

[2] Haynes v. Richey, 30 Iowa, 76.

[3] Woolcot v. Goodrich, 5 Cow. (N. Y.), 714.

[4] Cleveland v. Detweiler, 18 Iowa, 299.

[5] Harper v. Delph, 3 Ind., 225.

(2) *English cases:* "You P., you will lie with a cow again as you did. If you had your deserts you would deserve to be hanged."[1] "Thou art a buggering rogue. I could hang thee."[2] "His character is infamous. He would be disgraceful to any society. Whoever proposed him must have intended it as an insult. I will pursue him and hunt him from all society. If his name is enrolled in the Royal Academy, I will cause it to be erased, and will not leave a stone unturned to publish his shame and infamy. Delicacy forbids me from bringing a direct charge, but it was a male child of nine years who complained to me."[3] Where the declaration reciting that there was a suspicion of one Hooper being guilty of sodomitical practices, stated a colloquium about him, and the plaintiff being guilty of such practices, and that in that discourse the defendant spoke the following words: "I have seen Coleman go into Hooper's house and stay there all night, instead of going home to his wife."[4]

§ 104. **Soliciting Another to Commit an Offense — The Offense Defined.**— A common form of attempt is the soliciting of another to commit a crime; the act which is a necessary ingredient in every crime consisting in the solicitation.[5] To solicit a person to undertake a larceny; to incite a servant to steal his master's goods,— are severally indictable misdemeanors.[6]

§ 105. **Words Imputing the Offense.**— The following words, phrases and sentences charging the commission of the crime of solicitation have been held actionable in themselves:

(1) *American cases:* "M. C. and C. C. attempted to bribe H. S. to burn the wheat now stacked on my farm."[7]

(2) *English cases:* "My Lady Cockaine did offer two shillings to a woman with child to get her a drink to kill her child, because it was gotten by J. S., Sir Thomas Cockaine's butler."[8] "Tibbott and one Gough agreed to have hired a man to kill me, and that Gough should show me to the hired man to kill

[1] Polurite v. Barrel, 1 Siderfin, 220.
[2] Collier v. Barrel, 1 Siderfin, 373.
[3] Woolworth v. Meadows, 5 East, 463; 2 Smith, 28.
[4] Colman v. Godwin, 3 Doug., 90; 2 B. & C., 285, n.
[5] State v. Avery, 7 Conn., 266.
[6] 1 Bishop, Crim. Law, § 757.
[7] Womac v. Circle, 29 Grat. (Va.), 192.
[8] Cockaine v. Witness, Cro. Eliz., 49.

me."[1] "John Leversage would have robbed the house of J. S. if J. D. would have consented unto it; he persuaded J. D. unto it, and told him he would bring him where he would have money enough."[2] "Mrs. Margaret Paffie sent a letter to my master, and therein wished him to poison his wife."[3]

§ 106. **Subornation of Perjury — The Offense Defined.**— *Hawkins:* By the common law it seems to be an offense of procuring a man to take a false oath amounting to perjury, who actually takes such oath. The offense has been defined by statutory enactments in nearly if not all of the states.[4]

§ 107. **Words Imputing the Commission of the Offense.**— The following phrases and sentences charging the commission of the crime of subornation of perjury have been held actionable in themselves:

English cases: "Thou hast procured one Smith to come thirty miles to commit perjury before My Lord Winchester, and hast given him ten pounds for that purpose."[5] "Harrison got a witness to forswear himself in such a cause. You or he hired one Bell to forswear himself."[6] "He is a suborner of perjury."[7] "You have caused this boy to perjure himself."[8]

§ 108. **Watering Milk.**— "A.'s milk is watered, and the watering of his milk when brought to the factory is a loss to me." Under a Wisconsin statute making it an offense punishable with fine and imprisonment in the county jail to knowingly furnish watered milk to a factory to be manufactured into butter, these words are actionable.[9]

[1] Tibbott v. Haynes, Cro. Eliz., 191.
[2] Leversage v. Smith, Cro. Eliz., 710.
[3] Paffie v. Mondford, Cro. Eliz., 747.
[4] 2 Bishop, Crim. Law, §§ 1197, 1199.
[5] Harris v. Dixon, Cro. Jac., 158.
[6] Harrison v. Thornborough, 10 Mod., 196.
[7] Gurdon v. Wintderflush, Cro. Eliz., 308.
[8] Bridges v. Playdel, Brown & G., 2.
[9] Geary v. Bennett, 58 Wis., 444; 10 N. W. Rep., 602.

CHAPTER VII.

IMPUTATION OF A WANT OF CHASTITY, OR THE COMMISSION OF ADULTERY OR FORNICATION.

§ 1. **The Result of Statutory Enactments.**— Throughout the United States, with perhaps a single exception, an imputation of a want of chastity to a female, married or unmarried, or the commission of adultery or fornication, is actionable in itself without proof of special damage, and in Massachusetts it seems to be actionable to charge a woman with being drunk.[1] For these salutary provisions of the law we have to thank the wisdom of our legislatures rather than the wisdom of the common law.

§ 2. **Adultery — The Offense Defined.**— In those states which make adultery a criminal offense, without defining it, sexual intercourse between a married woman and a man other than her husband is held by all authorities to constitute the crime; and in some of the states this is held to be an exclusive definition of the offense, on the ground that the gist of the crime is the danger of introducing spurious heirs into the family. In other states, however, it is held that the offense is committed by sexual connection between a man and a woman, one of whom is lawfully married to a third person, and that whether the married person is a man or woman makes no difference.[2] It is the unlawful sexual intercourse or

[1] Brown v. Nickerson, 1 Gray, 1. [2] Rapalje & Lawrence, Law Dict., See, also, Jacksonville Journal v. 32. Beymer, 42 Ill. App., 443.

open and unlawful living together of a man and woman when one or both of them are married.[1]

§ 3. **Fornication — The Offense Defined.**— The carnal and unlawful intercourse of an unmarried person with the opposite sex.[2] The term is derived from the Latin *fornĭcātus*, vaulted, arched; *fornĭcātĭōnem*, an arching over — from *fornix*, an arch or vault, a brothel — [as being at Rome usually under ground]: to commit lewdness, as between unmarried persons. FOR'NICA'TION, n. *-kā'shŭn*, commerce between unmarried persons; figuratively, idolatry. FOR'NICATOR, n. *-tĕr*, an unmarried man having commerce with an unmarried woman; an idolater. FOR'NICA'TRESS, n. *-trĕs*, an unmarried woman guilty of lewdness. *Fornication*, in most countries, has been a crime brought within the pale of positive law at some period of their history, and prohibited by the imposition of penalties more or less severe; but it has always been found ultimately more expedient to trust to the restraints which public opinion imposes on it in every community which is guided by the principles of morality and religion. In England in 1650, during the ascendency of the Puritan party, the repeated act of keeping a brothel or committing fornication was made felony without benefit of clergy on a second conviction. At the Restoration, when the crime of hypocrisy seemed for a time to be the only one which, under the influences of a very natural reaction, men were willing to recognize, this enactment was not renewed; and though notorious and open lewdness, when carried to the extent of exciting public scandal, continued, as it had been before, an indictable offense at common law, the mere act of fornication itself was abandoned "to the feeble coercion of the spiritual court, according to the rules of the canon law — a law which has treated the offense of incontinence with a great deal of tenderness and lenity, owing perhaps to the constrained celibacy of its first compilers"— Blackstone. The proceedings of the spiritual court were regulated by 27 Geo. III., ch. 44, which enacts that the suit must be instituted within eight months, and that it cannot be maintained at all after the marriage of the parties offending. But proceedings in the eccle-

[1] Territory v. Whitcomb, 1 Mont. T., 359; Hood v. The State, 56 Ind., 263.

[2] Territory v. Whitcomb, 1 Mont. T., 359; Hood v. The State, 56 Ind., 263.

siastical courts for this offense have now fallen into entire desuetude (Stephen's Com., iv., 347). In Scotland, shortly after the Reformation, fornication was prohibited by what Baron Hume calls "an anxious statute of James VI." (1567, ch. 13), entitled "Anent the Filthie Vice of Fornication, and Punishment of the samin." This act, passed in the same parliament by which incest and adultery are punished with death, provides that the offender, whether male or female, shall pay for the first offense a fine of £40 Scots, and shall stand bareheaded, and fastened at the market-place, for the space of two hours; for the second, shall pay a fine of 100 merks, have the head shaven, and shall be exposed in the same public manner; and for the third, pay a fine of £100, be thrice ducked in the foulest pool of the parish, and be banished the town or parish forever. There is but one instance of this statute having been enforced by the court of justiciary, which occurs, as might be supposed, during the government of the Protector in Scotland.[1]

§ 4. **A Prostitute — The Term Defined.**— On the trial of an indictment in the Butler county district court, Iowa, for a libel in charging that one L. P. aided her daughter, M. R., in carrying on the business of a prostitute, the court, in charging the jury, among other matters stated: "To justify, under the charge, the defendant should prove that M. R. carried on the business of a prostitute in the house in question, and was aided by L. P. It would not be enough to show that M. R., in the house in question, had illicit commerce with one person, but it should go further and show that she submitted her person to illicit sexual intercourse with various persons. It need not be indiscriminately with all persons, but it should go further than incontinence with one or two persons; and it should be shown that L. P. knowingly aided in the business of prostitution." On appeal in the supreme court Seevers, J., said: "The question is whether a prostitute, or one who carries on the business of such, has been correctly defined. The thought of the instruction seems to be that M. R. must have submitted her person to illicit sexual intercourse with various persons, and that intercourse with one or two persons would not be sufficient. Now, as we understand, the jury was told as a

[1] Alden's Cyclopedia, title Fornicate.

matter of law that the acts aforesaid would not be sufficient to constitute M. R. a prostitute. It is certainly true, we think, that a woman may be a prostitute and carry on the business of such if she so holds herself out to the world. Her house may be so designated by a sign as to make this clearly apparent. She may upon the street, or in other public or private places, so conduct herself as to make it clear that she is a prostitute and that such is her profession. It is not essential, therefore, that she should have 'submitted her person to illicit sexual intercourse with various persons,' and that incontinence with one or two persons 'would not be sufficient' to show she was a prostitute. In other words, the accompanying circumstances are important, and it is not for the court (under the Iowa statute) to say that sexual intercourse alone is or is not sufficient to establish this woman to be a prostitute."[1]

§ 5. **Certainty of the Imputation.**— It is not necessary that the words should make the charge in express terms. They are actionable if they consist of a statement of matters which would naturally and presumably be understood by the hearers as a charge of the offense. There is no offense which can be conveyed in so many multiplied forms and figures as that of incontinence. The charge is seldom made, even by the most vulgar and obscene, in broad and coarse language. If the language used is such that in its ordinary acceptation a person of ordinary understanding could not doubt its signification it will be *prima facie* sufficient.[2]

§ 6. **Illustrations — Digest of American Cases.—**

1. **A Massachusetts Case (1829).** Jennett Miller sued Daniel Parish for slander. The declaration, after averring a proper colloquium, charged the defendant with saying: "Bagg thinks it a hard matter for any one to have intercourse with his niece; but I know." Parker, C. J., refusing to follow the rule laid down in Brooker v. Coffin as to such a charge being actionable, held the imputation sufficient. Miller v. Parish, 25 Mass., 384.

§ 7. **Sufficiency of the Imputation.**— Under statutes making it slander to falsely charge a woman with fornication or adultery it is not essential that the charge should be made in direct terms. It is sufficient in law if the words used are such

[1] State v. Rice, 56 Iowa, 432; 8 N. W. Rep., 343.

[2] Stroebel v. Wheney et al., 31 Minn., 384; 18 N. W. Rep., 98; Woolworth v. Meadows, 5 East, 463; Lewis v. Hudson, 44 Ga., 568; Proctor v. Owens, 18 Ind., 21; Walton v. Singleton, 7 S. & R. (Penn.), 449; Ranson v. McCurley, 140 Ill., 626.

as impute fornication or adultery, and are so understood by those who hear them.[1]

§ 8. **Illustrations — General Digest of American Cases.**—

1. In an Indiana case, decided in 1887, the alleged cause of action given in the complaint was this: "I know all about that case. While she was out there claiming to be the wife of G. W. F., she was back here claiming to be my wife." It was held the court did right in sustaining a demurrer, as the words did not imply a want of chastity, and were not actionable in themselves. Funk v. Beverly (Ind.), 13 N. E. Rep., 573; citing Emerson v. Morrel, 55 Ind., 265; Schurk v. Kollman, 50 Ind., 336.

2. To charge another with fornication is slanderous in itself. Page v. Murvin, 54 Conn., 426.

3. Words imputing fornication or adultery to a woman are actionable under the Indiana statute, as at common law. Buscher v. Scully, 107 Ind., 246.

4. To falsely speak of a married woman as the paramour of a man not her husband charges her with a want of chastity, and is actionable in itself. McKinney v. Roberts, 68 Cal., 192. And so to say of a woman she is a "bad" woman, etc., is actionable. Kedrolivansky v. Niebaum, 70 Cal., 216.

5. Calling a woman a whore is actionable in itself. Belck v. Belck, 97 Ind., 73. So to call a married woman a prostitute. Klewin v. Bauman, 53 Wis., 244. But to say of a married woman, "She has been lying on the lounge with a male boarder," does not amount to a charge of fornication or adultery under the statute of Illinois, and therefore is not actionable. Koch v. Heideman, 16 Ill. App., 478.

6. The words "those people upstairs keep a whore-house" gives a cause of action to one showing himself to be one of those people upstairs. Cook v. Rief, 52 N. Y. Super. Ct., 302.

7. It is actionable as imputing a want of chastity to say of a person "he was going to run away on account of J. S. being in a bad fix, and that a certain woman had got medicine of a doctor, and that she [J., the plaintiff] had become all right," when spoken of an unmarried female and of her character for chastity as amounting to a charge that she had been guilty of fornication, and had been in a state of pregnancy. Wilson v. Barnett, 45 Ind., 163. And so to say of a married woman "she has taken men into her bedroom," accompanied by a specification of circumstances fairly implying that it was done for the purpose of adultery. Waugh v. Waugh, 47 Ind., 580.

8. Words spoken of plaintiff, a married woman, and of a married man other than her husband, charging them with being in a store together alone, with the curtain drawn, behind the counter, with their arms around each other, embracing, and that when discovered they seemed much confused, are actionable, as imputing unchastity to plaintiff; and under Code Civil Proc. N. Y., § 1906, special damage need not be alleged. Mason v. Stratton, 1 N. Y. S., 511.

[1] Buscher v. Scully, 107 Ind., 246; 5 N. E. Rep., 738; Ledlie v. Wallen, 17 Mont., 150; Brown v. Moore, 90 Hun, 169; Blake v. Smith, 34 Atl. Rep., 995; Douglass v. Douglass, 38 Pac. Rep., 934; Michelson v. Lavin, 95 Ga., 565; Barr v. Birkner, 44 Neb., 197; Hemmens v. Nelson, 138 N. Y., 517; Noyes v. Hall, 62 N. H., 594; Freeman v. Sanderson, 123 Ind., 264.

9. The words, "Go over to my office. My wife and her mother are particular what company they keep. They do not wish to be annoyed by such characters as you," — spoken to a woman, are not slanderous, as they do not impute to her a want of chastity. McMahon v. Hallock, 1 N. Y. S., 312.

10. Under N. C. Code, § 3763, words written or spoken of a woman, which may amount to a charge of incontinency, are actionable, and it is not necessary to prove that they were wantonly as well as maliciously spoken. The provision of section 1113, making it a misdemeanor to attempt, in a wanton and malicious manner, to destroy reputation by such a charge has no application to a civil action. Bowden v. Bailes (N. C.), 8 S. E. Rep., 342.

11. To say of a married woman that she is a prostitute is necessarily to impute to her the guilt of adultery, and, as under the Criminal Code of Oregon adultery is indictable and punishable, such words charge a crime and are actionable *per se*. Davis v. Sladden (Or.), 21 Pac. Rep., 140.

12. To call a married woman a "whore," or to accuse her of having committed prostitution with men in the bushes, is actionable in itself. Rhoads v. Anderson (Pa.), 13 Atl. Rep., 823.

13. The words charged were: "I know all about that case. While she was out there claiming to be the wife of George W. Funk, she was back here claiming to be my wife." *Held*, not actionable in itself. Funk v. Beverly (Ind.), 13 N. E. Rep., 573.

14. It is no defense to an action for slander by words imputing unchastity to a woman to show that the defendant spoke the words to her, and was led to do so by her general conduct, and especially by her deportment with a particular man, believing the same to be true. In such action evidence that the plaintiff's general reputation is bad independently of the slander of which she complains, and that it was bad ten years before, and at another place, is admissible in mitigation of damages, although no such ground of defense is set up in the answer; but evidence of particular instances of her misconduct is not admissible. Parkhurst et ux. v. Ketchum, 88 Mass., 406.

15. In an action for slander, if the slanderous words charged are that the plaintiff, a married woman, is a "bad woman," a "bitch" and a "whore," it is for the jury to determine the sense in which the word "bad" is used; and an instruction that for that purpose "the jury may take into account the accompanying words and surrounding facts" is not open to exception. Riddell v. Thayer, 13 Lathrop (127 Mass.), 487.

16. In a Massachusetts case (1881) the declaration alleged that the defendant, on November 10, 1879, at Springfield, "publicly, falsely and maliciously accused the plaintiff of the crime of adultery by words spoken of the plaintiff to one Mrs. W. B. substantially as follows, to wit: "Mr. H. A. was intimate with his brother's wife for a number of years [meaning thereby that the plaintiff had committed adultery with his brother's wife for a number of years, meaning the wife of L. A.]." The defendant demurred to the declaration on the ground that it did not state a legal cause of action. The superior court sustained the demurrer and ordered judgment for the defendant, and the plaintiff appealed. Endicott, J.: "The demurrer was properly sustained. The words charged in the declaration

as spoken by the defendant do not in themselves impute or imply the commission of a crime. They merely state that the plaintiff was intimate with his brother's wife for a number of years. If the plaintiff intended to prove that the words, as used by the defendant, charged him with the commission of adultery with his brother's wife, he should have alleged the facts, circumstances or conversation in connection with which they were spoken, and which give to them this special and peculiar meaning. The innuendo is wholly insufficient for that purpose; it does not enlarge the meaning of the words beyond their natural import. It must appear from the declaration that the words used are actionable." Adams v. Stone, 131 Mass., 433.

17. Where the words charged without a colloquium or allegation of special damages were in German and spoken of a married woman, and translated, "She has been lying on the lounge with a male boarder," it was held that they were not actionable at common law; and under the statute of Illinois, which provides "that if any person shall falsely use, utter or publish words which in their common acceptation shall amount to charge any person with having been guilty of fornication or adultery, such words so spoken shall be deemed actionable, and he shall be deemed guilty of slander," do not amount to a charge of fornication or adultery. Koch v. Heidman, 16 Brad. (Ill.), 478; R. S. Ill. 1887, 1216.

18. The words spoken of a woman, that she "had acted the whore," are actionable. Such words are equivalent to charging that she has been guilty of fornication or adultery as she was single or married, and they are actionable of themselves without colloquium or innuendo. Schmisseur v. Krielich, 92 Ill., 348.

19. In an action for charging the plaintiff with having committed fornication, where the plea of justification averred that plaintiff had been guilty of fornication, without averring any time, it was error in the court to restrict the proof of her having committed fornication two years before the words were spoken by defendant. The plea not being limited as to time, the proof should not have been. Proof of the truth of the plea without reference to when the act was committed was pertinent to the issue, and should have been admitted. Stowell v. Beagle, 57 Ill., 97.

20. In an action for slander, the alleged publication being that plaintiff, an unmarried female, was unchaste, and that she had become pregnant and had committed an abortion, the defendant filed a plea of justification, and moved the court for a rule requiring the plaintiff to submit her person to a medical examination, for the purpose of furnishing evidence under defendant's plea of justification. The rule was refused, and on appeal the supreme court said: "We are not cited to any case where any court has held such an examination to be proper, and we think none can be found. One should not publish and circulate slanderous charges against a young unmarried female, as proven in this case, without being able to substantiate them when called upon to do so, without calling upon the court to aid in the search for evidence in his behalf by ordering and subjecting her to an indelicate examination of her person, with the hope of obtaining some information advantageous to the defense, and call to his aid the power of the court as a means of humiliating her still more. When one voluntarily as-

serts a slanderous charge against another, and defends by alleging the truth of his assertion, he must be able to substantiate the truth of the charge without invading the privacy of the person about whom the charge is made. The court very properly refused to make the order requiring the plaintiff to submit her person to an examination." Kern v. Bridwell, 119 Ind., 226, 21 N. E. Rep., 634.

21. The words that "Malvina [the plaintiff] has been to snare a young one" fairly convey the idea that she has committed the offense of fornication, and are actionable. Patterson v. Wilkinson, 55 Me., 42.

22. It is actionable to charge an unmarried woman with having committed fornication. Miller v. Parish, 8 Pick. (Mass.), 394. To the contrary, Stanfield v. Boyer, 6 Har. & J. (Md.), 248.

23. To say of a woman that she "has gone down the river with two whores to the goose-house" is not actionable, unless a colloquium showing what kind of a house is meant. Dyer v. Morris, 4 Mo., 214.

24. To publish falsely and maliciously of a woman that "she has a child," with the intention of charging her with having been guilty of fornication, is actionable under the Missouri act of 1835. Moberly v. Preston, 8 Mo., 462.

25. The words alleged to have been used by the defendant in an action of slander, that "he, the defendant, had had sexual intercourse with the plaintiff at divers different times," were held actionable in themselves. Adams v. Rankin, 1 Duv. (Ky.), 58.

26. Words charging a woman with a violation of chastity are actionable in themselves. Fristie v. Fowler, 2 Conn., 707; Rodebaugh v. Hollingsworth, 6 Ind., 339; Smalley v. Anderson, 2 T. B. Mon. (Ky.), 56; Wilson v. Robbins, Wright (Ohio), 40.

27. In an action by a *feme sole* against husband and wife for the following words spoken by the wife: "Dr. Eddy made an appointment with Elizabeth Cunningham [meaning the plaintiff], scaled the walls, and went to bed to her [meaning the plaintiff], at Mrs. Reperton's house" (thereby meaning that the plaintiff had committed fornication), it was held that the words were actionable under the statutes of Indiana. Shields v. Cunningham, 1 Blackf. (Ind.), 86.

28. Words which in their common acceptation amount to a charge of fornication are slanderous, and no colloquium or innuendo is necessary. Elam v. Badger, 23 Ill., 498.

29. To say of a woman, "She is not chaste, and I have kept her; I have had criminal intercourse with her," or "I have had sexual intercourse with her," does not charge an offense made indictable by the statute of Alabama, imposing a fine "for any man and woman to live together in adultery and fornication," and are therefore not actionable *per se*. Berry v. Carter, 4 Stew. & P. (Ala.), 387.

30. The declaration alleged that the defendant said of the plaintiff, "Mrs. Edwards has raised a family of children by a negro," without any averment of other circumstances. *Held*, that the words did not necessarily amount to a charge of fornication and adultery. Patterson v. Edwards, 7 Ill. (2 Gilm.), 720.

31. Words charging a woman with fornication or adultery, at a time

when neither of those crimes were indictable, were held not to be actionable. Dukes v. Clark, 2 Blackf. (Ind.), 20.

32. In an action of slander brought by *A.* and Mary *A.*, his wife, for the following words charged to have been spoken of the wife, and of and concerning her character for chastity: "Have you heard that B. was hunting up a story in circulation about C. and Mary A." [meaning, etc.] "being seen in the woods together? I saw them in the woods together myself," etc. "If you had seen what I have you would feel satisfied in your mind. God knows, and I know, that they are intimate;" thereby meaning that said Mary had been guilty of adultery with C.,—it was held that the words were not actionable unless they were spoken in a conversation about the wife's character for chastity. Ricket v. Stanley, 6 Blackf. (Ind.), 169.

33. In an action brought in Indiana for such words it will be presumed, until the contrary be proved, that they are spoken in that state. Worth v. Butler, 7 Blackf. (Ind.), 251.

34. Words charging a woman, never married, with "having a child and buried it in the garden," amount to a charge of fornication, and are therefore actionable in Indiana by statute. Worth v. Butler, 7 Blackf. (Ind.), 251.

35. The plaintiff in a slander suit proved the defendant said of her that "B. told him that on Sunday, at a camp-meeting, he either scared or drove Jane Owens [plaintiff] and a man, supposed to be J. D., up from behind a log, he and another, supposed to be J. D.; that they broke and ran, and that he, B., got her parasol and handkerchief, and if anybody did not believe him he could come and see them." It was *held* that these words were slanderous and actionable in themselves. Proctor v. Owens, 18 Ind., 21.

36. Words charging a single woman with having two or three little ones by a man, if intended to impute the crime of fornication, followed as a consequence by two or three bastard children, are actionable. Symonds v. Carter, 32 N. H., 458.

37. Words in themselves involving a charge of adultery are, by Missouri Revised Code, actionable without alleging special damages. Stieber v. Wensil, 19 Mo., 513.

38. Under a Kentucky act of 1811, a man may maintain an action of slander for words charging him with having been guilty of fornication. Morris v. Barkley, 1 Litt. (Ky.), 64. See, also, Philips v. Wiley, 2 id., 153. But words spoken charging a female with want of chastity were not actionable previous to the act of 1811. M'Gee v. Wilson, Litt. (Ky.) Sel. Cas., 187.

39. In a count in slander, the words charged with the accompanying averment imputed the crime of fornication, and as they were alleged to have been spoken of a female it was *held* they were actionable. Abshire v. Cline, 3 Ind., 115.

40. The words "P. E. was one week in L. in a whore-house" were *held* to imply a charge of whoredom. Blackenstaff v. Perrin, 27 Ind., 527.

41. Charging a single woman with being with child is sufficient, in New Jersey, to sustain an action for slanderous words. Smith v. Minor, 1 N. J. L. (Coxe), 16.

42. The words, "which amount to a charge of incontinency," and from

which an action of slander is given to a woman by the North Carolina act, must import not merely a lascivious disposition, but the criminal fact of adultery or fornication. M'Brayer v. Hill, 4 Ired. (N. C.) L., 136.

43. Words charging a married woman with seating herself upon the lap of a man other than her husband, and desiring him to have carnal intercourse with her, and insisting upon it, do not charge her with the act of adultery, and are not actionable in themselves. K. v. H., 20 Wis., 239.

44. The word "bitch," when applied to a woman, though a word of reproach, does not charge the crime of adultery or prostitution, and is not actionable. K. v. H., 20 Wis., 239. But to call a woman a "bitch," when it is meant and understood to import whoredom, is actionable as imputing a want of chastity. Logan v. Logan, 77 Ind., 558.

45. Charging defendant, in Pennsylvania, *totidem verbis*, with fornication, though he may be a married man, is slanderous. Walton v. Sigleton, 7 Serg. & R. (Pa.), 449.

46. To say of a woman that "she is kept by a man" is actionable as a slander under the act of North Carolina. M'Brayer v. Hill, 4 Ired. (N. C.) L., 136.

47. In a suit for libel the words set out were: "We see in the columns of the Macomb 'Journal' of the 24th an article under the blood-and-thunder heading of 'Middletown Mass Meeting, and Excitement over the Burial of a Colored Child! A Fight Proposed, and the Wetting Down of the Belligerents.' The colored child in question is supposed to be the offspring of a Mr. Snyder, formerly of Macomb. The 'Journal' article, from beginning to end, is a wilful lie. The author says the meeting was held in a blacksmith shop — a lie! The truth is Snyder lied to get his 'miscegen' in the graveyard; and when this was found to be the case the citizens of Middletown, both republicans and democrats, met at the grave-yard to investigate the matter; and the circumstances showed that Mr. Snyder, with ridiculous intentions, had misrepresented the facts concerning the child, and thereby obtained permission to bury his illegitimate 'production' in our burying-ground." It was held that the words did not, in their common acceptation and without the aid of extrinsic matters, impute to the plaintiff an act of adultery, much less with the negro woman to whom they were alleged to apply. Strader v. Snyder, 67 Ill., 404.

48. An action for charging a woman with unchastity cannot be defended by proof that the defendant had only reported what he heard, or by proof of particular acts or suspicions of unchastity; but only by a justification, duly interposed by plea or notice, on the ground that plaintiff was unchaste, supported by evidence of general reputation. Proctor v. Houghtaling, 37 Mich., 41.

49. The circulation of vile, defamatory and slanderous language concerning the chastity of a woman is not wholly excused by a protest at the time of disbelief, or by a showing that those who heard the slander did not believe it to be true. Such conduct is actionable, and the question of the responsibility is one for the jury, and not to be solved by any presumption of harmlessness. Burt v. McBain, 29 Mich., 260.

50. Where the imputation of a want of chastity in a female is actionable in itself under statutory provisions it is competent in actions for such slan-

ders, without any averments of special damages, to prove that in consequence of the slander the plaintiff was excluded from the society in which she formerly moved, and was affected in mind and health. Burt v. McBain, 29 Mich., 260.

51. Words spoken concerning a woman, which, although not slanderous in themselves, have at the time when and at the place where spoken a provincial or local meaning imputing to her the keeping of a bawdy-house, and which are spoken in such provincial sense and are so understood by the persons to whom they are spoken, are actionable. Liffrant v. Liffrant, 52 Ind., 273.

52. The word "bitch," when applied to a woman, does not in its common acceptation import whoredom in any of its forms, and therefore is not slanderous; nor can the innuendo change its meaning. Schwick v. Kadman, 50 Ind., 336; Craig v. Pyles (Ky.), 39 S. W. Rep., 33.

53. To say of a married woman "she is pregnant," or "she is in a fix," meaning by local usage that she is pregnant, is not actionable; but if spoken of an unmarried female such words are actionable. Acker v. McCullough, 50 Ind., 447.

54. In Maryland, in an action by a married woman for words touching her character for chastity, such words are not actionable in themselves unless they impute to her the commission of an offense which subjects her to an indictment and corporal punishment. But words charging her with keeping a bawdy-house are actionable in themselves. Griffin v. Morse, 43 Md., 246.

55. To say of a woman, "She was getting fat — some one had slipped up on the blind side of her," is not actionable without a special averment of the meaning of the words; but they may be shown to be actionable by distinct averments in the complaint that in the particular instance they were used with intent to convey a charge of fornication and pregnancy, or that in the locality where they were spoken they had acquired that sense. Emmerson v. Marvel, 55 Ind., 265.

56. Proof that a woman has had sexual intercourse with her affianced does not constitute a justification for calling her a whore, and to repel the assault upon her character she may introduce evidence to show that her general reputation for chastity is good. Sheehen v. Cockley, 43 Iowa, 183.

57. In an action under the laws of New York, 1871, chapter 219, by H. against L., for words imputing unchastity to H., she testified that L. accused her of having had a venereal disease. L., after introducing evidence tending to show improper intimacy between H. and W., offered to prove that H.'s son had stated at L.'s house that W. had such a disease. But it was held properly excluded, as it did not tend to prove the charge was true or that L. had heard the reports *per se* leading him to believe it true. Hatfield v. Lasher, 81 N. Y., 246.

58. Under the statutes of Arkansas a complaint which alleges that the defendant charged plaintiff with fornication or adultery is sufficient without an allegation of special damage. Roe v. Chitwood, 36 Ark., 210.

59. A false publication concerning a person that there are "suits pending against him to the effect that he has put himself in unlawful relations with the wives of other men" is actionable in itself without the innuendo to connect them with extrinsic matter. Broad v. Duester, 8 Biss. C. Ct., 265.

60. Words intending to convey the idea that one had been guilty of fornication, and in fact conveying that idea, are actionable if maliciously uttered. Branstetter v. Darrough, 81 Ind., 527.

61. In Texas words imputing merely a want of chastity to a female are not actionable in themselves. Special damages, however slight, will sustain an action. Ross v. Fitch, 58 Tex., 148.

62. Whether or not a woman is a prostitute is a question of fact, and in determining it a jury may consider her general character. State v. Rice, 56 Iowa, 431.

63. Upon the trial of an action for charging the plaintiff with illicit intercourse with a certain man, the plaintiff's general bad character for chastity may be shown by way of defense, but not particular acts of unchastity. Hallowell v. Guntle, 82 Ind., 554.

64. In an action for charging the plaintiff with unchastity it was held that the defendant might prove, in mitigation of damages, the circumstances upon which he based his charge, such as the physical appearance of pregnancy in plaintiff, and the fact of her being with a man under suspicious circumstances. Doe v. Roe, 32 Hun (N. Y.), 628.

65. The words "she is a bad character, a loose character" are slanderous, involving a charge of fornication, which may be sufficiently averred by an innuendo without a colloquium. Vanderlip v. Roe, 23 Pa. St., 82.

66. It is not actionable to express a supposition or belief that one went to a place for the purpose of persuading another to commit adultery with him. Dickey v. Andros, 32 Vt., 55.

67. In a young woman's action for words charging unchastity, the jury in estimating the damages may consider evidence of her consequent wounded feelings, enfeebled health and incapacity to perform labor. Zeliff v. Jennings, 61 Tex., 458.

68. When the plaintiff testifies that she is virtuous, defendant may show that she has permitted liberties, following that of sexual intercourse, to be taken with her. Dugald v. Coward, 96 N. C., 368.

§ 9. **The English Law.**— By the law of England words imputing unchastity or adultery to a woman, married or unmarried, however gross and injurious they may be, are not actionable, unless she can prove that they have directly caused her special damage.

The English law on this point has often been denounced by learned judges. Lord Campbell said: "I may lament the unsatisfactory state of our law according to which the imputation by words however gross, on an occasion however public, upon the chastity of a modest matron or a pure virgin, is not actionable without proof that it has actually produced special temporal damage to her."[1] Lord Brougham said: "Instead of the word 'unsatisfactory' I should substitute the word 'bar-

[1] Lynch v. Knight and wife, 9 H. L. C., 593; 5 L. T., 29.

barous.'"[1] Odgers says: "Two explanations may be assigned for the undesirable state of our law on this point: (1) In the days when our common law was formed every one was much more accustomed than they are at present to such gross language, and epithets such as "whore" were freely used as general terms of abuse without seriously imputing any specific act of unchastity. (2) The spiritual courts had jurisdiction over such charges, and though they could not award damages to the plaintiff, they could punish the defendant for the benefit of his soul.[2] In Scotland a verbal imputation of unchastity is actionable without proof of special damage.

The hardship is increased by the rules relating to special damage, which are peculiarly stringent in the case of a married woman. That her husband has sustained special damage in consequence of the words will not avail for her. And unless she carry on a special trade or business of her own it is almost impossible for her to sustain any special damage to herself, for all her property is either in law her husband's or is safely vested in trustees for her, and cannot possibly be affected by defamatory words. That she loses the society of her friends is no special damage; and Lord Wensleydale denied that the loss of the *consortium* of her husband could constitute special damage.[3]

§ 10. **Exceptions to the Rule.**— The only exception is in the case of actions brought in the local courts of the city of London, the borough of Southwark,[4] and, it is said, of the city of Bristol,[5] for words spoken within the jurisdiction of those courts. It was formerly the custom in those localities to cart and whip whores, tingling a basin before them. Hence to call a woman "whore" or "strumpet"[6] or "bawd,"[7] or her husband a "cuckold,"[8] was supposed to be an imputation of a criminal offense to the female plaintiff and therefore actionable. But no action will lie in the high court of justice for such words, since the custom has never been certified by the

[1] Jones v. Herne, 2 Wils., 87; Roberts and wife v. Roberts, 5 B. & S., 384; 33 L. J., Q. B., 249; 10 Jur. (N. S.), 1027; 12 W. R., 909; 10 L. T., 602.

[2] Odgers on Libel and Slander, 88.

[3] Lynch v. Knight and wife, 9 H. L. C., 577.

[4] Sid., 97.

[5] Power v. Shaw, 1 Wils., 62.

[6] Cook v. Wingfield, 1 Str., 555.

[7] 1 Vin. Abr., 396.

[8] Vicars v. Worth, 1 Str., 471.

recorder and must therefore be strictly proved. The plaintiffs failed to prove such a custom in 1782;[1] and it would be still more difficult to do so in the present day. The city courts used formerly to take judicial notice of their own custom; but it is doubted if they would do so now, the custom being entirely extinct.[2]

§ 11. Illustrations — Digest of English Cases.—

1. The defendant falsely imputed incontinence to a married woman. In consequence of his words she lost the society and friendship of her neighbors, and became seriously ill and unable to attend to her affairs and business, and her husband incurred expense in curing her and lost the society and assistance of his wife in his domestic affairs. *Held*, that neither husband nor wife had any cause of action. Allsop and wife v. Allsop, 5 H. & N., 534; 29 L. J., Ex., 315; 8 W. R., 449; 6 Jur. (N. S.), 433; 36 L. T. (O. S.), 290. See Dalies v. Solomon, L. R., 7 Q. B., 112; 41 L. J., Q. B., 10; 20 W. R., 167; 25 L. T., 799; Riding v. Smith, 1 Ex. D., 91; 45 L. J., Ex., 281; 24 W. R., 487; 34 L. T., 500.

2. The defendant told a married man that his wife was "a notorious liar" and "an infamous wretch," and had been all but seduced by Dr. C. of Roscommon before her marriage. The husband consequently refused to live with her any longer. *Held*, no action lay. Lynch v. Knight and wife, 9 H. L., 577; 8 Jur. (N. S.), 724; 5 L. T., 291.

3. Where the defendant asserted that a married woman was guilty of adultery, and she was consequently expelled from the congregation and bible society of her religious sect, and was thus prevented from obtaining a certificate, without which she could not become a member of any similar society, *held*, no action lay. Roberts and wife v. Roberts, 5 B. & S., 384; 33 L. J., Q. B., 249; 10 Jur. (N. S.), 1027; 12 W. R., 909; 10 L. T., 602.

4. To say of a young woman that she had a bastard is not actionable without proof of special damage, "because it is a spiritual defamation, punishable in the spiritual court." Per Holt, C. J., in Ogden v. Turner, Holt, 40; 6 Mod., 101; 2 Salk., 696; Dwyer v. Meehan, 18 L. R., Ir., 138.

5. To call a woman a "whore" or "strumpet" is not actionable, except by special custom, if the action be tried in the cities of London and Bristol. "To maintain actions for such brabling words is against law." Oxford et ux. v. Cross (1599), 4 Rep., 18; Gascoigne et ux. v. Ambler, 2 Ld. Raym., 1004; Power v. Shaw, 1 Wils., 62 (Bristol). It is not actionable to call a woman a "bawd" (Hollingshead Case (1632), Cro. Car., 229; Hixe v. Hollingshead (1632), Cro. Car., 261), unless it be in the city of London. Rily v. Lewis (1640), 1 Vin. Abr., 396.

[1] Stainton et ux. v. Jones, 2 Selw. N. P., 1205 (13th ed.).

[2] Oxford et ux. v. Cross (1599), 4 Rep., 18; Hassell v. Capcot (1639), 1 Vin. Abr., 395; 1 Roll. Abr., 36; Cook v. Wingfield, 1 Str., 555; Watson v. Clerke, Comb., 138, 139; notes [14] and [96] to 1 Dougl. by Frere, p. 380; Theyer v. Eastwick, 4 Burr., 2032; Brand and wife v. Roberts and wife, 4 Burr., 2418; Rily v. Lewis, 1 Vin. Abr., 396; Vicars v. Worth, 1 Str., 471; Hodgkins et ux. v. Corbet et ux., 1 Str., 545; Roberts v. Herbert, Sid., 87; S. C. sub. nom. Caus v. Roberts, 1 Keble, 418.

6. The words "You are living by imposture; you used to walk St. Paul's churchyard for a living," spoken of a woman with the intention of imputing that she was a swindler and a prostitute, are not actionable without special damage. Wilby v. Elston, 8 C. B., 142; 18 L. J., C. P., 320; 13 Jur., 706; 7 D. & L., 143. So to say of a married man that he has "had two bastards and should have kept them" is not actionable, though it is averred that by reason of such words "discord arose between him and his wife, and they were likely to have been divorced." Barmund's Case, Cro. Jac., 473; Salter v. Browne, Cro. Car., 436; 1 Roll. Abr., 37.

§ 12. **Special Damage under the English Law.**— All words, if published without lawful occasion, are actionable if they have in fact produced special damage to the plaintiff, such as the law does not deem too remote. "Any words by which a party has a special damage" are actionable.[1] "Undoubtedly all words are actionable if a special damage follows."[2]

§ 13. **Illustrations — Digest of English Cases.**—

1. Action by husband and wife, who kept a victualing-house, against the defendant for saying to the wife, "Thou art a bawd to thy own daughter," whereby J. S. that used to come to the house forbore, etc., to the damage of both. After a verdict for the plaintiff, judgment was stayed "because the words are not actionable, except in respect of the special loss, which is the husband's only." Coleman and wife v. Harcourt, 1 Lev., 140.

2. The female plaintiff lived separate from her husband and kept a boarding-house. The defendant spoke words imputing to her insolvency, adultery and prostitution; some of her boarders left her in consequence, and certain tradesmen refused her credit. After verdict for the plaintiff, judgment was arrested on the ground that the husband should have sued alone, for the words were actionable only by reason of the damage to the business, and such damage was solely his. Saville et ux. v. Sweeney, 4 B. & Adol., 514; 1 N. & M., 254.

3. Where words actionable in themselves were spoken of a married woman she was allowed to recover only 20s. damages; all the special damage which she proved at the trial was held to have accrued to her husband, and not to her; he ought therefore to have sued for it in a separate action. He could now claim such damage in his wife's action, if joined as a co-plaintiff. Dengate and wife v. Gardiner, M. & W., 5; 2 Jur., 470.

4. Where a married woman lived in service apart from her husband, maintaining herself, and was dismissed in consequence of a libelous letter sent to her master, it was held that the husband could sue; for his was the special damage. Coward v. Wellington, 7 C. & P., 531. In such a case, had the cause of her dismissal been slanderous words not actionable *per se*, the wife could not (before the Married Women's Property Act, 1870, at all events) have sued. She would have been held to have suffered no damage at all, her personal property belonging entirely to her husband. Per Lord Campbell in Lynch v. Knight and wife, 9 H. L. C., 589; 8 Jur. (N. S.), 724; 5 L. T., 291; Odgers on L. & S., 399.

[1] Comyn's Digest, Action upon the Case for Defamation, D., 30.

[2] Per Heath, J., in Moore v. Meagher, 1 Taunt., 44.

CHAPTER VIII.

DEFAMATION AFFECTING PERSONS IN OFFICES, PROFESSIONS AND TRADES.

§ 1. Where the Imputation Affects a Person in His Office, Profession or Business.— Defamatory words falsely spoken of a person, which impute to the party unfitness to perform the duties of an office or employment of profit, or the want of integrity in the discharge of the duties of such an office or employment, are actionable in themselves without proof of special damages; and so, too, are defamatory words falsely spoken of a party which prejudice such party in his or her profession or trade.[1] Next to imputations which tend to deprive a man of his life or liberty, or to exclude him from the comforts of society, may be ranked those which affect him in his office, profession or means of livelihood. To enumerate the different decisions upon this subject would be tedious, and to reconcile them impossible; yet they seem to yield a general rule sufficiently simple and unembarrassed, namely, that words are actionable which directly tend to the prejudice of any one in his office, profession, trade or business.[2] So, if a person carry on any trade recognized by the law, or be engaged in any lawful employment however humble, an action lies for any words which prejudice him in the way of such trade or employment. But the words must relate to his trade or employment and "touch" him therein.

§ 2. The Words Must be Spoken of the Person in His Office, Profession or Trade.— It by no means follows that all words to the disparagement of an officer, professional man or trader will for that reason, without proof of special damage, be actionable in themselves. Words to be actionable on this ground must touch the plaintiff in his office, profession or trade. They must be shown to have been spoken of the party in relation thereto, and to be such as would prejudice him therein. They

[1] Pollard v. Lyon, 91 U. S., 225; Warnoc v. Circle, 29 Grat. (Va.), 197; Chapin v. Lee, 18 Neb., 440; Williams v. Davenport, 42 Minn., 395; 44 N. W. Rep., 311; Cruikshank v. Gorden, 118 N. Y., 178; Dennis v. Johnson, 42 Minn., 301; 44 N. W. Rep., 68; Morasse v. Brochu, 151 Mass., 567; 25 N. E. Rep., 74; State v. Armstrong, 106 Mo., 395; 16 S. W. Rep., 604; Mains v. Whiting, 87 Mich., 172; 49 N. W. Rep., 559; Tarlton v. Lagarde, 46 La. Ann., 1368; Continental Nat. Bank v. Bowdre, 93 Tenn., 723; Bradstreet Co. v. Oswald, 96 Ga., 396; Giacona v. Bradstreet Co., 48 La. Ann., 1191; Fry v. McCord, 95 Tenn., 678.

[2] Starkie on Slander, 117; 3 Wils., 186.

must impeach either his skill or knowledge, or his official or professional conduct. His special office or situation need not be expressly referred to if the charge made be such as must necessarily affect it. And in determining whether the words used would necessarily affect him in his office, profession or trade, regard must be had to the rank and position of the person and to the mental and moral requirements of the office he holds. Words may be actionable if spoken of a clergyman or a barrister which would not be actionable of a trader or a clerk.

Thus, where integrity and ability are essential to the due conduct of an office, words impugning the integrity or ability of the party are clearly actionable without any express mention of that office; for they distinctly imply that he is unfit to continue therein. But where a person does not hold any situation of trust or confidence, words which merely convey a general imputation of immorality, or charge him with some misconduct not connected with his special profession or trade, will not be actionable in themselves.

§ 3. **The Rule Stated by Andrews, J.**— Where the words spoken have such a relation to the profession or occupation of the plaintiff that they directly tend to injure him in respect to it, or to impair confidence in his character or ability, when from the nature of the business great confidence must necessarily be reposed, they are actionable although not applied by the speaker to the profession or occupation of the plaintiff; but when they convey only a general imputation upon his character, equally injurious to any one of whom they might be spoken, they are not actionable unless such application be made.[1]

§ 4. **Prejudice and Malice Implied.**— The rule is well settled that, where the defamatory words are falsely spoken or written of a person in his profession, prejudice to him and malice on the part of defamer are implied in law.[2]

[1] Sanderson v. Caldwell, 45 N. Y., 405. See Van Epps v. Jones, 50 Ga., 238; Speiring v. Andrews, 45 Wis., 330; Cramer v. Riggs, 17 Wend. (N. Y.), 209; Williams v. Davenport, 42 Minn., 395: Cruikshank v. Gorden, 118 N. Y., 178; Brown v. Vannaman, 85 Wis., 451; 55 N. W. Rep., 183; Tarlton v. Lagarde, 46 La. Ann., 1369; 16 So. Rep., 180; Bradstreet Co. v. Oswald, 96 Ga., 396.

[2] Pratt v. The Pioneer Press Co., 32 Minn., 217; 20 N. W. Rep., 87; Ingram v. Lawson, 6 Bing. N. C., 212; Folkard's Starkie, § 188; State v. Clyne, 53 Kan., 8; Childers v. San Jose Mercury Printing and Publishing Co., 105 Cal., 284; 38 Pac. Rep., 903.

§ 5. Illustrations — Digest of American Cases.—

1. *It is actionable without proof of special damages* to say of a physician, "Doctor S. killed my children. He gave them teaspoonful doses of calomel and they died. He gave them teaspoonful doses of calomel and it killed them; they did not live long after they took it. They died right off the same day,"— spoken in reference to his treatment of the children, because they impute to him gross ignorance or unskilfulness, and are actionable in themselves. Secor v. Harris, 18 Barb., 425.

2. To say of a hotel-keeper "He keeps no accommodations. A person could not get a decent bed or meal there if he tried." Trimmer v. Hiscock, 27 Hun (N. Y.), 364.

3. Or, "Do not go to his house to bring disgrace on yourselves and me; do not go that way at all. He is a bad man." Fitzgerald v. Robinson, 112 Mass., 371.

4. To say of a mechanic "He is no mechanic. He cannot make a good wall or do a good job of plastering. He is no workman. He is a botch." Fitzgerald v. Redfield, 51 Barb. (N. Y.), 484.

5. "He keeps false books. I can prove it." Birch v. Nickerson, 17 Johns. (N. Y.), 217.

6. Words spoken falsely and maliciously of a physician, imputing to him a want of skill and good management in his treatment of a particular case, are actionable without proof of special damage if the jury can infer damage in his profession as the natural and probable consequence of such words. Sumner v. Utley, 7 Conn., 258.

7. Slander will lie for the speaking of words imputing insolvency to any one to whom credit is important in the prosecution of his business; thus, to say of a distiller "there is a time when men will fail, who must fail, and Ostrom's time has come," was held to be actionable. Ostrom v. Calkins, 5 Wend. (N. Y.). 263.

8. The declaration averred that plaintiff was a trader, and that defendant falsely said of and concerning him in his trade and business as a merchant that he was a villain, a rascal and a cheater. *Held*, that upon a motion in arrest of judgment the declaration was sufficient in substance. Although the words are not actionable *per se*, yet they are of such a character that, when spoken in reference to a person in his business, they are actionable without the averment of any other extrinsic circumstance to explain them. Nelson v. Borchsenius, 52 Ill., 236.

9. Words spoken of one in his office, trade, profession or business which tend to impair his credit, or charge him with fraud or indirect dealings, or with incapacity, and that tend to injure him in his trade, profession or business, are actionable without proof of special damage. So to say of an architect "the poor fellow is crazy," and that "his appointment [as architect of a public building] could be regarded in no other light than a public calamity," is actionable in itself. Clifford v. Cochrane, 10 Brad. (Ill.), 570.

10. Where, in answer to an inquiry, "Were there any failures yesterday?" it was said, "Not that I know of, but I understand there is trouble with the Messrs. S.," it was holden that such words, being spoken of the plaintiffs as merchants, were actionable in themselves. Any words which in common acceptation imply a want of credit or responsibility, when

spoken of a merchant, are actionable. Where such words were spoken by a defendant, evidence that another person heard the report that the plaintiffs had failed, and in consequence withdrew from them business to a large amount, is inadmissible in support of a charge for special damage unless the report thus acted upon is traced to the defendant. Sewell v. Catlin, 8 Wend. (N. Y.), 291.

11. To charge a butcher who kept a meat-market with having taken an unborn calf from a dead cow, dressed it, and sold a quarter of it to Mrs. Zimmerman, is actionable; but special damages may be alleged and proven in aggravation of damages. Singer v. Bender, 64 Wis., 169; 25 N. W. Rep., 903.

12. Words charging a clergyman with drunkenness, alleged to have been spoken of him in his profession, are actionable in themselves. Hayner v. Cowden, 27 Ohio St., 292.

13. During the month of February, 1822, a stranger was found dead at an inn kept by one Enoch Fowler at Rehoboth, in Massachusetts. A coroner's inquisition stated that he came to his death by intoxication. James Blanding composed an article for publication concerning the affair, in which he charged Fowler with having administered the *liquid* poison, and thus being the cause of the stranger's death. The public were warned against resorting to the house where such practice was allowed, and the municipal authorities invoked to exert their power by taking or withholding Fowler's license to keep a public house. He caused the same to be published in the Providence "Gazette," copies of which containing the publication were circulated in Rehoboth, where the inn was kept. The court held the publication libelous as insinuating gross misconduct against Fowler, charging him directly with a violation of his duty and exposing him to a loss of his livelihood, so far as it depended on the reputation of his inn for regularity and order. Admitting the account of the inquisition to be correct as published, yet the additions of comments and insinuations tending to asperse Fowler's character rendered it libelous. Com. v. Blanding, 20 Mass., 304.

15. In an action for a libel where injury to one's business is alleged, the amount of his sales for the year in which the libel was published may be shown as evidence, though it covered something previous to the publication. But the defendant should not be precluded from drawing out the facts in detail afterwards so as to enable the jury to distinguish between the business before and after the publication. Whittemore v. Weiss, 33 Mich., 348.

16. *But it is not actionable, without proof of special damages* to speak words of one who holds an office or exercises a trade or profession, unless they are spoken of and touch him in his office or calling. It is not enough that they may tend to injure him in his office or calling, unless they are spoken of him in his official or business character. So saying "there is a combined company here to cheat strangers, and 'Squire Van Tassel has a hand in it," imputes misconduct to Van T. as a man, and not as a magistrate. So, too, "I don't see why 'Squire Van T." [a justice of the peace] "did not tell me that the execution had not been returned in time, so that I could sue the constable and his bail," cannot touch Van T. in his official character. Van Tassel v. Capron, 1 Den., 250.

17. Words spoken of a professional man are actionable only when they

charge him with ignorance or want of skill in general, or a want of integrity either in general or in particular; but not when they charge him with ignorance in a particular case. So, to say of an attorney or counselor in a particular suit, F. "knows nothing about the suit; he will lead you until he has undone you," is not actionable without alleging and proving special damage. Foot v. Brown, 8 Johns., 64.

18. The declaration charged the speaking of the following words of the plaintiff in his character of a justice of the peace: "There is a combined company here to cheat strangers, and 'Squire Van Tassel has a hand in it.' K. A., J. G. and 'Squire Van Tassel are a set of damned blacklegs;" but it did not show that the imputation was connected with the plaintiff's official conduct. *Held* not actionable. Van Tassel v. Capron, 1 Denio, 250.

19. It is not actionable to charge a man with keeping false books or accounts unless his business necessarily leads to dealing on credit, and the keeping of books is incident to his business. Accordingly it is held that slander will not lie for saying of a farmer, or a sawyer of lumber and dealer therein, he keeps false books of account. Rathburn v. Emigh, 6 Wend., 407.

20. The words "'Squire Oakley is a damned rogue" were held not actionable, because they did not appear to have been spoken of him in his official capacity. Oakley v. Farrington, 1 Johnson's Cases (N. Y.), 130.

§ 6. Digest of English Cases.—

1. *It is actionable without proof of special damage* to say that a judge gives corrupt sentences (Cæsar v. Curseny, Cro. Eliz., 305); to say that a clergyman had been guilty of gross immorality and had appropriated the sacrament money (Highmore v. Earl and Countess of Harrington, 3 C. B., N. S., 142); or of an attorney that he deserved to be struck off the roll (Phillips v. Jansen, 2 Esp., 624; Warton v. Gearing, 1 Vict. L. R., C. L., 123); of a watchmaker, "he is a bungler, and knows not how to make a good watch" (Redman v. Pyne, 1 Mod., 19); of a superintendent of police that "he has been guilty of conduct unfit for publication" is not actionable, unless the words were spoken of him with reference to his office (James v. Brook, 9 Q. B., 7; 16 L. J., Q. B., 17; 10 Jur., 541); of an attorney that "he hath the falling sickness" is actionable without special damage, because that disables him in his profession (Taylor v. Perr, 1 Roll. Abr., 44); to say of a gamekeeper that "he trapped three foxes," for that would be misconduct in a gamekeeper (Foulger v. Newcomb, L. R., 2 Ex., 327; 36 L. J., Ex., 169; 15 W. R., 1181; 16 L. T., 595); so of an auctioneer, "You are a deceitful rascal, a villain and a liar. I would not trust you with an auctioneer's license. You robbed a man you called your friend; and not satisfied with 10*l.*, you robbed him of 20*l.* a fortnight ago," was held actionable. Ramsdale v. Greenacre, 1 F. & F., 61; Bryant v. Loxton, 11 Moore, 344.

2. To say to the mistress of a servant girl, "You are not aware, Mrs. C., what kind of a girl you have in your service; if you were, you would not keep her, for I can assure you she is often out with our married man." Coltman, J., held that these words were actionable without proof of special damage; and on a motion for a new trial, Tindal, C. J., said: "The words are actionable, inasmuch as they are spoken of the plaintiff in her vocation" (Rumsey v. Webb et ux., 11 L. J., C. P., 129; Car. & M., 104); or to an innkeeper, "Thy house is infected with the pox, and thy wife was laid of the

pox;" for even if small-pox only was meant, still "it was a discredit to the plaintiff, and guests would not resort" to his house. Levet's Case, Cro. Eliz., 289; Kelly, C. B., in Riding v. Smith, 1 Ex. D., 94; 45 L. J., Ex., 281; 24 W. R., 487; 34 L. T., 500.

3. To say of a clerk or servant that he had "cozened his master" (Seaman v. Bigg, Cro. Car., 480; Reginald's Case (1640), Cro. Car., 563); of a gamekeeper that he trapped three foxes, for that would be clearly a breach of his duties as gamekeeper (Foulger v. Newcomb, L. R., 2 Ex., 327; 36 L. J., Ex., 169; 15 W. R., 1181; 16 L. T., 595); or of a servant girl that she had had a miscarriage and had lost her place in consequence. Connors v. Justice, 13 Ir. C. L. R., 451.

4. To in any way impute insolvency or bankruptcy to any merchant or trader (Arne v. Johnson, 10 Mod., 111; Davis v. Lewis, 7 T. R., 17); to impute immorality or adultery to a beneficed clergyman is actionable, for it is ground of deprivation (Gallwey v. Marshall, 9 Exch., 294; 23 L. J., Ex., 78; 2 C. L. R., 399); to impute habitual drunkenness to a beneficed clergyman (Dod v. Robinson, Al., 63; McMillan v. Birch, 1 Binn., 178); or to a master mariner in command of a vessel (Irwin v. Brandwood, 2 H. & C., 960; 33 L. J., Ex., 257; 9 L. T., 772; 10 Jur. (N. S.), 370; 12 W. R., 438; Hamon v. Falle, 4 App. Cas., 247; 48 L. J., P. C., 45); or to a schoolmaster. Hume v. Marshall, 42 J. P., 136; Brandrick v. Johnson, 1 Vict. L. R., C. L., 306.

5. It would not be actionable where sobriety was not an essential qualification for the post. And to state that a clergyman or a schoolmaster was drunk on one particular occasion, and that neither in church nor in school, would not be actionable, as that alone would not necessitate his removal from his office. Anon., 1 Ohio, 83, n.; Tighe v. Wicks, 33 Up. Can., Q. B. Rep., 470; Brandrick v. Johnson, 1 Vict. L. R., C. L., 306.

7. *But it is not actionable without proof of special damages* to say of an attorney, "He has defrauded his creditors and has been horsewhipped off the course of Doncaster," for it is no part of his professional duties to attend horse-races. Doyley v. Roberts, 3 Bing. N. C., 835; 5 Scott, 40; 3 Hodges, 154.

8. To say of a livery-stable keeper, "You are a regular prover under bankruptcies, a regular bankrupt maker," is not actionable, for it is not a charge against him in the way of his trade. Angle v. Alexander, 7 Bing., 119; 1 Cr. & J., 143; 4 M. & P., 870; 1 Tyrw., 9. So to call a carpenter "a rogue," or a cooper "a varlet and a knave," is clearly not actionable *per se*, for the words do not touch them in their trades. Lancester v. French, 2 Str., 797; Cotes v. Ketle, Cro. Jac., 204.

9. A declaration alleged that the defendant falsely and maliciously spoke of the plaintiff, a working stone-mason, "he was the ringleader of the nine hours' system," and "he has ruined the town by bringing about the nine hours' system," and "he has stopped several good jobs from being carried out by being the ringleader of the system at Llanelly," whereby the plaintiff was prevented from obtaining employment in his trade at Llanelly. *Held*, on demurrer, that the words not being in themselves defamatory nor connected by averment or by implication with the plaintiff's trade, and the alleged damage not being the natural or reasonable consequence of the

speaking of them, the action could not be sustained. Miller v. David, L. R., 9 C. P., 118; 43 L. J., C. P., 84; 22 W. R., 332; 30 L. T., 58.

10. To say of a livery-stable keeper, "You are a regular prover under bankruptcies, a regular bankrupt maker;" for it is not a charge against him in the way of his trade. Angle v. Alexander, 7 Bing., 119; 1 Cr. & J., 143; 4 M. & P., 870; 1 Tyrw., 9. Nor to say to a clerk to a gas company, "You are a fellow, a disgrace to the town, unfit to hold your situation for your conduct with whores." Lumby v. Allday, 1 C. & J., 301; 1 Tyrw., 217. And see James v. Brook, 9 Q. B., 7; 16 L. J., Q. B., 17; 10 Jur., 541. Nor to impute to a stay-maker that his trade is maintained by the prostitution of his shopwoman. Brayne v. Cooper, 5 M. & W., 249. But see Riding v. Smith, 1 Ex. D., 91; 45 L. J., Ex., 281; 24 W. R., 487; 34 L. T., 500.

11. To say of a land speculator, "He cheated me of one hundred acres of land," was held in Canada not to touch him in his trade, and therefore not actionable. Fellowes v. Hunter, 20 Up. Can., Q. B., 382. See Sibley v. Tomlins, 4 Tyrw., 90.

12. To call a dancing mistress "an hermaphrodite" is not actionable; for girls are taught dancing by men as often as by women. Wetherhead v. Armitage, 2 Lev., 233; 3 Salk., 328; Freem., 277; 2 Show., 18. *Secus*, in America, Malone v. Stewart, 15 Ohio, 319.

13. To say of the keeper of a restaurant, "You are an infernal rogue and swindler," was held not to be actionable without proof of special damage, as not of itself necessarily injurious to a restaurant keeper; for, as the supreme court of Victoria remarked: "In fact there might be very successful restaurant keepers who were both rogues and swindlers." Brady v. Youlden, Kerferd & Box's Digest of Victoria Cases, 709; Melbourne Argus Reports, 6th September, 1867.

14. *So it is not actionable without proof of special damage* to impute drunkenness to a physician. Ayre v. Craven, 2 A. & E., 2; 4 Nev. & M., 220. To a stay-maker. Brayne v. Cooper, 5 M. & W., 249. Or a clerk to a gas company. Lumby v. Allday, 1 C. & J., 301; 1 Tyrw., 217.

§ 7. **The Words Must Touch the Party in His Trade, Office or Profession.**— It by no means follows that all words spoken to the disparagement of an officer, professional man or trader will be actionable in themselves. Words to be actionable on this ground "must touch the party in his office, profession or trade;" that is, they must be shown to have been spoken of him in relation thereto, and to be such as would prejudice him therein. They must impeach either his skill or knowledge, or his official or professional conduct. His special office, profession or trade need not be expressly referred to, if the charge made be such as must necessarily affect it. And in determining this question regard must be had to the rank and position of the party and to the mental and moral require-

ments of the office he holds or the trade or profession which he follows.[1]

§ 8. **The Subject Illustrated.**— From the illustrations given it will be easy to form an idea of what is meant by the words "touch him in his profession," and the principal reason upon which they depend is tolerably apparent. It may perhaps be made clear by a simple illustration in point: Mr. Brown says of Mr. Smith, a carpenter, that he is incapable of making up a physician's prescription, and he also says of Mr. Jones, a chemist and druggist, that he cannot construct a door or mend a table. Obviously such assertions convey no injurious imputation to the parties of whom they are made. But if they are applied inversely to the parties in question the words may have the effect of seriously damaging each in his own particular trade or employment; that is, touch him in his trade, office or profession.[2]

§ 9. **The Defamatory Words Must be Published while the Party Still Carries on His Trade, Practices His Profession or Holds His Office.**— The ground of action in these cases is that the party is disgraced, or injured in his profession or trade, or exposed to the hazard of losing his office, in consequence of the slanderous words; not that his general reputation and standing in the community are affected by them. It will be recollected that the words spoken, in this class of cases, are not actionable of themselves, but that they become so in consequence of the special character of the party of whom they were spoken. The fact of his maintaining that special character, therefore, lies at the very foundation of the action.[3] Thus, where an action is brought for words spoken of a lawyer or a physician, it must appear that he practiced as such at the time the words were spoken; for otherwise the words could not have affected him professionally. So if an action be brought for publishing words of a tradesman concerning his trade, it must be averred that at the time of publishing them he was in trade, for if he were not at that time in trade his credit could not be injured by the words. The cases all admit

[1] Dole v. Van Rensselaer, 1 Johns. Cas. (N. Y.). 330; Kinney v. Nash, 3 N. Y., 117; James v. Brook, 2 Q. B., 7; Odgers on L. & S., 62; Flood on L. & S., 120; Morasse v. Brochu, 151 Mass., 567; Baldwin v. Walser, 41 Mo. App., 243; Pfitzinger v. Dubbs, 64 Fed. Rep., 696; Piper v. Woolman, 48 Neb., 280; 61 N. W. Rep., 588; State v. Mason, 26 Or., 273.

[2] Flood on L. & S., 120.

[3] Heard on L. & S., § 45.

this principle and show that, for slander of a man in his calling, that calling, whatever it might be, had continued, either actually or by intendment, to the time of the speaking of the words. Trades or professions in the legal acceptation of those terms are conditions which by law are presumed to continue and not to be altered.[1]

§ 10. **Requisites of the Imputation.**— Words imputing adultery, profligacy or immoral conduct, when spoken of one holding an office or carrying on a profession or business, will not be actionable unless they "touch" him in that office, profession or business. Thus, if alleged of a clergyman they will be actionable, because if the charge were true it would be ground for degradation or deprivation, as it would prove him unfit to hold his benefice or to continue in the active duties of his profession.[2] But if the same words were spoken of a trader or of a physician they would not be actionable without proof of special damage, as they do not necessarily affect the plaintiff in relation to his trade or profession. Any words spoken of a person, in relation to his office, trade or profession, which tend to impair his credit, or to charge him with fraud or indirect dealing in his line of calling or business, are actionable in themselves.[3]

§ 11. **Imputations upon the Integrity of Persons Holding Offices of Trust.**— Words which impute a want of integrity to any one holding an office of confidence or trust, whether an office of profit or not, are clearly actionable in themselves. So if the words employed have a natural tendency to cause the plaintiff to be removed from his office, as by imputing insufficiency or gross incompetency, or habitual negligence of his duties.[4] But where the words merely impute want of ability,

[1] Tuthil v. Milton, Yelverton, 158; Collis v. Malin, Cro. Car., 282; Jordan v. Lyster, Cro. Eliz., 273; Moore v. Synne, 2 Rolle Rep., 84; Forward v. Adams, 7 Wend., 204; Bellamy v. Burch, 16 Meeson & Welsby, 590; Gallwey v. Marshall, 9 Ex., 294.

[2] Gallwey v. Marshall, 9 Ex., 294; 23 L. J., Ex., 78.

[3] Davis v. Davis, 1 N. & M. (S. C.), 290; Ostrom v. Calkins, 5 Wend. (N. Y.), 263.

[4] Williams v. Davenport, 42 Minn., 393; Dennis v. Johnson, 42 Minn., 301; Doan v. Kelley, 121 Ind., 413; Morasse v. Brochu, 151 Mass., 567; Mains v. Whiting, 87 Mich., 172; Alexander v. Jenkins, 1 Q. B., 797; Arrow Steamship Co. v. Bennett, 73 Hun, 81; Gaither v. Advertiser Co., 102 Ala., 458; Tarlton v. Lagarde, 46 La. Ann., 1368; Mattice v. Wilcox, 147 N. Y., 624.

without ascribing to the plaintiff any wicked or dishonest conduct, no action lies.

As the danger of plaintiff's losing his office is the gist of the action, it is essential that plaintiff should hold the office at the time the words were spoken.[1]

To say publicly of a man who is in the enjoyment of an office of honor, profit or trust that he is wanting in integrity in his office, or that he habitually neglects his official duties, or that he is a corrupt man and takes bribes, is actionable; but if the words merely impute to him want of ability and general unfitness for his post, the words are not actionable without proof of special damage. Whenever words are sought to be made actionable on the ground that they were spoken of a man in office, it must be shown that they were spoken of him in his character or conduct in his office, and that they impute to him the want of some qualification for or misconduct therein.[2]

§ 12. **Illustrations — Digest of American Cases.—**

1. *It is actionable without proof of special damages* to say of the chief engineer of the fire department, "You have got a pretty chief engineer here; it took two men to hold him up. He was dead drunk. He is a pretty man to be chief engineer. He is not fit to be engineer when a man is so drunk." Gottbehuet v. Hubacheck, 36 Wis., 515.

2. To charge a member of a nominating convention of a political party with bribery or with having been influenced by a bribe. Dolloway v. Turrel, 26 Wend. (N. Y.), 883; Stone v. Cooper, 2 Denio (N. Y.), 193; Hand v. Winton, 9 Vroom, 122; Hand v. Winton, 38 N. Y., 122; Sanderson v. Coldwell, 45 N. Y., 598.

3. To say of a justice of the peace: "The reason I did not take out my second papers was, I did not want to sit as a juror before such a damned fool of a justice." Speiring v. Andrae, 45 Wis., 333.

4. Words spoken of a sheriff in relation to his office, charging him with converting moneys collected on execution to his own use, amount to a charge of malpractice, and are actionable. Dole v. Van Rensselaer, 1 Johns. Cas. (N. Y.), 330.

5. To say of a postmaster, in reference to his official character: "He would rob the mail for $100; yes, he would rob the mail for $5." Craig v. Brown, 5 Blackf. (Ind.), 44.

[1] Odgers on L. & S., 72; Eviston v. Cramer, 47 Wis., 659; Kinney v. Nash, 3 N. Y., 177; Van Tassel v. Capron, 1 Den. (N. Y.), 250.

[2] How v. Prin, Holt, 653; 2 Salk., 694; R. v. Darby, 3 Mod., 136, with Prowse v. Wilcox, ib., 163; Onslow v. Horne, 3 Wils., 177; 2 W. Bl., 753; Morasse v. Brochu, 151 Mass., 567; Kent v. Bongartz, 15 R. I., 72; Ramsey v. Cheek, 109 N. C., 270; Hallam v. Post Pub. Co., 55 Fed. Rep., 456; Jackson v. Pittsburg Times, 152 Pa. St., 406; Upton v. Hume, 24 Or., 420; Post Pub. Co. v. Moloney, 50 Ohio St., 71; Meteye v. Times Dem. Pub. Co., 47 La. Ann., 824; Pokrok Zapadu Pub. Co. v. Ziskovsky, 42 Neb., 64; 60 N. W. Rep., 358.

6. Officers and candidates for office may be canvassed but not calumniated. Seely v. Blair, Wright (Ohio), 358, 683.

7. Words spoken of a party in his character as a judge are actionable without colloquium or innuendo. Hook v. Hackney, 16 Serg. & R. (Penn.), 385.

8. To charge a town clerk acting as moderator of a town meeting with fraudulently destroying a vote. Dodds v. Henry, 9 Mass., 262.

9. An article in a newspaper headed "An unwarranted outrage," charging a deputy-sheriff with arresting peaceable and innocent men as tramps merely to get the fees allowed by law for such services, is actionable in itself. Baureseau v. Detroit Ev. Jour. (Mich.), 30 N. W. Rep., 376.

10. To charge a county attorney with culpable neglect of his official duty in failing to prosecute, "purely out of political fear," a certain person suspected of having committed a criminal offense, was held actionable, for the reason that neglect from such a motive must be a gross offense, for which he might be removed from office. Larrabee v. Minn. Trib. Co., 36 Minn., 141; 30 N. W. Rep., 462.

11. To charge any public officer falsely with gross ignorance of his duties is actionable. Spiering v. Andrae, 45 Wis., 330.

12. In Canada, where the plaintiff was charged with being a public robber — innuendo, that he, plaintiff, had defrauded the public in his dealings with them — it was held not necessary for plaintiff to aver that he is in any office, trade or employment in which he could have defrauded the public. Taylor v. Carr, 3 Up. Can., Q. B. Rep., 306.

13. The conduct of public officers is open to public criticism, but the groundless imputation of bad motives or of criminal offenses is not such criticism. Neebe v. Hope (Penn), 2 Atl. Rep., 568.

14. To impute to a public officer any official misconduct for the purpose of increasing his fees is actionable *per se*. Eviston v. Cramer, 47 Wis., 659; 3 N. W. Rep., 302.

15. Charging a commissioner in bankruptcy with being a misanthropist and violent partisan, stripping unfortunate debtors of every cent and then depriving them of the benefit of the act, is libelous. Riggs v. Denniston, 3 Johns. Cas. (N. Y.), 198. And so is an article representing the lieutenant-governor as being in a beastly state of intoxication while in the discharge of his duty in the senate — "an object of loathing and disgust." Root v. King, 7 Cow., 613; 4 Wend., 113.

16. *But it is not actionable without proof of special damages* to call a candidate for office "a corrupt old tory" (Hogg v. Dorrah, 2 Port. (Ala.), 212); or to say of a justice of the peace 'Squire "Oakley is a damned old rogue," unless it appears that the words were spoken of him in his official capacity (Oakley v. Farrington, 1 Johns. Cas. (N. Y.), 129); or to impute weakness of understanding to a candidate for congress (Mayrant v. Richardson, 1 N. & M. (S. C.), 347); or to say of a magistrate, "There is a combined company here to cheat strangers, and 'Squire V. T. has a hand in it. He is a damned blackleg," for the reason that words spoken against a magistrate are not actionable because tending to injure him in his office unless spoken of him in his official capacity — the words in question not imputing to him any misconduct as a magistrate. Van Tassel v. Capron, 1 Denio (N. Y.), 250.

17. Words charging the plaintiff, a justice of the peace, with omitting to inform a party who had recovered a judgment before him of the fact that the constable who had the execution had rendered himself liable for not returning the same in time, do not impute official misconduct. Van Tassel v. Capron, 1 Denio, 250.

18. To say of a member of the legislature in reference to the future discharge of his functions that "he is a corrupt old tory" is not actionable in itself. To be actionable such words must have been spoken in reference to his past conduct. Hogg v. Dorrah, 2 Port. (Ala.), 212.

19. An action for slanderous words imputing to the plaintiff misconduct as a constable is not sustained by proving words imputing misconduct to him, as an agent of the executive of this state, for the arrest in another state of a fugitive from justice. Kenney v. Nash, 3 Coms., 177.

20. Where words are actionable only on account of the official or professional character of the plaintiff, it is not enough that they tend to injure him in his office or calling, but they must relate to his official or business character, and impute misconduct to him in that character. Van Tassel v. Capron, 1 Denio, 250.

21. A charge against a health officer of selling a coat belonging to one who had died in a hospital, and with concealing property belonging to the hospital, are not actionable without proof of special damages. Harcourt v. Harrison, 1 Hall (N. Y.), 474.

22. In order to render words actionable in themselves when spoken in reference to the official character or action of a person holding an office of profit, it is not necessary that they should import a crime, but it is sufficient if they charge incapacity or want of integrity, or corruption, in the officer. When an office is lucrative, words which reflect upon the integrity or the capacity of the officer render his tenure precarious, and are therefore a detriment in a pecuniary point of view. Gove v. Blethen, 21 Minn., 80.

23. Charges made against the sheriff of a county that he was "a profane man," "a libertine," "untruthful," "ruining a young and innocent lady," "boasting of the influence of his office . . . to crush any one who would oppose him," and that "he drew a pistol on a young lady for no other cause than exposing him in a crime which would send him to the state's prison," were held to relate to his private rather than to his official capacity. Com. v. Wardwell, 136 Mass., 164.

§ 13. Digest of English Cases.—

1. *It is actionable without proof of special damage* to say to a churchwarden, "Thou art a cheating knave and hast cheated the parish of £40." Strode v. Holmes (1651), Styles, 338; 1 Roll. Abr., 58; Woodruff v. Wooley, 1 Vin. Abr., 463; Jackson v. Adams, 2 Bing. N. C., 402; 2 Scott, 599; 1 Hodges, 339.

2. To call an escheator, attorney or other officer of a court of record an "extortioner." Stanley v. Boswell, 1 Roll. Abr., 55.

3. To say of a town clerk that he hath not performed his office according to law (Fowell v. Cowe, Rolle's Abr., 56; Wright v. Moorhouse, Cro. Eliz., 358); or that he destroyed votes at an election. Dodds v. Henry, 9 Mass., 262.

4. To say of a constable, "He is not worthy the office of constable." Taylor v. How, Cro. Eliz., 861; 1 Vin. Abr., 464.

5. To accuse a royal commissioner of taking bribes. Moor v. Foster, Cro. Jac., 65; Purdy v. Stacey, 5 Burr., 2698.

6. To say of a justice of the peace, "Mr. Stuckley covereth and hideth felonies, and is not worthy to be a justice of the peace;" for it is against his oath and the office of a justice of peace, and a good cause to put him out of the commission." Stuckley v. Bulhead, 4 Rep., 16; Sir John Harper v. Beamond, Cro. Jac., 56; Sir Miles Fleetwood v. Curl, Cro. Jac., 557; Hob., 268.

7. That "he is a Jacobite and for bringing in the Prince of Wales and popery;" for this implies that he is disaffected to the established government and should be removed from office immediately (How v. Prin (1702), Holt, 652; 7 Mod., 107; 2 Ld. Raym., 812; 2 Salk., 694, affirmed in House of Lords sub nom. Prinne v. Howe, 1 Brown's Parl. Cases, 64); to insinuate that he takes bribes or "perverts justice to serve his own turn." Cæsar v. Curseny, Cro. Eliz., 305; Carn v. Osgood, 1 Lev., 280; Alleston v. Moor, Hetl., 167; Masham v. Bridges, Cro. Car., 223; Isham v. York, Cro. Car., 15; Beamond v. Hastings, Cro. Jac., 240; Aston v. Blagrave, 1 Str., 617; 8 Mod., 270; 2 Ld. Raym., 1369; Fort., 206; Lindsey v. Smith, 7 Johns., 359.

8. Thus, "You are a sweet justice; you sent your warrant for J. S. to be brought before you on suspicion of felony and afterwards sent J. D. to give him warning thereof that he might absent himself." Burton v. Tokin, Cro. Jac., 142.

9. *But it is not actionable without proof of special damage* to impute insincerity to a member of parliament (Onslow v. Horne, 3 Wils., 177; 2 W. Bl., 750); to say of a justice of the peace, "He is a logger-headed, a slouch-headed, bursen-bellied bound" (R. v. Farre, 1 Keb., 629); or "He is a blood-sucker and sucketh blood:" "for it cannot be intended what blood he sucketh" (Sir Christopher Hillard v. Constable, Cro. Eliz., 306; Moore, 418); or "He is a fool, an ass, and a beetle-headed justice;" for these are but general terms of abuse, and disclose no ground for removing the plaintiff from office. Bill v. Neal, 1 Lev., 52; Sir John Hollis v. Briscow et ux., Cro. Jac., 58.

10. *Lord Holt:* It has been adjudged that to call a justice of the peace blockhead, ass, etc., is not a slander for which an action lies, because he was not accused of any corruption in his employment, or any ill design or principle; and it was not his fault that he was a blockhead, for he cannot be otherwise than his Maker made him; but if he had been a wise man, and wicked principles were charged upon him when he had not them, an action would have lain; though a man cannot be wiser, he may be honester than he is. Howe v. Prinn, Holt, 653; Salk., 694. Since no special learning or ability is expected of a justice of the peace, it is not actionable to call him a "fool," "ass," "blockhead," or any other words merely imputing want of natural cleverness or ignorance of law. But words which impute to him corruption, dishonesty, extortion or sedition are actionable in themselves. Bill v. Neal, 1 Lev., 52; How v. Prin, Holt, 652; 2 Salk., 694; 2 Ld. Raym., 812; 7 Mod., 107; 1 Bro. Parl. C., 64; Aston v. Blagrave, 1 Str., 617; 8 Mod., 270; Fort., 206; 2 Ld. Raym., 1369.

§ 14. Meaning of the Terms Actionable per se, In Themselves and Actionable without Proof of Special Damages — Illustrations.— When language is used concerning a person or his affairs which from its nature necessarily must, or presumably will as its natural and proximate consequence, occasion him pecuniary loss, its publication *prima facie* constitutes a cause of action and *prima facie* constitutes a wrong without any allegation or evidence of damage other than that which is implied or presumed from the fact of publication; and this is all that is meant by the terms "actionable *per se*," etc. Therefore the real practical test by which to determine whether special damage must be alleged and proven in order to make out a cause of action for defamation is whether the language is such as necessarily must or naturally and presumably will occasion pecuniary damage to the person of whom it is spoken. Of course it can be readily seen that a false statement might be made regarding, for example, a physician's conduct in a particular case, ascribing to him only such want of information or good management as is compatible with general skill and care in his profession, and no damage to his professional character would be presumed. The false statement might ascribe to him an error or mistake of a kind that would not necessarily do him prejudice, because rather indicative of human imperfection than of general professional incompetency or gross disregard of professional duty.

But on the other hand, it is evident that a false report concerning a physician, although confined to his conduct in a particular case, and although it neither imputes to him a crime nor general professional incompetency, may nevertheless imply such gross ignorance, or such gross and reckless or inhuman disregard for the health or life of his patient in that particular instance as necessarily to injure his professional reputation, and hence cause him pecuniary damage. Such a charge is actionable without alleging special damage, because damage must be presumed as its necessary or natural effect. Such charges are more than ordinary criticism. They are not merely charges of simple neglect or oversight. For example, to charge a physician with allowing "the decomposing body of a dead infant to remain for several days in the room with the sick mother" is in effect a charge of gross, culpable and almost

inhuman neglect or oversight, evincing a reckless disregard of the life and health of his patient. The natural and necessary effect of such a charge against a physician, if believed, would be to injure his professional reputation, and if so, the charge is actionable without proof of special damage.[1]

§ 15. **Imputation of a Want of Special Knowledge, etc.**— In all cases where a special kind of learning is essential to the proper conduct of a particular trade or profession, words asserting that a party who belongs to such a trade or profession does not possess such special learning is actionable without proof of special damages. Hence to impute duncehood or want of scholarship generally to a member of either of the learned professions touches his profession.[2] This principle will be found also to govern the numerous cases respecting attorneys and apothecaries. The duties of an attorney requiring integrity and knowledge of the law, any general imputation of dishonesty, or any imputation of ignorance of the law, would of course be slanderous.[3] The practice of an apothecary requires skill in medicine, and any imputation of a want of such skill would be slanderous.[4] Want of skill, knowledge or diligence to a person exercising an art must be imputed with reference to the particular situation of the plaintiff or it will not be actionable.[5]

§ 16. **Illustrations — Digest of American Cases.**—

1. *It is actionable without proof of special damages* to charge a counselor at law with offering his services to his client in order to divulge his secrets. Riggs v. Dennison, 3 Johns. Cas. (N. Y.), 198.

2. Words spoken falsely and maliciously of a physician, imputing to him a want of skill and good management in his treatment of a particular case, are actionable without proof of special damage, if the jury can infer damages in his profession as the natural and probable consequence of such words. Sumner v. Utley, 7 Conn., 258; Garr v. Selden, 6 Barb. (N. Y.), 416.

[1] Secor v. Harris, 18 Barb. (N. Y.), 425; Carroll v. White, 33 Barb. (N. Y.), 616; Bergold v. Putcha, 2 Thomp. & C., 532; Johnson v. Robertson, 8 Port., 486; Tutty v. Alewin, 11 Mod., 221; Onslow v. Horne, 3 Wils., 177; Pratt v. Pioneer Press Co., 35 Minn., 251; 28 N. W. Rep., 708; Summer v. Utley, 7 Conn., 257.

[2] Peard v. Jones, Cro. Car., 382; 6 Bac. Abr., 215; Cruikshank v. Gorden, 118 N. Y., 178; Henderson v. Commercial Advertiser, 46 Hun, 504; Dennis v. Johnson, 42 Minn., 301.

[3] 4 Rep., 16; Cro. Car., 192; Cro. Jac., 586; 3 Wils., 59; 2 Esp., 624; Mains v. Whiting, 87 Mich., 172; 49 N. W. Rep., 559; Mattice v. Wilcox, 147 N. Y., 624; Harris v. Minvielle, 48 La. Ann., 908.

[4] 1 N. R., 196; Hargan v. Purdy, 93 Ky., 424.

[5] Tutty v. Alewin, 11 Mod., 221; Flower's Case, Cro. Car., 211; Redman v. Pyne, 1 Mod., 19; Cruikshank v. Gorden, 118 N. Y., 178; Williams v. Davenport, 42 Minn., 393; Lotto v. Davenport, 42 Minn., 395.

3. And it has been held that the words, "Dr. A. killed my children. He gave them teaspoonful doses of calomel, and it killed them. They did not live long after they took it. They died right off, the same day," are actionable in themselves. Secor v. Harris, 18 Barb. (N. Y.), 425.

4. Words imputing to a mechanic the want of skill or knowledge in his craft are actionable, without proof of special damage, if they are clearly shown to have been spoken with reference to the plaintiff's occupation, and the employment is one requiring peculiar knowledge and skill. Fitzgerald v. Redfield, 51 Barb. (N. Y.), 484.

5. *But it is not actionable without proof of special damage* to say of an attorney in a particular suit, "He knows nothing about the suit; he will lead you on until he has undone you" (Foot v. Brown, 8 Johns. (N. Y.), 64); or to say of a physician, "In my opinion the bitters that A. fixed for B. were the cause of his death," for such words do not in their usual sense import a charge of murder. Jones v. Diver, 22 Ind., 184.

6. To say of a physician: "He is no good, only a butcher. I would not have him for a dog,"— is actionable. Cruikshank v. Gorden, 118 N. Y., 178; 23 N. E. Rep., 457. See, also, Garr v. Selden, 6 Barb., 416.

§ 17. Digest of English Cases.—

1. *It is actionable without proof of special damages* to say of a barrister, "He is a dunce, and will get little by the law" [though here it was argued for the defendant that Duns Scotus was "a great learned man;" that though to call a man "a dunce" might in ordinary parlance imply that he was dull and heavy of wit, yet it did not deny him a solid judgment; and that to say "he will get little by the law" might only mean that he did not wish to practice]. Peard v. Jones, Cro. Car., 382.

2. To say of a midwife. "Many have perished for her want of skill." Flowers' Case, Cro. Car., 211.

3. To charge an apothecary with having caused the death of a child by administering to it improper medicines. Edsall v. Russell, 4 M. & Gr., 1090; 5 Scott, N. R., 801; 2 Dowl. (N. S.), 641; 12 L. J., C. P., 4; 6 Jur., 996; Tutty v. Alewin, 11 Mod., 221.

4. Where an architect is engaged to execute certain work, it is a libel upon him in the way of his profession to write to his employers asserting that he has no experience in that particular kind of work, and is therefore unfit to be intrusted with it. Botterill and another v. Whytehead, 41 L. T., 588.

5. To say of an attorney, "He can't read a declaration" (Powell v. Jones, 1 Lev., 297); or "He has no more law than Master Cheyny's bull," or "He has no more law than a goose." Baker v. Morfue, vel Morphew, Sid., 327; 2 Keble, 202.

6. According to the report in Keble, an objection was taken in this case on behalf of the defendant that it was not averred in the declaration "that Cheyny had a bull, *sed non allocatur*, for the scandal is the greater if he had none." And the court adds a solemn *quære* as to saying "He has no more law than the man in the moon," feeling no doubt a difficulty as to ascertaining the precise extent of that individual's legal acquirements. But in Day v. Buller, 3 Wils., 59, the court strangely decides that it is defamatory to say of an attorney that "he is no more a lawyer than the devil!" Odgers on L. & S., 71.

7. To say of a physician that "he is no scholar," "because no man can be a good physician unless he be a scholar." Cawdrey v. Highley, al. Tythay, Cro. Car., 270; Godb., 441.

8. To say of the deputy of Clarencieux, king-at-arms, "He is a scrivener and no herald." Brooke v. Clarke, Cro. Eliz., 328; 1 Vin. Abr., 464. But since no special learning or ability is expected of a justice of the peace it is not actionable to call him "fool," "ass," "blockhead," or any other words merely imputing want of natural cleverness or ignorance of law. But words which impute to him corruption, dishonesty, extortion or sedition are actionable of course. Bill v. Neal, 1 Lev., 52; How v. Prin, Holt, 652; 2 Salk., 694; 2 Ld. Raym., 812; 7 Mod., 107; 1 Bro. Parl. C., 64; Aston v. Blagrave, 1 Str., 617; 8 Mod., 270; Fort., 206; 2 Ld. Raym., 1361.

§ 18. **Attorneys and Solicitors.**— The duties of attorneys requiring integrity and knowledge of the law, any general imputation of dishonesty, or any imputation of ignorance of the law, will of course be defamatory.[1]

For example: It is actionable, without proof of special damage, to charge an attorney with offering his services to his client in order to divulge his secrets,[2] or with revealing or disclosing confidential communications made to him by a client for the purpose of aiding and abetting another person with whom he had combined and colluded, and of injuring his client.[3]

§ 19. **Illustrations — Digest of American Cases.—**

1. *It is actionable without proof of special damage* to say of an attorney or counselor at law, "He is not a man of integrity and is not to be trusted; he will take fees on both sides of a cause." Chipman v. Cooke, 2 Tyler (Vt.), 456.

2. To charge a counselor at law with offering his services to his client in order to divulge his secrets is libelous. Riggs v. Dennison, 3 Johns. Cas. (N. Y.), 198.

3. To charge an attorney with revealing and disclosing confidential communications made to him by his client for the purpose of aiding and abetting another person with whom he has combined and colluded, and of injuring his client. Gau v. Selden, 6 Barb. (N. Y.), 416.

4. To call an attorney a "cheat" is actionable, even though an indictable offense is not imputed. Rush v. Cavanaugh, 2 Penn. St., 187.

5. Where, in a conversation concerning an attorney's professional skill, the defendant called him "a damned rascal," under the circumstances it was held that these words were actionable without proof of special damages. Brown v. Mims, 2 Treadw. (S. C.) Const., 235. So to charge an at-

[1] Cooke on Defamation, 14; Barker v. Morfue, Sid., 327; 2 Keb., 202; Powell v. Jones, 1 Lev., 297; Henderson v. Commercial Advertiser, 46 Hun, 504; Mains v. Whiting, 87 Mich., 172; Rush v. Cavenaugh, 2 Pa. St., 187; Gribble v. Pioneer Press Co., 34 Minn., 342; Greenwood v. Cobbey, 26 Neb., 449.

[2] Riggs v. Dennison, 3 Johns. Cas. (N. Y.), 198.

[3] Gapp v. Selden, 6 Barb. (N. Y.), 416; 4 Comst., 91.

torney with professional misconduct. Atkinson v. Detroit Free Press, 46 Mich., 341: 9 N. W. Rep., 501.

6. *But it is not actionable without proof of special damage* to say of an attorney or counselor at law in a particular suit, "He knows nothing about the suit. He will lead you on until he has undone you." Foot v. Brown, 8 Johns. (N. Y.), 64.

§ 20. Digest of English Cases.—

1. *It is actionable without proof of special damages* to say of an attorney, "He is an ambidexter," *i. e.*, one who being retained by one party in a cause, and having learnt all his secrets, goes over to the other side and acts for the adversary. Such conduct was subject for a *qui tam* action under an old penal statute. Rastell's Entries, p. 2, Action *sur le case vers* Attorney, 3; Annison v. Blofield, Carter, 214; 1 Roll. Abr., 55; Shire v. King, Yelv., 32.

2. To impute that he will betray his clients' secrets and overthrow their cause. Martyn v. Burlings, Cro. Eliz., 589.

3. To say of an attorney, "He is a very base rogue and a cheating knave, and doth maintain himself, his wife and children by his cheating." Anon. (1638), Cro. Car., 516. See Jenkins v. Smith, Cro. Jac., 586.

4. To say of an attorney that "he hath the falling sickness;" for that disables him in his profession. Taylor v. Perr (1607), 1 Rolle's Abr., 44.

5. To say of an attorney, "What, does he pretend to be a lawyer? He is no more a lawyer than the devil;" or any other words imputing gross ignorance of law. Day v. Buller, 3 Wils., 59; Baker v. Morfue, Sid., 327; 2 Keb., 202; Powell v. Jones, 1 Lev., 297.

6. To say of an attorney, "He is only an attorney's clerk, and a rogue; he is no attorney," or any words imputing that he is not a fully qualified practitioner. Hardwick v. Chandler, 2 Stra., 1138.

7. To charge an attorney with barratry, champerty or maintenance. Boxe v. Barnaby, 1 Roll. Abr., 55; Hob., 117; Proud v. Hawes, Cro. Eliz., 171; Hob., 140; Taylor v. Starkey, Cro. Car., 192; 9 Bac. Abr., 51.

8. To say to a client, "Your attorney is a bribing knave, and hath taken twenty pounds of you to cozen me." Yardley v. Ellis, Hob., 8.

9. To say of an attorney, "He stirred up suits, and once promised me that if he did not recover in a cause for me he would take no charges of me;" "because stirring up suits is barratry, and undertaking a suit, no purchase no pay, is maintenance." Smith v. Andrews, 1 Roll. Abr., 54; Hob., 117; 9 Bac. Abr., 51.

10. To assert that an attorney has been guilty of professional misconduct and ought to be struck off the rolls. Byrchley's Case, 4 Rep., 16; Phillips v. Jansen, 2 Esp., 624; Wartin v. Gearing, 1 Vict. L. R., C. L., 122; 9 Bac. Abr., 51.

11. *But it is not actionable without proof of special damages* to say of an attorney, "He has defrauded his creditors and has been horse-whipped off the course at Doncaster;" for it is no part of his professional duties to attend horse-races, and his creditors are not his clients. Doyley v. Roberts, 3 Bing. N. C., 835; 5 Scott, 40; 3 Hodges, 154; 9 Bac. Abr., 51.

12. Nor to abuse him in general terms, such as "cheat," "rogue" or "knave;" though to say, "You cheat your clients," would be actionable. Alleston v. Moor, Het., 167; Bishop v. Latimer, 4 L. T., 775; 9 Bac. Abr., 51.

§ 21. **Barristers at law.**— Barristers may sue for words touching them in their profession, although their fees are honorary. The loss of a gratuity is special damage.[1]

§ 22. **Illustrations — Digest of English Cases.**—

1. *It is actionable without proof of special damages* to say of a barrister: "Thou art no lawyer; thou canst not make a lease; thou hast that degree without desert; they are fools who come to thee for law." Bankes v. Allen, 1 Roll. Abr., 54. Or, "He hath as much law as a jackanapes." Palmer v. Boyer, Owen, 17; Cro. Eliz., 342; Broke's Case, Moore, 409; Cawdrey v. Tetley, Godb., 441. It is said that had the words been "He has no more wit than a jackanapes," no action would have lain, wit not being essential to success at the bar, according to F. Pollock, 2 Ad. & E., 4. Or, "He has deceived his client and revealed the secrets of his cause." Snag v. Gray, 1 Roll. Abr., 57; Co. Entr., 22. Or, "He will give vexatious and ill counsel, and stir up a suit and milk her purse, and fill his own large pockets." King v. Lake, 2 Ventr., 28; Hardres, 470.

2. When a plaintiff who was a barrister gave counsel to divers of the king's subjects: The defendant said to J. S. [the plaintiff's father-in-law], concerning the plaintiff, "He is a dunce and will get little by the law." J. S. replied, "Others have a better opinion of him." The defendant answered, "He was never but accounted a dunce in the middle temple." *Held*, that the words were actionable though no special damage was alleged. Peard v. Jones, Cro. Car., 382.

§ 23. **Clergymen and Ministers of the Gospel.**— Words are often actionable when spoken of clergymen which would not be so if spoken of others.[2] But it does not follow that all words which tend to bring a clergyman into disrepute or which merely impute that he has done something wrong are actionable without proof of special damage. The reason always assigned for this distinction between clergymen and others is that the charge, if true, would be ground of degradation or deprivation.[3] The imputation, therefore, must be such as, if true, would tend to prove him unfit to continue his calling, and therefore tend more or less directly to proceedings by the proper authorities to silence him. So to say of a clergyman he is a rogue or a drunkard, because these words, if believed, must deprive him of that respect, veneration and confidence without which he can expect no hearers as a minister of the Gospel. The reason why these expressions are

[1] Bracebridge v. Watson, Lilly, Extr., 61; Hartley v. Henning, 8 T. R., 130.

[2] Galway v. Marshall, 9 Ex., 294; 23 L. J., Ex., 78; 2 C. L. R., 399; Piper v. Woolman, 43 Neb., 280; Bidwell v. Rademacher, 11 Ind., App., 218; Munson v. Lathrop (Wis.), 71 N. W. Rep., 596.

[3] Drake v. Drake, 1 Roll. Abr., 58; Dodd v. Robinson (1648), Aleyn, 63; Pemberton v. Colls, 10 Q. B., 461; 16 L. J., Q. B., 403; 11 Jur., 1011.

actionable when applied to persons of certain professions is because from the nature of the case it is evident that damage must ensue.[1]

For example: It is actionable, without proof of a special damage, to falsely and maliciously charge a settled minister of the Gospel with being drunk, and with having had a drunken frolic, so that he was unable to go home, but staggered towards another house, where he remained all night;[2] or to say he is a drunkard, a common swearer, a common liar, and hath preached false doctrine and deserves to be degraded, for such matters are good cause to have him degraded;[3] or, "he is a rogue and a dog, and will never be good till he is three feet underground. I had rather my son should make hay on a Sunday than to go hear him preach;"[4] or, "he is an old rogue and a contemptible fellow, and hated and despised by everybody;"[5] or, "he preacheth nothing but lies and malice in the pulpit."[6]

§ 24. **Illustrations — Digest of American Cases.—**

1. *It is actionable without proof of special damages* to say of a minister of the Gospel, "Old Chaddock staid at our house last night and was pretty devilish drunk. He was so drunk he could not find his key. He made out to stagger up to the house. He was drunk." "Mr. Chaddock has had a drunken frolic this week. He and a party went out getting hay, got back to our house, and he got so drunk he could not get home." Chaddock v. Briggs, 13 Tyng (Mass.), 252. To say of a preacher, "He is a drunkard." McMillan v. Birch, 1 Binn. (Penn.), 178. But, *contra*, see O'Hanlon v. Myers, 10 Rich. (S. C.), 128.

2. To impute incontinence — the indulgence in unlawful carnal connections — to a clergyman is actionable. Demarest v. Haring, 6 Cow. (N. Y.), 76.

3. Words charging a clergyman with drunkenness, alleged to have been spoken of him in his profession, are actionable in themselves. Hayner v. Cowden, 27 Ohio St., 292.

4. There are some authorities which hold that to charge a minister of the Gospel with being a drunkard are not actionable without proof of special damages. Cucks v. Stone, Cro. Car., 285; Tighe v. Wicks, 33 Upper Canada, Q. B. Rep., 470; Buck v. Hersey, 31 Maine (1 Red.), 558; O'Hanlon v. Meyers, 10 Rich. Law (S. C.), 128. But the weight of modern authorities seems to be the other way.

[1] McMillan v. Birch, 1 Binn., 184; Demarest v. Haring, 6 Cow. (N. Y.), 76.

[2] Chaddock v. Briggs, 13 Mass., 248.

[3] Dodd v. Robinson (1648), Aleyn, 63.

[4] Pocock v. Nash, Comb, 253.

[5] Musgrave v. Bovey, Stra., 946.

[6] Cranden v. Nolden, 3 Lev., 17; 9 Bac. Abr., 48; Piper v. Woolmann, 43 Neb., 280; Bidwell v. Rademacher, 38 N. E. Rep., 879; 11 Ind. App., 218; Ritchie v. Widdemer, 35 Atl. Rep., 825.

§ 25. Digest of English Cases.—

1. *It is actionable without proof of special damage* to say to a parson, "Thou hast made a seditious sermon, and moved the people to sedition today." Phillips, B. D. v. Badby, cited in Bittridge's Case, 4 Rep., 19.

2. To say of a parson, "He preaches nothing but lies and malice in the pulpit;" for the words are clearly spoken of him in the way of his profession. Crauden v. Walden, 3 Lev., 17; Bishop of Sarum v. Nash, B. N. P., 9; Willes, 23. And see Pocock v. Nash, Comb., 253; Musgrave v. Bovey, 2 Str., 946.

3. To charge a clergyman with immorality and misappropriation of the sacrament money is clearly actionable. Damages, £750. Highmore v. Earl and Countess of Harrington, 3 C. B. (N. S.). 142. And, of course, to charge a clergyman with having indecently assaulted a woman on the highway is actionable. Evans v. Gwyn, 5 Q. B., 844.

4. To say of a beneficed clergyman that he drugged the wine he gave the speaker, and so fraudulently induced him to sign a bill of exchange for a large amount, is actionable without proof of special damage; but it is not actionable merely to say of a beneficed clergyman, "He pigeoned me." Pemberton v. Colls, 10 Q. B., 461; 16 L. J., Q. B., 403; 11 Jur., 1011.

5. To say of a bishop that "he is a wicked man" is actionable without special damage. Per Scroggs, J., in Tounshend v. Dr. Hughes, 2 Mod., 160. But this is only because the statute of Scandalum Magnatum, 2 Rich. II., stat. 1, ch. 5, expressly mentions "prelates." See note to 10 Q. B., p. 469.

6. To say of a parson that "he had two wives;" for though bigamy was not made felony till 1603, still in 1588 it was "cause of deprivation." Nicholson v. Dyne, Cro. Eliz., 94.

7. To say that "he is a drunkard, a whoremaster, a common swearer, a common liar, and hath practiced false doctrine, and deserves to be degraded;" for "the matters charged are good cause to have him degraded, whereby he should lose his freehold." Dod v. Robinson, Aleyn, 63; Dr. Sibthorpe's Case, W. Jones, 356; 1 Roll. Abr., 76.

8. To say "he preacheth lies in the pulpit;" "car ceo est bon cause de deprivation." Drake v. Drake, 1 Roll. Abr., 58; 1 Vin. Abr., 473.

[These cases clearly overrule Parret v. Carpenter, Noy, 64; Cro. Eliz., 502, wherein it was held that an action could lie only in the spiritual court for saying of a parson: "Parret is an adulterer, and hath two children by the wife of J. S., and I will cause him to be deprived for it." See the remarks of Pollock, C. B., 23 L. J., Ex., 80.] Odgers on L. & S., 75.

9. *But it is not actionable without proof of special damages* to charge a clergyman with incontinence, unless he hold some benefice or preferment, or some post of emolument, such as preacher, curate, chaplain or lecturer. Gallwey v. Marshall, 9 Exch., 294; 23 L. J., Ex., 78; 2 C. L. R., 399.

10. To say of one who had been a linen-draper, but at time of publication was a dissenting minister that he was guilty of fraud and cheating when a linen-draper, is no slander of the plaintiff in his office of dissenting minister. Hopwood v. Thorn, 8 C. B., 293; 19 L. J., C. P., 94; 14 Jur., 87.

11. To say to a clergyman, "Thou art a drunkard," is not of itself actionable; but it is submitted that to impute to a clergyman habitual drunkenness, or drunkenness whilst engaged in the discharge of his official duties,

would be actionable. Cucks v. Starre, Cro. Car., 285; Tighe v. Wicks, 33 Upper Canada, Q. B. Rep., 470.

§ 26. **Medical Men — Physicians — Surgeons — Apothecaries — Pharmacists.**— Any words imputing to any person engaged in the practice of the medical profession, including apothecaries, pharmacists, accoucheurs and midwives, misconduct or incapacity in the discharge of professional duties are actionable without proof of special damages.[1]

§ 27. **The Law Stated.**— A physician is only required to possess the ordinary knowledge and skill of his profession. He may possess them and much more, and yet be unable to accurately diagnose every disease presented, or always foretell the exact power and effect of medicine or treatment prescribed; but such deficiencies are incidents to human imperfections. So long, therefore, as the words employed in stating the conduct of the physician in a particular case only impute to him such ignorance or want of skill as is compatible with the ordinary and general knowledge and skill in the same profession, they are not actionable in themselves. But where the words so employed in detailing the action of the physician in a particular case taken together are such as fairly impute to him gross ignorance or unskilfulness in such matters as men of ordinary knowledge and skill in the profession should know and do, then they necessarily tend to bring such physician into public hatred, contempt, ridicule or professional disrepute, and hence are actionable in themselves.[2]

§ 28. **Illustrations — Digest of American Cases.**—

1. *It is actionable without proof of special damages* to say of a physician: "Dr. S. killed my children. He gave them spoonful doses of calomel, and it killed them. They did not live long after they took it. They died right off — the same day." Secor v. Harris, 18 Barb. (N. Y.), 425.

[1] Camp v. Martin, 23 Conn., 86; Gapp v. Selden, 6 Barb. (N. Y.), 416; Day v. Buller, 3 Wils., 59; Poe v. Mondford, Cro. Eliz., 620; Watson v. Vanderlash, Hetl., 71; Southee v. Denny, 1 Exch., 196; 17 L. J., Ex., 151; Edsall v. Russell, 4 M. & Gr., 1090; 12 L. J., C. P., 4; 5 Scott, N. R., 801; 2 Dowl. (N. S.), 641; 6 Jur., 996; Foster v. Scripps, 39 Mich., 376; 33 Amer. R., 403; Hargan v. Purdy, 93 Ky., 424; Tarlton v. Lagarde, 46 La. Ann., 1368; Cruikshank v. Gorden, 118 N. Y., 178.

[2] Ganvreau v. Superior Publishing Co., 62 Wis., 403; 22 N. W. Rep., 726; Bradley v. Cramer, 59 Wis., 312, 313; 18 N. W. Rep., 268; Southee v. Denny, 1 Exch., 196; Edsall v. Russell, 43 E. C. L., 560; Bishop v. Latimer, 4 Law T., 775; Camp v. Martin, 23 Conn., 86; Bowe v. Rogers, 50 Wis., 598; 7 N. W. Rep., 547.

2. "He killed the child by giving it too much calomel." Johnson v. Robertson, 8 Porter (Ala.), 486.

3. "He is no doctor. He bought his diploma for $50." Bergold v. Puchta, 2 Sup. Ct. N. Y. (T. & C.), 532.

4. "He killed six children in one year." Carcol v. White, 33 Barb. (N. Y.). 615.

5. "The bitters Dr. Diver gave John Smith caused his death. There was poison enough in them to kill ten men." Jones v. Diver, 22 Ind., 184.

6. Where the words spoken of a professional man only impute want of skill in a particular case they are not actionable in themselves. Woodbury v. Thompson, 3 N. H., 194; Fry v. Bennett, 28 N. Y., 324.

7. But to charge a physician with want of skill and good management in his treatment of a patient, if the jury can infer from the evidence special damage to him in his profession as the natural or probable consequence of such words, are actionable. Camp v. Martin, 23 Conn., 86; Sumner v. Utley, 7 Conn., 258.

8. To charge, maliciously, a physician with ignorance and unskilfulness in his profession is actionable *per se*. Cruikshank v. Gordon, 48 Hun (N. Y.), 308.

9. *But it is not actionable without proof of special damage* to say of a physician, "In my opinion the bitters that he fixed for Smith were the cause of his death," for such words do not in their usual sense import a charge of murder. Jones v. Diver, 22 Ind., 184.

10. To charge a person, not legally authorized to practice medicine as a profession, with having destroyed the life of a patient by mistaken but legal and well-meant effort to save his life. March v. Davison, 9 Paige, 580. And it has been held in Ohio not actionable to say of a physician, "He is so steady drunk he cannot get business any more." Anon., 1 Ohio, 83, n.

11. Or to say "he is a two-penny bleeder." Foster v. Small, 2 Whart. (Penn.), 138.

12. It is not actionable in itself to say of a physician that he acted hastily in amputating an arm and did not make the amputation on his own judgment, or that he had better have cut off the left arm than the right. Lynch v. Johnson, 39 Hun (N. Y.), 12.

13. It seems the person must be lawfully authorized to practice the profession. One who is not a regular physician or surgeon, nor authorized to practice as such, being unable by statute to recover for his services as a physician, cannot maintain an action of slander against one who charges him with malpractice, unless the charge is of an offense which involves moral turpitude, or would subject him to an infamous punishment. The statute, however, does not extend to such as deal only in roots, barks or herbs, the growth or produce of the United States; and charging such a practitioner with having killed a patient through mere ignorance of the dangerous nature of the roots, etc., administered is not actionable. But otherwise if the charge be that he destroyed the life of another by the use of poisonous roots, etc., with a full knowledge of their deleterious effects. March v. Davison, 9 Paige, 580.

§ 29. Digest of English Cases.—

1. *It is actionable without proof of special damages* to charge any medical man or apothecary with either ignorantly or unskilfully adminis-

tering the wrong medicines or in excessive doses. Collier, M. D., v. Simpson, 5 C. & P., 73; Tutty v. Alewin, 11 Mod., 221.

2. To call a practicing medical man "a quack-salver," or "an empiric," or a "mountebank." Allen v. Eaton, 1 Roll. Abr., 54; Goddart v. Haselfoot, 1 Viner's Abr. (S. a.), pl. 12; 1 Roll. Abr., 54.

3. To say of a surgeon to his patient, "I wonder you had him to attend you. Do you know him? He is not an apothecary; he has not passed any examination; he is a bad character; none of the medical men here will meet him. Several persons have died that he had attended, and there have been inquests held on them," was held actionable in Southee v. Denny, 1 Exch., 196; 17 L. J., Ex., 151.

4. To accuse any physician, surgeon, accoucheur, midwife or apothecary with having caused the death of any patient through his ignorance or culpable negligence. Poe v. Mondford, Cro. Eliz., 620; Watson v. Vanderlash, Hetl., 71; Southee v. Denny, 1 Exch., 196; 17 L. J., Ex., 151; Edsall v. Russell, 4 M. & Gr., 1090; 12 L. J., C. P., 4; 5 Scott, N. R., 801; 2 Dowl. (N. S.), 641; 6 Jur., 996.

5. *But it is not actionable without proof of special damages* to say of a surgeon, "He did poison the wound of his patient," without some averment that this was improper treatment of the wound, for else "it might be for the cure of it." Suegoe's Case, Hetl., 175.

6. To call a person who practices medicine without full legal qualification "a quack" or "an impostor," for the law only protects *lawful* employments. Collins v. Carnegie, 1 A. & E., 695; 3 N. & M., 703.

7. To charge a physician with adultery unconnected with his professional conduct. It would be otherwise if he had been accused of seducing or committing adultery with one of his patients. Ayre v. Craven, 2 A. & E., 2; 4 N. & M., 220.

2. To say of an accoucheuse, "A lady who has established a medical college at —— has issued a prospectus, in which my name appears as president. I have sanctioned the issue of no prospectus with my name in it. I wish to know what remedy I have," was held no slander on her in the way of her trade. Brent v. Spratt, Times, Feb. 3, 1882.

9. Dawes intended to employ the plaintiff, a surgeon and accoucheur, at his wife's approaching confinement, but the defendant told Dawes that the plaintiff's female servant had had a child by the plaintiff. Dawes consequently decided not to employ the plaintiff. Dawes told his mother and his wife's sister what defendant had said, and consequently the plaintiff's practice fell off considerably among Dawes' friends and acquaintances and others. The fee for one confinement was a guinea. *Held*, that the action lay, special damage being proved; that the plaintiff was entitled to more than the one guinea damages; that the jury should give him such sum as they considered Dawes' custom was worth to him; but that the jury clearly could not in this action give him anything for the general decline of his business. Dixon v. Smith, 5 H. & N., 450; 29 L. J., Ex., 125; Odgers on L. & S., 78.

§ 30. **Other Learned Professions and Trades — Architects, Dentists, Teachers, Surveyors, Mechanics, and the Like.**— To impute incompetency to any person practicing the art of architecture, dentistry, school-teaching or land-surveying, mechanical trades, and the like, is actionable without proof of

special damages. Words imputing to a mechanic a want of skill or knowledge in his craft are actionable in themselves if they are clearly shown to have been spoken in reference to the party's occupation, and the occupation is one requiring peculiar knowledge and skill. There is no distinction recognized by the authorities in this regard between a learned profession and a mechanical trade.[1]

§ 31. **Illustrations — Digest of American Cases.—**

1. *It is actionable without proof of special damages* to say of an architect: "The poor fellow is crazy." "His appointment as architect of a public building can be regarded in no other light than as a public calamity." Clifford v. Cochrane, 10 Brad. (Ill.), 570.

2. To say of a brick mason: "He is no mechanic. He cannot make a good wall or do a good job of plastering. He is no workman. He is a botch." Fitzgerald v. Redfield, 51 Barb. (N. Y.), 484.

§ 32. **Digest of English Cases.—**

1. *It is actionable without proof of special damages* to say of an architect engaged to restore a church that he has no experience in church work (Botterill and another v. Whytehead, 41 L. T., 588); or to say of a land-surveyor, in the way of his trade, "Thou art a cozener and a cheating knave, and that I can prove." London v. Eastgate, 2 Rolle's Rep., 73.

2. To say of a schoolmaster: "Put not your son to him, for he will come away as very a dunce as he went" (Watson v. Vanderlash, Hetl., 71); or to accuse a schoolmaster of habitual drunkenness. Hume v. Marshall, 42 J. P., 136; Brandrick v. Johnson, 1 Vict. L. R., C. L., 306.

§ 33. **Imputations upon the Credit of Merchants and Traders.**— The law guards most carefully the credit of all merchants and traders. Any imputation on their solvency, any suggestion that they are in pecuniary difficulties, is therefore actionable without proof of special damages. In actions of slander for words affecting the pecuniary credit of a merchant it need not be averred nor proved that they were spoken in relation to his occupation as a merchant; for in their nature they strike at the root of the mercantile character.[2]

§ 34. **The Extent of the Rule.**— The rule is well settled in the United States that words spoken of a person in his office,

[1] Fitzgerald v. Redfield, 51 Barb. (N. Y.), 484; Levy v. McCan, 44 La. Ann., 528; Murphy v. Nelson, 94 Mich., 554; Lapham v. Noble, 54 Fed. Rep., 108; Williams v. Davenport, 42 Minn., 393; Dennis v. Johnson, 42 Minn., 301; Doan v. Kelley, 121 Ind., 413; Harris v. Minvielle, 48 La. Ann., 908.

[2] Davis v. Ruff, Cheves (S. C.), 17; Sewall v. Catlin, 3 Wend. (N. Y.), 291; Orr v. Skofield, 56 Me., 483; Brown v. Vannaman, 85 Wis., 451; Mitchell v. Bradstreet Co., 116 Mo., 226; McKenzie v. Denver Times, 3 Colo. App., 554; Continental Nat. Bank v. Bowdre, 92 Tenn., 723; Nettles v. Somervell, 6 Tex. Civ. App., 627; Urban v. Helmick, 15 Wash., 155; Peterson v. Western Union Tel. Co., 67 N. W. Rep., 646.

business or employment, imputing a want of integrity, of credit, of common honesty, are actionable without proof of special damages; and any lawful employment or situation of trust, lucrative or confidential, is within the rule.[1]

§ 35. **Persons Engaged in Occupations where Credit is Essential.**— Of merchants, tradesmen and others in occupations where credit is essential to the successful prosecution, any language is actionable without proof of special damages which imputes a want of credit or responsibility or insolvency; and generally it may be said of all persons who carry on any trade recognized by law, or are engaged in any lawful employment, however humble, an action lies for any words falsely and maliciously spoken which prejudice them in the way of such trade or employment, provided the words are spoken of and concerning such trade or employment, and "touch" them therein.

For example: It is actionable without proof of special damages to say of a clerk or servant, "He cozened his master."[2] Of a tradesman, "He is not able to pay his debts."[3] Of a farmer, "The sheriff will sell him out one of these days, and claims against him not sued will be lost."[4] Of a distiller whose custom was to buy grain on credit, "He must fail — his time is come."[5] Of a carpenter, "He is broken up and run away, and will never return."[6] Of a tailor, "I heard he was run away."[7] Of a merchant, "I have heard of no failures, but understand there is trouble with S."[8] "He will lose his debt; M. is unable to pay it."[9] Of one engaged in buying and selling wooden ware, "There is no bottom to you. I would put you through, but you won't stand; you will burst or fail before I have a chance."[10] Of a merchant, "They have been sued. Report says J. B.'s wife [J. B. being one of the plaintiffs] is about to apply for a divorce, and that J. B. has put his property out of his hands; if so the store will be closed soon."[11]

[1] Johnson v. Shields, 1 Dutcher (N. J.), 116.

[2] Seamon v. Bigg, Cro. Car., 480.

[3] Dobson v. Thornstone, 3 Mod., 112.

[4] Phillips v. Hoeffer, 1 Penn. St. Rep., 62.

[5] Ostrom v. Calkins, 5 Wend. (N. Y.), 563.

[6] Chapman v. Lamphire, 3 Mod., 155.

[7] Davis v. Lewis, 7 Term R., 17.

[8] Sewall v. Catlin, 7 Wend. (N. Y.), 291.

[9] Mott v. Comstock, 7 Cow. (N. Y.), 654.

[10] Carpenter v. Dennis, 3 Sandf., 305.

[11] Beardsly v. Tappan, 1 Blatch. C. C. R., 588.

§ 36. Illustrations — Digest of American Cases.—

1. *It is actionable without proof of special damages* to say of a merchant, "There is a time when men will fail who must fail, and O.'s time has come." Ostrom v. Calkins, 5 Wend. (N. Y.), 262. And where, in answer to the inquiry, "Were there any failures yesterday?" it was said, "Not that I know of, but I understand there is trouble with the Messrs. S." Sewall v. Catlin, 3 Wend. (N. Y.), 291.

2. To charge that a merchant is unable to pay a debt. Mott v. Comstock, 7 Cow. (N. Y.), 654. Or to say, "He will be a bankrupt in six months." Else v. Ferris, Anth. N. P., 23.

3. To say of a farmer, falsely and maliciously, "The sheriff will sell him out one of these days, and claims against him not sued will be lost." Phillips v. Hoeffer, 2 Penn. St., 62. To write of a merchant, "GENTS: M. has delayed answering your letter for the purpose of collecting the amount of T. R. N.'s [the plaintiff] indebtedness and to ascertain the amount of his assets. We are now able to report, not fully, but nearly so, regarding his financial ability. His assets, consisting of merchandise, show-cases, tools, book accounts, as per his own guess, is about $1,800. His indebtedness is, as far as I know, about the same amount. He may owe more; I speak of what I know — $1,300 to merchants like you and a $500 demand note. If any one of his creditors should crowd him the demand would be pushed. M. would advise a caution on your part in selling, and a prompt payment of matured indebtedness," was held libelous *per se*. Newell v. How, 31 Minn., 235.

4. A. and B. had been carrying on the commission business under the firm name of B. & C. A., a minor, bought out B.'s interest in the property and good-will of the concern. B. prepared and sent to the customers of A. a postal card reading as follows: "Dear Sir: I drop you a line to let you know A., my successor in business, is not legally responsible for his contracts, as he is yet a minor, under twenty-one years of age. A word to the wise is sufficient. Store No. 118, South Water street, I shall occupy and do business. Would be pleased to hear from you. B." *Held*, that the words of this publication are capable and reasonably susceptible of a defamatory meaning as respects A. in connection with his business. Hays v. Mather, 15 Brad. (Ill.), 30.

5. Any words spoken in relation to his trade or profession which tend to impair his credit or charge him with fraud or indirect dealing in his line of business are actionable. Davis v. Davis, 1 N. & M. (S. C.), 290; Ostrom v. Calkins, 5 Wend. (N. Y.), 263.

§ 37. Digest of English Cases.—

1. *It is actionable without proof of special damage* to impeach the credit of any merchant or tradesman by imputing to him bankruptcy or insolvency, either past, present or future. Johnson v. Lemmon, 2 Rolle's Rep., 144: Thompson v. Twenge, 2 Rolle's Rep., 433; Vivian v. Willet, Sir Thomas Raymond, 207; 3 Salk., 326; Stanton v. Smith, 2 Ld. Raymond, 1480; 2 Str., 762; Whittington v. Gladwin, 5 B. & C., 180; 2 C. & P., 146; Robinson v. Marchant, 7 Q. B., 918; 15 L. J., Q. B., 134; 10 Jur., 156; Harrison v. Bevington, 8 C. & P., 708; Gostling v. Brooks, 2 F. & F., 76; Brown v. Smith, 13 C. B., 596; 22 L. J., C. P., 151; 17 Jur., 807; 1 C. L. R., 4.

2. To say of a brewer that he has been arrested for debt. And this al-

though no express reference to his trade was made at time of publication, for such words must necessarily affect his credit therein. Jones v. Littler, 7 M. & W., 423; 10 L. J., Ex., 171.

8. To assert that the plaintiff had once been bankrupt in another place when carrying on another trade; for that may still affect him here in his present trade. Leycroft v. Dunker, Cro. Car., 317; Hall v. Smith, 1 M. & S., 288; Figgins v. Cogswell, 3 M. & S., 369.

4. To say of any trader, "He is not able to pay his debts." Drake v. Hill, Sir T. Raym., 184; 2 Keble, 549; 1 Lev., 276; Sid., 424; Hooker v. Tucker, Holt, 39; Carth., 330; Morris v. Langdale, 2 Bos. & Pul., 284; Orpwood v. Barkes (vel Parkes), 4 Bing., 261; 12 Moore, 492.

5. To say of a farmer, "He cannot pay his laborers." Barnes v. Holloway, 8 T. R., 150.

6. To impute insolvency to an innkeeper, even though at that date innkeepers were not subject to the bankruptcy laws. Whittington v. Gladwin, 5 B. & C., 180; 2 C. & P., 146; Southam v. Allen, Sir T. Raym., 231.

7. To say to a tailor, "I heard you were run away," *sc.* from your creditors. Davis v. Lewis, 7 T. R., 17. And see Dobson v. Thornistone, 3 Mod., 112; Chapman v. Lamphire, 3 Mod., 155; Arne v. Johnson, 10 Mod., 111; Harrison v. Thornborough, 10 Mod., 196; Gilb. Cas., 114.

8. *But it is not actionable without proof of special damages* to say, merely, "A. owes me money," if no words be added imputing that A. is *unable* to pay the debt. Per Bramwell, B., 4 F. & F., 321, 323.

§ 38. **Imputations upon the Honesty and Integrity of Merchants, Traders, etc.**— Defamatory words which impute to a person dishonesty and fraud in the conduct of his trade, such as knowingly selling inferior articles as superior, or wilfully adulterating his wares, will be actionable without proof of special damages; though all complaints made in good faith by a customer of the goods supplied to him are of course privileged.[1] If the words merely impugn the goods the plaintiff sells, they are not actionable unless they fall within the rules relating to slander of title; for they are but an attack on a thing, not a person.[2] But often an attack on a commodity may be also an indirect attack upon its vendor; as if fraud or dishonesty be imputed to him in offering it for sale.[3]

[1] Crisp v. Gill, 29 L. T. (O. S.), 82; Oddy v. Lord Geo. Paulet, 4 F. & F., 1009; Peterson v. Western Tel. Co., 67 N. W. Rep., 646; Booth v. Arnold, 1 Q. B., 571; 14 Repts., 326; Rea v. Wood, 105 Cal., 314; Rider v. Rulison, 74 Hun, 239.

[2] Fenn v. Dixe (1638), 1 Roll. Abr., 58; Evans v. Harlow, 5 Q. B., 624; 13 L. J., Q. B., 120; Harman v. Delaney, 2 Str., 898; Fitz., 121; 1 Barnard., 289, 438.

[3] Jenner v. A'Becket, L. R., 7 Q. B., 11; 41 L. J., Q. B., 14; 20 W. R., 181; 25 L. T., 464; Burnet v. Wells (1700), 12 Mod., 420; Clark v. Freeman, 11 Beav., 112; 17 L. J., Ch., 142; 12 Jur., 149.

§ 39. Illustrations — Digest of American Cases.—

1. *It is actionable without proof of special damage* to say of a merchant, "You keep false books, and I can prove it." Backus v. Richardson, 5 Johns. (N. Y.), 476.

2. To say of a blacksmith, in relation to his business and trade, "He keeps false books, and I can prove it," is actionable. Burtch v. Nickerson, 17 Johns., 217.

3. Wilson was a clerk and assistant weighmaster in the employ of one Arthur Rhett. Cottman, the defendant, who was a customer of Rhett, falsely and maliciously said of Wilson: "He has caused the downfall and ruin of my clerk." "I do not want him to have anything to do with my business" — meaning he should not weigh any goods consigned to him — in consequence of which Wilson was discharged from his employment. In an action brought by Wilson, it was held that the words imputed misconduct which would unfit him to discharge faithfully and correctly all the duties pertaining to his position and were actionable. Wilson v. Cottman, 65 Md., 190.

4. In a New York case (1809) the declaration, after the usual averments that the plaintiff was a merchant of good credit, etc., charged the defendant with speaking the words of the plaintiff as a merchant, "You keep false books, and I can prove it." The chancellor, in delivering the opinion of the court, said: "The words are alleged to have been spoken of the plaintiff in the court below, as a merchant. The occasion of speaking them is not otherwise adverted to than that the defendant, speaking of the plaintiff, uttered them. They are not introduced as relating to mutual claims or to repel a demand made by the defendant in the court below. It is a simple declaration that the plaintiff kept false books, and that he could prove it — not as relating to a single point. The allegation applied to the books of the plaintiff generally, and alleged the falsity of those books. These words spoken of a merchant are undoubtedly calculated to impair a confidence in his integrity and injure his credit, which chiefly arises from his being reputed a fair dealer. Whatever may be the ancient doctrine with respect to the construction of words which may sustain an action of slander, it is now well established that they are to be taken in the common and ordinary sense; and if the words are so construed here I think they conveyed the imputation of a deliberate falsity, and not an accidental one arising from mistake." Backus v. Richardson, 5 Johns. (N. Y.), 477.

5. Any words spoken of a person in relation to his trade or profession which charge him with fraud or indecent dealing in his line of business are actionable. Ostrom v. Calkins, 5 Wend. (N. Y.), 263; Davis v. Davis, 1 N. & M. (S. C.), 290; Chipman v. Cook, 2 Tyler (Vt.), 45; McMillan v. Birch, 1 Binn. (Penn.), 178.

6. *But it is not actionable without proof of special damage* to charge a person with keeping false books, unless the keeping of such books is incident to the party's business which necessarily leads to credit. Rathbun v. Emigh, 6 Wend. (N. Y.), 407. So to say of a sawyer, "He keeps false books," is not actionable, because the business of a sawyer did not require the giving of a credit and keeping of books; for it was admitted that in such cases the words would be actionable. Rathbun v. Emigh, 6 Wend., 407.

§ 40. Digest of English Cases.—

1. *It is actionable without proof of special damage* to say of a trader, "He is a cheating knave, and keeps a false debt-book." Crawfoot v. Dale, 1 Vent., 203; 3 Salk., 327, overruling Todd v. Hastings, 2 Saund., 307. Or that he uses false weights or measures. Griffiths v. Lewis, 7 Q. B., 61; 14 L. J., Q. B., 197; 9 Jur., 370; 8 Q. B., 841; 15 L. J., Q. B., 219; 10 Jur., 711; Bray v. Ham, 1 Brownlow & Golds., 4; Stober v. Green, id., 5; Prior v. Wilson, 1 C. B. (N. S.), 95.

2. To say of an auctioneer or appraiser who had valued goods for the defendant, "He is a damned rascal; he has cheated me out of £100 on the valuation." Bryant v. Loxton, 11 Moore, 344; Ramsdale v. Greenacre, 1 F. & F., 61.

3. To say of a butcher that he changed the lamb bought for him for a coarse piece of mutton. Crisp v. Gill, 29 L. T. (O. S.), 82; Rice v. Pidgeon, Comb., 161.

4. To say to a corn factor, "You are a rogue and a swindling rascal; you delivered me one hundred bushels of oats worse by 6*s.* a bushel than I bargained for." Thomas v. Jackson, 3 Bing., 104; 10 Moore, 425.

5. To say of a tradesman that he adulterates the goods he sells. Jesson v. Hays (1636), Roll. Abr., 63.

6. To say of a contractor, "He used the old materials," when his contract was for new, is actionable with proper innuendoes. Baboneau v. Farrell, 15 C. B., 360; 24 L. J., C. P., 9; 1 Jur. (N. S.), 114; 3 C. L. R., 142; Sir R. Greenfield's Case, Mar., 82; 1 Viner's Abr., 465. See Smith v. Matthews, 1 Moo. & Rob., 151.

7. To say of a clerk, "He cozened his master," is actionable, though the defendant did not expressly state that the cozening was done in the execution of the clerk's official duties; that will be intended. Reignald's Case (1640), Cro. Car., 563; Reeve v. Holgate (1672), 2 Lev., 62.

8. *But it is not actionable without proof of special damages* to say to a pork butcher, "Who stole Frazer's pigs? You did, you bloody thief, and I can prove it; you poisoned them with mustard and brimstone" (the jury having found that the words were not intended to impute felony); for there was nothing to show that they were spoken of the plaintiff in relation to his trade. Sibley v. Tomlins, 4 Tyrwhitt, 90. So to say of a grocer, "His shop is in the market," is not actionable in the primary sense of the words, at all events. Ruel v. Tatnell, 29 W. R., 172; 43 L. T., 507.

9. To call a tradesman "a rogue," or "a cheat," or "a cozener" is not actionable, unless it can be shown that the words refer to his trade. To impute distinctly that he cheats or cozens in his trade is actionable. Johns v. Gittings, Cro. Eliz., 239; Cotes v. Ketle, Cro. Jac., 204; Terry v. Hooper, 1 Lev., 115; Savage v. Robery, 5 Mod., 398; 2 Salk., 694; Surman v. Shelleto, 3 Burr., 1688; Bromefield v. Snoke, 12 Mod., 307; Savile v. Jardine, 2 H. Bl., 531; Lancaster v. French, 2 Stra., 797; Davis v. Miller et ux., 2 Stra., 1169; Fellows v. Hunter, 20 Up. Can., Q. B., 382; Brady v. Youlden, Melbourne Argus R.

CHAPTER IX.

DEFAMATORY WORDS IMPUTING DISEASE, ETC.

Defamatory words falsely spoken of a person which impute that the party is infected with some contagious disease, where, if the charge is true, it would exclude the party from society, are actionable in themselves without proof of special damages.[1]

§ 1. **The Law Stated.**— Bacon, in his abridgment of the English law, says upon this subject: "Since man is a being formed for society, and standing in almost constant need of the advice, comfort and assistance of his fellow-creatures, it is highly reasonable that any words which import the charge of a contagious distemper should be in themselves actionable, because all prudent persons will avoid the company of one having such a distemper."[2] This is doubtless the rule which reason would prescribe for such cases; but it does not appear to be warranted by the decisions. The books point out only two diseases, namely, leprosy and *lues venerea*,[3] the imputation of which is absolutely slanderous. Just what diseases would be included in the rule at the present day is not quite certain, but it is probable it would include only those which are contagious or infectious, and which are also usually brought upon one by disreputable practices, limiting the list to venereal complaints.

Actions for words of this description seem, in the absence of special damage, to have been confined to charges of leprosy and *lues venerea*. To say[4] a man has the leprosy, or to call

[1] Kaucher v. Blinn, 29 Ohio St., 62; Pollard v. Lyon, 91 U. S., 225; Warnoc v. Circle, 29 Grat. (Va.), 197; Chapin v. Lee, 18 Neb., 440; Chaddock v. Briggs, 13 Mass., 248; Joannes v. Burt, 6 Allen, 236; Bruce v. Soule, 69 Me., 562; Bloss v. Tobey, 2 Pick., 320; Golderman v. Stearns, 7 Gray, 181; Williams v. Holdridge, 22 Barb., 398; Nichols v. Guy, 2 Carter, 82; Irons v. Field, 9 R. I., 216; Watson v. McCarthy, 2 Kelly, 57; Hewit v. Mason, 24 How. Pr., 366.

[2] 9 Bacon's Abridgment, 45.

[3] 5 Rep., 125; 2 Wils., 404.

[4] Carslake v. Mapledoram, 2 T. R., 473; Cr. J., 144.

him a leprous knave, is actionable — the term leper being in itself a clear and unequivocal designation of the speaker's meaning. So great, formerly, was the dread of leprous contagion that an especial writ was provided for the removal of the infected object to some secluded place where he might no longer be a terror to society. From an English case it appears that to say another has the itch is not actionable, though such an accusation would be actionable if written.[1]

Charging a person with having had such a contagious disorder, however, is not actionable in itself, because it is no reason why the company of a person so charged should be avoided.

The ground of the action being the presumption of the exclusion of the party from society, no action will lie for such an imputation in the past tense; for such an assertion does not represent the party at the time of speaking as unfit for society, and therefore the reason for the action is wanting.[2]

§ 2. **The Law Stated by Metcalf, J.**— The charge against a person of having the venereal disease is held to be actionable not because the charge imputes any legal or moral offense, but solely because it tends to exclude him from society as a person having a disgusting and contagious disease, and with whom it is unsafe to associate.[3]

§ 3. **Illustrations — Digest of American Cases.**—

It is actionable without proof of special damages to say of a married woman, "She has the venereal disease." "She has the clap." "She has the pox." Williams v. Holdridge, 22 Barb. (N. Y.), 396. Or to say of a woman, "I will tell you what the matter with her is — she has had the pox." Irons v. Fuld, 9 R. I., 216. "Golderman has the venereal disease. It is an old affair, and being married has brought it on again. He is the guilty one; he has given it to his wife." Golderman v. Stearns et ux., 7 Gray (73 Mass.), 181. But where the words spoken were, "He was about dead with the bad disorder," they were held not actionable, as they did not charge the plaintiff with having the "bad disorder" at the time of speaking, but that "he was," in the past tense, about dead with it. Bruce v. Soule, 69 Me., 562.

A complaint for slander charged the defendant with stating that the plaintiff "has" a loathsome disease, and "that is what is the matter with him, and now he is trying to get a pension for some other disease;" again, that he has got it, "and has had it ever since he came out of the army."

[1] Villars v. Monsley, 2 Wils., 403.

[2] Carslake v. Mapledoram, 2 T. R., 473; Pike v. Van Warner, 5 How. Pr. (N. Y.), 171; Bruce v. Soule, 69 Me., 562.

[3] Golderman v. Stearns, 7 Gray (73 Mass.), 181; March on Slander, Ed. 1674, 77.

The complaint added "that the words charged, and were meant to charge, the plaintiff with having contracted and being afflicted with a certain loathsome and filthy disease," etc. *Held*, that the complaint sufficiently charged that the defendant published that the plaintiff had contracted a disorder, from the effects of which he was still suffering. Monks v. Monks (Ind., 1889), 20 N. E. Rep., 744.

§ 4. **Digest of English Cases.**—

It is actionable without proof of special damages to say of a man: "Thou are a pocky knave. Get thee home to thy pocky wife; her nose is eaten with the pock." Brook v. Wise (1601), Cro. Eliz., 878. Or to say of a woman: "You are a damned bitch, whore, and a pocky whore, and if you have not the itch you have the pox." Grimes v. Lovel, 12 Mod., 242. And an action lies for calling a woman "a pocky whore." Whitfield v. Powel, 12 Mod., 248. To say of a woman: "Thou are a pocky whore, and carriest the pox along with you." Clifton v. Wells, 12 Mod., 634. To say of a man, "Thou art a leprous knave" (Taylor v. Perkins, Cro. Jac., 144), or, "He is a leper." 9 Bacon's Abridgment, 45.

§ 5. **The Rule of Construction.**— Without citing any more of these disgusting illustrations it will undoubtedly be safe and proper to adopt as a guide in all cases the following rule: With respect to the terms in which the imputation is conveyed, viz., they may either expressly and by their own power impute the disease, or by the aid of collateral circumstances may render the implication unavoidable.

The same rule of construction will apply to this as to other slanders. Whenever it can be collected from the circumstances that the speaker intended the hearers to understand that the person spoken of was, at the time of speaking, afflicted with either of the disorders above mentioned, an action may be maintained. And the meaning may be evidenced either by reference to the mode in which the disease was communicated, the symptoms with which it is attended, its effects upon the person or constitution, the means[1] of cure, the necessity of avoiding[2] the person infected, or, in short, by any other allusion capable of conveying the offensive imputation.[3]

[1] Miller's Case, Cro. Jac., 430; Davies v. Taylor, Cro. Eliz., 648.

[2] Miller's Case, Cro. Jac., 430.

[3] Folkard's Starkie, 109; 9 Bac. Abr., 45; Joannes v. Burt, 6 Allen, 239; Golderman v. Stearns, 7 Gray, 181; Kaucher v. Blinn, 29 Ohio St., 62; Williams v. Holdridge, 22 Barb., 398.

CHAPTER X.

SCANDALUM MAGNATUM.

§ 1. The English Law.— Words spoken in derogation of a peer, a judge or other great officer of the realm are usually called *scandalum magnatum;* and though they be such as would not be actionable when spoken of a common person, yet when applied to persons of high rank and dignity they constitute a more heinous injury, which is redressed by an action on the case founded on many ancient statutes; as well on behalf of the crown to inflict the punishment of imprisonment on the slanderer as on behalf of the party to recover damages sustained.[1]

In this country no distinction as to persons is recognized, and in practice a person holding a high office is regarded as a target at whom any person may let fly his poisonous words. High official position, instead of affording immunity from slanderous and libelous charges, seems rather to be regarded as making his character free plunder for any one who desires to create a sensation by attacking it.[2]

§ 2. Illustrations — Digest of English Cases and Ancient Statutes.—

1. *Words complained of:* "I value my Lord Marquess of Dorchester no more than I value the dog at my foot." *Held*, that the action was well laid in *scandalum magnatum*, the plaintiff being a marquess. But a private person would have had no action for such words without proof of special damage, as they merely show the esteem in which the defendant held him. Proby v. Marquess of Dorchester, 1 Levinz, 148; Lord Falkland v. Phipps, 2 Comyns, 439; 1 Vin. Abr., 549.

2. *An ancient statute:* "Forasmuch as there have been oftentimes found

[1] Westm. 1 (3d ed.), 1, ch. 34; 2 Rich. II., ch. 5; 12 Rich. II., ch. 11; 2 Mod., 152; Barrington on the Penal Statutes, 301, 314; 3 Reeve's Hist., 211; and 1 Parl. Hist., 360; Rymer, vol. 3, part 3; 3 Black. Com., 123; Folkard's Starkie, 142.

[2] Wood's edition of Folkard's Starkie, 218, n.; Sillars v. Collier, 151 Mass., 50.

in the country devisors of tales, whereby discord or occasion of discord hath many times arisen between the king and his people or great men of his realm, for the damage that hath and may thereof ensue, it is commanded that from henceforth none be so hardy as to tell or publish any false news or tales whereby discord or occasion of discord or slander may grow between the king and his people or the great men of the realm; and he that doth so shall be taken and kept in prison until he hath brought him into the court which was the first author of the tale." 3 Ed. I., Stat. Westminster 1, ch. 34.

3. *Another:* "Item of devisors of false news, and of horrible and false lyes of prelates, dukes, earls, barons and other nobles and great men of the realm, and also of the chancellor, treasurer, clerk of the privy seal, steward of the king's house, justices of the one bench or the other, and of other great officers of the realm, of things which by the said prelates, lords, nobles and officers aforesaid were never spoken, done or thought in great slander of the said prelates, lords, nobles and officers, whereby debates and discords might arise betwixt the said lords, or between the lords and the commons, which God forbid, and whereof great peril and mischief might come to all the realm, and quick subversion and destruction of the said realm if due remedy be not provided: It is straitly defended upon grievous pain for to eschew the said damages and perils, that from henceforth none be so hardy to devise, speak, or to tell any false news, lyes or such other false things, of prelates, lords, and of other aforesaid, whereof discord or any slander might rise within the same realm; and he that doth the same shall incur and have the pain another time ordained thereof by the statute of Westminster the First, which will that he be taken and imprisoned till he have found him of whom the word was moved." 2 Rich. II., st. I, ch. 5; Odgers on L. & S., 134.

CHAPTER XI.

SLANDER OF PROPERTY.

§ 1. **Slander of Property.**— Words are not usually termed defamatory unless they affect some person either in his individual capacity or in his office, profession or trade. But a defamatory attack may be made upon things as well as upon persons; and a defamatory attack upon a thing may be an indirect attack upon an individual, and therefore be defamatory of him without proof of special damage. So where one person said of another, "He is a cheat; he has nothing but rotten goods in his store," it was held slander on the party in his trade or calling;[1] for the words clearly imputed that he was aware of the bad condition of his goods and yet continued to offer them for sale to the public. To charge a tradesman with wilfully adulterating the goods he sells is an attack upon him as well as upon his goods, and actionable without proof of special damage.[2] But aside from these cases there is a branch of the law of defamation generally known by the somewhat indefinite term "slander of title." It permits an action to be brought against any one who falsely and maliciously defames the title of property, either real or personal, of another, and thereby causes him some special pecuniary damage or loss. As in all other actions dependent upon special damage there

[1] Barnett v. Wells, 12 Mod., 420. Ingraham v. Lawson, 6 Bing. N. C., 212.
[2] Jesson v. Hayes, Roll. Abr., 63;

must be injury and damage; the injurious words falsely and maliciously spoken, and the damage, the consequent pecuniary loss to the party whose property is defamed. There can be no action except for the injury, the slanderous words, and no recovery except for special damages.[1]

§ 2. **Nature of the Action.**— It makes no difference whether the matter complained of has been published orally or by writing, printing or otherwise.[2] The gist of the action is the special damage sustained. There are some cases holding that it is not an action for slander, but in reality an action on the case for maliciously acting in such a way as to cause the plaintiff some pecuniary loss.[3] But it seems to be an attempt to set up a far-fetched distinction without any material difference. It is better reason to call it an action for slander and for special damage resulting therefrom. We have seen that there can be no action except for the slander, and no recovery except for the damage. The idea that it is not an action of slander seems clearly wrong; for the very foundation of the action is words falsely and maliciously published, and the only ground of recovery is that the publication results in pecuniary loss or damage to the owner of the property. The words then belong to that class of defamatory words actionable with proof of special damage.[4]

§ 3. **Requisites of the Action.**— Three things are necessary to maintain an action for slander of property or of title:

(1) The words must be false.

(2) They must be maliciously published.

[1] 1 Roll. Abr., 58; Tasburg v. Day, Cro. Jac., 484; Evans v. Harlow, 5 Q. B., 624; Tobias v. Harland, 4 Wend. (N. Y.), 537; Linden v. Graham, 1 Duer (N. Y.), 670; Kendal v. Stone, 5 N. Y., 15; Hartley v. Herring, 8 Term R., 130; Hallock v. Miller, 2 Barb. (N. Y.), 630; Ashford v. Choate, 20 U. C., C. P., 471; Stiebeling v. Lockhaus, 21 Hun (N. Y.), 457; Cramer v. Cullinane, 2 MacArthur, 197; Bergman v. Jones, 94 N. Y., 51; Russell v. Elmore, 48 N. Y., 563; Pollard v. Lyon, 91 U. S., 225; Odgers on L. & S., 138; Chesebro v. Powers, 78 Mich., 472; Duncan v. Griswold, 92 Ky., 546; Land Trust v. Hoffman, 57 Fed. Rep., 333; 6 C. C. A., 358; McConnell v. Ory, 46 La. Ann., 564; Remick v. Lang, 47 La. Ann., 914; 17 So. Rep., 461; Everett Piano Co. v. Bent, 60 Ill. App., 372; May v. Anderson, 42 N. E. Rep., 946; 14 Ind. App., 251; Harrison v. How, 67 N. W. Rep., 527.

[2] Malady v. Soper, 3 Bing. N. C., 371; 3 Scott, 371.

[3] Odgers on L. & S., 138.

[4] Wood's Folkard on Slander, 208, n.; Hargreave v. Le Breton, 4 Burr., 2422; Kendall v. Stone, 5 N. Y., 14; Smith v. Spooner, 3 Taunton, 246; Like v. McKinstry, 3 Abb. (N. Y.) App., 62; 4 Keyes, 397; Wakeley v. Bostwick, 49 Mich., 374; 13 N. W. Rep., 780.

(3) They must result in a pecuniary loss or injury to the plaintiff.

The words must be spoken pending some treaty or public auction for the sale or purchase of the property, or the action will not lie, and it must be such a slander as goes to defeat the plaintiff's title. And unless the plaintiff shows falsehood and malice in the defendant, and an injury to himself, he establishes no case to go to the jury.[1]

(1) *The words must be false*, not because it is an additional requisite of malice and damage, but because it is comprised as one of the elements of the damages sustained;[2] and the burden of proving the falsity is on the plaintiff.[3] If the statements complained of are true, and if there really is the infirmity in the title as alleged, no action will lie, however malicious the intention to defame may have been.[4]

(2) *The words must be maliciously published.* It is essential to the action that the words complained of should have been maliciously uttered — not malicious in the worst sense, but at least uttered with the intent of injuring the plaintiff. The burden of proving malice, either expressed or implied, is upon the plaintiff, in order to sustain his case. It is sufficient if he establishes the publication of the defamatory words and their falsity, and that there was no ground for the defendant's claim; or any facts that warrant an inference that the words were not uttered in good faith, to assert or uphold a real claim of title in himself, so that malice can fairly be implied.[5]

(3) *A pecuniary loss must result.* Where the slander tends to

[1] Ross v. Pines, Wythe (Va.), 71; Linden v. Graham, 1 Duer (N. Y.), 670; Madison v. Baptist Church, 26 How. (N. Y.), 72; Tasburgh v. Day, Cro. Jac., 484; Hargreave v. Le Breton, 4 Burr., 2423; Pater v. Baker, 3 C. B., 869; Steward v. Young, L. R., 5 C. P., 122; McDaniel v. Baca, 2 Cal., 326; Hill v. Ward, 13 Ala., 310.

[2] Dodge v. Colby, 108 N. Y., 445; Hill v. Ward, 13 Ala., 310; Like v. McKinstry, 41 Barb., 186; Folkard on Slander, 131.

[3] Burnett v. Tak, 45 L. T., 743.

[4] Griffon v. Blanc, 12 La. Ann., 5; McDaniel v. Baca, 2 Cal., 326; Hill v. Ward, 13 Ala., 310; Folkard on Slander, 151; Pater v. Baker, 3 C. B., 868; Steward v. Young, 39 L. J., C. P., 85; L. R., 5 C. P., 122; Pollard v. Lyon, 91 U. S., 225; Russell v. Elmore, 48 N. Y., 653; Tobias v. Harland, 4 Wend., 537; Collins v. Whitehead, 34 Fed. Rep., 121; Ashford v. Choate, 20 U. C., C. P., 471.

[5] Kendall v. Stone, 5 N. Y., 14; Like v. McKinstry, 3 Abb. (N. Y.) App., 62; 4 Keyes, 397; Bailey v. Dean, 5 Barb. (N. Y.), 297; Hill v. Ward, 13 Ala., 310; Stock v. Chetwood, 5 Kan., 141; Smith v. Spooner, 3 Taunt., 246; Hargreave v. Le Breton, 4 Burr., 2423; Folkard on Slander, 131; Walkley v. Bostwick, 49 Mich., 374; 13 N. W. Rep., 780.

the disherison of one as an heir-apparent, the action may be sustained without proof of special damage; but where it affects the present title of the plaintiff, special damage must be shown and proved to have arisen from the slander.[1]

Where a party is prevented from selling, exchanging or making any advantageous disposition of lands or other property in consequence of the impertinent interference of another, he may maintain an action for the inconvenience he has suffered, but special damage must be shown; and the mere apprehension that in consequence of the slander the plaintiff's title may be drawn in question will not support an action.[2] And it is not sufficient to show generally that the plaintiff intended to sell to any one that would buy, but he must prove that he was in treaty to sell to some specific person, or at least that some one was deterred by the slander from making an offer.[3] Neither will it suffice to show that the value of the lands was lessened in people's opinions, but proof must be given of damage actually sustained. Where the alleged loss consists in the prevention of the sale of lands, it must appear that the words directly tended to defeat the plaintiff's title.[4]

§ 4. **The Plaintiff's Interest or Title.**—The same rules of law apply equally to the slander of title of property both personal and real, and the interest of the plaintiff therein may be either in possession or in reversion. It need not be a vested interest. The true test is, Has the interest or title defamed a market value? If so it is sufficient to sustain the action.[5]

Corporations and companies may maintain actions for slander of their title, whether the slander be uttered by one of their own members or by a stranger.[6]

§ 5. **The Assertion of a Claim of Title.**—The mere fact that a person asserts a claim to the property which is un-

[1] Pollard v. Lyon, 91 U. S., 225; Russell v. Elmore, 48 N. Y., 653; Tobias v. Harland, 4 Wend., 537; Collins v. Whitehead, 34 Fed. Rep., 121; Ashford v. Choate, 20 U. C., C. P., 471; Swan v. Tappan, 59 Mass. (5 Cush.), 104; Cane v. Golding, Styles' Rep., 169; Brook v. Rawl, 4 Ex., 521; Hadden v. Lott, 24 L. J., C. P., 49; Law v. Harwood, Cro. Car., 140; Humphrey v. Stanfield, Cro. Car., 469; Folkard on Slander, 138.

[2] Folkard on Slander, 138; Kendall v. Stone, 5 N. Y., 14; Like v. McKinstry, 3 Abb. (N. Y.) App., 62; Cro. Eliz., 197; 1 Vin. Abr., 550; 6 Yelv., 80.

[3] Manning v. Amy, 3 Keb., 153.

[4] Folkard on Slander, 138.

[5] Bliss v. Stafford, Owen, 37; Moore, 188; Jenk., 247; Folkard on Slander, 128.

[6] Metropolitan Saloon Omnibus Co. v. Hawkins, 4 H. & N., 90; 28 L. J., Ex., 201; Folkard on Slander, 131.

founded does not warrant a presumption of malice. Malice must be proved as a substantive fact. The reason for this rule is obvious. It is the duty of a person who has a claim upon property that is about to be sold to assert his claim in order that innocent persons may not be misled or damnified by its purchase; and inasmuch as every person who is inquired of by another as to the title to property offered for sale is bound to assert his claim thereto if he has one, or, as against the person inquiring, be forever estopped from asserting it against him, so, too, if he stands by and sees property sold, knowing that he has a claim thereto and does not assert it, the law provides that such a claim honestly made, although erroneous and without real foundation, shall not subject him to an action. The policy of this rule is not doubtful, and stands upon the same broad principle as all other privileged communications.[1] So it is not actionable for any man to assert his own rights at any time. And even where the defendant fails to prove such right on investigation, still if at the time he spoke he supposed in good faith such right to exist, no action lies.[2] Hence, whenever a man claims a right or title in himself, in possession or in remainder, it is not enough for the plaintiff to prove that he had no such right; he must also give evidence of express malice[3] — that is, he must also attempt to show that the defendant could not honestly have believed in the existence of the right he claimed, or at least that he had no reasonable or probable cause for so believing. If there appear no reasonable or probable cause for his claim of title, still the jury are not bound to find malice; the defendant may have acted stupidly, yet from an innocent motive.[4] But in all cases where it appears that the defendant at the time he spoke knew that what he said was false, the jury should certainly find malice; lies which injure another cannot be told in good faith.[5]

[1] Bailey v. Dean, 5 Barb., 397; Wood's Folkard on Slander, 208, note; Hargreave v. Le Breton, 4 Burr., 2422; Earl of Northumberland v. Burt, Cro. Jac., 165; Williams v. Linford, 2 Leon., 111; Vaughn v. Ellis, Cro. Jac., 213; Viner's Abr., Actions, C., 2; 3 Woodeson, 176.

[2] Carr v. Duckett, 5 H. & N., 783; 29 L. J., Ex., 468.

[3] Smith v. Spooner, 3 Taunt., 246.

[4] Pitt v. Donovan, 1 M. & S., 648; Steward v. Young, L. R., 5 C. P., 122; 39 L. J., C. P., 85; 18 W. R., 492; 22 L. T., 168; Clark v. Molyneux, 3 Q. B. D., 237; 47 L. J., Q. B., 230; 26 W. R., 104; 37 L. T., 694.

[5] Odgers on L. & S., 142; Waterer v. Freeman, Hob., 266.

§ 6. **Statements by Agents and Attorneys.**— The law applies equally where the defendant is an agent or attorney, and claims for his principal or client a title which he honestly believes him to possess.[1] So where a man in good faith asserts a title in his father or other near relative to whom he or his wife is heir apparent.[2] But where the defendant makes no claim at all for himself or any connection of his, but asserts a title in some one who is a stranger to him, here he clearly is meddling in a matter which does not concern him; and such officious and unnecessary interference will be deemed malicious.[3]

§ 7. **The Subject Divided.**— The subject of slander of property may be very conveniently divided into two classes: (1) Where the title of the property is defamed; and (2) where the quality of the property is defamed, though under the general but seemingly inappropriate term of "slander of title" is included all the rules of law equally applicable, whether the words complained of be defamatory of the title or the quality of the property.

§ 8. **Slander of the Title of Property.**— Where a person possesses an estate or interest in any real or personal property, an action lies against any one who maliciously comes forward and falsely denies or impugns the plaintiff's title thereto, if thereby damage follows to the owner.[4]

The statement claimed as slanderous must be false; if there be such a flaw in the title as the defendant asserted, no action lies. And it is for the plaintiff to prove it false, not for the defendant to prove it true.[5] And the statement must be malicious; if it be made in the *bona fide* assertion of defendant's own right, real or supposed, to the property, no action lies. But whenever a man unnecessarily intermeddles with the affairs of others with which he is wholly unconcerned, such

[1] Hargreave v. Le Breton, 4 Burr., 2422; Steward v. Young, L. R., 4 C. P., 122; 39 L. J., C. P., 85; 18 W. R., 492; 22 L. T., 186.

[2] Pitt v. Donovan, 1 M. & S., 639; Gutsole v. Mathers, 1 M. & W., 499; 5 Dowl., 69; 2 Gale, 64; 1 Tyrw. & Gr., 694.

[3] Pennyman v. Rabanks, Cro. Eliz., 427; 1 Vin. Abr., 551; Mildmay et ux. v. Standish, 1 Rep., 177 b; Cro. Eliz., 34; Moore, 144; Jenkins' Centuries, 247; Odgers on L. & S., 142.

[4] Dodge v. Colby, 108 N. Y., 445; Hill v. Ward, 13 Ala., 310; Like v. McKinstry, 41 Barb., 186; Griffon v. Blanc, 12 La. Ann., 5; Pater v. Baker, 3 C. B., 869; 16 L. J., C. P., 124; 11 Jur., 370; Kendall v. Stone, 5 N. Y., 14.

[5] Burnett v. Tak, 45 L. T., 743.

officious interference will be deemed malicious, and he will be liable if damage follow. It is enough for the plaintiff to establish the speaking or writing of the words, their falsity, and that there was no ground for the defendant's claim.[1] And special damage must be proved and shown to have arisen from the defendant's words. And for this it is generally necessary for the plaintiff to prove that he was in the act of selling his property either by public auction or private treaty, and that the defendant by his words prevented an intending purchaser from binding or completing.[2] So proof that plaintiff wished to let his lands and that the defendant prevented an intending tenant from taking a lease will be sufficient. But a mere apprehension that plaintiff's title might be drawn in question, or that the neighbors placed a lower value on plaintiff's lands in their own minds in consequence, the same not being offered for sale, will not be sufficient evidence of damage. "This action lieth not but by reason of the prejudice in the sale."[3] The special damage must always be such as naturally or reasonably arises from the use of the words.[4]

ILLUSTRATIONS — DIGEST OF AMERICAN CASES.

1. An action for slander of title was brought against the sheriff of Genesee county, Michigan, and one Byron Bostwick. Bostwick was the plaintiff in an execution against one John Walkley, and the action was brought for wrongfully levying the execution upon lands owned by the plaintiff (who, it seems, was the wife of John Walkley), whereby a trade which she had negotiated was broken up to her loss. The plaintiff did not aver that the levy on her property was malicious, or that it was made with any purpose to wrong her, but she relied for recovery upon the bare facts that the levy was made upon her lands, and that a purchaser to whom she had bargained it refused in consequence to complete the bargain. In delivering the opinion of the supreme court of Michigan on an appeal, Cooley, J., said: "As the levy could create no lien on her land or in any manner charge, endanger or affect her title, it will be questioned whether the alleged damage is the natural and proximate result of the act complained of. At most the act of the defendants amounted to no more than a formal assertion that the ownership of the plaintiff's land was in John Walkley, and that they proposed to maintain that assertion in legal proceedings. But

[1] Bailey v. Dean, 5 Barb. (N. Y.), 297.

[2] Tasburgh v. Day, Cro. Jac., 484; Lowe v. Harewood, Sir W. Jones, 196; Cro. Car., 140; Odgers on L. & S., 139.

[3] Fenner, J., in Bold v. Bacon, Cro. Eliz., 346.

[4] Haddon v. Lott, 15 C. B., 411; 24 L. J., C. P., 49.

this assertion would not have justified a purchaser in throwing up his bargain. If he had previously entered into a valid contract, the levy could not have excused his failure to perform it; and if he had only agreed by parol to take the land, the breaking off of the negotiation for a reason that would not have excused the performance of a valid contract can only be attributed to excess of caution, and cannot certainly be referred to an act which in law was wholly inadequate to have caused it. A purchaser who is not yet bound may make such an attack upon the title an excuse for breaking off negotiations, and so a master may make the slander of his servant an excuse for discharging him from employment; but if he should do so the discharge could not be deemed a natural consequence of the slander. (Citing Wiars v. Wilcocks, 8 East, 1; Ward v. Weeks, 7 Bing., 211; Netern v. Hurley, 98 Mass., 211.) The cases are analogous. Nor is this action grounded on the principle that supports an action for slander of title, for that is grounded on malice. (Citing Malachy v. Soper, 3 Bing. N. C., 371; Walden v. Peters, 2 Rob. (La.), 331.) Here, as has been said, no malice is averred, and it is presumable that the defendants in good faith supposed they might contest and disprove the plaintiff's title. The case, therefore, is without precedent so far as we know, and no authority is cited for it. . . . The plaintiff finds her injury in the bare fact of the levy; in other words, in the bare fact that these two defendants without malice have asserted that another party owns the land. But in law this is not an actionable wrong." (Citing Howeth v. Mills, 19 Tex., 265.) The judgment is reversed. Walkley v. Bostwick, 49 Mich., 374; 13 N. W. Rep., 780.

2. Mrs. Lewis Riner and Mrs. Isaac Van Tuyle were sisters; their father, Asher Davis, who was eighty-one years old in August, 1878, had in February, 1873, conveyed the land, the title of which is claimed to have been slandered, to Mrs. Riner and her husband, and in consideration for the same they had entered into a contract to support Mr. Davis and his wife, who were both old and feeble, during their lives, and to bury them when dead. Riner and wife desired to sell the land and go to Kansas. Mr. Davis, his wife being then dead, consented. He said he was satisfied he "was just as near heaven in Kansas as he was in Illinois. It made no difference where his old body lay after he was dead." They entered into a negotiation for the sale of the land with one Peter Stoley. He made them a verbal offer to pay them $3,000 cash on September 1, 1877. On September 1st a deed was tendered to Stoley, but he declined to take it and pay the money, because, as he said, Van Tuyle had told him in August that his wife was a legal heir to that piece of land, and that one Mrs. Bell, of Ohio, was also an heir, and if he bought it he would buy a lawsuit; that Davis had not been capable of doing business for a good many years; he supposed Riner had a deed, but if he had he had got it in some way; that he was fearful if Riner sold the land the old man would be thrown on public charity, and might come back on him for support. Riner and his wife brought suit against Van Tuyle for slander of his title.

On the part of the defense there was some evidence tending to show that the motives for speaking the words were not malicious, but honest, without malice, and that the damage, if any, by reason of not completing the sale to Stoley was trifling.

The jury, however, returned the following verdict:

"We, the jury, find the issue for the plaintiffs, and assess the damages on the land at $1,000 and exemplary damages at $500; total, $1,500. The court considering the verdict informal caused it to be put in the following form: "We, the jury, find the issue in favor of plaintiffs, and asess the damages at $1,500."

Upon an appeal Leland, J., said: "As to whether the defendant honestly found that if the land was once converted into money the latter 'might take unto itself wings and fly away,' and the old father be made to suffer because of the inability of Riner and wife to take care of him, or whether this interference with the sale was from selfish, dishonest and malicious motives, was a question for the jury to determine. . . . If this verdict had been for reasonable compensatory damages only, we might say that verdicts should not be interfered with except in clear cases of an indication that there was passion, prejudice or other improper influence operating on the jury. While we are disposed to concede that in a case of slander of the title to real estate there may be evidence of that wanton, wilful and malicious attempt to injure the owner of the land which would justify punitive or exemplary damages, we do not think this case one for anything more than just and reasonable compensation. Reversed." Van Tuyle v. Riner, 8 Brad. (Ill.),-556.

3. False, defamatory and malicious statements made with intent to injure the owner of land and his title thereto constitute slander of title. Dodge v. Colby, 108 N. Y., 445; 87 Hun (N. Y.), 515.

4. To support an action for slander of title special damages must be alleged circumstantially. There must, too, be a want of probable cause; and if what the defendant said or did was in pursuance of a claim of title, for which he had some ground, he is not responsible. Bailey v. Dean, 5 Barb., 297.

5. Three things are necessary to maintain an action for slander of title: the words must be false; work an injury to the plaintiff in respect to his title; and be malicious, not in the worst sense, but with intent to injure the plaintiff. The truth of the words may be proven under the general issue. The existence of probable cause is no answer to the action; nor does the want of it necessarily prove malice. Proof of other conversations of the defendant, respecting the same title and subject, is admissible to prove malice, though they were after suit brought. The jury may give exemplary damages. Kendall v. Stone, 2 Sandf. (N. Y.), 269.

6. To maintain the action the words must be maliciously uttered as well as false, and be followed, as a natural and legal consequence, by a pecuniary damage to the plaintiff, which must be specially alleged in the declaration and substantially proven on the trial. Kendall v. Stone, 1 Seld., 14; 5 N. Y., 14. Where the land had been sold, and, in consequence of the slander, the vendee applied to the vendor to be released from the contract, and the vendor thereupon refunded the paid purchase money and rescinded the contract, *held*, that here was no damage within the rule. Id.; rev'g 2 Sand., 269.

7. The complaint in an action for slander of title must show special damage, and to show it the person who refused to purchase or to loan in con-

sequence of the slander must be named or the complaint is bad on demurrer. Linden v. Graham, 1 Duer, 670.

8. An action for slander to title of lands lies only when the words are false and uttered maliciously, and are also followed by direct pecuniary damage. Sike v. McKinstry, 41 Barb. (N. Y.), 186. There must be a want of probable cause. The defendant is not responsible for words or acts done in pursuance of a claim of title. Bailey v. Dean, 5 Barb. (N. Y.), 297.

9. To maintain an action for slander of title, it is necessary for the plaintiff to have either a title or an interest in the property. Edwards v. Burris, 60 Cal., 157.

10. Where D. published, in the notice of defect of A.'s title to an oleomargarine patent, that "a final injunction and decree was obtained against A. in the United States circuit court," whereas, in fact, there had been only an *ex parte* order for a preliminary injunction, and the suit was discontinued by consent of the parties, it was held in an action for slander of title that such allegations are in excess of the occasion, and not merely an assertion of supposed right, and must be presumed to be malicious. The gist of the action is the malice or *bona fides* of the statement. Andrew v. Deshler, 45 N. J. L., 167.

11. Where the slander charged is the record of a claim, evidence that the plaintiff was thereby precluded from selling the land, and from using the proceeds of the sale in his business, is sufficient to support a verdict for substantial damages without further proof of special damages. Collins v. Whitehead, 34 Fed. Rep., 121.

12. The defendant is entitled to a nonsuit if the evidence shows that the existence of the title alleged to have been slandered is in dispute in a prior action between the parties. Thompson v. White, 70 Cal., 135.

13. A levy of execution against one person upon lands belonging to another, and without going upon the land, does not excuse a contract purchaser of the land from fulfilling his contract, creates no lien upon it, and is not an actionable wrong where there is no malice; and, if not alleged to be malicious, it will not sustain an action for a slander of title. Walkley v. Bostwick, 49 Mich., 374, 13 N. W. Rep., 780.

14. In an action brought by the defendant in equity against the plaintiff for slandering the title of the former to certain slaves by him exposed to public sale, a verdict was found for him, and the defendant at law brought his bill praying for relief and an injunction against the verdict. It was *held* that, as the loss in the sale of the slaves was caused by the plaintiff, even though he was believed to have designed no injury, he was bound to make reparation, and his bill was dismissed. Ross v. Pines, Wythe (Va.), 71.

15. In an action for slander of title the judge charged the jury that the question for them to determine was whether the defendant made the alleged statements in good faith and under an honest impression of their being true, or whether he made them maliciously and for the purpose of slandering the title of the plaintiff; that the question whether the words were maliciously or *bona fide* spoken depended very much upon their truth or falsity — the circumstances under which they were spoken, whether honestly to caution purchasers, or to alarm them with bugbears of their own creation. It was held that the charge was proper. Kendall v. Stone, 2 Sandf. (N. Y.), 269; 5 N. Y. (1 Seld.), 14.

16. A card published by the defendant, in an action for slander of title, cautioning all persons not to purchase a certain tract of land of the plaintiff, alleging that he obtained the title from him (the defendant) under false pretenses, and declaring that he should institute a suit to annul the title, was held, under the circumstances, not to show malice. McDaniel v. Baca, 2 Cal., 326.

17. In an action for slander of the title to personal property where the alleged slander consisted in claiming the title to such property where offered for sale as the property of another, to recover malice must be shown; and to rebut malice the defendant may prove that he was advised by a lawyer to forbid the sale to render his title under a mortgage effectual. Hill v. Ward, 13 Ala., 310.

18. Proof of other conversations of the defendant respecting the same title is admissible on the question of malice; and the *quo animo* with which the words charged were spoken may be shown by evidence of conversations of the defendant subsequent to the commencement of the suit. Kendall v. Stone, 2 Sandf. (N. Y.), 269. See 5 N. Y. (1 Seld.), 14.

19. In an action for slander of title to land exemplary damages are not to be awarded unless there be proof of a wanton and malicious attempt to injure the owner. So held in an action brought by a person whose father-in-law, in consideration of a life support, had conveyed the land to him, against a brother-in-law, for saying to a person who was negotiating a purchase, "If he bought the land he would buy a lawsuit." Van Tuyle v. Riner, 3 Ill. App., 556.

20. In an action for slander of title, whereby the plaintiff was prevented from procuring money on mortgage, if the complaint does not set forth the name of the person who would otherwise have lent money on the mortgage, but was prevented by the slander, it is bad on demurrer. Linden v. Graham, 1 Duer (N. Y.), 670.

21. The defendant in an action for slander of title by setting up title in himself changes the suit into a petitory action, in which he becomes plaintiff; and he must succeed or fail on the strength of his own title and not on the weakness of his adversary's title. Gray v. Ellis, 33 La. Ann., 249; Clarkson v. Vincent, 32 La. Ann., 613.

22. The rule of practice which, in an action of slander of title, imposes on the defendant who reconvenes and sets up title to the property the burden of proof which rests on the plaintiff in a petitory action, applies only to the case where the defendant is out of possession. Where the defendant is himself in actual possession, the plaintiff cannot so change his position by the form of action to which he resorts as to escape the burden imposed on him by law of establishing his title. In such an action, if the title relied on by defendant is not a valid one, he cannot be permitted to controvert a confirmation of the plaintiff's title by the government, nor to require that the plaintiff's title should be traced from the original claimant to the confirmee. Griffon v. Blane, 12 La. Ann., 5; Moore v. Blane, id., 7; Pontalla v. Blane, id., 8.

Digest of English Cases.

1. Plaintiff succeeded to certain lands as heir-at-law; the defendant asserted that plaintiff was a bastard; plaintiff was in consequence put to great expense to defend his title. Elborow v. Allen, Cro. Jac., 642.

2. To call a man a bastard while his father or other ancestor is alive may be actionable on general principles, if special damage ensue, such as the loss of a marriage, or if he be disinherited in consequence of defendant's words (a very improbable result, as his father must know better than the defendant whether the plaintiff is a bastard or not); but it is not the subject of an action for slander of title; for, even though heir-apparent, plaintiff has no title, but only a mere expectancy. Nelson v. Staff, Cro. Jac., 422; Humphrys v. Stanfeild, vel Stridfield, Cro. Car., 469; Godb., 451; Sir Wm. Jones, 388; 1 Roll. Abr., 38; Turner v. Sterling, 2 Vent., 26; Anon., 1 Roll. Abr., 37; Banister v. Banister, 4 Rep., 17.

3. The defendant falsely represented to the bailiff of a manor that a sheep of the plaintiff was an estray, in consequence of which it was wrongfully seized. *Held*, that an action on the case lay against him. Newman v. Zachary, Aleyn, 8.

4. The plaintiff was desirous to sell his lands to any one who would buy them, when the defendant said that the plaintiff had mortgaged all his lands for 100*l.*, and that he had no power to sell or let the same. No special damage being shown, judgment was stayed. It was not proved that any one intending to buy plaintiff's lands heard defendant speak the words. Manning v. Avery, 3 Keb., 153; 1 Vin. Abr., 553.

5. The plaintiff was possessed of tithes, which he desired to sell; the defendant falsely and maliciously said, "His right and title thereunto is nought, and I have a better title than he." As special damage it was alleged that the plaintiff "was likely to sell, and was injured by the words: and that by reason of the defendant's speaking the words, the plaintiff could not recover his tithes." *Held* insufficient. Cane v. Golding, Styles, 169, 176; Law v. Harwood, Sir Wm. Jones, 196; Palm., 529; Cro. Car., 140.

6. Lands were settled on D. in tail, remainder to the plaintiff in fee. D. being an old man and childless, plaintiff was about to sell his remainder to A., when the defendant interfered and asserted that D. had issue. A. consequently refused to buy. *Held*, that the action lay. Bliss v. Stafford, Owen, 37; Moore, 188; Jenk., 247.

7. The plaintiff's father being tenant in tail of certain lands which he was about to sell, the purchaser offered the plaintiff a sum of money to join in the assurance, so as to estop him from attempting to set aside the deed should he ever succeed to the estate-tail; but the defendant told the purchaser that the plaintiff was a bastard, wherefore he refused to give the plaintiff anything for his signature. *Held*, that the plaintiff had a cause of action, though he was the youngest son of his father, and his chance of succeeding was therefore remote. Vaughan v. Ellis, Cro. Jac., 213.

8. The plaintiff was the assignee of a beneficial lease, which he expected would realize 100*l.* But the defendant, the superior landlord, came to the sale and stated publicly: "The whole of the covenants of this lease are broken, and I have served notice of ejectment; the premises will cost £70 to put them in repair." In consequence of this statement the property fetched only thirty-five guineas. Rolfe, B., left to the jury only one question: Was the defendant's statement true or false? and they found a verdict for the plaintiff — damages £40. But the court of exchequer granted a new trial on the ground that two other questions ought to have been left to the jury as well: Was the statement or any part of it made maliciously?

and, Did the special damage arise from such malicious statement or from such part of it as was malicious? Brook v. Rawl, 4 Exch., 521; 19 L. J., Ex., 114; Smith v. Spooner, 3 Taunt., 246; Milman v. Pratt, 2 B. & C., 486; 3 D. & R., 728; Watson v. Reynolds, Moo. & Mal., 1.

9. An advertisement was sent to the Wolverhampton "Chronicle" in the ordinary course of business, and published once on January 6, 1868. It was as follows: "Important notice. Horsehill estate. The public are respectfully requested not to buy any property formerly belonging to A., B. and C. without ascertaining that the title deeds of the same are correct, as the heirs are not dead nor abroad, but are still alive." This estate was at that moment advertised for sale in building lots; but this advertisement revived all previous doubts about plaintiff's title, and rendered the estate practically unsalable. On January 13th plaintiff wrote and complained of this advertisement, and asked for the name and address of the person who sent it to the paper. This the proprietor of the paper at once furnished, but on January 30th he was served with a writ. On February 10th he inserted an apology. But the jury, under the direction of Keating, J., found for the plaintiff. Ravenhill v. Upcott, 33 J. P., 299.

10. The plaintiff held one hundred and sixty shares in a silver mine in Cornwall, which he said were worth £100,000. Tollervey and Hayward each filed a bill in chancery against the plaintiff and others claiming certain shares in the mine, and praying for an account and an injunction, and for the appointment of a receiver. To these bills plaintiff demurred. Before the demurrers came on for hearing a paragraph appeared in the defendants' newspaper to the effect that the demurrers had been overruled; that an injunction had been granted; that a receiver had been duly appointed, and had actually arrived at the mine,—all of which was quite untrue. A verdict having been obtained for the plaintiff, damages £5, the court of common pleas arrested judgment on the ground that there was no sufficient allegation of special damage, and this although the declaration contained averments to the effect that "the plaintiff is injured in his rights; and the shares so possessed by him, and in which he is interested, have been and are much depreciated and lessened in value; and divers persons have believed and do believe that he has little or no right to the shares, and that the mine cannot be lawfully worked or used for his benefit; and that he hath been hindered and prevented from selling or disposing of his said shares in the said mine, and from working and using the same in so ample and beneficial a manner as he otherwise would have done." Odgers on L. & S., 141; Malachy v. Soper and another, 3 Bing. N. C., 371; 3 Scott, 723; 2 Hodges, 217; Hart and another v. Wall, 2 C. P. D., 146; 46 L. J., C. P., 227; 25 W. R., 873.

11. The plaintiff put up for sale by public auction eight unfinished houses in Agar Town. The defendant, a surveyor of roads appointed under the 7 and 8 Vict., ch. 84, had previously insisted that these houses were not being built by the plaintiff in conformity with the act. He now attended the sale and stated publicly, "My object in attending the sale is to inform purchasers, if there are any present, that I shall not allow the houses to be finished until the roads are made good. I have no power to compel the purchasers to complete the roads; but I have power to prevent them from completing

the houses until the roads are made good." In consequence only two of the carcasses were sold, and they realized only £35 each instead of £65. The jury found a verdict for the plaintiff for £18 12s. But the court of common pleas held that there was no evidence of malice to go to the jury; for malice is not to be inferred from the circumstance of the defendant having acted upon an incorrect view of his duty, founded upon an erroneous construction of the statute. Pater v. Baker, 3 C. B., 831; 16 L. J., C. P., 124; 11 Jur., 370; Hargreave v. Le Breton, 4 Burr., 2422.

12. Plaintiff had purchased the manor and castle of H. in fee from Lord Audley, and was about to demise them to Ralph Egerton for a term of twenty-two years, when the defendant, a widow, said, "I have a lease of the castle and manor of H. for ninety years;" and she showed him what purported to be a lease from a former Lord Audley to her husband for a term of ninety years. This lease was a forgery, and the defendant knew it. *Held*, that an action lay for slander of title; though the defendant had claimed a right to the property herself. It would have been otherwise had she not known that the lease was a forgery. Sir G. Gerard v. Dickenson, 4 Rep., 18; Cro. Eliz., 197. And see Fitzh. Nat. Brev., 116 (B. & D.); Lovett v. Weller, 1 Roll. R., 409.

13. The plaintiff was the widow and administratrix of her deceased husband, and advertised a sale of some of his property. Defendant, an old friend of the husband, thereupon put an advertisement in the papers offering a reward for the production of the will of the deceased. The defendant subsequently called on the solicitor of the deceased and was assured by him there was no will; but in spite of this the defendant attended at the sale and made statements which effectually prevented any person present from bidding. After waiting twelve months the plaintiff again put the property up for sale and defendant again stopped the auction. Cockburn, C. J., left it to the jury to say whether, after the interview with the plaintiff's solicitor, defendant could still possess an honest and reasonable belief that the deceased had left a will. The jury found that he had not that belief. Verdict for the plaintiff. Damages, £54 7s. Atkins v. Perrin, 3 F. & F., 179.

14. Plaintiff held lands on lease from Home, which he put up for sale. Defendant, who was Home's attorney, attended and said publicly before the first lot was put up, "There is a suit depending in the court of chancery in respect to this property; encroachments have been made; proceedings will be taken against the purchaser; there is no power to sell the premises; a good title cannot be made," etc. Littledale, J., directed the jury that defendant was not liable if he *bona fide*, though without authority, raised such objections only as Home, if present, might lawfully have raised. Verdict for the plaintiff. Damages, one farthing. Watson v. Reynolds, Moo. & Mal., 1; Pawley v. Scratton, 3 Times L. R., 146.

15. The lessee of a hotel agreed to sell her lease and certain valuable tenant's fixtures to Turner. Defendant, the assignee of the lessor, thereupon gave notice to Turner that he claimed most of the fixtures as landlord's fixtures, and that if Turner bought them he would have to give them up at the end of the term or pay defendant for them. *Held*, that no action lay, for there was no evidence of malice, although defendant had no present property in the goods. Baker and others v. Piper, 2 Times L. R., 733.

16. The defendant wrongfully and maliciously caused certain persons who had agreed to sell goods to the plaintiff to refuse to deliver them by asserting that he had a lien upon them, and ordering those persons to retain the goods until further orders from him, he well knowing at the time that he had no lien. *Held*, that the action was maintainable, though the persons who had the goods were under no legal obligation to obey the orders of the defendant, and their refusal was their own spontaneous act. Green v. Button, 2 C., M. & R., 707; Barley v. Walford, 9 Q. B., 197; 15 L. J., Q. B., 369; 10 Jur., 917.

17. A. died possessed of furniture in a beer-shop. His widow, without taking out administration, continued in possession of the beer-shop for three or four years and then died, having whilst so in possession conveyed all the furniture by bill of sale to her landlords by way of security for a debt she had contracted with them. After the widow's death the plaintiff took out letters of administration to the estate of A., and informed the defendant, the landlords' agent, that the bill of sale was invalid, as the widow had no title to the furniture. Subsequently the plaintiff was about to sell the furniture by auction, when the defendant interposed to forbid the sale, and said that he claimed the goods for his principals under a bill of sale. On proof of these facts in an action for slander of title the plaintiff was nonsuited. *Held*, that the mere fact of the defendants' having been told before the sale that the bill of sale was invalid was no evidence of malice to be left to the jury, and that the plaintiff was therefore properly nonsuited. Steward v. Young, L. R., 5 C. P., 122; 39 L. J., C. P., 85; 18 W. R., 492; 22 L. T., 168. And see Blackham v. Pugh, 2 C. B., 611; 15 L. J., C. P., 290.

§ 9. **Slander of the Quality of Property.**—False and malicious statements disparaging an article of property, when followed as a natural, reasonable and proximate result by special damage to the owner, are actionable.[1]

An untrue statement disparaging a man's goods, published without lawful occasion and causing him special damage, is actionable. This is laid down as a general principle by Baron Bramwell;[2] and it applies although no imputation is cast on the plaintiff's private or professional character. Nor, in the opinion of the same learned judge, is it necessary to prove actual malice; it is sufficient if it be made "without reasonable cause."

At the same time it is not actionable for a man to commend

[1] Paul v. Halferty, 63 Penn. St., 46; Gott v. Pulsifer, 122 Mass., 235; Manning v. Avery, 8 Keble, Eng. K. B., 153; Swan v. Tappan, 5 Cush., Mass., 104; Western Co. v. Lawes Co., L. R., 9 Exch., 218; Malachy v. Soper, 3 Bing. N. C., 371; Brook v. Rawl, 4 Welsby, H. & G., 521; Wetherell v. Clerkson, 12 Mod., 597; Cook v. Cook, 100 Mass., 194.

[2] Western Counties Manure Co. v. Lawes Chemical Manure Co., L. R., 9 Ex., 218, 222; 43 L. J., Ex., 171; 23 W. R., 5.

his own goods, or to advertise that he can make as good articles as any other person in the trade.[1] Competition between rival traders is allowed to any extent, so long as only lawful means are resorted to.[2] But force and violence must not be used;[3] nor threats,[4] nor imputations of fraud or dishonesty.[5]

ILLUSTRATIONS — AMERICAN CASES.

1. **In a Minnesota** case the complaint alleges that the plaintiff, a horse-dealer, owned January 30, 1886, and still owns a race horse, which then was and still is for sale; that on that day the defendant maliciously published in a newspaper of large circulation, of which he was proprietor, a statement that the horse was twenty-one years old, when he was not more than twelve years old, as defendant well knew, thereby intending to injure the sale of the horse by plaintiff, to his pecuniary loss and damage; that at said time plaintiff had "a chance to sell and was negotiating a sale" of said horse for $1,000, and but for said false publication would have sold him for that sum; and that solely because of said false publication "plaintiff lost the chance to sell said horse; the negotiations were broken up by said parties who contemplated purchasing; no one will pay more than $500." And that plaintiff has accordingly suffered damages in the sum of $500. To this declaration the court sustained a demurrer and an appeal was taken. The supreme court sustained the ruling of the court below. In the opinion Berry, J., says: "False and malicious statements disparaging an article of property, when followed as a natural, reasonable and proximate result by special damage to the owner, are actionable. Does the complaint state a cause of action under the rule? That the statement complained of was false and malicious is distinctly averred. It was also *prima facie* disparaging; for *prima facie*, as a matter of common knowledge, a horse at twenty-one years of age is less valuable than he is at twelve. The complaint also alleged, in effect, that the plaintiff's loss of sale of his horse was the result of the publication; and there is no difficulty in conceiving of a state of facts showing that the intending purchaser was influenced and led to decline or refuse to purchase by the publication complained of, and hence no difficulty in conceiving that the failure to sell to him may have been a natural, reasonable and proximate consequence of said publication. But the allegation of special damage is insufficient. The action is in the nature of one for slander of title, and hence is not an ordinary action for slander, properly so called, but an action on the case for special damages sustained by reason of the speaking complained of. Special damages are therefore of the gist of the action. Without them the action cannot be

[1] Harman v. Delaney, 2 Str., 898; 1 Barnard., 289; Fitz., 121.

[2] Pudsey Coal Gas Co. v. Corporation of Bradford, L. R., 15 Eq., 167; 42 L. J., Ch., 293; 21 W. R., 286; 28 L. T., 11; Mogul Steamship Co. v. M'Gregor, Gow & Co., 15 Q. B. D., 476; 54 L. J., Q. B., 540; 53 L. T., 268; 49 J. P., 646; Johnson v. Hitchcock, 15 Johns., 185.

[3] Young v. Hickens, 6 Q. B., 606.

[4] Tarleton and others v. McGawley, Peake, 204, 270.

[5] Odgers on L. & S., 148.

maintained; and therefore a complaint failing to allege them failed to allege the cause of action. Where loss of sale of a thing disparaged is claimed and relied on as special damages occasioned by the disparagement, it is indispensable to allege and show a loss of sale to some particular person; for the loss of a sale to some particular person is a special damage and of the gist and substance of the action." Wilson v. Dubois, 35 Minn., 471; 29 N. W. Rep., 68.

2. **A Massachusetts Case:** Seth W. Boynton brought an action against the Shaw Stocking Company to recover damages for an alleged libel. At the trial it appeared from the evidence offered by the plaintiff, who was a tradesman doing business in Waltham, that on May 3, 1886, one Guild, who sold defendant's goods on commission, called at plaintiff's place of business and represented that he had a large stock of navy blue, first quality Shaw-knit stockings to sell; that they were in such sizes that defendant would sell them cheap, as it desired to reduce its very large stock; that plaintiff examined the samples of the goods offered, which were first quality navy blue, Shaw-knit stockings, and after being assured by said Guild that the stock was like the samples of the very first quality, the plaintiff purchased one hundred dozen pairs of the stockings for $118.75; that he received the stockings on May 6, 1886, and upon examination they appeared to be of first quality navy blue; that after the receipt of the stockings the plaintiff caused to be inserted in a certain paper published at Waltham the following advertisement: "Shaw-knit hose, navy blue, size eight to eleven, first quality goods, at twelve and one-half cents per pair." That thereafter the defendant caused to be inserted in six issues of the Waltham "Daily Tribune," a newspaper published in Waltham, the following (which was the libel complained of): "Caution.— An opinion of Shaw-knit hosiery should not be formed from the navy blue stockings advertised as of first quality by Messrs. S. W. Boynton & Co. at twelve and one-half cents, since we sold that firm, at less than ten cents a pair, some lots which were damaged in the dye-house. (Signed) Shaw Stocking Co., Lowell, May 29, 1886." The plaintiff submitted evidence tending to show that the stockings had not been damaged in the dye-house, and they were not damaged in any other respect, but were first quality stockings, which the defendant well knew. On this evidence the court ruled that the action could not be maintained, and instructed the jury to return a verdict for the defendant. On an appeal being taken to the supreme court it was held that the ruling of the trial court was proper; that an action does not lie for the mere disparagement of another's goods without an averment and proof of special damage. Boynton v. Shaw Stocking Co., 146 Mass., 219; 15 N. E. Rep., 507.

3. **A New York Case:** Tobias sued Harland for a libel. The declaration, after stating by way of inducement that the plaintiff used and exercised the trade and business of a manufacturer of patent lever watches, called S. J. Tobias & Co.'s patent lever watches, and that the defendant was a dealer in patent lever watches manufactured by M. J. Tobias and Robert Rockell and by other persons, averred that the defendant, intending to defame and slander the plaintiff and to injure and prejudice him in the use and exercise of his trade and business of a manufacturer of patent lever watches, falsely and maliciously spoke and published of and concerning the

plaintiff in his said business the following words: "1. Tobias' watches [meaning the watches manufactured by the plaintiff] are bad. 2. S. J. Tobias & Co.'s watches are bad. 3. S. J. Tobias & Co.'s watches are inferior watches. 4. Tobias' watches are inferior watches. 5. This watch [meaning a patent lever watch which he held in his hand, and which had been manufactured by the plaintiff] is not a good watch. 6. The watch [meaning, etc.] is an inferior watch. 7. This watch [meaning, etc.] is a bad watch. 8. S. J. Tobias' watches [meaning the watches manufactured by the plaintiff] are inferior to M. J. Tobias' and to Rockell's. 9. This watch [meaning a watch he held in his hand, manufactured by the plaintiff] is inferior to M. J. Tobias' and to Rockell's;" and concluded by averring that by means of the speaking and publishing of the said words the plaintiff was greatly injured and prejudiced in his trade and business, and divers citizens, since the speaking and publishing of the said words, had refused to purchase the watches manufactured by the plaintiff, and so the plaintiff was deprived of great gain and profit. To this declaration a demurrer was sustained and the plaintiff appealed. In the supreme court Marcy, J., said: "If the plaintiff can recover at all it must be because the words are actionable in themselves. Whether they are so or not is the only question presented by the demurrer. The words charged do not directly impeach the integrity, knowledge, skill, diligence or credit of the plaintiff. They only relate to the quality of the article which he manufactures or in which he deals. The words which relate to a particular watch, and those which are obviously mere comparisons, are clearly not actionable. No instance can be found, I believe, where an action has been sustained on words for misrepresenting the quality of any single article which a person has for sale, unless special damages are alleged and proved. To impute ignorance to an attorney or counselor in a particular cause, or want of skill to a physician in relation to the disease of a particular patient, is not actionable. On the same principle, an allegation that a manufacturer has made a particular article bad cannot be a slander. A contrary doctrine would, in my apprehension, be exceedingly pernicious. It would render a man liable to be called into court to justify an unfavorable opinion he might express of any manufactured article which another had for sale. It would involve a strange contradiction to hold a man answerable for words imputing defects in an article of merchandise, and to exonerate him from responsibility when he charged his neighbor with a defect or want of moral virtue, or the neglect of moral duty or obligation." Tobias v. Harland, 4 Wend. (N. Y.), 537. Citing Buller's N. P., 71; Saund., 243, n. 5; 1 Strange, 666; Cro. Eliz., 620; Foot v. Brown, 8 Johns. (N. Y.), 64; Dixie v. Fenn, Jones, 444; Freem., 25; 1 Vin. Abr., 477; Tobart v. Tippe, 1 Camp., 330.

4. **A Massachusetts Case:** In an action to recover damages for a libel, the publication of which was admitted by the defendant, the following words were complained of: "Probably never in the history of the ancient and honorable artillery company was a more unsatisfactory dinner served than that of Monday last. One would suppose from the elaborate bill of fare that a sumptuous dinner would be furnished by the caterer, Dooling, but instead a wretched dinner was served, and in such a way that even hungry barbarians might justly object. The cigars were simply vile, and the wines not much bet-

ter." At the trial counsel in opening the case to the jury stated that the plaintiff was a caterer in the city with a very large business, and acted as caterer upon the occasion referred to; and also stated that he should offer no evidence of special damage. The court ruled, without any reference to any question of privilege that might be involved in the case, that the words set forth were not actionable in themselves, and that the plaintiff could not maintain his action without proof of special damage. And the counsel still stating that he should offer no evidence of special damage, the court ruled, as a matter of law, that the jury should render a verdict for the defendant, which was done, and the case was reported to the supreme judicial court for consideration. It was claimed by the plaintiff that the words were actionable in themselves as affecting him in his office, profession or business. For the defendant it was claimed that the words were not actionable in themselves, because they did not charge the plaintiff with the commission of a crime or with having some loathsome disease. Nor did they contain any defamatory reference to him personally or in his business, trade or office, etc. What was published related solely to the quality and satisfactoriness of a public dinner which he provided on a single occasion. The court held that the language, though somewhat strong, amounted only to a condemnation of the dinner and its accompaniments. "Words relating merely to the quality of articles made, produced, furnished or sold by a person, though false and malicious, are not actionable without special damage." The charge was in effect that the plaintiff, being a caterer, on a single occasion furnished a very poor dinner, vile cigars and bad wine, and is not actionable without proof of special damage. Dooling v. Budget Co., 144 Mass., 258; 10 N. E. Rep., 809. Citing West. Co. Manure Co. v. Lawes Chem. Manure Co., L. R., 9 Exch., 219; Young v. Macrae, 3 Best & S., 264; Ingram v. Lawson, 6 Bing. N. C., 212; Rignell v. Buzzard, 3 Hurl. & N., 217; Fen v. Dixee, W. Jones, 444; Evans v. Harlow, 5 Q. B., 631; Tobias v. Harland, 4 Wend., 537.

DIGEST OF AMERICAN CASES.

1. The defendants published of the plaintiff, a druggist, that he sold what he claimed to be genuine Netherlands Haarlem oil, and that they (the defendants), doubting it, had sent one of his labels to Haarlem and received from the rector of the gymnasium a letter which was given at length stating that a consignment of genuine oil was on its way to them, and that the label which they sent to him was not genuine and was probably printed in America. They (the defendants) then went on to make some comments as to the genuineness of the oil sold by the plaintiff, warning buyers from dealing with any one but themselves, and added a letter from one of the two manufacturing houses in Haarlem, stating that the label did not come from that establishment, and charging that Steketee (the plaintiff) had at one time sold genuine oil, and had caused the oil and wrappers to be counterfeited, and then sold the spurious article as genuine. It was held by the supreme court of Michigan as libelous in not only depreciating a tradesman's wares, but also in charging him with counterfeiting genuine articles and their labels. Kim et al. v. Steketee, 48 Mich., 322; 12 N. W. Rep., 177.

2. A narr. for slander averred that on a certain day, plaintiff then being, as he still is, engaged in the "business of butchering cattle for sale," de-

fendant uttered concerning him and his business the words: "It is better to buy western beef than to buy beef from a slaughter-house where condemned and diseased cattle are slaughtered;" and the words: "Did you hear of those diseased stillery bulls [plaintiff] was getting, and selling the meat at four and four and one-half cents, and bulls are selling for that; it is cheaper to buy the meat than bulls." It was held that the words as thus set out were actionable in themselves, and a colloquium was unnecessary. It sufficiently appeared that plaintiff was engaged in killing and selling cattle for human food, especially where the innuendo averred the meaning to be that plaintiff was slaughtering and selling the carcasses of diseased cattle for meat and human food. Blumhardt v. Rohr, 70 Md., 328, 17 Atl. Rep., 266.

3. Where one under contract for the purchase of property is induced to refuse to complete the purchase by reason of slanderous words uttered concerning the property by a third person, the vendor cannot sue such person for slander. His remedy is on the contract of sale. Brentman v. Note, 3 N. Y. S., 420, 24 N. Y. St. Rep., 281.

4. A dealer in paints of a particular quality, who sells the same with the condition that they shall be used as they came from the manufacturers, and be properly put on, and who subsequently discovers that one to whom he has sold such paints has put in the same foreign ingredients, is not, as a rule, liable in damages for refusing to sell further to such purchaser, and for stating that he had not kept his agreement, especially when the statements are made without malice, under the firm belief that they are true and for self-protection to the party himself, or to parties interested entitled to information. Lynch v. Febiger, 39 La. Ann., 336, 1 So. Rep., 690.

5. Where injury is implied from the use of certain words, there is no error in the admission of testimony that witness cannot tell how much reports of this sort injured plaintiff's business, and that he should think it would necessarily injure it. Blumhardt v. Rohr, 70 Md., 328.

6. Plaintiff's testimony as to the number of cattle killed by him per week before a slander as to the quality of cattle he butchered and the number killed afterwards went to the question of general and not special damages, and exception to it as evidence of special damage not authorized by the declaration is not well taken. Blumhardt v. Rohr, 70 Md., 328.

7. Issue having been joined in the plea of the truth of the alleged defamatory words, evidence that plaintiff was not selling meat diseased or unfit for human food, and therefore evidence as to the stage of pleuropneumonia at which the meat becomes diseased, is proper. Blumhardt v. Rohr, 70 Md., 328, 17 Atl. Rep., 266.

8. The admission of evidence that proper precautions for destroying diseased animals were taken at plaintiff's place of slaughtering, and testimony as to the construction of the buildings given by an expert, and as to the condition of the premises, is not reversible error. Blumhardt v. Rohr, 70 Md., 328, 17 Atl. Rep., 266.

9. In an action for publishing a false and malicious statement concerning the property of the plaintiff, the special damage alleged being the loss of sale of the property, evidence of its value as a scientific curiosity or for exhibition is immaterial. Fair and reasonable comments, however severe in

terms, may be published in a newspaper concerning anything which is made by its owner a subject of public exhibition, and are privileged communications, for which no action will lie without proof of actual malice. Gott v. Pulsifer, 8 Lathrop (122 Mass.), 235.

10. In an action for publishing in a newspaper a false and malicious statement concerning the property of another, actual malice may be inferred from false statements exceeding the limits of fair and reasonable criticism, and recklessly uttered in disregard of the right of those who might be affected by them; and it is erroneous to instruct the jury that the plaintiff must prove a disposition wilfully and purposely to injure the value of the property, with wanton disregard of the interest of the owner. Gott v. Pulsifer, 8 Lathrop (122 Mass.), 235.

11. Plaintiff sued for a libel consisting of an article and a picture which showed his saloon to be the resort of degraded characters, etc. It was held that the libel was on the place rather than on the plaintiff, and that an allegation of special damages was necessary to show a cause of action. Kennedy v. Press Pub. Co., 41 Hun (N. Y.), 422.

12. It is actionable to falsely and maliciously disparage the value of a race-horse if special damage results. But special damage is the gist of the action; and where the loss of the sale of the horse to some particular person is the special damage relied upon, it must be specially averred and proved. Wilson v. Dubois, 35 Minn., 471.

13. No action lies for representing that the plaintiff's ferry was not to be as good as another rival ferry, and inducing and persuading travelers to cross at the other and not at the plaintiff's ferry. Johnson v. Hitchcock, 15 Johns. (N. Y.), 185.

Digest of English Cases.

1. The defendants falsely and without lawful occasion published a detailed analysis of the plaintiffs' artificial manure and of their own, in which the plaintiffs' manure was much disparaged and their own extolled. Special damage having resulted, *held* that the action lay. Western Counties Manure Co. v. Lawes Chemical Manure Co., L. R., 9 Ex., 218; 43 L. J., Ex., 171; 23 W. R., 5; Thorley's Cattle Food Co. v. Massam, 6 Ch. D., 582; 46 L. J., Ch., 718; 14 Ch. D., 763; 28 W. R., 295 966; 41 L. T., 542; 42 L. T., 851; Salmon v. Isaac, 20 L. T., 885.

2. The defendant stated in Ireland that the plaintiff's ship was unseaworthy; consequently her crew refused to proceed to sea in her, and a negotiation for the sale of her fell through. The ship was in England. But it was held that this fact would not give an English court jurisdiction. Casey v. Arnott, 2 C. P. D., 24; 46 L. J., C. P., 3; 25 W. R., 46; 35 L. T., 424.

3. The defendant published an advertisement denying that the plaintiff held any patent for the manufacture of "self-acting tallow syphons or lubricators," and cautioning the public against such lubricators as wasting the tallow. No special damage was alleged. *Held*, that the words were not a libel on the plaintiff, either generally or in the way of his trade, but were only a reflection upon the goods sold by him, which was not actionable without special damage. Evans v. Harlow, 5 Q. B., 624; 13 L. J., Q. B., 120; Dav. & M., 507; 8 Jur., 571.

4. "If a man makes a false statement with respect to the goods of A. in comparing his own goods with those of A., and A. suffers special damage, will not an action lie?" (Young v. Macrae, 32 L. J., Q. B., 8); and counsel answers, "Certainly it would." "If a man were to write falsely that what another man sold as Turkish rhubarb was three parts brick-dust, and special damage could be proved, it might be actionable." Young v. Macrae, 32 L. J., Q. B., 7.

5. The defendant published a certificate by a Dr. Muspratt, who had compared the plaintiffs' oil with the defendant's, and deemed it inferior to the defendant's. It was alleged that the certificate was false, and that divers customers of the plaintiffs after reading it, had ceased to deal with the plaintiffs and gone over to the defendant. *Held*, that the plaintiffs' oil, even if inferior to the defendant's, might still be very good; and that the falsity was alleged too generally, and that therefore no action lay. It was consistent with the declaration that every word said about the plaintiffs' oil should be true, and the only falsehood the assertion that defendant's was superior to it, which would not be actionable. "It is not averred that the defendant falsely represented that the oil of the plaintiffs had a reddish-brown tinge, was much thicker, and that it had a more disagreeable odor. If that had been falsely represented and special damage had ensued, an action might have been maintained." Young v. Macrae, 3 B. & S., 264; 32 L. J., Q. B., 6; 11 W. R., 63; 9 Jur. (N. S.), 539; 7 L. T., 354.

6. The defendant falsely represented to the bailiff of a manor that a sheep of the plaintiff was an estray, in consequence of which it was wrongfully seized. *Held*, that an action on the case lay against him. Newman v. Zachary, Aleyn, 3.

§ 10. **Slander of Title to Letters Patent, etc.**— It has been held that this action will also lie for words uttered reflecting injuriously on a party's title to letters patent, copyrights, trade-marks, etc.[1]

In a recent English case, in which the plaintiff and the defendant were each of them possessed of a separate patent for the construction of spooling machines, the plaintiff was negotiating for the sale of his machines to different manufacturers, some of whom were already using the defendant's machines under licenses from him. The defendant wrote to these manufacturers letters stating that the plaintiff's machines were infringements of a patent of the defendant's, and that if they were used he (the defendant) would claim royalties for their use, which, if not paid, he would take legal proceedings. In consequence of these threats, the plaintiff lost the sale of his machines. The plaintiff then brought his action, the declara-

[1] McElwee v. Blackwell, 94 N. C., Mo. App., 329; Lovell Co. v. Hough-261; Snow v. Tappan, 59 Mass. (5 ton, 54 N. Y. Sup. Ct., 60. Cush.), 104; Meyrose v. Adams, 12

tion stating the facts above mentioned, and averring that the letters were falsely and maliciously written. The defendant pleaded not guilty. At the trial the plaintiff tendered evidence to show that the defendant's patent (which had not been disputed by *scire facias* or otherwise) was void for want of novelty, so that the plaintiff's machines were no infringement of the defendant's patent; but this evidence was rejected as immaterial, and a nonsuit was directed. It was afterwards held that the evidence was properly rejected, as, if admitted and accepted as true, it could only show that the patent was void, and not that the defendant made the communication to the intended purchasers *mala fide*, and without any intention of instituting proceedings against them. And it was also held that the nonsuit was right, as the action would not lie without proof that the claim of the defendant was a *mala fide* and malicious attempt to injure the plaintiff by asserting a claim of right against his own knowledge that it was without foundation.[1]

ILLUSTRATIONS — DIGEST OF AMERICAN CASES.

1. Slander of title may be predicated upon letters patent, and an action for such slander or libel lies although the defendant has merely repeated what he has heard. Meyrose v. Adams, 12 Mo. App., 329.

2. Where the defendant, a book publisher, issued a circular charging that plaintiff, by certain publications, infringed defendant's copyright, plaintiff sued to recover damages sustained by the publication of the circular. It was held that the suit was in the nature of an action for slander of title, and that actual malice must be shown to justify a recovery. John W. Lovell Co. v. Houghton, 54 N. Y. Super. Ct., 60.

3. In an action for slander of title to a trade-mark, where the injury has been done more by acts and threats than by words, the complaint may be good although it does not set out the words. McElwee v. Blackwell, 94 N. C., 261.

DIGEST OF ENGLISH CASES.

1. The plaintiffs were the makers of "Rainbow Water Raisers or Elevators," and they commenced an action for an injunction to restrain the defendants from issuing a circular cautioning the public against the use of such elevators as being direct infringements of certain patents of the defendants. The plaintiffs subsequently gave notice of a motion to restrain the issue of this circular until the trial of the action. The defendants then commenced a cross-action claiming an injunction to restrain the plaintiffs from infringing their patents. *Held*, by Kay, J., that as there was no evidence of *mala fides* on the part of the defendants, they ought not to be re-

[1] Wren v. Weild, L. R., 4 Q. B., 730; 38 L. J., Q. B., 327.

strained from issuing the circular until their action had been disposed of, but that they must undertake to prosecute their action without delay. Household and another v. Fairburn and another, 51 L. T., 498. And now see 46 and 47 Vict., ch. 57, sec. 32; Barney v. United Telephone Co., 28 Ch. D., 394; 33 W. R., 576; 52 L. T., 573; Driffield Cake Co. v. Waterloo Cake Co., 31 Ch. D., 638; 55 L., J. Ch., 391; 34 W. R., 360; 54 L. T., 210; Walker v. Clarke, 56 L. T., 111; 3 Times L. R., 297.

2. The defendant had a subsisting patent for the manufacture of spooling machines; so had the plaintiff. The defendant wrote to certain manufacturers, customers of the plaintiff, warning them against using the plaintiff's machine, on the ground that it was an infringement of the defendant's patent. *Held*, that "the action could not lie unless the plaintiff affirmatively proved that the defendant's claim was not a *bona fide* claim in support of a right which, with or without cause, he fancied he had, but a *mala fide* and malicious attempt to injure the plaintiff by asserting a claim of right against his own knowledge that it was without any foundation." Evidence to show that the defendant's patent, though subsisting, was void for want of novelty, was not admitted, as being irrelevant in this action. Wren v. Weild, L. R., 4 Q. B., 730, 737; 10 B. & S., 51; 38 L. J., Q. B., 88, 327; 20 L. T., 277. And see Dicks v. Brooks, 15 Ch. D., 22; 49 L. J., Ch., 812; 29 W. R., 87; 40 L. T., 710; 43 L. T., 71; Hammersmith Skating Rink Co. v. Dublin Skating Rink Co., 10 Ir. R. Eq., 235.

3. But a patentee is not entitled to publish statements that he intends to institute legal proceedings in order to deter persons from purchasing alleged infringements of his patent, unless he does honestly intend to follow up such threats by really taking such proceedings. Rollins v. Hinks, L. R., 13 Eq., 355; 41 L. J., Ch., 358; 20 W. R., 287; 26 L. T., 56; Axmann v. Lund, L. R., 18 Eq., 330; 43 L. J., Ch., 655; 22 W. R., 789.

4. The holder of a patent, the validity of which is not impeached, who issues notices to the trade alleging that certain articles are infringements of his patent, and threatening legal proceedings against those who purchase them, is not liable to an action for damages by the vendor of those articles for the injury done to the vendor's trade thereby, provided such notices are issued *bona fide* in the belief that the articles complained of are infringements of the patent. Nor is he liable to be restrained by injunction from continuing to issue them until it is proved that they are untrue, so that his further issuing them would not be *bona fide*. Halsey v. Brotherhood (C. A.), 19 Ch. D., 386; 51 L. J., Ch., 233; 30 W. R., 279; 45 L. T., 640; affirming the decision of Jessel, M. R., 15 Ch. D., 514; 49 L. J., Ch., 786; 29 W. R., 9; 43 L. T., 366.

5. Where defendant has issued notices to plaintiff's customers asserting that plaintiff in selling certain goods is infringing defendant's patent rights, it is for the plaintiff to prove that the defendant's statements are false, and if no *mala fides* is proved, so that no damages could be recovered, the court will not grant an injunction. If in a judicial proceeding the statements are proved to be false in fact, an injunction will be granted against continuing them, as that would be acting *mala fide*. Burnett v. Tak, 45 L. T., 743.

CHAPTER XII.

PUBLICATION OF DEFAMATORY MATTER.

§ 1. **Publication Defined.**— Publication is the communication of the defamatory matter to some third person or persons. It is essential to the case that the words should be expressed; the law permits us to think as badly as we please of our neighbors so long as we keep our uncharitable thoughts to ourselves. So merely composing a libel is not actionable

unless it be published. And it is no publication when the words are only communicated to the person defamed;[1] for that cannot injure his reputation. A man's reputation is the estimate in which others hold him; not the good opinion which he has of himself. The communication, whether it be in words or by signs, gestures or caricature, must be intelligible to such third person. If the words used be in the vernacular of the place of publication, it will be presumed that such third person understood them until the contrary be proved. And it will be presumed that he understood them in the sense which such words properly bear in their ordinary signification, unless some reason appear for assigning them a different meaning.[2]

The burden is on the plaintiff to prove publication.

§ 2. **What Amounts to a Publication.**— It is not necessary that the publication of a libel should be effected solely or directly by the author of it personally. For if a person having printed or written a defamatory statement parts with it in order that its contents may become known, or if a person communicates to a third person a libel hitherto unknown, either proceeding will amount to a publication by the former.[3] The legal maxim applicable to such cases is the well-known one, *qui facit per alium facit per se:* he who does a thing by the instrumentality of another does it by himself — a rule expressive of the force of agency, and adopted alike by the criminal and the civil branches of our law.[4]

§ 3. **Illustrations — Digest of American Cases.—**

(1) LIBEL.

1. A defamatory charge made by one person against another person and contained in a letter written and mailed in the state of Nebraska (where both persons were residing) to a third person living in the state of West Virginia was held to be a sufficient publication to render the writer liable in the state of Nebraska to a criminal prosecution. Mills v. The State, 18 Neb., 575; 26 N. W. Rep., 354.

[1] Sheffil v. Van Dusen, 13 Gray (Mass.), 304.

[2] Frolich v. McKiernan, 84 Cal., 177; Allen v. Wortham, 89 Ky., 485; Warnock v. Mitchell, 43 Fed. Rep., 428; Muetze v. Tuteur, 77 Wis., 236; Woods v. Wyman, 47 Hun, 362; 122 N. Y., 445; Burt v. Advertiser Co., 154 Mass., 238; Witcher v. Jones, 17 N. Y. S., 491; Delaware State F. & M. Ins. Co. v. Crosdale, 6 Houst., 181; Schuyler v. Busbey, 23 N. Y. S., 102; 68 Hun, 474; Warner v. Clark, 45 La. Ann., 863; Mitchell v. Bradstreet Co., 116 Mo., 226; Randall v. Evening News, 97 Mich., 136; Odgers on L. & S., 151.

[3] Smith, Manual Com. Law, 21.

[4] Flood on L. & S., 43.

2. In an action for libel a publication charged the plaintiff with perjury in swearing that the contents of a certain bond represented the truth of a certain contract between himself and another. *Held*, that the defendant in support of his plea of justification might properly prove acts and sayings of the plaintiff inconsistent with the face of the bond. The act and the mode of publishing a libel are difficult to separate. Hence, although the Georgia Code, section 2996, declares that by a plea of justification defendant "admits the act to be done," the jury is not bound in all cases to consider the filing of such plea and the failure to establish it as aggravating the tort. Ransone v. Christian, 49 Ga., 491.

3. A count stating that the defendant sent a letter to the plaintiff, and that the same was, by means of such sending thereof, received and read by the plaintiff, is bad, as showing no publication, and is cause for arresting the judgment. Sending a letter sealed up is no publication; and a letter is always to be understood as being sealed up, unless otherwise expressed. Lyle v. Clason, 1 Cai., 581.

4. The plaintiff, after so receiving a libelous letter from the defendant, send for a friend of his and also for the defendant: he then repeated the contents of the letter in their presence, and asked the defendant if he wrote that letter; the defendant, in the presence of the plaintiff's friend, admitted that he had written it. *Held*, no publication by the defendant to the plaintiff's friend. Fonville v. Nease, Dudley (S. C.), 203.

5. Where the defendant, before posting the letter to the plaintiff, had it copied, *held*, a publication by the defendant to his own clerk, who copied it. Keene v. Ruff, 1 Clarke (Iowa), 482. So where the defendant wrote a letter to the plaintiff himself, but read it to a friend before posting it. Snyder v. Andrews, 6 Barb. (N. Y.), 43; McCombs v. Tuttle, 5 Blackf. (Ind.), 431.

6. The writer's reading to a stranger his libelous letter to the plaintiff, before dispatching it, is a publication. Snyder v. Andrews, 6 Barb., 43.

7. Where a corporation, by its superintendent, prepares a "discharge list," assigning a criminal act as a reason for the discharge of an employee, and sends it to its agents, and it reaches its destination and is read by its agents, this is a sufficient publication to support an action for libel against the corporation. Bacon v. Mich. Cent. R. R. Co., 55 Mich., 224; 21 N. W. Rep., 324.

8. The libelous matter was contained in a letter which came to the prosecuting witness sealed. He opened it, and, not being able to read, got his wife to read it to him. He afterwards, in the presence of the accused and others, mentioned the fact of having received the letter and stated its contents. The accused then admitted that he had written the letter. There was no evidence that the accused knew that the prosecuting witness could not read. *Held*, that there had been no publication of the libel. State v. Syphrett (S. C.), 2 S. E. Rep., 624.

9. Whether the libel was published of and concerning the plaintiff, or whether by the person mentioned in the libel the plaintiff was intended, is a question of fact for the jury. Van Vechten v. Hopkins, 5 Johns., 211.

10. In an action for libel, based upon a newspaper publication, the plaintiff may show that the article had been read by other persons, and that they had called his attention to it. Park v. Detroit Free Press Co. (Mich.), 1 L. R. A., 599; 21 Ohio L. J., 19; 40 N. W. Rep., 731.

11. Where one authorizes an item to be inserted in a newspaper without directing in what part of it, he is responsible for its insertion in any part in which the publisher of the paper may place it. And where one publishes a libel in a newspaper, and, without his knowledge, a third person cuts the libel from the paper and sends it to another person, the first is responsible for its being so sent, if the sending it was a natural consequence of its publication in the paper — of which the jury are to judge. Zin v. Hoflin, 33 Minn., 60; 21 N. W. Rep., 862.

12. Where a witness swore that he was a printer, and had been in the office of the defendant when a certain paper was printed, and he saw it printed there, and the paper produced by the plaintiff was, he believed, printed with the types used in the defendant's office, *held*, that this was *prima facie* evidence of the publication by the defendant. Southwick v. Stevens, 10 Johns., 442.

13. Two persons having participated in the composition of a libelous letter written by one of them, which was afterwards put into the postoffice and sent by mail to the person to whom it was addressed, such participation was held to be competent and sufficient evidence to prove a publication by both. Miller v. Butler, 6 Cush., 71.

14. A libelous article was published in the Providence "Gazette," a newspaper published in Rhode Island. Copies of the paper containing the article circulated at Rehoboth, Bristol county, Massachusetts. *Held*, that this was competent and conclusive evidence of a publication within Bristol county. Com. v. Blanding, 20 Mass., 304.

15. The defendant had been chairman of a public meeting, at which the libel in question had been signed by him, and ordered by the meeting to be published. On a demurrer to evidence, an affidavit of the defendant and one of A., which the defendant in his own affidavit referred to as correct, stating that the address was ordered to be published, and admitting and justifying the publication, together with a copy of the address annexed to the affidavits, and referred to in them, were held sufficient evidence of the publication. Lewis v. Few, 5 Johns., 1.

16. At the trial of an indictment for publishing a libel in a newspaper at a certain time and place, the production of a copy of the newspaper containing the libel, bearing date of a day within the statute of limitations, together with evidence that it was purchased at a newspaper stand in said place, is sufficient evidence of the time and place of publication. Com. v. Morgan, 107 Mass., 199.

17. Laws of Michigan of 1885, page 354, section 3, providing that in suits for publication of libels in newspapers only actual damages proved can be recovered if it appear that the publication was in good faith, did not involve a criminal charge, was due to mistake, and that a retraction was published, is unconstitutional as depriving persons of all adequate remedy for injuries to reputation caused by the publication of charges involving moral turpitude, but not technically criminal, and for which injuries no retraction can effect a remedy. Park v. Detroit Free Press Co., 72 Mich., 560, 40 N. W. Rep., 731, 1 L. R. A., 599.

17a. The testimony of ministers who in their ministerial office have drawn from defendant statements of an ancient transaction which is the

ground of suit is not admissible to show publication of the slander. Vickers v. Stoneman, 73 Mich., 419, 41 N. W. Rep., 495.

18. In an action for libel brought against the Societe La Prevoyance, a corporation, it appeared that the corporation appointed a committee to investigate certain bills for a weekly allowance presented by the plaintiff, without specially giving them, by vote or regulation of the corporation, any directions or authority to make their report in print. The committee did, however, make a report in print at a regular meeting by placing in the secretary's desk printed documents or reports which were libelous. They were freely taken from the desk by members present at the meeting. All the corporation did at that meeting in respect to the report was to vote to hold a special meeting to pass upon its adoption. At the next meeting it voted to adopt the report. The court on hearing the case without a jury ruled there was no publication of the libel by the society, found for the defendant, and reported the case to the supreme judicial court. It was held that under those circumstances there was no evidence of a publication of the libel by the defendant. De Senancour v. Societe La Prevoyance (Mass.), 16 N. E. Rep., 553.

19. The entry of the resolution of excommunication from membership in a church on the minute-book of the session and the exhibition of it to the members for their signatures does not constitute a publication. Landis v. Campbell, 79 Mo., 433.

20. A proprietor of a newspaper cannot be found to have "published" a libel, unless it is proved to have been read as well as printed and sold. Sedgwick, C. J., dissenting. Prescott v. Tansey, 50 N. Y. Sup. Court, 12.

(2) SLANDER.

1. To shout defamatory words on a desert moor, where no one can hear you, is not a publication; but if any one chances to hear you it is a publication, although you thought no one was by. To utter defamatory words in a foreign language is not a publication if no one present understands their meaning; but if defamatory words be written in a foreign language, there will be a publication as soon as ever the writing comes into the hands of any one who does understand that language or who gets them explained or translated to him. If defamatory words be spoken in English when the only person present besides the plaintiff is a German who does not understand English, this is no publication. Hurtert v. Weines, 27 Iowa, 134.

2. Where the defendant had a single conversation only with Mrs. C., a married woman, in which he said: "What do you think of your minister? He has had intercourse with you, and I can prove it,"—in an action brought by the minister it was held that the words were actionable, although Mrs. C. knew them to be false, and that the publication was sufficient to enable him to sustain the action. Marble v. Chapin, 132 Mass., 225.

3. Uttering slanderous words in the presence of the person slandered only is not actionable. Sheffil v. Van Dusen, 13 Gray (Mass.), 304.

4. The defendant accused the plaintiff of the larceny of a parasol, there being no third parties present. The plaintiff took with her a third party for a witness, and called upon the defendant and requested him to repeat what he had before said to her. It was conceded that he complied with

the request, and repeated the whole or a portion of it. *Held*, that this would have no tendency to show that any third person heard such first conversation at the time it was had, and it would not do to say that the repetition of it in the presence and hearing of the witness who came with the plaintiff constituted of itself such a legal injury as to give rise to an action. The repetition was at her special request, and the maxim *volenti non fit injuria* will apply. Heller v. Howard, 11 Brad. (Ill.), 554.

5. Evidence that slanderous words were uttered in presence of the plaintiff's family is proof of the publication of the slander. As much protection is due a man's reputation in the presence of his family as in the presence of strangers; and where slanderous words are uttered of a person in the presence of others, whether members of his family or strangers, they may be said to be spoken concerning him, in the technical sense, and that constitutes a publication of the slander. Miller v. Johnson, 79 Ill., 58.

6. A bank director is not privileged in speaking, in the street or marketplace, of the credit or standing of a merchant to a co-director; though his so doing in a meeting of the board, if the merchant were a customer of the bank, and probably if he were not, would be justifiable. Sewell v. Catlin, 3 Wend., 291.

§ 4. Digest of English Cases — Libel and Slander.—

1. Sending a letter through the post to the plaintiff, properly addressed to him, and fastened in the usual way, is no publication; and the defendant is not answerable for anything the plaintiff may choose to do with the letter after it has once safely reached his hands. Barrow v. Lewellin, Hob., 62. But where the defendant knew that the plaintiff's letters were always opened by his clerk in the morning, and yet sent a libelous letter addressed to the plaintiff, which was opened and read by the plaintiff's clerk lawfully and in the usual course of business, *held* a publication by the defendant to the plaintiff's clerk. Delacroix v. Thevenot, 2 Stark., 63.

2. The delivery of a newspaper containing a libel to the proper officer of the commissioners of stamps and taxes for revenue purposes was a sufficient publication of the libel, although the proprietor of the paper was required by law so to deliver it. R. v. Amphlit, 4 B. & C., 35; 6 D. & R., 125. So the delivery of a manuscript to be printed is a sufficient publication, even though the author repent and suppress all the printed copies. For the compositor must hear it read. Baldwin v. Elphinston, 2 W. Bl., 1037. See Watts v. Fraser and another, 7 Ad. & E., 223; 6 L. J., K. B., 226; 7 C. & P., 369; 1 M. & Rob., 449; 2 N. & P., 157; 1 Jur., 671; W., W. & D., 451.

3. Where it is proper that the words should be printed, the publication, if it be one, to the printer and his men will not destroy any privilege which might otherwise exist. Lawless v. The Anglo-Egyptian Cotton and Oil Co., L. R., 4 Q. B., 262; 10 B. & S., 226; 38 L. J., Q. B., 129; 17 W. R., 498; Lake v. King, 1 Lev., 241; 1 Saund., 131; Sid., 414; 1 Mod., 58. But merely to be in possession of a copy of a libel is no crime, unless some publication thereof ensue. R. v. Beere, Carth., 409; 12 Mod., 219; Holt, 422; 2 Salk., 417, 646; 1 Ld. Raym., 414. See 11 Hargrave's St. Tr., 322, sub. Entick v. Carrington.

4. A letter is published as soon as posted, and in the place where it is posted, if it is ever opened anywhere by any third person. Ward v. Smith, 6 Bing., 749; 4 M. & P., 595; 4 C. & P., 302; Clegg v. Laffer, 3 Moore & Scott,

727; 10 Bing., 250; Warren v. Warren, 4 Tyr., 850; 1 C., M. & R., 250; Shipley v. Todhunter, 7 C. & P., 680.

5. The defendant wrote a letter and gave it to B. to deliver to the plaintiff. It was folded, but not sealed. B. did not read it, but conveyed it direct to the plaintiff. *Held*, no publication. Clutterbuck v. Chaffers, 1 Stark., 471; Day v. Bream, 2 Moo. & Rob., 54. So it is no defense that a third person was not intended to overhear the slander or to read the libel, if in fact he has done so. An accidental or inadvertent communication is quite sufficient. Shepheard v. Whitaker, L. R., 10 C. P., 502; 32 L. T., 402.

§ 5. Communications by Telegrams, Postal Cards, etc.— Communications in the nature of telegrams and postal cards containing defamatory matter, transmitted in the usual manner, are necessarily communicated to all the clerks through whose hands they pass.[1]

§ 6. Illustrations — Digest of American Cases.—

1. Where an information charges that the accused did wilfully and maliciously libel and defame the prosecutrix by sending her through the mails an envelope with certain libelous indorsements thereon, it is sufficient, though it does not charge that the matter complained of was wilfully and maliciously published. State v. Armstrong, 106 Mo., 395.

2. The act of sending through the mails an envelope bearing the device "Bad Debt Collecting Agency," addressed to a person in care of her employers, is a sufficient publication of a libel. State v. Armstrong, 106 Mo., 397; 16 S. W. Rep., 604.

3. Letters sent in open envelopes indorsed "Bad Debt Collecting Agency," which are read before reaching their destination, and which state among other things that the correctness of the claim against the addressee is guarantied, that if she wishes to maintain a reputation for fair dealing and honesty she must pay the claim at once, and that a list is furnished all merchants of those who will not pay their debts, is libelous *per se*, and special damages need not be alleged thereon. Burton, Lingo & Co. v. O'Niell, 6 Tex. Civ. App., 613; 25 S. W. Rep., 1013.

4. The sending of a postal card through the mails by a bank to its correspondent, from whom it had received a draft on a mercantile firm for collection, stating that such draft is in the hands of a notary, when the draft in question had in fact been paid to the bank, is a sufficient publication of a libel. Continental Nat. Bank v. Bowdre, 92 Tenn., 723; 23 S. W. Rep., 131.

5. A telegraph message containing the words "Slippery Sam, your name is pants," signed and delivered in the ordinary form and transmitted over the wires of the telegraph company, is fairly susceptible of a libelous meaning. Peterson v. Western Union Tel. Co., 67 N. W. Rep., 646.

6. A telegram directed to a minister of the gospel, containing the words "The citizens of Wisconsin demonstrated you are an unscrupulous liar,

[1] Whitfield et al. v. S. E. Ry. Co., E., B. & E., 115; 27 L. J., Q. B., 229; 4 Jur. (N. S.), 688; Robinson v. Jones, 4 L. R., Ir., 391; Williamson v. Freer, L. R., 9 C. P., 393; 43 L. J., C. P., 161; 22 W. R., 878; 30 L. T., 332; 7 Chicago Legal News, 30.

(signed) A Marshfield Democrat," is a libel *per se*. Munson v. Lathrop, 71 N. W. Rep., 596.

§ 7. **Digest of English Cases.**—

1. The defendant sent two telegrams to the plaintiff's father, as follows: (1) "Come at once to Leicester if you wish to save your child from appearing before the magistrates." (2) "Your child will be given in charge of the police unless you reply, and come to-day. She has taken money out of the till." *Held* actionable. Williamson v. Freer, L. R., 9 C. P., 393; 43 L. J., C. P., 161; 22 W. R., 878; 30 L. T., 332; 7 Chicago Legal News, 30. Lord Coleridge, C. J., said: If this matter had been written in a letter to the plaintiff's father, they would have been privileged communications; and told the jury that, as a matter of law, there was nothing to negative legal publication in the fact that matter, which was undoubtedly libelous, was communicated by means of a telegram. Ibid.

2. The transmission by post of an uncovered post-card, containing matter libelous of the person to whom it is addressed, is an actionable publication of the libel; and it is no defense to an action for the libel that the writer had an interest in making, and the person addressed a corresponding interest in receiving, the communication; that it was made *bona fide*, believing the contents to be true, without malice, and in the *bona fide* belief that the mode of communication used was reasonable. Robinson v. Jones, 4 Ir. L. Rep., 391.

3. It is a sufficient publication of a libel to send a postal card on which is the following message: "Received the amount all right, nicely caught in your own trap,—honesty is the best policy,—your confidence games will work no more, you do not need a diploma, rest on your laurels, deeds go further than words, though your words of Saturday and Monday were strong enough. Au revoir." O'Brien v. Semple, Montreal L. Rep., 6 Super. Ct., 344.

§ 8. **Publication by Letters.**—The act of sending a letter or other sealed communication containing libelous matter by mail is not necessarily a publication of such matter, and although addressed to some person other than the one affected or intended to be affected by the libelous matter, the publication does not appear to be sufficient in law to sustain an action until read by or in the presence of some third person or persons.[1] And the person to whom such letter or other similar communication is addressed is not justified in publishing it, even by the consent of the person from whom he received it. The sending of such a letter to the person affected or intended to be affected thereby has been held a sufficient publication

[1] McCoombs v. Tuttle, 5 Blackf., 431; Mielenz v. Quasdorf, 68 Iowa, 726; Snyder v. Andrews, 6 Barb., 42; Kiene v. Ruff, 1 Iowa, 482. See, also, Allen v. Worthan, 89 Ky., 485; Muetze v. Tuteur, 77 Wis., 236; Houston v. Wooley, 37 Mo. App., 15; Over v. Shiffling, 102 Ind., 191; Brown v. Vannaman, 85 Wis., 451; 55 N. W. Rep., 183; Coles v. Thompson, 7 Tex. Civ. App., 666.

in criminal prosecutions, upon the ground of its tendency to provoke a breach of the peace. But where no third person reads or hears it read, it is not sufficient to support a civil action.[1] Where an intention, however, on the part of the sender to publish the matter is shown, it is sufficient.[2]

§ 9. **Illustrations — Digest of American Cases.**—

1. The act of giving a letter containing matter defamatory of another to a clerk to copy, which he does, is a sufficient publication in law. State v. McIntire, 20 S. E. Rep., 731; 115 N. C., 769.

2. And so is the sending of a letter containing libelous matter through the mail to a person who, because of illiteracy, is obliged to have it read by others. Allen v. Worthan, 89 Ky., 485; 13 S. W. Rep., 73.

3. So, also, is the sending through the mail of envelopes with the clause "For the collection of bad debts" printed on them. Muetze v. Tuteur, 77 Wis., 236; 46 N. W. Rep., 123.

4. So it is sufficient publication to send a letter through the mail imputing an indictable offense, punishable corporally, to the person charged. Houston v. Woolley, 37 Mo. App., 15.

5. A letter written voluntarily, and for the sole benefit of the writer, to another's employer, using language such as must have been understood by the employer as charging the employee with having obtained goods from the writer by fraudulent means, was held to be libelous, and not a privileged communication.

6. A complaint alleging that a libel was written and sent by mail to the plaintiff, and showing no further publication, is bad on demurrer. Spaits v. Poundstone, 87 Ind., 522.

7. Sending a sealed libelous letter to the plaintiff himself is not a ground for an action by him. Every letter sent is presumed to have been sent sealed. In an action for a libelous letter on the plaintiff, publication must be shown. Stating it to have been by means of its being sent to, and received by, the plaintiff is bad, and, as showing on the record itself no publication, is good cause for arresting the judgment. Lyle v. Clason, 1 Cai, 581.

8. Throwing a sealed letter, addressed to the plaintiff or a third person, into the inclosure of another, who delivers it to the plaintiff himself, is not such a publication as would render the defendant responsible in an action for damages. It would have been otherwise had such a third person read the letter, or, on hearing of it, required the plaintiff to do so. State v. Potter, Dudley, 303; 32 Am. Dec., 49.

9. While a prosecuting attorney had charge of a pending criminal prosecution against the son of one C., Y. sent a letter to C. by mail, which was received and read, stating that he was reliably informed that C. had bribed the prosecuting attorney, naming him, to release his son by employing him

[1] De Crespigny v. Wellesley, 5 Bing., 402, 406; Lyle v. Clason, 1 Cai., 581; Fonville v. Nease, Dudley, 303; 32 Am. Dec., 49; Mielenz v. Quasdorf, 68 Iowa, 726; Barrow v. Lewellen, 1 Hob., 152.

[2] Delacroix v. Thevenot, 2 Starkie, 62; Young v. Clegg, 93 Ind., 371; Kiene v. Ruff, 1 Iowa, 482; Snyder v. Andrews, 6 Barb., 43; McCoombs v. Tuttle, 5 Blackf., 431; Van Cleef v. Lawrence, 2 City Hall Rec., 41.

upon a contingent fee to conduct a suit against Y., suggesting that the giver of the bribe is as guilty as the taker. *Held* to be a libel, and the publication sufficient in law. Young v. Clegg, 93 Ind., 391.

10. Where in an action for libel, the evidence showed that the letter containing the libelous matter was written in Dubuque, and in the German language, and that the defendant gave it to a third person to transcribe, and that the transcript made by that third person was forwarded from Dubuque to Switzerland, held, 1. That a publication in Iowa was sufficiently proved. 2. That the cause of action did not arise in a foreign country. 3. That it was not necessary for the plaintiff, to entitle him to recover, to show that the person to whom the letter was sent understood the German language. 4. That it was not necessary for the plaintiff to allege in his declaration that the person to whom the letter was directed was a German, by birth or education, or that he understood the German language, in order to entitle him to offer the letter in evidence. 5. That the proof of a publication of the letter in Switzerland was only necessary for the purpose of enhancing the damages. Kiene v. Ruff, 1 Iowa, 482.

§ 10. Digest of English Cases.—

1. A libel by writing a reproachful letter, sealed and delivered to the party libeled, and not published to others, is punishable, as tending to a breach of the peace, but no civil action can be maintained thereon. Barrow v. Lewellin, 1 Hob., 152.

2. If a man receives a letter with authority from the author to publish it, the person receiving it will not be justified, if it contain libelous matter, in inserting it in the newspapers. No authority from a third person will defend a man against an action brought by a person who has suffered from an unlawful act. If the receiver of a letter publish it without authority, he is, from his own motion, the wilful circulator of slander. De-Crespigny v. Wellesley, 5 Bing., 392.

3. In an action for a libel contained in a letter written by the defendant to the plaintiff, proof that the defendant knew that the letters sent to the plaintiff were usually opened by his clerk is evidence to go to the jury of the defendant's intention that the letter should be read by a third person. Delacroix v. Thevenot, 2 Stark., 63.

4. Defendant being a competitor with plaintiffs for a contract with the navy board for African timber, the plaintiffs obtained the contract; the defendant then agreed to supply the plaintiffs with a portion of the timber, and made no objection to taking their bills in payment; this agreement, however, having been rescinded on a disagreement as to the terms, the defendant wrote to a merchant at Sierra Leone, who was to supply the timber in question, and of whom the defendant was a creditor and the sole correspondent in London, a letter reflecting deeply on plaintiffs' mercantile character, and putting the merchant on his guard against them, for which, as a libel, the plaintiffs brought an action. The transmission of the letter by defendant to his correspondent was held a sufficient publication by defendant. Ward and Somes v. Smith, 6 Bing., 749.

5. A letter written by the defendant and containing a libel was dated in Essex, and addressed to a person in Scotland. It was proved to have been in the Colchester postoffice, and, after being marked there, to have been forwarded to London on its way to Scotland. It was produced at the trial,

with proper post marks, and with the seal broken, but not by the party to whom it was addressed. *Held* sufficient *prima facie* evidence of a publication in Essex, and that it had reached its address in Scotland. Warren v. Warren, 4 Tyr., 850; 1 C., M. & R., 150.

6. A letter to the manager of a property in Scotland, in which plaintiff and defendant were jointly interested, related principally to the property and the plaintiff's conduct respecting it, but also contained a passage reflecting on his conduct to his mother and aunt. *Held*, that the latter part could not be privileged as a confidential communication. Warren v. Warren, 4 Tyr., 850; 1 C., M. & R., 150.

7. A man has a right to communicate to any other any information he is possessed of in a matter in which they have a mutual interest; and it is a perfectly legal and justifiable object for one to induce another to become a party to a suit as to a subject-matter in which both have an interest; and it is not because strong or angry language is used in such a communication that it will be a libel, but the jury must go further and see, not merely whether expressions are angry, but whether they are malicious. If a letter containing a libel have the post mark on it, that is *prima facie* evidence of its having been published. Shipley v. Todhunter, 7 C. & P., 680.

8. In an action for libel, the defendant pleaded that the letter containing the libel was intended to come into the hands of the plaintiff himself, but, by mistake, was directed by the defendant and delivered through the postoffice to the plaintiff's employer, instead of to the plaintiff. *Held*, on demurrer, that the above plea was bad, as the letter was not a privileged communication, and as the legal inference of malice would have arisen, even though the letter had been addressed and delivered to the plaintiff, and that the absence of intention to give the plaintiff a remedy by civil action for the malicious act (to which the plea amounted) was no defense. Fox v. Broderick, 14 Ir. C. L. Rep., 453.

§ 11. **Publication to Third Persons Necessary.**— Proof of the publication of defamatory words is essential to the maintenance of the action. Defamation consists in publishing words to the injury of a person's reputation; and, as no such injury can be done when the defamatory words are uttered only to the person concerning whom they are spoken, no one else being present or within hearing, there can be no publication in the legal sense sufficient to maintain the action. It is damage done to character in the opinion of others, and not in the party's self-estimation. And in a civil action for libel, evidence that the defendant wrote and sent a sealed letter to the plaintiff containing defamatory matter was held insufficient proof of publication, although it would be otherwise in an indictment for a libel tending directly to provoke a breach of the peace. But the rule is held different where the letter is sent for the purpose of having it opened and read by a clerk;[1]

[1] Delacroix v. Thevenot, 2 Stark., 63.

and it has been held a sufficient publication to sustain the action if sent to the wife of the person libeled.[1] So it must be shown that the words were spoken in the presence of some one who understood them. If spoken in a foreign language which no one present understood, no action will lie.[2]

§ 12. **Illustrations — Digest of American Cases.—**

1. The words not being of a confidential character, it cannot be objected that speaking them by the husband in the presence of his wife did not amount to a publication, especially where it appears that other persons were near by who might have heard them. State v. Shoemaker (N. C.), 8 S. E. Rep., 332.

2. Proof that a man conversed with his wife in a room in such a tone of voice that he could be heard outside the room is sufficient to raise a presumption that she heard and understood him, and overcomes the burden of proving that fact, which rests on the plaintiff in an action for slander. Sesler v. Montgomery 78 Cal., 486, 19 Pac. Rep., 686.

3. Where it is shown that defendant accused plaintiff of perjury and want of chastity, in a room where his wife was, in a voice loud enough to be heard outside, there is sufficient evidence that she heard and understood the words. Communication by a husband to his wife of slanderous words in regard to a woman is a publication. Sesler v. Montgomery (Cal.), 19 Pac. Rep., 686.

4. Pending the prosecution of a criminal charge against A., the defendant wrote to A.'s father stating that he was reliably informed that the prosecuting attorney had been bribed to release A. on consideration of the father employing him on a contingent fee in a suit against the defendant. The letter was held to be a libel, and the publication sufficient in law. Young v. Clegg, 93 Ind., 371.

5. If I compose or copy a libel, and keep the manuscript in my study, intending to show it to no one, and it is stolen by a burglar and published by him, it is submitted that there is no publication by me, either in civil or criminal proceedings. Weir v. Hoss, 6 Ala., 881.

§ 13. **Digest of English Cases.—**

1. Rev. Samuel Paine sent his servant to his study for a certain paper, which he wished to show Brereton; the servant by mistake brought a libelous epitaph on Queen Mary, which Paine inadvertently handed to Brereton, supposing it to be the paper for which he had sent, and Brereton read it aloud to Dr. Hoyle. This would probably be deemed a publication by Paine to Brereton in a civil case (note to Mayne v. Fletcher, 4 Man. & Ry., 312), but would not be sufficient in a criminal case. R. v. Paine, 5 Mod., 167.

[1] Wriman v. Ash, 13 C. B., 836. And see Cheritree v. Roggen, 67 Barb., 124; Kiene v. Ruff, 1 Iowa, 482.

[2] Sheffil et ux. v. Van Dusen et ux., 79 Mass., 304; Edwards v. Wooton, 12 Co., 35; Hicks' Case, Pop., 139; Phillips v. Jansen, 2 Esp. R., 624; Lyle v. Clason, 1 Caines, 581; Hammond, N. P., 287; Waitsell v. Holman, 2 Had., 172; Fonville v. Nease, Dudley (S. C.), 303; Peacock v. Reynall, 2 Browne, 151; Spaits v. Poundstone, 87 Ind., 522; 44 Am. Rep., 773; Sullivan v. Sullivan, 48 Ill. App., 435.

2. For in a criminal case it is essential that there should be a guilty intention. R. v. Lord Abingdon, 1 Esp., 228; Brett v. Watson, 20 W. R., 723; Blake v. Stevens, 4 F. & F., 232; 11 L. T., 542.

3. The defendant by mistake directed and posted a libelous letter to the plaintiff's employer instead of the plaintiff himself. *Held*, a publication. Fox v. Broderick, 14 Ir. C. L. Rep., 453. And see Thompson v. Dashwood, 11 Q. B. D., 43; 52 L. J., Q. B., 425; 48 L. T., 943; 48 J. P., 55.

§ 14. **Husband and Wife Sufficient Third Persons for Publication.**— Husband and wife are generally to be considered one person in actions of tort as well as of contract;[1] still the wife is sufficiently a third person to make a communication to her of words defamatory of her husband a publication in law.[2] And it is submitted that a similar communication to the husband of a charge against his wife is a sufficient publication.[3]

The delivery of a libel by the author to his wife "in confidence" is privileged.[4] The fact that defendant's wife was present on a privileged occasion, and heard what her husband said, would not take away the privilege so long as her presence, though unnecessary, was not improper.[5]

§ 15. **A Libel Deemed Published, when.**— A libel is deemed to be published as soon as the manuscript has passed out of defendant's possession,[6] unless it comes directly and unread into the possession and control of the plaintiff.[7] That some third person had the opportunity of reading it in the interval is not sufficient if the jury are satisfied that he did not in fact avail himself thereof, even though it is clear that the defendant desired and intended publication to such third person.

§ 16. **Illustrations — Digest of American Cases.**—

Though the proprietor and printer of a paper are always held liable, the editor is, it would seem, allowed to plead as a defense that the libel was inserted without his orders and against his will (The Commonwealth v. Kneeland, Thatcher's C. C., 346); or without any knowledge on his part that the article was a libel on any particular individual. Smith v. Ashley, 52 Mass. (11 Met.), 367.

[1] Phillips v. Barnet, 1 Q. B. D., 436.

[2] Wenman v. Ash, 13 C. B., 836; 22 L. J., C. P., 190; 1 C. L. R., 592; 17 Jurist, 579; Jones v. Williams, 1 Times L. R., 572.

[3] But see Sesler v. Montgomery, 78 Cal., 486; 21 Pac. Rep., 185; Trumbull v. Gibbons, 3 City Hall Rec. (N. Y.), 97.

[4] Trumbull v. Gibbons, 3 City Hall Recorder, 97; Jones v. Thomas, 34 W. R., 104; 53 L. T., 678; 50 J. P., 149.

[5] Odgers on L. & S., 154.

[6] R. v. Burdett, 4 B. & Ald., 143.

[7] Lyle v. Clason, 1 Cai. (N. Y.), 581; Mielenz v. Quasdorf, 68 Iowa, 726.

§ 17. **Digest of English Cases.**—

1. A servant carries a libelous letter for his master, addressed to C. It is his duty not to read it. If he does read it, that is a publication by his master to him, although he was never intended to read it. If after reading it he delivers it to C., then this is a publication by the servant to C., for which the person libeled, not being C., can sue either the master or the servant or both. If the servant never reads it, but simply delivers it as he was bidden, then he is not liable to any action, unless he either knew or ought to have known that he was being employed illegally. If he either knew or ought to have known, then it is no defense of him to plead "I was only obeying orders." The defendant kept a pamphlet shop; she was sick and upstairs in bed; a libel was brought into the shop without her knowledge, and subsequently sold by her servant on her account. She was held criminally liable for the act of her servant, on the ground that "the law presumes that the master is acquainted with what his servant does in the course of his business" (R. v. Dodd, 2 Sess. Cas., 33; Nutt's Case, Fitzg., 47; 1 Barnard., 306). But later judges would not be so strict; the sickness upstairs, if properly proved by the defendant, would now be held an excuse. Odgers on L. & S., 161; R. v. Almon, 5 Burr., 2686; R. v. Gutch, Fisher and Alexander, Moo. & Mal., 433.

2. The defendants were news venders on a large scale at the Royal Exchange. In the ordinary course of their business they sold several copies of a newspaper called "Money," which contained a libel on the plaintiff. The jury found that the defendants did not, nor either of them, know that the newspapers at the time they sold them contained libels on the plaintiff; that it was not by negligence on the defendants' part that they did not know there was any libel in the newspapers; and that the defendants did not know that the newspaper was of such a character that it was likely to contain libelous matter, nor ought they to have known so. *Held*, that defendants had not published the libel, but had only innocently disseminated it. Emmens v. Pottle & Son (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.

3. The plaintiff's agent, with a view to the action, called at the office of the defendants' newspaper, and made them find for him a copy of the paper that had appeared seventeen years previously, and bought it. *Held*, that this was a fresh publication by the defendants, and that the action lay in spite of the statute of limitations. Duke of Brunswick v. Harmer, 14 Q. B., 185; 19 L. J., Q. B., 20; 14 Jur., 110; 3 C. & K., 10.

4. A porter who, in the course of business, delivers parcels containing libelous handbills is not liable in an action for libel, if shown to be ignorant of the contents of the parcel, for he is but doing his duty in the ordinary way. Day v. Bream, 2 M. & Rob., 54.

§ 18. **Joint and Several Liability.**— Every one who prints or publishes a libel may be sued by the person defamed, and to such an action it is no defense that another wrote it; it is no defense that it was printed or published by the desire or procurement of another, whether that other be made a defend-

ant to the action or not. All concerned in publishing the libel or in procuring it to be published are equally responsible with the author. And printing the libel, or causing it to be printed, is *prima facie* evidence of publication.[1] If the libel appear in a newspaper, the proprietor, the editor, the printer and the publisher are liable, either separately or together. In all cases of joint publication each defendant is liable for all the ensuing damage. The proprietor of a paper sued jointly with his careless editor or with the actual composer of the libel cannot compel either of his co-defendants to repay him the damages which he has been compelled to pay.[2]

§ 19. **The Composer Not Liable Without Publication.**— Composing a libel without publishing it is not actionable. But publishing it, not having composed it, is actionable. The mere delivery of a libel to a third person by one conscious of its contents amounts to a publication and is an indictable offense.[3] *Lord Coke:* "If one reads a libel, that is no publication of it; or if he hears it read 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; or if he writes a copy of it, and does not publish it to others, it is no publication of the libel; 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."[4]

§ 20. **The Law Stated by Best, C. J.**— "If a man receives a letter with authority from the author to publish it, the person receiving it will not be justified, if it contains libelous matter, in inserting it in the newspapers. No authority from a third person will defend a man against an action brought by a person who has suffered from an unlawful act. If the receiver of a letter publish it without authority, he is, from his own motion, the wilful circulator of slander. If the person receiving

[1] Atkins v. Johnson, 43 Vt., 78; Shackell v. Rosier, 2 Bing., 234; Ludwig v. Cramer, 53 Wis., 193; Dexter v. Spear, 4 Mason, 115; Burdett v. Abbot, 5 Dow., H. L., at p. 201; Baldwin v. Elphinston, 3 W. Bl., 1037.

[2] Odgers on L. & S., 158; Colburn v. Patmore, 1 C., M. & R., 73; 4 Tyr., 677; Shackell v. Rosier, 29 Com. L., 438; 2 Bing., 234.

[3] Maloney v. Bartley, 3 Camp., 213; Turton v. New York Recorder Co., 144 N. Y., 144; Adams v. Lawson, 17 Gratt., 250; Sheffil v. Van Dusen, 79 Mass., 304; Spaits v. Poundstone, 87 Ind., 523.

[4] John Lamb's Case, 9 Rep., 60.

a libel may publish it at all, he may publish it in whatever manner he pleases; he may insert it in all the journals, and thus circulate the calumny through every region of the globe. The effect of this is very different from that of the repetition of oral slander. In the latter case what has been said is known only to a few persons, and if the statement be untrue the imputation cast upon any one may be got rid of; the report is not heard of beyond the circle in which all the parties are known, and the veracity of the accuser and the previous character of the accused will be properly estimated. But if the report is to be spread over the world by means of the press, the malignant falsehoods of the vilest of mankind, which would not receive the least credit where the author is known, would make an impression which it would require much time and trouble to erase, and which it might be difficult, if not impossible, ever completely to remove. Before he gave it general notoriety by circulating it in print he should have been prepared to prove its truth to the letter; for he had no more right to take away the character of the plaintiff, without being able to prove the truth of the charge that he made against him, than to take his property without being able to justify the act by which he possessed himself of it. Indeed, if we reflect on the degree of suffering occasioned by loss of character, and compare it with that occasioned by loss of property, the amount of the former injury far exceeds that of the latter."[1]

§ 21. **Illustrations — Digest of English Cases.**—

1. A man may thus be guilty both of libel and of slander at the same moment and by the same act; as, by reading to a public meeting a defamatory paper written by another. Hearne v. Stowell, 12 A. & E., 719; 6 Jur., 458; 4 P. & D., 696.

2. Hudson brought the manuscript of a libelous song to Morgan to have one thousand copies printed; Morgan printed one thousand and sent three hundred to Hudson's shop. Hudson gave several copies to a witness, who sung it about the streets. It did not appear in whose writing the manuscript was; but probably not in Hudson's. *Held*, that both Hudson and Morgan had published the libel. Johnson v. Hudson and Morgan, 7 A. & E., 233, n.; 1 H. & W., 680.

3. The proprietor of a newspaper is always liable for whatever appears in its columns, although the publication may have been made without his

[1] De Crespigney v. Wellesley, 5 Bing., 402; Odgers on L. & S., 159. See, also, Rex v. Bear, Carth., 407; Rex v. Paine, 5 Mod., 173; Rex v. Williams, 2 Camp., 646; Rex v. Drake, Holb., 425; Rex v. Cooper, 15 L. J., Q. B., 206; Miller v. Butler, 6 Cush., 71; Cochran v. Butterfield, 18 N. H., 115; Dole v. Lyon, 10 Johns., 461.

knowledge and in his absence. R. v. Walter, 3 Esp., 21; Storey v. Wallace, 11 Ill., 51; Scripps v. Reilly, 38 Mich., 10. So is the printer, though he had no knowledge of the contents. R. v. Dover, 6 How. St. Tr., 546; and see 2 Atkyns, at p. 472. So, in England, the acting editor is always held liable. Watts v. Fraser and another, 7 C. & P., 369; 7 Ad. & E., 223; 1 M. & Rob., 449; 2 N. & P., 157; 1 Jur., 671; W., W. & D., 451.

4. The proprietor of a newspaper is liable even for an advertisement inserted and paid for by Bingham, although the plaintiff is bringing another action against Bingham at the same time. Harrison v. Pearce, 1 F. & F., 567; 32 L. T. (O. S.), 298.

5. "If you look upon the editor as a person who has published a libelous advertisement incautiously, of course he is liable." Per Pollock, C. B., in Keyzor and another v. Newcomb, 1 F. & F., 559.

6. If a country newspaper copy and publish a libelous article from a London newspaper, the country paper makes the article its own, and is liable for all damages resulting from its publication in the country. The fact that it had previously appeared in the London paper is no defense; it will not even tend to mitigate the damages. Talbutt v. Clark, 2 M. & Rob., 312; Saunders v. Mills, 3 M. & P., 520; 6 Bing., 213.

7. Evidence that the plaintiff had in a previous action recovered damages against the London paper for the same article is altogether inadmissible, as in that action damages were given only for the publication of the libel in London. Creevy v. Carr, 7 C. & P., 64; Hunt v. Algar and others, 6 C. & P., 245.

§ 22. **Sale or Delivery of Libelous Compositions.**— To sell or deliver to any one a libelous composition is to publish it; hence a news vender, whether he actually sells the libel himself personally or by his agent, and whether he is aware of the character of what he sells or not, may be proceeded against either civilly or criminally as the publisher of the libel which he vends.[1] But this rule presumably refers mainly to the selling or distribution of a libel whereon appears neither the name of the printer thereof nor that of a regular publisher, and the vender is either ignorant of who such persons are, or refuses to disclose their names, etc. At the same time it is of great importance in cases of newspapers and other journals, which, though circulated and sold, bear no evidence as to by whom they are printed and regularly published.[2]

§ 23. **Every Sale or Delivery a Separate Publication.**— Every sale or delivery of a written or printed copy of a libel is a fresh publication; and every person who sells or gives away

[1] Folkard on Libel, 425.

[2] Flood on L. & S., 46; Staub v. Van Benthuysen, 36 La. Ann., 467; Bigelow v. Sprague, 140 Mass., 425; Thorn v. Moser, 1 Denio, 488; Brunswick v. Harmer, 14 Q. B., 185; King v. Waring, 5 Esp. Cas., 13; Griffiths v. Lewis, 7 Ad. & El., 61; Johnson v. Hudson et al., 7 Ad. & El., 233; Day v. Bream, 2 M. & Rob., 54.

a written or printed copy of a libel may be made a defendant, unless, indeed, he can satisfy the jury that he was ignorant of the contents. The *onus* of proving this lies on the defendant; and where he has made a large profit by selling a great many copies of a libel, it will be very difficult to persuade the jury that he was not aware of its libelous nature.[1] But if the paper was sold in the ordinary way of business by a news vender who neither wrote nor printed the libel, and who neither knew nor ought to have known that the paper he was so selling did contain or was likely to contain any libelous matter, he will not be deemed to have published the libel which he thus innocently disseminated.[2]

§ 24. **The Author of a Slander is Not Responsible for Voluntary and Unjustifiable Repetitions.**— It is too well settled to be now questioned that one who utters a slander is not responsible, either as on a distinct cause of action or by way of aggravation of damages of the original slander, for its voluntary and unjustifiable repetition, without his authority or request, by others over whom he has no control, and who thereby make themselves liable to the person slandered; and that such repetition cannot be considered in law a necessary, natural and probable consequence of the original slander. If there be two distinct and separate publications of the same libel, a defendant who was concerned in the first publication, but wholly unconnected with the second, would not be liable for any damages which he could prove to have been the consequence of the second publication and in no way due to the first. Nor, on the other hand, should the fact that other actions have been brought for other publications of the same libel be taken into consideration by the jury in assessing the damage arising from the publication by the present defendant.[3]

§ 25. **Publication —When by Agents, etc.**— Every one who requests, procures or commands another to publish a libel is

[1] Chub v. Flannagan, 6 C. & P., 431.

[2] Odgers on L. & S., 161.

[3] Harrison v. Pearce, 1 F. & F., 567; 32 L. T. (O. S.), 298; Tucker v. Lawson, 2 Times L. R., 593; Hastings v. Stetson, 12 Lathrop (Mass.), 329; Ward v. Weeks, 4 Moore & Payne, 796; 7 Bing., 211; Tunnicliffe v. Moss, 3 Car. & K., 83; Barnett v. Allen, 1 F. & F., 125; Dixon v. Smith, 5 H. & N., 450; Parkins v. Scott, 1 H. & C., 153; Derry v. Handley, 16 L. T. (N. S.), 263; Stevens v. Hartwell, 11 Met., 542, 550; Terwilliger v. Wands, 17 N. Y., 54; Shurtleff v. Parker, 130 Mass., 293; Elmer v. Fessenden, 5 L. R. A., 724; 22 N. E. Rep., 635; 151 Mass., 359.

answerable as though he published it himself. And such request need not be expressed, but may be inferred from the defendant's conduct in sending his manuscript to the editor of a magazine, or making a statement to the reporter of a newspaper, with the knowledge that they will be sure to publish it, and without any effort to restrain their so doing. And it is not necessary that the defendant's communication be inserted *verbatim*, so long as the sense and substance of it appear in print.

This rule is of great value in cases where the words employed are not actionable when spoken, but are so if written. Here, though the proprietor of the newspaper is of course liable for printing them, still it is more satisfactory, if possible, to make the author of the scandal defendant, and if he speak the words under such circumstances as will ensure their being printed, or if in any other way he requests or contrives their publication in the paper, he is liable in an action of libel as the actual publisher. *Qui facit per alium facit per se.*[1]

§ 26. **Illustrations — Digest of American Cases.—**

1. A newspaper reporter told defendant he should read defendant's statements to the paper for publication. Defendant replied: "Let them go." *Held*, that defendant had published them in the paper. Clay v. People, 86 Ill., 147.

2. The ticket agent having charge of the office, subject to the supervision of the general passenger agent, and one of the uses of the office being to advertise tickets and presumptively to furnish information in relation to purchasing tickets, and the libel being calculated to diminish the income of the broker and increase that of defendant, there is evidence that the publication was made by the agent in the course of the business of the company, in which case the company would be liable though the act was in excess of his authority. Where a libelous article, indicating that a neighboring ticket broker is not liable, is conspicuously posted forty days in the ticket office of a railroad company, whose principal terminus and office are in the same city, and there is evidence that such office is used to publish general information of interest to purchasers of tickets, the jury may find that the company had knowledge of the character of the notices posted, and that the libel would not have remained posted so long had not the company authorized or ratified it. The refusal of the general passenger agent of the company to interfere with the publication a month before its discontinuance is evidence, in connection with the other evidence, of a ratification and of a publication by the company from that time. Fogg v. Boston & L. R. Co. (Mass.), 20 N. E. Rep., 109.

[1] Odgers on L. & S., 156; State v. Smith, 78 Me., 260. See Mechem on Agency, §§ 740, 741; Gillian v. S. & N. Ala. R. R. Co., 70 Ala., 268.

§ 27. **Digest of English Cases.**—

1. Cooper told the editor several good stories against the Rev. J. K., and asked him to "show Mr. K. up;" and subsequently the editor published the substance of them in the newspaper, and Cooper read it and expressed his approval. This was held a publication by Cooper, although the editor knew of the facts from other quarters as well. R. v. Cooper, 15 L. J., Q. B., 206; 8 Q. B., 533; Adams v. Kelly, Ry. & Moo., 157.

2. At the meeting of the board of guardians, at which reporters were present, it was stated that the plaintiff had turned his daughter out of doors, and that she consequently had been admitted into the workhouse and had become chargeable to the parish. Ellis, one of the guardians, said: "I hope the local press will take notice of this very scandalous case," and requested the chairman, Prescott, to give an outline of it. This Prescott did, remarking: "I am glad gentlemen of the press are in the room, and I hope they will give publicity to the matter." Ellis added, "And so do I." From the notes taken in the room the reporters prepared a condensed account, which appeared in the local newspapers, and which, though partly in the reporters' own language, was substantially a correct report of what took place at the meeting. *Held*, by the majority of the court of exchequer chamber (Montague Smith, Keating and Hannen, JJ., Byles and Mellor, JJ., dissenting), that Martin, B., was wrong in directing the jury that there was no evidence to go to the jury that Prescott and Ellis had directed the publication of the account which appeared in the papers. Parkes v. Prescott and Ellis, L. R., 4 Ex., 169; 38 L. J., Ex., 105; 17 W. R., 773; 20 L. T., 537.

3. If a manuscript in the handwriting of the defendant be sent to the printer or publisher of a magazine, who prints and publishes it, the defendant will be liable for the full damages caused by such publication, although there is no proof offered that he expressly directed the printing and publishing of such manuscript. Bond v. Douglas, 7 C. & P., 626; R. v. Lovett, 9 C. & P., 462; Burdett v. Abbot, 5 Dow, H. L., 201; 14 East, 1. And this is so although the editor has cut the article up, omitting the most libelous passages, and only publishing the remainder. Tarpley v. Blabey, 2 Bing. N. C., 437; 2 Scott, 642; 1 Hodges, 414; 7 C. & P., 395; Pierce v. Ellis, 6 Ir. C. L. R., 55.

§ 28. **Manner of Publication.**— A libel may also obviously be very effectually published by writing or fixing it up in a public place, as on a wall; and this would be a most offensive method of making it known, especially if the wall happened to be in a much frequented thoroughfare. Likewise the act of sending defamatory matter by a postoffice telegram is an unauthorized publication so far as to prevent a communication from being privileged, though made *bona fide* and under circumstances which otherwise would have made it privileged.[1] The modes of publication — and the same may be said of the actual writing of libels — are infinite.[2]

[1] Williamson v. Freer, L. R., 9 C. P., 393; 43 L. J., 161.

[2] Flood on L. & S., 47; Wood v. Gilchrist, 1 Code R. N. Y., 117; Adams

§ 29. **Manner of Sale or Delivery Immaterial.**— It makes no difference in law whether the libel is sold to the public or whether a copy is merely shown confidentially to a friend. Each is equally a publication. But the jury will, in estimating the damages, attach great importance to the mode of publication; as an indiscriminate public sale must inflict much more serious injury on the plaintiff's reputation. The defendant could not afterwards recall or contradict his statements did he desire to do so.[1]

§ 30. **Injunctions Restraining the Publication of Defamatory Matter.**— Upon the question of relief by injunction against the publication of defamatory statements affecting the character or business of persons, the authorities both in England and America present a noticeable want of uniformity, and are indeed wholly irreconcilable. The earlier English doctrine, and that which seems most in accord with the principles governing the jurisdiction of equity by way of injunction, was that the preventive jurisdiction being limited to the protection of property rights which are remediless by the usual course of procedure at law, courts of equity would not restrain the publication of libels or works of a libelous nature, even though such publications were calculated to injure the credit, business or character of the person aggrieved, and that he would be left to pursue his remedy at law.[2]

§ 31. **Illustrations — Digest of American Cases.**—

1. A court of equity cannot, under its common-law powers, restrain the publication of a mere libel. This seems to be most in accordance with the authorities in this country as well as in England. Mr. Justice Waterman in Everett Piano Co. v. Bent, 60 Ill. App., 372; Boston Dietite Co. v. Flor-

v. Lawson, 17 Gratt., 250; Spaits v. Poundstone, 87 Ind., 522; Sheffil v. Van Dusen, 79 Mass., 304.

[1] Lord Denman, C. J., 9 A. & E., 149.

[2] 2 High on Injunctions, 3d ed., § 1015; 23 Sol. J., 865, 877; 14 Ir. L. T., 308; 15 L. J., 248; 70 L. T., 22; Chi. Leg. News, vol. 13, 98; 1 O. L. J., 252; 9 Cent. L. J., 314; 2 Man. L. J., 49; Monson v. Tussaud, 9 Reps., 177; 1 Q. B., 671; Pre-Digested Food Co. v. McNeal, 1 Ohio N. P., 266; Reyes v. Middleton (Fla., 1895), 17 So. Rep., 937; Lee v. Gibbings, 67 L. T. (N. S.), 263; Grand Rapids School Furniture Co. v. Haney School Furniture Co., 92 Mich., 558; 52 N. W. Rep., 1009; Salomons v. Knight, L. R., 2 Ch., 294; Flint v. Hutchinson Smoke Burner Co., 110 Mo., 492; 19 S. W. Rep., 804; Mayer v. Journeyman's Stone Cutters Ass'n, 47 N. J. Eq., 519; 20 Atl. Rep., 492; Everett Piano Co. v. Bent, 60 Ill. App., 372; Wolfe v. Burke, 56 N. Y., 115; Whitehead v. Tipson, 119 Mass., 484; Kidd v. Horry, 28 Fed. Rep., 773; Baltimore Wheel Co. v. Bemis, 29 Fed. Rep., 95; Consumers' Gas Co. v. Kansas City, etc., Co., 100 Mo., 501.

ence Mfg. Co., 114 Mass., 69; High on Injunctions (3d ed.), §§ 1015, 1093. See, also, cases cited in Appellant's Brief, 60 Ill. App., 375, 376, 377.

2. Courts of equity have no jurisdiction to restrain a slander of title to letters patent until the question of slander has been determined by a jury in an action at law. Flint v. Hutchinson's Smoke Burner Co., 110 Mo., 492.

3. The question of slander or libel should first be determined by a jury in an action of law, and, after a verdict for the plaintiff, he can have an injunction to restrain the further publication of that which the jury has found to be actionable libel or slander. Flint v. Hutchinson's Smoke Burner Co., 110 Mo., 492.

4. An injunction will not issue to restrain a publication, though it be a libel on complainant's business. Pre-Digested Food Co. v. McNeal, 1 Ohio (N. P.), 266.

5. An injunction to restrain slander of title is not authorized by the mere fact that the defendant is insolvent. Reyes v. Middleton, 36 Fla., 99; 17 So. Rep., 937.

6. In New Jersey a court will not interfere by injunction to prevent the circulation of a slander or libel, even though it may tend to injure the person affected in his business or employment. Mayer v. Journeymen's Stone Cutters Ass'n, 47 N. J. Eq., 519; 20 Atl. Rep., 492.

§ 32. **Digest of English Cases.**—

1. "The publication of a libel is a crime; and I have no jurisdiction to prevent the commission of crimes; excepting of course such cases as belong to the protection of infants, where a dealing with an infant may amount to a crime — an exception arising from that peculiar jurisdiction of this court." Lord Chancellor Eldon in Gee v. Pritchard, 2 Swanst., 413 (1818).

2. The court will not interfere by injunction to prevent the publication of a libel. Clark v. Freeman, 11 Beav., 112; Martin v. Wright, 6 Sim., 297; Seeley v. Fisher, 11 Sim., 581; Fleming v. Newton, 1 H. L. Cas., 363; Mulcern v. Ward, 13 L. R., Eq., 619; Prudential Assurance Co. v. Knott, 23 W. R., 249; L. R., 10 Ch., 142; Shepherd v. Trustees, Ind. L. R., 1 Bomb., 132.

3. In 1877 it was held that the court of chancery had power under the judicature act to restrain the publication of an advertisement containing false representations calculated to injure the plaintiff's trade. Thorley's Cattle Food Co. v. Massam, L. R., 6 Ch. D., 582.

4. Where in an action for libel the matter complained of is found to be libelous, the court has power to grant an injunction to restrain the defendant from publishing similar libels if such publication would be injurious to the plaintiff's trade. Saxby v. Easterbrook, 27 W. R. 188; L. R., 3 C. P. D., 339; Day v. Brownrigg, 27 W. R., 217; L. R., 10 Ch. D., 294.

5. In the case of Brook v. Evans, a motion was made by the defendants to restrain the circulation of a report, circulated by the plaintiff, of the proceedings on the motion for an injunction as being libelous, and in contempt of court. The motion was refused. Brook v. Evans, 8 W. R., 688.

CHAPTER XIII.

CERTAINTY OF IMPUTATION.

§ 1. **The Subject Classified.**— Where the meaning of the defamatory words is clear or can be ascertained, two questions arise:

(1) Is the language of the imputation sufficiently definite to injure the reputation of the complaining party?

(2) Is the language of the imputation sufficiently certain as to the party who is defamed? And unless both of the questions can be determined in the affirmative no action lies, for the law requires a specific imputation cast with certainty upon the person bringing the action.

In every action for defamation two things are necessary:

(1) A defamation apparent from the words themselves, for no innuendo can alter the sense.

(2) Certainty as to the person who is defamed, for no innuendo can render certain that which is uncertain.

§ 2. **Illustrations — Digest of American Cases.**—

1. If slanderous words which impute a criminal offense are not so understood by their hearers, the speaker is not liable for their utterance; but the burden of proof rests upon him to establish that fact. Myers v. Dresden, 40 Iowa, 660.

2. The words alleged were the calling of the plaintiff's children bastards, "meaning to insinuate and to be understood that said children were illegitimate and not born in lawful wedlock, and that the plaintiff had been unfaithful to her husband, and had not observed and kept hear marriage covenants, but had been guilty of lewd and unchaste conduct, and had committed a crime under the statutes of the state." There was no prefatory averment of any intent to charge any particular crime. It was held that the averments did not impute crime with sufficient certainty, and that the words were not, therefore, actionable in themselves. Hoor v. Ward, 14 Vt., 657.

3. In slander the words alleged to have been spoken should be understood and construed in their most innocent sense, unless there are averments giving them other and sinister meaning. And so where the words alleged were, "told W. that he, W., had intercourse with the said plaintiff, Martha," with an innuendo that she had committed adultery with W., but without any colloquium or other averment, it was held that the allegation imputed no crime. Merritt v. Dearth, 48 Vt., 65.

4. Words merely charging that the plaintiff administered morphine to another on the day of the making of his will, and that if it had not been for that the plaintiff's daughters would not have got what they did, are not actionable in themselves, nor with an innuendo that the plaintiff had unlawfully administered poison, causing death. McFadin v. David, 78 Ind., 445; 41 Am. Rep., 587.

5. Words charging a person with having attempted to commit a larceny are actionable in themselves. Berdeaux v. Davis, 58 Ala., 611.

6. Offering to buy a vote being made a criminal offense by statute, a publication in a newspaper charging such offer or bribery is libelous; and it is immaterial that the person averred to have been bribed was not a legal voter. Heilman v. Shanklin, 60 Ind., 424.

7. Words spoken of a person charging him with sodomy are not actionable without an allegation of special damages in Ohio, sodomy not being a criminal offense under the laws of that state. Melvin v. Weiant, 36 Ohio St., 184; 38 Am. Rep., —.

§ 3. First, the Defamation Must be Apparent from the Words Themselves.— Where words are sought to be made actionable, as charging the party with the commission of a crime, a criminal offense must be specifically imputed. It will not be sufficient to prove words which only amount to an accusation of fraudulent, dishonest, vicious or immoral conduct, so long as it is not criminal; or of a mere intention to commit a crime, not evidenced by any overt act. But still it is not necessary that the alleged crime should be stated with all the technicality or precision of an indictment, if the crime be imputed in the ordinary language usually employed to denote it in common conversation. All that is requisite is that the bystanders should clearly understand that the plaintiff is specially charged with the commission of a crime. The meaning of the words is to be gathered from the vulgar import, and not from any technical legal sense.[1]

§ 4. The Imputation Sufficient — Arson — Illustrations — Digest of American Cases.—

1. "You burned your barn to cheat the insurance company." "Case burnt his barn to get the insurance money." Case v. Buckley, 15 Wend. (N. Y.), 824.

2. But to say "You burnt your buildings" will not support an action for slander in charging the crime of arson. Estes v. Estes, 75 Me., 478.

3. Words merely charging a person with setting fire to and burning up his hop-house do not naturally and in themselves impute a felonious burning. Frank v. Dunning, 38 Wis., 270.

[1] Colman v. Godwin, 3 Dougl., 91; 2 B. & C., 285, n.; Odgers on L. & S., 121; Loibl v. Breidenbach, 78 Wis., 49; 47 N. W. Rep., 15; Sanford v. Rowley, 93 Mich., 119; 52 N. W. Rep., 1119: Jones v. Greeley, 25 Fla., 629; 6 So. Rep., 448.

§ 5. **Digest of English Cases.**—

"I never set my premises on fire" was held sufficiently clear in Cutler v. Cutler, 10 J. P., 169. See Sweetapple v. Jesse, 5 B. & Ad., 27; 2 N. & M., 36; Barham's Case, 4 Rep., 20; Yelv., 21.

§ 6. **Adulteration of Food.**—Words charging a mere adulteration are not actionable; addition of foreign substances in refining sugar may be proper.[1]

§ 7. **Attempt to Commit a Felony — Digest of English Cases.**—

"He sought to murder me, and I can prove it." Preston v. Pinder, Cro. Eliz., 308. "She would have cut her husband's throat and did attempt it." Scot et ux. v. Hilliar, Lane, 98; 1 Vin. Abr., 440.

But the following was held to be insufficient: "He would have robbed me." Stoner v. Audely, Cro. Eliz., 250. For here no overt act is charged, and mere intention is not criminal. Eaton v. Allen, 4 Rep., 16 *b*; Cro. Eliz., 684. "Thou wouldst have killed me." Dr. Poe's Case, cited in Murrey's Case, 2 Buls., 206; 1 Vin. Abr., 440. "Sir Harbert Crofts keepeth men to rob me." Sir Harbert Crofts v. Brown, 3 Buls., 167.

§ 8. **Bigamy — Digest of American Cases.**—

1. The words, "He was married to a woman, J. S., and kept her till he got sick of her, and then sent her away, he having all the time two wives," were held to impute the commission of this offense with sufficient certainty. Parker v. Meade, 32 Vt., 300.

Digest of English Cases.—

Mrs. Heming was sister to Mr. Alleyne. The defendant said: "It has been ascertained beyond all doubt that Mr. Alleyne and Mrs. Heming are not brother and sister, but man and wife." *Held*, that it was open to the jury to construe this as a charge of bigamy as well as of incest. Heming and wife v. Power, 10 M. & W., 564.

§ 9. **Embezzlement — Digest of American Cases.**—

1. Where the charge published was that "A young man named F. M., employed as driver and collector by A. H. G., has disappeared with some of his employer's funds and the police have been notified," the jury were justified in ascribing to it the meaning that the plaintiff had absconded with funds of his employer under circumstances rendering him criminally responsible. Mallory v. Pioneer Press Co., 34 Minn., 521; 26 N. W. Rep., 904.

2. A statement made of a person in his absence, that if he had not gone away the speaker should issue warrants for him, is capable of meaning that he had absconded and was liable to arrest, and if so meant is clearly actionable, although a statement that he had left town is not. A remark made of a person that he went to a certain place named "and collected $1,400 of our money and went west with it" is capable of a very bad and dishonest meaning, and is sufficient to support an action for slander. A charge that a person is trying to get and convert to his own use, without

[1] Havemeyer v. Fuller, 10 Abb. (N. Y.) N. Cas., 9.

paying for it, the property of another is properly enough connected with an innuendo that it meant defrauding or swindling such person out of his property, and is slanderous. Ayres v. Toulmin, 74 Mich., 44, 41 N. W. Rep., 855.

3. In an action for slander it was alleged that in conversations concerning the plaintiff and his acts as collector of customs in reference to the settlement of a claim in behalf of the United States against W., the defendant used these words: "G. [the plaintiff] had not accounted to the department for the sum paid by W. by some $32,000;" and also words substantially as follows: "That in the settlement of the alleged frauds by W., amounting to many hundreds of thousands of dollars, the amount paid by them was $157,224; that only $125,224 was accounted for; . . . that it was not known what had been done with the balance. . . . And it was understood that this settlement was made through the intercession of S. and his partner, the late deputy collector; that it was discreditable to the government to have it generally known that the sum of $157,224 was paid by W. in a settlement and that $32,000 of that sum was not accounted for." *Held*, on demurrer, that these words do not by their natural sense and meaning impute to the plaintiff any criminal offense, and are not actionable, although the plaintiff by innuendoes avers that they impute to himself the crimes of embezzlement and of receiving a bribe, and were so understood in the conversation alleged. Goodrich v. Hooper, 97 Mass., 1.

5. And so where an employee of a passenger railway company brought an action of libel against the company for posting up a notice that he "had been discharged for failing to ring up all fares collected," alleging in his petition that the meaning of the notice was that he was guilty of embezzlement, *held*, that as a failure to ring up fares might result from mere neglect, inefficiency, mistake or accident as well as dishonesty, the notice did not necessarily imply the fraud or dishonesty of plaintiff, nor did it import the commission of any crime, and that the opinions of witnesses as to their understanding of the meaning of the notice were not competent to aid the innuendo. Pittsburgh, A. & M. R'y Co. v. McCurdy (Pa.), 8 Atl. Rep., 230.

Digest of English Cases.—

"He made a few hundreds in my service — God only knows whether honestly or otherwise," is a sufficient imputation of embezzlement. Clegg v. Laffer, 8 Moore & Sc., 727; 10 Bing., 250.

§ 10. False Pretenses — Digest of American Cases.—

1. Where the defendant charged the plaintiff with "bearing down" the scales when defendant's stock was weighed and "lifting up" when plaintiff's stock was weighed, it was held not to charge the crime of obtaining goods under false pretenses, though it might be otherwise if it were charged that the plaintiff was the weighmaster having charge of the scales. Wilkin v. Thorp, 55 Iowa, 609; 8 N. W. Rep., 467.

2. But the words, "You had better go to Tom McW. and pay him back the twenty dollars you got from him by false pretenses," unexplained, impute a crime by general description identifying it to the common understanding, as by a name which is sufficient and therefore implies malice. Lafollett v. McCarthy, 18 Brad. (Ill.), 87.

Digest of English Cases.—

The words "He has defrauded a mealman of a roan horse," held not to imply a criminal act of fraud; as it is not stated that the mealman was induced to part with his property by means of any false pretense. Richardson v. Allen, 2 Chit., 657; Needham v. Dowling, 15 L. J., C. P., 9.

§ 11. Forgery — Digest of American Cases.—

1. The following words have been held a sufficient charge of forgery: "You are guilty of forgery. You are guilty of absolute forgery." Jarvis v. Hatheway, 3 Johns. (N. Y.), 180.

2. In an action for slander the charge of forgery does not necessarily and exclusively mean a felonious forgery, punishable as such. If the plaintiff is charged with having been guilty of any forgery which if committed would subject him to criminal punishment of any description, the action lies. Thus, where the words complained of were, "My brother John has forged my name, and I can put him in state prison," and from the explanation of the witnesses it appeared that the defendant charged the plaintiff with forging his name to a petition to the legislature in relation to a lot of land to which the defendant claimed a prescriptive right, by means of which the plaintiff, instead of the defendant, obtained the lot, it was held that an action of slander might be maintained for the speaking of the words; for if the charge were true the plaintiff would be punishable as for a misdemeanor. Alexander v. Alexander, 9 Wend. (N. Y.), 141.

3. Words charging a party with false swearing in an affidavit made to obtain a warrant from a justice are actionable if the affidavit contain any material fact proper to be submitted to the justice on such application, although on *certiorari* the affidavit would not be held sufficient to justify the issuing of the warrant. Dayton v. Rockwell, 11 Wend. (N. Y.), 140.

4. But it has been held not actionable where a person called on for the payment of a note, alleged to have been signed by him as a surety, said: "I never signed the note that was given to Fancher, or saw the note, in God's world. I never signed a note with Thomas Andrews that was given to Fancher in God's world." Andrews v. Woodmansee, 15 Wend. (N. Y.), 222.

Digest of English Cases.—

"This is a counterfeit warrant made by Mr. Stone." Stone v. Smalcombe, Cro. Jac., 648. "Thou hast forged a privy seal, and a commission." *Per cur.*: "'A commission' shall be intended the king's commission, under the privy seal." Baal v. Baggerley, Cro. Car., 826. "You forged my name," although it is not stated to what deed or instrument. Jones v. Herne, 2 Wils., 87; overruling Anon., 3 Leon., 231; 1 Roll. Abr., 65.

§ 12. Larceny — Digest of American Cases.—

1. The following words are a sufficient imputation of the charge of larceny: "You have been cropped for felony." Wiley v. Campbell, 5 Monroe (19 Ky.), 396.

2. "Dr. K. was imprisoned many years in a penitentiary in Germany for larceny." Krebs v. Oliver, 78 Mass., 239.

3. "My watch has been stolen and I have reason to believe T. took it." Miller v. Miller, 8 John. (N. Y.), 77.

4. "You will steal and I can prove it." Cornelius v. Van Slyck, 21 Wend. (N. Y.), 70.

5. The words charged were, "Old C. is a hog-thief; I have been keeping him in hog meat for twenty years; he has always kept a set of thieves and liars about him to steal for him, and swear for him; they will swear a man to hell." *Held*, that the allegations as to keeping C. in meat, and as to swearing a man to hell, and as to C.'s keeping liars to swear for him, were not actionable; otherwise those as to C.'s being a thief and keeping thieves to steal for him. Porter v. Choen, 60 Ind., 338.

6. Where it is apparent that the defendant intended to charge the plaintiff with stealing, and that the charge was so understood by those who heard it, an action of slander is maintainable, without regard to whether, technically, the plaintiff's act was a theft or trespass. Wilson v. McCrory, 86 Ind., 170.

7. Where plaintiff was spoken of in company, defendant broke out thus: "He is the best hand to steal sheep I ever saw; he stole A.'s sheep." *Held* to support an action of slander. Harman v. Cundiff, 82 Va., 239.

8. *But it is not actionable to say:* "You as good as stole the canoe" (Stokes v. Arey, 8 Jones, 46); or, "A man that would do that would steal," Stees v. Kemble, 27 Penn. St., 112.

Digest of English Cases.—

1. "Thou hast stolen our bees, and thou art a thief." After verdict it was contended that larceny cannot be committed of bees, unless they be hived; but the court held that the subsequent words, "thou art a thief," showed that the larceny imputed was of such bees as could be stolen. Tibbs v. Smith, 3 Salk., 325; Sir Thos. Raym., 33; Minors v. Leeford, Cro. Jac., 114.

2. "Thou art a corn-stealer" held sufficient. Anon. (1597), Cro. Eliz., 563; Smith v. Ward, (1624), Cro. Jac., 674. So a charge of being "privy and consenting to" a larceny is actionable. Mot et ux. v. Butler, Cro. Car., 236.

3. "He is a pickpocket; he picked my pocket of my money," was once held an insufficient charge of larceny. Watts v. Rymes, 2 Lev., 51; 1 Ventr., 213; 3 Salk., 325. But now this would clearly be held sufficient. Baker v. Pierce, *supra;* 2 Ld. Raym., 959; Stebbing v. Warner, 11 Mod., 255.

4. "He was put into the round-house for stealing ducks at Crowland." Beavor v. Hides, 2 Wilson, 300.

5. "Baker stole my box-wood, and I will prove it." It was argued that it did not appear from the words that the box-wood was not growing; and that to cut down and remove growing timber is a trespass only, not a larceny. But the court gave judgment for the plaintiff, holding that *ex vi termini* stealing "did import felony." Baker v. Pierce, 6 Mod., 23; 2 Salk., 695; Holt, 645; overruling Mason v. Thompson, Hutt., 38.

6. Gybbons asked May: "Have you brought home the forty pounds you stole?" *Held*, that an action lay. May v. Gybbons, Cro. Jac., 568.

§ 13. Murder — Digest of American Cases.—

1. The words, "She is slow poisoning her husband," are capable of being understood as charging the giving of poison with intent to kill. Campbell v. Campbell, 54 Wis., 90; 11 N. W. Rep., 456.

2. A declaration in slander setting forth no extrinsic explanatory circumstances, but charging defendant with the use, in reference to plaintiff, of the words, "He killed her by his bad conduct, and I think he knows more about her being drowned than anybody else," is bad on demurrer; the words themselves, taken in their natural sense, importing no charge of criminal homicide. Thomas v. Blasdale, 147 Mass., 438, 18 N. E. Rep., 214.

3. A demurrer to a declaration for slander, setting forth the use of the following words by defendant in reference to plaintiff: "He knows how she came to her death. He killed her. He is to blame for her death. There was foul play there," without averments of any explanatory circumstances, should be overruled, since the words used impute a crime to plaintiff. Thomas v. Blasdale, 147 Mass., 438, 18 N. E. Rep., 214.

Digest of English Cases.—

1. "Thou hast killed thy master's cook." Cooper v. Smith, Cro. Jac., 423; 1 Roll. Abr., 77.

2. "I am thoroughly convinced that you are guilty of the death of Daniel Dolly, and rather than you should want a hangman, I will be your executioner." Peake v. Oldham, Cowp., 275; 2 Wm. Bl., 959.

3. But it is not sufficient to say, "Hext seeks my life." "Because he may seek his life lawfully upon just cause." Hext v. Yeomans, 4 Rep., 15.

4. "He was the cause of the death of Dowland's child," because a man might innocently cause the death of another by accident or misfortune. Miller v. Buckdon, 2 Buls., 10.

5. "Thou wouldst have killed me," for here a murderous intention only is imputed. Dr. Poe's Case, 1 Vin. Abr., 440, cited in 2 Buls., 206.

§ 14. Perjury at Common Law — Digest of American Cases.—

1. In an action for saying "You have perjured yourself," it is enough to prove the words were spoken, and that they referred to the plaintiff. Green v. Long, 2 Caines' Rep. (N. Y.), 91.

2. Plaintiff had recently given evidence in an action against defendant, who thereupon wrote and published of him: "The man at the sign of the Bible is no slouch at swearing to an old story." *Held*, that if these words did not amount to a charge of actual perjury, they at least imputed that he swore with levity without due regard to the solemnity of an oath; and therefore, being written, were actionable. Steele v. Southwicke, 9 Johns. (N. Y.), 214.

3. The words, "He has sworn falsely in a lawsuit between me and my brother," are not actionable in themselves, as they do not necessarily imply that the false testimony was given wilfully, and therefore do not necessarily amount to an imputation of the crime of perjury. Schmidt v. Withwick, 29 Minn., 156; 12 N. W. Rep., 448.

4. The general doctrine seems to be that to say that a man swore falsely is not actionable in itself, unless coupled with some other words which imply that he did so wilfully and that he did so under an oath legally imposed. Id.

5. A direct charge of perjury is actionable *per se;* but the words "he made false affidavits in order to commence his case," or "the affidavit made by Mr. C. was false," are not necessarily actionable in themselves;

nor can an action be maintained upon these merely by an innuendo that they were intended to import perjury. Cassellman v. Windship (Dak.), 19 N. W. Rep., 412.

6. So, too, "He is a damned liar; he took a false oath, and I can prove it." Sibley v. Marsh, 24 Mass., 38.

7. "You swore to a —— —— lie last spring in that case about the poor-house farm, and I can prove it." Foster, J.: "This language would seem to be in itself actionable as amounting to an accusation of the crime of perjury, without the aid of any colloquia or averments of extrinsic facts in explanation of the circumstances under which it was uttered. In such a case the materiality of the false testimony with which the party is charged may well be presumed in the absence of anything to show that it was known or understood to relate to an immaterial matter at the time by those in whose presence the accusation was made. Wood v. Southwick, 97 Mass., 354; Butterfield v. Buffam, 9 N. H., 156.

8. To say, "You have sworn to a lie, and I will prove it," is not actionable. Hopkins v. Budle, 1 Caines' Rep., 349. But to say, "He has sworn false and perjured himself, and I will put him into the state prison," is actionable. Fox v. Vanderbeck, 5 Cow. (N. Y.), 513.

9. Where one interrupted another who was giving his testimony as a witness before the justice, required the justice to be particular in keeping minutes of the testimony, and afterwards demanded the minutes of the justice, and said he wanted them to prosecute the witness for perjury; and on another occasion said the witness swore falsely or to what was not true, and that he thought he should prosecute him for perjury, *held*, that these words were actionable as imputing the crime of perjury. Fox v. Vanderbeck, 5 Cow. (N. Y.), 513.

10. Perjury imputed to a person testifying as a witness in a proceeding to test the sanity of a person alleged to be insane is actionable. Hutts v. Hutts, 62 Ind., 214.

11. It is not slander in Kentucky to charge that one has falsely taken an oath prescribed by an unconstitutional and void act of the legislature. Burket v. McCarty, 10 Bush (Ky.), 758.

12. The words, "He has perjured himself; he swore lies before the court at Madison, according to the church book," are actionable in themselves. Brown v. Hanson, 53 Ga., 632.

13. And so are the words "Peter Smith has told lies and sworn to them." Smith v. Wright, 55 Ga., 218.

14. Where perjury is charged in an alleged libel it is for the jury to determine, by a scrutiny of the whole publication, whether the word was used by the defendant in a popular sense or as charging the technical crime of perjury. Hawkins v. N. O. Printing Co., 29 La. Ann., 134.

Under Statutes.

1. Under the Massachusetts practice act a declaration in slander is sufficient which alleges that the defendant published falsely and maliciously charged the plaintiff of the crime of perjury, by words spoken of the plaintiff, substantially as follows: "He has been to New Bedford and sworn to a pack of darned lies;" and that the plaintiff, at a certain term of court held

at New Bedford, was summoned and attended as a witness in the case of a certain libel for divorce, and did before a certain judge of said court testify as a witness under oath, and that it is to that subject that the defendant's malicious declarations refer. Gardner v. Dyer, 5 Gray (71 Mass.), 22.

Digest of English Cases.—

1. To say they "did not scruple to turn affidavit-men" is sufficient. Roach v. Garvan, *Re* Read & Huggonson (1742), 2 Atk., 469; 2 Dick., 794. "Thou art forsworn in a court of record, and that I will prove," was held sufficient, though it was argued after verdict that he might only have been talking in the court-house and so forsworn himself; but the court held that the words would naturally mean forsworn while giving evidence in some judicial proceeding in a court of record. Ceely v. Hoskins, Cro. Car., 509.

2. But to say "You are forsworn," without more, is insufficient. Stanhope v. Blith (1585), 4 Rep., 15; Holt v. Scholefield, 6 T. R., 691; Hall v. Weedon, 8 D. & R., 140.

§ 15. Receiving Stolen Goods — Digest of English Cases.—

1. To say, "I have been robbed of three dozen winches; you bought two, one at 3*s*., one at 2*s*.; you knew well when you bought them that they cost me three times as much making as you gave for them, and that they could not have been honestly come by," is a sufficient charge of receiving stolen goods, knowing them to have been stolen. An indictment which merely alleges that the prisoner knew the goods were not honestly come by would be bad. R. v. Wilson, 2 Mood. C. C., 52; Alfred v. Farlow, 8 Q. B., 854; 15 L. J., Q. B., 258; 10 Jur., 714; Clarke's Case de Dorchester, 2 Rolle's Rep., 136; King v. Bagg, Cro. Jac., 331.

§ 16. Treason — Digest of English Cases.—

1. The following words have been held in England sufficiently definite to impute a charge of treason, or at least of sedition, and therefore actionable: "Thou art an enemy to the state." Charter v. Peter, Cro. Eliz., 602.

2. "He has the pretender's picture in his room, and I saw him drink his health. And he said he had a right to the crown." Fry v. Carne (1724), 8 Mod., 283; How v. Prin (1702), Holt, 652; 7 Mod., 107; 2 Ld. Raym., 812; 2 Salk., 694; 1 Brown, P. C., 64.

3. "Thou hast made a seditious sermon and moved the people to sedition this day." Phillips (D. B.) v. Badby, 1582, cited 4 Rep., 19.

4. "Thy master is no true subject." Waldegrave v. Agas, Cro. Eliz., 191; 1 Roll. Abr., 75; *sed quære*, Fowler v. Ashton, Cro. Eliz., 268; 1 Roll. Abr., 43.

5. "Thou hast committed treason beyond the seas;" for there is a violent intendment that he committed treason to the state here, and not to a foreign state. Lewis v. Coke, Cro. Jac., 424.

6. "He consented to the late rebels in the north." Stapleton v. Frier, Cro. Eliz., 251.

7. "Thou art a rebel, and all that keep thee company are rebels, and thou art not the queen's friend." Redston v. Eliot, Cro. Eliz., 638; 1 Roll. Abr., 49.

§ 17. Second, the Person Who is Defamed Must be Certain.— The defamatory words must refer to some ascertained or ascertainable person, and that person must be the plaintiff. If the words used really contain no reflection on any particu-

lar individual, no averment or innuendo can make them defamatory. "An innuendo cannot make the person certain which was uncertain before."[1]

§ 18. **Illustrations — Digest of American Cases.—** In an action for libel for a grand jury's report, where the only evidence to show that plaintiff was one of the majority of the board therein referred to is an indictment brought in by the grand jury at the same time against the plaintiff and other members of the board, charging them and other persons with having combined to obstruct the laws and to remove a chief of police, it is not sufficient evidence to show that he was the person intended by the grand jury's report, which alleged corruption on the part of the majority of such board, but in which the removal of the chief of police is but incidentally mentioned. Caruth v. Richeson (Mo.), 9 S. W. Rep., 633.

§ 19. **Digest of English Cases.—** 1. The defendant in a speech commented severely on the discipline of the Roman Catholic church and the degrading punishments imposed on penitents. He read from a paper an account given by three policemen of the severe penance imposed on a poor Irishman. It appeared incidentally from this report that the Irishman had told the policemen that his priest would not administer the sacrament to him till the penance was performed. The plaintiff averred that he was the Irishman's priest, but it did not appear how enjoining such a penance on an Irishman would affect the character of a Roman Catholic priest. The alleged libel was in no other way connected with the plaintiff. *Held*, no libel and no slander of the plaintiff. Hearne v. Stowell, 12 A. & E., 719; 6 Jur., 458; 4 P. & D., 696.

2. "If a man wrote that all lawyers were thieves, no particular lawyer could sue him unless there is something to point to the particular individual." Per Wiles, J., in Eastwood v. Holmes, 1 F. & F., 349.

3. To assert that an acceptance is a forgery is no libel on the drawer unless it somehow appear that it was he who was charged with forging it. Stockley v. Clement, 4 Bing., 162; 12 Moore, 576.

4. "Suppose the words to be 'a murder was committed in A.'s house last night;' no introduction can warrant the innuendo 'meaning that B. committed the said murder;' nor would it be helped by the finding of the jury for the plaintiff. For the court must see that the words do not and cannot mean it, and would arrest the judgment accordingly. *Id certum est, quod certum reddi potest.*" Soloman v. Lawson, 8 Q. B., 837; 15 L. J., Q. B., 257; 10 Jur., 796.

§ 20. **Words Applying to a Class, etc.—** Though the words used may at first sight appear only to apply to a class of individuals, and not to be specially defamatory of any particular member of that class, still an action may be maintained by any one individual of that class who can satisfy the court that the words referred especially to himself, but the words must

[1] McCallum v. Lambie, 145 Mass., 284; Crane v. O'Reilly, 11 N. Y. St. Rep., 277; De Witt v. Wright, 77 Cal., 576; Rhodes v. Naglee, 66 Cal., 680; Van Vechten v. Hopkins, 5 Johns., 211; Miller v. Miller, 8 Johns., 74; Swan v. Tappan, 5 Cush., 104; Frank v. Dunning, 38 Wis., 270; Sanderson v. Caldwell, 45 N. Y., 398.

be capable of bearing such special application. There must be an averment in the statement of claim that the words were spoken of the plaintiff, and the plaintiff may also aver extraneous facts, if any, showing that he was the person expressly referred to.[1]

§ 21. **The Rule Stated by Chief Justice Shaw.**— It is undoubtedly a correct principle of law that, where defamatory matter is published against a class or aggregate body of persons, an individual member not specially included or designated cannot maintain an action, for this, among other reasons that the body may act very corruptly or disgracefully, and yet the individual may have been in the minority and may have opposed measures alluded to; but where many individuals are severally included in the same attack, whether by the language of the satirist or the pencil of the caricaturist, the plaintiff is none the less entitled to redress because others are injured by the same act.[2]

§ 22. **Illustrations — Digest of American Cases.**—

1. When the declaration in slander stated that B., in a certain discourse with G., of and concerning the children of G., and of and concerning C., one of the children of G., and the plaintiff in the suit, B. said: "Your children are thieves, and I can prove it," it was held that the charge was sufficiently definite to designate the plaintiff as one of the children of G., intended by B. Gidney v. Blakes, 11 Johns. (N. Y.), 54.

2. An action for a libel may be sustained by an individual for an injury to his business resulting from a libelous publication, although it affects the business of others engaged in the same calling as well as his own, unless it be manifest upon the face of the publication that the charges made were intended against a class of society, a particular profession, an order or body of men, and cannot possibly import a personal application tending to private injury. Ryckman v. Delavan, 25 Wend., 186.

3. A declaration is bad charging the defendant with saying to the father of the plaintiff: "You have brought up your sons to break open letters and steal money out of them; they have broken open letters, and stolen money out of them," if there be no colloquium averred of and concerning the plaintiff, or the sons of the persons addressed, although it be stated in the antecedent part of the declaration that the plaintiff is a son of the person addressed. Mulligan v. Thorn, 6 Wend., 412.

4. An action may be supported for a libel in which the plaintiff was described directly or indirectly, though his name was not given. Thus, one may bring an action for a libel on "A. and his friend," and show that the

[1] Byer v. Fireman's Journal Co., 11 Daly (N. Y.), 257; Harvey v. Coffin, 5 Blackf., 566; Dicken v. Shepherd, 22 Md., 399; Petsch v. St. Paul Despatch Co., 40 Minn., 291; Baldwin v. Hildreth, 14 Gray, 221; Brashear v. Shepherd, Sneed (Ky.), 249; Miller v. Maxwell, 16 Wend., 9.

[2] Ellis v. Kimball, 33 Mass., 133; Gidney v. Blake, 11 Johns. (N. Y.), 54; Foxcroft v. Lacey, Hob., 89; Ryckman v. Delevan, 25 Wend., 186.

words "his friend" meant the plaintiff. Clark v. Creitzburg, 4 McCord (S. C.), 491.

5. A publication which, without naming any one, so refers to certain persons that it is clear that they are referred to, may be libelous as to them. Byer v. Fireman's Journal Co., 11 Daly (N. Y.), 257.

6. Where a publication affects a class of persons, no individuals of that class can sustain an action for the publication. White v. Delavan, 17 Wend. (N. Y.), 49. But see Ryckman v. Delavan, 25 id., 186.

7. Where several are included in the same libel they may each maintain a separate action for the injury. Smart v. Blanchard, 42 N. H., 137.

§ 23. **Digest of English Cases.**—

1. A suit was pending against the plaintiff and sixteen other persons. In a discourse concerning the suit the defendant said: "These defendants helped to murder H. F." It was adjudged that each of the seventeen defendants was entitled to have his separate action of slander. Foxcroft v. Lacy, Hob., 89.

2. A colloquium is sufficient to give application to the words, "One of the servants of I. S. is a thief." 4 Coke's Reports, 17. *b.*

§ 24. **Defamatory Words Applicable to Different Persons.**— If the words spoken or written, though plain in themselves, apply equally well to more persons than one, evidence may be given both of the cause and occasion of publication, and of all the surrounding circumstances affecting the relation between the parties, and also of any subsequent article referring to the former one or of any statement or declaration made by the defendant as to the person referred to.[1] The plaintiff may also call at the trial persons acquainted with the circumstances to state that on reading the libel they at once concluded that it was aimed at the plaintiff.[2] If the application to a particular individual can be generally perceived the publication is a libel on him, however general its language may be.

The rule stated by Lord Campbell: "Whether a man is called by one name or whether he is called by another, or whether he is described by a pretended description of a class to which he is known to belong, if those who look on know well who is aimed at, the very same injury is inflicted, the very same thing is in fact done, as would be done if his name and Christian name were ten times repeated."[3]

§ 25. **Effigies, Pictures and Caricatures.**— Where a libel consists of an effigy, picture or caricature, care should be taken

[1] Barwell v. Adkins, 1 M. & Gr., 807; 2 Scott, N. R., 11; Knapp v. Fuller, 55 Vt., 311; 45 Am. R., 618; Allenworth v. Coleman, 5 Dana (Ky.), 315; Miller v. Butler, 6 Cush., 71; White v. Sayward, 33 Me., 322.

[2] Bourke v. Warren, 2 C. & P., 307; Broome v. Gosden, 1 C. B., 728; Smart v. Blanchard, 42 N. H., 137; Mix v. Woodward, 12 Conn., 262; Leonard v. Allen, 11 Cush., 241.

[3] Le Fanu v. Malcolmson, 1 H. L. C., 668.

to show by proper innuendoes and averments the libelous nature of the representation and its especial reference to the plaintiff. The plaintiff must prove that he is the person caricatured.

A man may be as successfully exposed to ridicule by a caricature painting as by any written misrepresentation; and the object of the defendant may be as clearly manifested in the latter case as the former. The difficulty, indeed, of proving the plaintiff to be the person aimed at may, in some instances, be greater in the latter case; but when the doubt as to the defendant's application of the calumny has been overcome, there seems to be no room for further distinction.

The pencil of the caricaturist is frequently an instrument of ridicule more powerful than the press; and it is not easy to conceive an imputation which an ingenious artist would not be able successfully to communicate to minds of even the meanest capacity. A man may be as effectually held up as the object of ridicule, contempt or hatred by means of a picture as by the most labored form of words. In legal consideration, the only question is whether the mode of defamation which has been adopted be capable of conveying that meaning which is detrimental to the plaintiff. If, in fact, such modes be equally distributable and equally durable — in short, equally mischievous in every respect — they cannot be considered as distinguishable, for legal purposes upon any principle of reason and good sense; and no such distinction is to be found in the reports.[1] It was expressly held by Holt, C. J., that "In case upon libel it is sufficient if the matter be reflecting; as to paint a man in any disgraceful situation."[2]

§ 26. **Illustrations — Digest of American Cases.—**

(1) LIBEL.

1. Defendant wrote and published of plaintiff, a bookseller: "The man at the sign of the Bible is no slouch at swearing to an old story." The sign over plaintiff's shop was a book, lettered "Bible," and he had recently given evidence against defendant in another action. *Held*, that he could recover. Steele v. Southwick, 9 Johns. (N. Y.), 214.

2. The defendant wrote and published that his hat had been stolen by some of the members of No. 12 Hose Company. This hose company was a volunteer fire brigade, unincorporated, and the members brought a joint

[1] 1 Starkie on Slander, 171.

[2] Moley v. Barager, 77 Wis., 43; Randall v. Evening News, 79 Mich., 266; 7 L. R. A., 309; 44 N. W. Rep., 783. See, also, 2 Hawk. P. C., ch. 73, § 2; 5 Co., 125; Skinner, 123; 3 Keb., 378; 11 Mod., 99.

action. *Held*, that the action could not be maintained, and that the defendant could not be compelled to declare to which individual member he referred. Girand v. Beach, 3 E. D. Smith (N. Y.), 337.

(2) SLANDER.

1. To say, "I have seen women steal yarn before," may amount to a charge of larceny against some particular woman now; provided there be proper averments in the pleadings and sufficient evidence of the surrounding circumstances at the trial. Hart v. Coy, 40 Ind., 553.

2. But to say of the plaintiff in an action for slander, "He or some one else altered the credit on a note from a larger to a less sum; the note will show for itself," is not actionable, as the charge is not positive, but in the disjunctive; and for aught that appears he may have altered the credit on his own note, and violated no law in doing it. Ingalls v. Allen, Breese Rep. (Ill.), 233.

3. At an election held in Wisconsin, Hayes charged one Ellsworth, who was chairman of the board of election inspectors, with miscounting votes. The language used was as follows: "He counted four of the votes which were cast for Estes [the republican candidate for sheriff] for Barry [the democratic candidate] for sheriff." Several persons, hearing the statement, remarked that they did not believe that Ellsworth was that kind of a man. Hayes further stated, "It is true. There is no doubt of it. There was a man standing, looking right over Mr. Ellsworth's shoulder, and saw him do it. It is a swindle." In an action brought by Ellsworth for slander it was held the language might be construed as charging the plaintiff with fraudulently counting votes, and it was proper to admit evidence to prove the meaning intended. Ellsworth v. Hayes, 71 Wis., 427; 37 N. W. Rep., 249.

§ 27. Digest of English Cases.—

(1) LIBEL.

1. A newspaper article imputed that "in some of the Irish factories cruelties were practiced upon the work-people. Innuendo, "in the factory of the plaintiffs," who were manufacturers. The jury were satisfied that the newspaper was referring especially to the plaintiffs' factory, and found a verdict for the plaintiffs, and the house of lords held the declaration good. Le Fanu v. Malcolmson, 1 H. L. C., 637; 13 L. T. (O. S.), 61; 8 Ir. L. R., 418.

2. Plaintiff had been in defendant's employment as a gardener, and was dismissed by him and entered Mr. Pierce's service. Defendant wrote to Mr. Pierce that he had dismissed plaintiff for dishonesty, adding, "I have reason to suppose that many of the flowers of which I have been robbed are growing upon your premises." An innuendo, "thereby meaning that the plaintiff was guilty of larceny, and had stolen defendant's flowers and had disposed of them unlawfully to Mr. Pierce," etc., was held good. Williams v. Gardiner, 1 M. & W., 245; 1 Tyr. & Gr., 578; 2 C., M. & R., 78.

3. If asterisks be put instead of the name of the party libeled, it is sufficient that those who know the plaintiff should be able to gather from the libel that he is the person meant. It is not necessary that all the world

should understand it, so long as the meaning of the paragraph is clear to the plaintiff's acquaintances. Bourke v. Warren, 2 C. & P., 307.

4. Some libelous verses were written about "L——y, the Bum." The court was satisfied, in spite of the finding of the jury, that the words related to the plaintiff, a sheriff's officer. Levi v. Milne, 4 Bing., 195; 12 Moore, 418.

5. "All the libelers of the kingdom know now that printing initial letters will not serve the turn, for that objection has been long got over." Per Lord Hardwicke in Roach v. Garvan, 2 Atk., 470; 3 Dick., 794.

6. A libel was published on a "diabolical character," who, "like Polyphemus, the man-eater, has but one eye, and is well known to all persons acquainted with the name of a certain noble circumnavigator." The plaintiff had but one eye, and his name was I'Anson; so it was clear that he was the person referred to. I'Anson v. Stuart, 1 T. R., 748; 2 Smith's L. Cas. (6th ed.), 57 (omitted in the 7th and 8th eds.); Fleetwood v. Curl, Cro. Jac., 557; Hob., 268.

7. In a recent case the libel did not name the person alluded to, but described him "as a man of high descent, who has been regarded as a man not only of refined tastes and studious habits, but as an artist of somewhat more than ordinary ability." The relator swore that he believed that the libel was intended to refer to himself. The Duke of Sutherland and others of his friends considered that it would be generally understood as applying to him, and a rule was granted. But upon the argument of the rule the publisher and the author of the libel both swore positively that the relator was not the person referred to, and that they were not in fact aware that he was either a man of refined tastes and studious habits or an artist of somewhat more than ordinary ability. And the rule was therefore discharged. R. v. Barnard, 43 J. P., 127.

8. There appeared in "Mist's Weekly Journal" an account professedly of certain intrigues, etc., at the Persian court, really at the English. The late King George I. was described under the name of "Merewits," George II. appeared as "Esreff," the queen as "Sultana," while a most engaging portrait was drawn of the pretender under the name of "Sophi." It was objected on behalf of the prisoner that there was no evidence that the author intended his seemingly harmless tale to be thus interpreted and applied; but the court held that they must give it the same meaning as the generality of readers would undoubtedly put upon it. R. v. Clerk, 1 Barnard, 304.

(2) SLANDER.

1. Words complained of: "We would exhort the medical officers to avoid the traps set for them by desperate adventurers [innuendo, thereby meaning the plaintiff among others], who, participating in their efforts, would inevitably cover them with ridicule and disrepute." The jury found that the words were intended to apply to the plaintiff. Judgment accordingly for the plaintiff. Wakley v. Healey, 7 C. B., 591; 18 L. J., C. P., 241.

2. "There is strong reason for believing that a considerable sum of money was transferred by power of attorney obtained by undue influence;" an innuendo "meaning as a fact that the plaintiff had by undue influence procured the money to be transferred" was held not too wide, for such

would be the meaning conveyed to readers by the defendant's insinuations. Turner v. Meryweather, 7 C. B., 251; 18 L. J., C. P., 155; 13 Jur., 683; 19 L. J., C. P., 10.

8. Where plaintiff's house had been insured and burnt down, and the insurance company at first demurred to pay, but ultimately did pay, the insurance money, and defendant subsequently, in the course of a quarrel with the plaintiff, said, in the presence of others, "I never set my premises on fire," and "I was never accused of setting my premises on fire," this was held to be a slander on the plaintiff. Cutler v. Cutler, 10 J. P., 169; Snell v. Webling, 2 Lev., 150; Clerk v. Dyer, 8 Mod., 290.

4. "His name was O'B." (meaning thereby the plaintiff). This was held sufficient in O'Brien v. Clement, 16 M. & W., 159; 16 L. J., Ex., 77.

5. If a man says "my brother" or "my enemy" is perjured, and hath only one brother or one enemy, such brother or enemy can sue; but if he says, "One of my brothers is perjured," and he hath several brothers, no one of them can sue (without special circumstances to show to which one he referred). Jones v. Davers, Cro. Eliz., 497; 1 Roll. Abr., 74; Wiseman v. Wiseman, Cro. Jac., 107.

6. But where seventeen men were indicted for conspiracy, and A. said, "These defendants are those that helped to murder Henry Farrer," each one of the defendants can bring a separate action, as much as if they each had been specially named. Foxcroft v. Lacy, Hobart, 89; 1 Roll. Abr., 75. So if a man says to a plaintiff's servant, "Thy master Brown hath robbed me," Brown can sue; for it shall not be intended that the person addressed had more than one master of the name of Brown. So if the defendant had said, "Thy master," *simpliciter;* or to a son, "Thy father;" to a wife, "Thy husband." Per Haughton, J., in Lewes v. Walter, 3 Bulstr., 226; Brown v. Low or Lane, Cro. Jac., 443; 1 Roll. Abr., 79; Waldegrave v. Agas, Cro. Eliz., 191.

7. But if the defendant said to a master, "One of thy servants hath robbed me," in the absence of special circumstances no one could sue; for it is not apparent who is the person slandered. James v. Rutlech, 4 Rep., 17. So where a party in a cause said to three men who had just given evidence against him, "One of you three is perjured," no action lies. Sir John Bourn's Case, cited Cro. Eliz., 497.

8. Where the defendant said to his companion B., "He that goeth before thee is perjured," the plaintiff can sue if he aver and prove that he was the person who was at that moment walking before B. Aish v. Gerish, 1 Roll. Abr., 81.

9. A. said to B., "One of us two is perjured." B. answered, "It is not I," and A. replied, "I am sure it is not I." B. can sue A. for charging him with perjury. Coe v. Chambers, 1 Roll. Abr., 75; Vin. Abr., c. b., 4.

§ 28. **Indirect Defamation.**— Slanderous words or libelous matter, defamatory of a certain person, may in some cases be indirectly defamatory of other persons; and when words apparently apply only to a thing, and not to a person, still if the owner of the thing can show that the words substantially reflect upon him, he may sue without giving proof of special

damage and without proving malice. Thus, to write and publish that plaintiff's ship is unseaworthy and has been sold to the Jews to carry convicts, is a libel upon the plaintiff in the way of his business, as well as upon his ship.[1]

§ 29. **Digest of English Cases.**—

1. Slander addressed to plaintiff's wife: "You are a nuisance to live beside of. You are a bawd, and your house is no better than a bawdy-house." *Held*, that the plaintiff could maintain the action without joining his wife, and without proving special damage; because if in fact his wife did keep a bawdy-house, the plaintiff could be indicted for it. Huckle v. Reynolds, 7 C. B. (N. S.), 114.

2. Where a married man was called "cuckold" in the city of London, his wife could sue; for it was tantamount to calling her "whore." Vicars v. Worth, 1 Stra., 471; Hodgkins et ux. v. Corbet et ux., 1 Stra., 545.

§ 30. **The Imputation Need Not be in Positive and Direct Language.**— It is not necessary that the defendant should in so many words expressly state the plaintiff has committed a particular crime. So, where a charge is made against a trader, it need not be conveyed in positive and direct language. Any words which distinctly assume or imply the plaintiff's guilt are sufficient. But words merely imputing to the plaintiff a criminal intention or design are not actionable so long as no criminal act is directly or indirectly assigned. So, too, words of mere suspicion, not amounting to a charge of felony, are not actionable; and no innuendo can make them so.[2]

§ 31. **The Law Stated by Chief Justice Shaw.**— The law cannot be eluded by any of the artful and disguised modes in which men attempt to conceal treasonable or libelous and slanderous meanings and designs; that, in truth, language is published and circulated with intent to slander and defame others, though such intent is artfully concealed by use of ambiguous, technical or conventional terms, or court phrases, or in any of the other thousand forms in which malice attempts to disguise itself; still, if it really does mean and intend the criminal charge attributed to it, it shall not escape legal animadversion and publication, if rightfully and sufficiently charged, so as to enable the jury to receive proof of all those extraneous facts and circumstances which conspire to affix upon it such criminal character; and that when so charged,

[1] Ingram v. Lawson, 6 Bing. N. C., 212; 4 Jur., 151; 9 C. & P., 326; 8 Scott, 471; Solomon v. Lawson, 8 Q. B., 823; 15 L. J., Q. B., 253; 10 Jur., 796.

[2] Odgers on L. & S., 133; Com. v. Child, 30 Mass., 205.

and when the facts are proved which give it this character, the jury are not to shut their eyes to that which all the rest of mankind can see and know and understand.[1]

§ 32. Illustrations — Digest of American Cases.—

1. The following words have been held to convey an imputation with sufficient certainty and precision: "Knave," to call a clergyman a knave, a liar and a rascal. Harding v. Brooks, 22 Mass., 243.

2. "I never took a pair of boots from a dead man." The taking of articles of dress *animo furandi* from the body of a dead man, drowned and driven ashore from a wreck, is a felony in Massachusetts; hence, the above words imputing such act and intent are actionable. Wonson v. Saywood, 31 Mass., 402.

3. The statements "You are either a thief or you got the book from a thief" is equivalent to a direct charge of theft. Blackwell v. Smith, 8 Mo. App., 43.

4. But the words "You will steal" or "I believe you will steal" are actionable in themselves. It is competent, however, to show that the words, spoken under the peculiar circumstances attending their utterance, expressed a charge of crime committed, in which case they are actionable. Zeliff v. Jennings, 61 Tex., 458.

§ 33. Digest of English Cases.—

1. "Thou art a corn-stealer;" in spite of the objection "that it might be that the corn was growing, and so no felony." Anon. (1597), Cro. Eliz., 563.

2. So where the defendant, on hearing that his barns were burnt down, said: "I cannot imagine who it should be but the Lord Sturton." Lord Sturton v. Chaffin (1563), Moore, 142.

3. To state that criminal proceedings are about to be taken against the plaintiff (as that the attorney-general bad directed a certain attorney to prosecute him for perjury) is actionable, although the speaker does not expressly assert that the plaintiff is guilty of the charge. Roberts v. Camden, 9 East, 93; Tempest v. Chambers, 1 Stark., 67.

4. "I believe all is not well with Daniel Vivian; there be many merchants who have lately failed, and I expect no otherwise of Daniel Vivian," is a charge of present pecuniary embarrassment. Vivian v. Willet, 3 Salk., 326; Sir Thos. Raym., 207.

5. So, also, "two dyers are gone off, and for aught I know Harrison will be so too within this twelvemonth." Harrison v. Thornborough, 10 Mod., 196; Gilb. Cas., 114.

6. "He has become so inflated with self-importance by the few hundreds made in my service — God only knows whether honestly or otherwise," is an insinuation of embezzlement. Clegg v. Laffer, 3 Moore & Sc., 727; 10 Bing., 250.

7. "I think in my conscience if Sir John might have his will he would kill the king" is a charge of compassing the king's death. Sidnam v. Mayo, 1 Roll. Rep., 427; Cro. Jac., 407; Peake v. Oldham, Cowp., 275; 2 Wm. Bl., 959.

[1] Com. v. Child, 30 Mass., 205.

8. It is actionable to say, "I am of opinion that such a privy councilor is a traitor," or "I think such a judge is corrupt." Per Wyndham and Scroggs, JJ., and North, C. J., in Lord Townshend v. Dr. Hughes, 2 Mod., 166.

9. So, too, if the charge incidentally slips into a conversation on another matter an action lies; as where the defendant said: "Mr. Wingfield, you never thought well of me since Graves did steal my lamb;" and it was held that Graves could sue. Graves' Case, Cro. Eliz., 289.

10. Or, "I dealt not so unkindly with you when you stole a sack of my corn." Cooper v. Hawkeswell, 2 Mod., 58.

11. A libelous charge may be insinuated in a question: *e. g.*, "We should be glad to know how many popish priests enter the nunneries at Scorton and Darlington each week? and also how many infants are born in them every year, and what becomes of them? whether the holy fathers bring them up or not, or whether the innocents are murdered out of hand or not." Alderson, B., directed the jury that if they thought the defendant by asking the question meant to *assert* the facts insinuated the passage was a libel. R. v. Gathercole, 2 Lew. C. C., 237, 255.

12. But where the defendant said: "I have a suspicion that you and B. have robbed my house, and therefore I take you into custody," the jury found that the words did not amount to a direct charge of felony, but only indicated what was passing in defendant's mind. Tozer v. Mashford, 6 Ex., 539; 20 L. J., Ex., 225; Harrison v. King, 4 Price, 46; 7 Taunt., 431; 1 B. & Ald., 161.

13. No action lies for such words as "Thou deservest to be hanged;" for here no fact is asserted against the plaintiff. Hake v. Molton, Roll. Abr., 43; Cockaine v. Hopkins, 2 Lev., 214.

§ 34. **The Defamatory Charge — How Conveyed.** — A defamatory charge may be sufficiently conveyed: (1) By the use of adjective words; (2) by a sentence in the form of a question; (3) by questions and answers, as in a series of questions and answers; (4) by repeating gossip; (5) by certain expressions, gestures and intonation of voice.

§ 35. **First, by Adjective Words — Illustrations — American Cases.**—

1. It is actionable to call a person a thieving puppy. Little v. Barlow, 26 Ga., 423; Pierson v. Stortz, 1 Morr. (Iowa), 136.

2. To charge one with being a thieving person or to say of him that he stole and ran away is actionable. Alley v. Neely, 5 Blackf. (Ind.), 300.

3. Also to say "you G—d d—d lying, thieving son of a bitch." Reynolds v. Ross, 42 Ind., 387.

4. "You are an infernal roguish rascal." Morgan v. Livingston, 2 Rich. (S. C.), 573.

5. "The Rev. Thomas Smith is a perjured man." Cunningham v. Smith, 2 S. & R., 440.

§ 36. **Digest of English Cases.**—

1. "Thou art a leprous knave." Taylor v. Perkins, Cro. Jac., 144; 1 Roll. Abr., 44.

2. "He is a bankrupt knave," spoken of a trader. Squire v. Johns, Cro. Jac., 585; Loyd v. Pearce, Cro. Jac., 424.

3. "Thou art a broken fellow." Anon., Holt, 652.

4. "Mr. Bittridge is a perjured old knave." Bittridge's Case, 14 Rep., 19; Croford v. Blisse, 2 Buls., 156.

5. "A libelous journalist," a phrase which will be taken to mean that the plaintiff habitually publishes libels in his paper, not that he once published one libel merely. Wakley v. Cook and Healey, 4 Exch., 511; 19 L. J., Ex., 91.

§ 37. Second, by a Sentence in the Form of a Question — Illustrations — Digest of American Cases.—

1. "What did you do with the sheep you killed?" "Did you eat it?" "It was like the beef you got negroes to bring you at night." "Where did you get the little wild shoats you always have in your pen?" "You are an infernal roguish rascal." Morgan v. Livingston, 2 Rich. (S. C.), 573.

§ 38. Digest of English Cases.—

1. An action lies where the defendant said "When wilt thou bring home the nine sheep thou stolest from J. N.?" Hunt v. Thimblethorpe, Moo, 418; 1 Vin. Abr., 429.

2. A libelous charge may be insinuated in a question; as, "We should be glad to know how many popish priests enter the nunneries at Scorton and Darlington each week? and also how many infants are born in them every year, and what becomes of them? whether the holy fathers bring them up or not, or whether the innocents are murdered out of hand or not." Alderson, B., directed the jury that if they thought the defendant by asking the question meant to assert the facts insinuated the passage was a libel. R. v. Gathercole, 2 Lew. C. C., 237, 255.

3. So an action lies for saying, "Did you hear that J. S. is guilty of treason?" Earl of Northampton's Case, 12.

4. A., the wife of B., was asked by C., "Wherefore will your husband hang J. S.?" She answered, "For breaking our house in the night and stealing our goods." The words were held to be actionable, for though they were spoken in answer to a question they amount to a charge of stealing goods. Hayward v. Naylor, 1 Roll. Abr., 50.

5. The defendant published the following advertisement: "This is to request that if any printer or other person can ascertain that James Delany, Esquire [the plaintiff], some years since residing at Cork, late lieutenant in the North Lincoln militia, was married previous to 9 o'clock in the morning of the 10th of August, 1799, they will give notice, etc., and received the reward." And it was left by Lord Ellenborough, C. J., to the jury to say whether the advertisement imputed a charge of bigamy to the plaintiff. Delany v. Jones, 4 Esp. C., 191.

§ 39. Third, in a Question and Answer or in a Series of Questions and Answers — Illustrations — Digest of American Cases.—

Where, in answer to an inquiry, "Were there any failures yesterday?" it was said, "Not that I know of, but I understand there is trouble with the Messrs. S.," it was held that the words being spoken of the plaintiffs as

merchants they were actionable in themselves. Sewall v. Coltin, 8 Wend. (N. Y.). 291.

§ 40. **Fourth, by Repeating Gossip — Illustrations — Digest of American Cases.—**

1. A man may slander or libel another as effectually by circulating rumors or reports, or by putting his communication, spoken or written, in the shape of hearsay, as by making distinct assertions of the slanderous matters, and asserting them as truths of his own knowledge. Schenck v. Schenck, 20 N. J. L., 208.

2. The fact that, when making a slanderous statement, the defendant gave it as a report, and mentioned his authority, does not exonerate him from liability. Fowler v. Chicester, 26 Ohio St., 9.

3. One who repeats slanderous words of another is liable, although a disbelief in the truth of the slander is expressed at the time, and although the charge was repeated for the purpose of asking advice. Branstetter v. Darrough, 81 Ind., 527.

4. Where one person hears another make a charge which he repeats, he will not be exempt from liability unless at the time of repeating the words he affords the person against whom the charge is made a cause of action against the original author. Johnson v. St. L. Dispatch Co., 65 Mo., 539.

§ 41. **Digest of English Cases.—**

1. "One told me that he heard say that Mistress Meggs had poisoned her first husband." Meggs v. Griffith (vel Griffin), Cro. Eliz., 400; Moore, 408; Read's Case, Cro. Eliz., 645.

2. "Did you not hear that C. was guilty of treason?" *Per cur.* in Earl of Northampton's Case, 12 Rep., 134.

3. "Thou art a sheep-stealing rogue, and farmer Parker told me so." Gardiner v. Atwater, Sayer, 265.

4. "I heard you had run away" (*sc.* from your creditors). Davis v. Lewis, 7 T. R., 17.

§ 42. **Fifth, Slanderous Imputation Conveyed by Signs and Gestures.**— A defamatory charge may also be conveyed by certain expressions accompanied by gestures and intonations of voice. In such cases the rule relating to evidence of intention is somewhat different from cases where the charge is conveyed by language capable of being stated fully to the jury, and capable of being fully understood by them. When the charge is made by gestures and signs or intonations of the voice and not solely in words, courts have found it necessary to allow a departure from the strict rule that has to some extent prevailed, and to permit witnesses to state what meaning they understood the defendant to convey and to whom he intended to apply it.[1]

[1] Leonard v. Allen, 11 Cush. (65 Mass.), 241.

§ 43. Intention Indicated by Signs, Gestures and the Like. The general rule is that the jury and not the witnesses are to determine the meaning and application of defamatory words. But where, as is often the case, the slanderous charge is not made in direct terms, but by equivocal expressions, insinuations, gestures, or even tones of the voice, which often have a potent meaning incapable of description, it is competent for witnesses who heard and saw them to state what they understood by them and to whom they understood them to apply.[1]

[1] Blakeman v. Blakeman, 31 Minn., 396; 18 N. W. Rep., 103; Leonard v. Allen, 11 Cush., 241; Smith v. Miles, 15 Vt., 245; Barton v. Holmes, 16 Iowa, 252.

CHAPTER XIV.

CONSTRUCTION OF LANGUAGE.

§ 1. **The Construction of Language.**— In applying the rules of pleading and evidence in the construction of defamatory words, it will be convenient to divide them into five classes:[1]

(1) *Words obviously defamatory.*

(2) *Words ambiguous*, which, though apparently defamatory, are still on their face susceptible of an innocent meaning.

(3) *Words meaningless* until some explanation is given; slang

[1] Odgers on L. & S., 104.

expressions; foreign languages; words used in some special, local, technical or customary sense.

(4) *Words apparently innocent* but capable of a defamatory meaning ironically spoken.

(5) *Words obviously innocent* and incapable of a defamatory meaning.

§ 2. **First, Words Obviously Defamatory.**— In pleading this class of words no innuendo is necessary. Nor is parol evidence admissible to explain the meaning of the words. The defendant cannot be heard to say that he did not intend to injure the plaintiff's reputation, if he has in fact done so. The question is still, however, for the jury; but the court will practically instruct them that the words are actionable and that they should find for the plaintiff.[1]

§ 3. **The Defense.**— But the defendant may plead circumstances which make it clear that at the time he spoke or wrote the words they were not used in their ordinary signification, and thus render the words *prima facie* defamatory only. It will then be a question for the jury how the by-standers understood the words. This question can only arise where the words are susceptible of the innocent meaning which the defendant seeks to place upon them, and where also the circumstances which are alleged to qualify the injurious words were known to the by-standers at the time.[2] But words which are clearly slanderous in the understanding of the by-standers, and from their proper import, cannot be explained by reference to other facts which were not mentioned by the party at the time he uttered the words complained of.[3]

§ 4. **Illustrations — Digest of American Cases.—**

(1) LIBEL.

1. To write and publish that a certain woman is a prostitute, and that "she is, I understand, under the patronage or protection of" the plaintiff, was held actionable in the court of appeals in New York, although there was no innuendo averring that she was under the plaintiff's protection for immoral purposes. More v. Bennett (1872), 48 N. Y. (3 Sickels), 472; reversing the judgment of the court below, 33 How. 180; 48 Barb. (N. Y.), 229.

[1] Levi v. Milne, 4 Bing., 195; 12 Moore, 418; Posnett v. Marble, 62 Vt., 481; 20 Atl. Rep., 813; Wilson v. Fitch, 41 Cal., 363; Carroll v. White, 33 Barb., 615; Newell v. Howe, 31 Minn., 235; Lewis v. Black, 27 Miss., 425; Worth v. Butler, 7 Blackf., 251.

[2] Garrett v. Dickerson, 19 Md., 418; De Moss v. Haycock, 15 Iowa, 149.

[3] Watson v. Nicholas, 6 Humph. (Tenn.), 174.

2. Charging a person with infringing upon a patent regularly granted is libelous. Watson v. Trask, 6 Ohio, 531.

3. To falsely and maliciously publish that the plaintiff's house was searched under legal process to discover stolen goods is libelous in itself. State v. Smiley, 37 Ohio St., 30; 41 Am. Rep., 487.

4. "The Hurricane Vote.— Again we have to chronicle most atrocious corruption, intimidation and fraud in the Hurricane Island vote, for which David Tillson is without doubt responsible, as he was last year." *Held* to be actionable without extrinsic averments to communicate its precise import, and without any allegation of special damage. Tillson v. Robbins, 68 Me., 295.

(2) SLANDER.

1. "Blackmailing" is clear, and requires no innuendo to support it. Edsall v. Brooks, 2 Robt. (N. Y.), 29; 3 Robt. (N. Y.), 284.

2. So is "pettifogging shyster" when applied to a lawyer. "Courts have no right to be ignorant of the meaning of current phrases which everybody else understands." Bailey v. Kalamazoo Pub. Co., 4 Chaney (40 Mich.), 251.

3. So to say of a bank director, "He is a swindler." Forrest v. Hanson, 1 Cranch, C. Ct., 63.

4. It is equally slanderous in legal contemplation to say that a woman is a whore, or that there is a rumor she is such. Kelly v. Dillon, 5 Ind., 426.

5. Calling a person a knave was held actionable in Massachusetts. Harding v. Brooks, 5 Pick., 244.

6. Charging a woman with drunkenness was held sufficient to sustain an action for slander. Brown v. Nickerson, 5 Gray (Mass.), 1.

7. The words, "You are a vagrant," are slanderous in Pennsylvania. Miles v. Oldfield, 4 Yeates (Penn.), 423. And so to charge another with making a libel. Andreas v. Kopphefer, 3 Serg. & R. (Penn.), 255.

8. To call a man or his wife a mulatto is actionable in South Carolina. Eden v. Legare, 1 Bay (S. C.), 171; Atkinson v. Hartly, 1 McCord (S. C.), 203; King v. Wood, 1 N. & M. (S. C.), 184.

9. No innuendo is necessary to explain the meaning of the word "defaulter" used in a publication to express a disqualification for an office of trust. State v. Kountz. 12 Mo. App., 511.

10. In North Carolina a count charging the defendant with saying the plaintiff is "incontinent," without prefatory matter and without innuendo, is good. Watts v. Greenlee, 2 Dev. L., 115.

11. The declaration alleged that the defendant said of the plaintiff, "He is a thief and a liar, and I can prove it." It was held that the words of themselves in their common acceptation imported a charge of larceny, and that the declaration was sufficient without a colloquium or innuendo; that if the words were spoken in a different sense, not amounting to a charge which they usually import, and were understood in that sense by those in whose presence they were spoken, the defendant might show this on trial as a defense to the action. Robinson v. Keyser, 22 N. H., 323.

12. Words which charge the taking of the personal property of another may be defamatory or not, according to the circumstances; but words which are obviously defamatory in the understanding of the by-standers,

and from their proper import, cannot be explained by reference to other facts which were not mentioned by the party at the time he uttered the words. Watson v. Nicholas. 6 Humph. (Tenn.), 174.

§ 5. Digest of English Cases.—

(1) LIBEL.

1. It is libelous to write and publish these words: "Threatening Letters. The Middlesex grand jury have returned a true bill against a gentleman of some property named French." And no innuendo is necessary to explain the meaning of the words; for they can only import that the grand jury had found a true bill against French for the misdemeanor of sending threatening letters. Harvey v. French, 1 Cr. & M., 11; 2 M. & Scott, 591; 3 Tyrw., 585.

2. Allegorical terms of well-known import are libelous *per se*, without innuendoes to explain their meaning; *e. g.*, imputing to a person the qualities of the "frozen snake," or calling him "Judas." Hoare v. Silverlock, (No. 1, 1848), 12 Q. B., 624; 17 L. J., Q. B., 306; 12 Jur., 695.

3. It is libelous without any innuendo to write and publish that a newspaper has a separate page devoted to the advertisements of usurers and quack doctors, and that the editor takes respectable advertisements at a cheaper rate if the advertisers will consent to their appearing on that page. The court, however, expressed surprise at the absence of some such innuendo as "meaning thereby that the plaintiff's paper was an ill-conducted and low class journal." Russell v. Webster, 23 W. R., 59.

4. Where a libel called the plaintiff a "truckmaster," and the defendant justified, but no evidence was given at the trial as to the meaning of the word, the court held after some hesitation that, though the word was not to be found in any English dictionary, its meaning was sufficiently clear to sustain the action, there being a statute called "The Truck Act." Homer v. Taunton, 5 H. & N., 661; 29 L. J., Ex., 318; 8 W. R., 499; 2 L. T., 512.

(2) SLANDER.

1. Words complained of, "Thou art a thief." No innuendo at all is necessary, as larceny is clearly imputed. Blumley v. Rose, 1 Roll. Abr., 73; Slowman v. Dutton, 10 Bing., 402.

2. If the words can be understood as imputing a crime no innuendo is necessary. And, if it were, an innuendo, "meaning thereby that the plaintiff had been guilty of a criminal offense," is sufficient without specifying what particular crime is meant. Webb v. Beavan, 11 Q. B. D., 609; 52 L. J., Q. B., 544; 49 L. T., 201; 47 J. P., 488; Kinnahan v. McCullagh, Ir. R., 11 C. L., 1; Saunders v. Edwards, 1 Sid., 95; Francis v. Roose, 3 M. & W., 191; 1 H. & H., 86.

3. To say, "He robbed John White," is *prima facie* clearly actionable. But the defendant may show, if he can, that that is not the sense in which the words were fairly understood by by-standers who listened to the whole conversation, though previously unacquainted with the matter to which the words sued on relate. Tomlinson v. Brittlebank, 4 B. & Adol., 630; 1 Nev. & Man., 455; Hankinson v. Bilby, 16 M. & W., 442; 2 C. & K., 440; Martin v. Loei, 2 F. & F., 654.

§ 6. **Second.**— Words ambiguous, which, though apparently defamatory, are still on their face susceptible of an innocent meaning.

In this class of defamatory words no innuendo is necessary, and no parol evidence is admissible to explain the meaning of the words. The court will direct the jury that the words are actionable in themselves.

THE DEFENSE.

The defendant may plead circumstances showing that the words were not used by him in their ordinary signification. He may show that the words were uttered merely in a joke, and were so understood by all who heard them; or that the words were part of a longer conversation, the rest of which limits and explains the words sued on; or any other facts which tend to show that they were uttered with an innocent meaning, and were so understood by the by-standers. And if such a defense be pleaded, parol evidence may be given of the facts alleged. It then becomes a question for the jury whether the facts as pleaded are substantially proved, and whether they put on the words a color different from what they would *prima facie* bear. It may be difficult, however, to induce the jury to adopt the defendant's harmless view of his own language.[1]

But the defendant cannot plead or give in evidence any facts which were not known to the by-standers at the time the words were uttered. His secret intent in uttering the words is immaterial.[2]

He is allowed thus to give evidence of all the surrounding circumstances, in order to place the jury so far as possible in the position of by-standers, so that they may judge how the words would be understood on the particular occasion. But though evidence of such extrinsic facts is admitted, parol evidence merely to explain away the words used, to show that they did not for once bear their ordinary signification, is inadmissible. A witness cannot be called to say, "I should not

[1] Roby v. Murphy, 27 Ill. App., 394; Odgers on L. & S., 106; Carter v. Carter, 62 Ill., 439; Welch v. Eakle, 7 J. J. Marsh. (Ky.), 424.

[2] Hankinson v. Bilby, 16 M. & W., 445; 2 C. & K., 440; Carroll v. White, 33 Barb., 615; Brittain v. Allen, 8 Dev. (N. C.) L., 167.

have understood defendant to make any imputation whatever on the plaintiff." The jury know what ordinary English means, and need no witness to inform them. They are the sole judges of the intent to be given to the defamatory words.

§ 7. Illustrations — Digest of American Cases.—

§ 1. Where the declaration charged the defendant with calling the plaintiff "a dirty bitch," "a dirty slut," "a dirty lying slut," "a filthy lying slut," the words being laid without a colloquium going to show that they were used in a slanderous sense, it was held that the words must be taken in their common acceptation. The word "bitch" when applied to a woman does not in its common acceptation import fornication or adultery. The word "slut" according to Webster means an untidy woman, a slattern, and also a female dog, the same as "bitch." While such terms are coarse, vulgar and brutal when applied to a woman, they do not amount to a charge of crime or want of chastity, and are not, therefore, in their common meaning slanderous words. Roby v. Murphy, 27 Ill. App., 394; K. v. H., 20 Wis., 252; Logan v. Logan, 77 Ind., 558.

§ 2. In cases of slander, words take their actionable character from the sense in which they are used and that in which they are most likely to be understood by those who hear them. Garrett v. Dickerson, 19 Md., 418; De Moss v. Haycock, 15 Iowa, 149.

§ 8. Digest of English Cases.—

1. The leading English case on this subject is one cited in Lord Cromwell's Case (1578), 4 Rep., 13, 14: "If a man brings an action on the case for calling the plaintiff murderer, the defendant will say that he was talking with the plaintiff concerning unlawful hunting, and the plaintiff confessed that he killed several hares with certain engines; to which the defendant answered and said, 'Thou art a murderer' (innuendo the killing of the said hares). . . . Resolved by the whole court that the justification was good. For in case of slander by words the sense of the words ought to be taken, and the sense of them appears by the cause and occasion of speaking of them, for *sensus verborum ex causa dicendi accipiendus est et sermones semper accipiendi sunt, secundum subjectum.* . . . And it was said, God forbid that a man's words should be by such strict and grammatical construction taken by parcels against the manifest intent of the party upon consideration of all the words which import the true cause and occasion which manifest the true sense of them; *quia quæ ad unum finem loquuta sunt, non debent ad alium detorqueri:* and, therefore, in the said case of murder the court held the justification good; and that the defendant should never be put to the general issue when he confesses the words and justifies them, or confesses the words and by special matter shows that they are not actionable." Shipley v. Todhunter, 7 C. & P., 680; Odgers on L. & S., 109.

2. Defendant stated publicly that plaintiff had been detected taking dead bodies out of the churchyard, and fined, etc. He meant it as a joke, but there was no evidence that the by-standers so understood it. The court set aside a verdict for the defendant. Joy, C. B.: "The principle is clear that a person shall not be allowed to murder another's reputation in jest. But

if the words be so spoken that it is obvious to every by-stander that only a jest is meant, no injury is done, and consequently no action would lie." Donoghes v. Hayes, Hayes (Irish Exch.), 265.

8. But where the defendant said, "Thompson is a damned thief, and so was his father before him, and I can prove it;" but added, "Thompson received the earnings of the ship, and ought to pay the wages," Lord Ellenborough held that the latter words qualified the former and showed no felony was imputed; the person to whom the words were spoken being the master of the ship and acquainted with all the circumstances referred to. Thompson v. Bernard, 1 Camp., 48; Bittridge's Case, 4 Rep., 19; Cristie v. Cowell, Peake, 4; Day v. Robinson, 1 A. & E., 554; 4 N. & M., 884.

5. Where words are used which clearly import a criminal charge (as "You thief," or "You traitor") it is still open to the defendant to show if he can that he used them merely as vague terms of general abuse, and that the by-standers must have understood them as meaning nothing more than "You rascal," or "You scoundrel." When such words occur in a string of non-actionable epithets, or in a torrent of general vulgar abuse, the jury may reasonably infer that no felony was seriously imputed. If, however, the jury put the harsher constructions on defendant's language no new trial will be granted, for it is a question entirely for them. Minors v. Leeford, Cro. Jac., 114; Penfold v. Westcote, 2 Bos. & P. N. R., 335.

6. Where the defendant said to the plaintiff in the presence of others, "You are a thief, a rogue and a swindler," it was held that the defendant could not call a witness to explain the particular transaction which he had in his mind at the time, since he did not in any way expressly refer to it in the presence of his hearers. Martin v. Loei, 2 F. & F., 654; Read v. Ambridge, 6 C. & P., 308; Hankinson v. Bilby, 16 M. & W., 442; 2 C. & K., 440.

7. Words complained of: "Thou hast killed my wife." Defendant's wife was still alive, and the by-standers knew it. *Held*, that plaintiff was not put "in any jeopardy, and so the words vain and no scandal or damage to the plaintiff." Snag v. Gee, 4 Rep., 16, as explained by Parke, B., in Heming v. Power, 10 M. & W., 569.

8. Words complained of: "You stole my apples." The defendant cannot be allowed to state that he only meant to say, "You have tortiously removed my apples under an unfounded claim of right." The by-standers could not possibly have understood from the words used that a civil trespass only was imputed. Devrill v. Hulbert (Jan. 25, 1878), unreported; Odgers on L. & S., 103.

9. But where the words complained of are, "Thou art a thief, for thou tookest my beasts by reason of an execution, and I will hang thee," no action lies, for it is clear that the whole sentence taken together imports only a charge of trespass. Wilk's Case, 1 Roll. Abr., 51; Smith v. Ward, Cro. Jac., 674; Sibley v. Tomlins, 4 Tyrw., 90.

§ 9. **Third.**— Words which are meaningless until some explanation of them is given; such as slang expressions, words in a foreign language, or used in some special, local, technical or customary sense.[1]

[1] Edgar v. McCutchen, 9 Mo., 768; Pelzer v. Benish, 67 Wis., 291; Stichtd Vanderlip v. Roe, 23 Pa. St., 82; v. State, 25 Tex. App., 420.

Where the words complained of are only ordinary English words, the court can decide at once whether they are *prima facie* actionable or not. But where the words are in a foreign language, or are technical or provincial terms, an innuendo is absolutely necessary to disclose an actionable meaning. So, too, an innuendo is essential where ordinary English words are not in the particular instance used in their ordinary English signification, but in some peculiar sense.[1]

§ 10. **Words Spoken in a Foreign Language.**— Where the words are spoken in a foreign language the original words should be set out in the declaration and an exact translation should be added.[1] In the case of slander an averment was formerly required to the effect that those who were present understood that language.[2] And though such an averment is no longer necessary, the fact must still be proved at the trial. For if words be spoken in a tongue altogether unknown to the hearers, no action lies;[3] for no injury is done to the plaintiff's reputation. But if a single by-stander understood them, that is enough. Where, however, the words are spoken in the vernacular of the place of publication, as English words spoken in England, it will be presumed that the by-standers understood them. At the trial the correctness of the translation must be proved by a sworn interpreter.

§ 11. **Provincial or Obsolete Expressions — Slang Phrases, etc.**— Whenever the words used are not ordinary English, but some local, technical, provincial or obsolete expressions, or slang or cant terms, evidence is admissible to explain their meaning, provided such meaning has been properly alleged in the pleadings. But when the words are well known and perfectly intelligible English the court will give them their ordinary English meaning, unless it is in some way shown that that meaning is inapplicable. This may appear from the words themselves; for in some cases to give them their ordinary English meaning would make nonsense of them. But if in their ordinary English meaning the words would be intelligible, facts must be given in evidence to show that they may

[1] Zenobio v. Axtell, 6 T. R., 162; 3 M. & S., 116.

[2] Fleetwood v. Curl, Cro. Jac., 557; Hob., 268.

[3] Jones v. Davers, vel Dawkes, Cro. Eliz., 496; 1 Roll. Abr., 74.

have been used in another special meaning on this particular occasion. After that has been done a by-stander may be asked, "What did you understand by the expression used?" But without such a foundation being first laid the question is not allowable.[1]

§ 12. **Illustrations — Digest of American Cases.—**

1. The defendant, the editor of a newspaper, owed plaintiff money under an award, and wrote and published in his newspaper these words: "The money will be forthcoming on the last day allowed by the award, but we are not disposed to allow him to put it into Wall street for shaving purposes before that period." "Shaving" in New York means (1) discounting bills or notes; (2) fleecing men of their goods or money by overreaching, extortion and oppression. The declaration contained no innuendo alleging that the words were used in the second defamatory sense. *Held* no libel, on demurrer. Stone v. Cooper, 2 Den. (N. Y.). 293.

2. The meaning of slang phrases and metaphors may be sufficiently averred in the innuendo without a colloquium, and the truth of the averment is for the jury to decide. Vanderlip v. Roe, 23 Penn. St., 83.

§ 13. **Digest of English Cases.—**

(1) LIBEL.

1. Libel complained of: "There are very few persons in society who do not look upon the whole affair to be got up for a specific occasion, and consider that it has been neither more nor less than a 'plant.' We have heard it roundly asserted that a clerk of Mr. Hamer, the notorious lawyer, was placed under a sofa at his lordship's residence when the Earl of Cardigan called there." The indictment stated "that the said Thomas Holt used the words 'a plant' for the purpose of expressing and meaning, and the said words used by him were by divers, to wit, all the persons to whom the said libel was published, understood as expressing and meaning, an artful and wicked plan and contrivance made and entered into by the said William Paget, Esq., and other persons by false and unfounded testimony and a wrongful and wicked perversion of facts to make out, support and establish the said charge, and by concert and arrangement falsely to fix upon the said earl the commission of the said trespass and assault for the purpose of obtaining divers of the moneys of the said earl to the use of the said William Paget, Esq.," and concluded with the following innuendo: "Thereby then and there meaning that the said William Paget, Esq., had with other persons artfully and wickedly planned and contrived to make a false and unfounded charge against the said earl of his having been guilty of the said trespass and assault upon the said wife of the said William Paget, Esq., and to make out, support and establish such charge by false and unfounded testimony and a wicked and wrongful perversion of facts for the purpose of extorting and obtaining from the said earl divers of his moneys to the use of the said William Paget, Esq." A reporter for one of the London news-

[1] Odgers on L. & S., 110; Daines v. Hartley, 3 Exch., 200; 18 L. J., Ex., 81; 12 Jur., 1093.

papers was called to define 'a plant,' and his evidence justified the innuendo. The recorder left it to the jury whether they were satisfied that the word "plant" bore the meaning attributed to it by the prosecution; if so, the passage was libelous. Verdict, guilty. R. v. Holt, 8 J. P., 212.

3. It is libel on L. to write and publish of him that he is one of "a gang who live by card-sharping," there being an innuendo, "meaning thereby that L. is a swindler and a cheat, and lives by cheating or playing at cards, and that he and B. and G. had, previous to the libel, conspired together in cheating divers persons in playing at cards." Reg. pros. Lambri v. Labouchere, 14 Cox, C. C., 419.

(2) SLANDER.

1. Words complained of: "You are a bunter." No innuendo. Willes, J., nonsuited the plaintiff on the ground that the word had no meaning at all, and could not therefore be defamatory in ordinary acceptation; and he refused to allow the plaintiff to be asked what the word "bunter" meant. *Aliter*, had there been an innuendo averring a defamatory sense to the word "bunter." Rawlings et ux. v. Norbury, 1 F. & F., 341.

2. Words spoken to an attorney: "Thou art a daffadowndilly." Innuendo, meaning thereby that he is an "ambidexter," *i. e.*, one who takes a fee from both sides, and betrays the secrets of his client. *Held*, that an action lay. Anon. (Exch.), 1 Roll. Abr., 55; Annison v. Blofield, Carter, 214.

3. It is actionable to say, "Thou art a clipper, and thy neck shall pay for it." "For though 'clipper' is general, and may be intended a clipper of wool, cloth, etc., yet the following words show it to be intended of clipping for which he shall be hanged." Naben v. Miecock, Skin., 183.

4. It is actionable to say of a stock-jobber that "He is a lame duck;" innuendo, "meaning thereby that the plaintiff had not fulfilled his contracts in respect of the said stocks and funds" (stock-jobbing being now legalized by the 23d and 24th Vict., ch. 28). Morris v. Langdale, 2 Bos. & Pul., 284.

5. The word "welcher" requires an innuendo to explain its meaning. Blackman v. Bryant, 27 L. T., 491.

6. Pollock, C. B., thought the word "truckmaster" required no innuendo to explain its meaning, as it "is composed of two English words intelligible to everybody." Homer v. Taunton, 5 H. & N., 661; 29 L. J., Ex., 318; 8 W. R., 499; 2 L. T., 512. But so are "blackleg" and "blacksheep," and these words do require an innuendo. M'Gregor v. Gregory, 11 M. & W., 287; 12 L. J., Ex., 204; 2 Dowl. (N. S.), 769; O'Brien v. Clement, 16 M. & W., 166; 16 L. J., Ex., 77; Barnett v. Allen, 1 F. & F., 125; 27 L. J., Ex., 412; 4 Jur. (N. S.), 488; 3 H. & N., 376.

7. The defendant charged the plaintiff, a pawnbroker and silversmith, with "duffing;" an innuendo, "meaning thereby the dishonorable practice of furbishing up damaged goods and pledging them with other pawnbrokers as new," was held good. Hickinbotham v. Leach, 10 N. & W., 361; 2 Dowl. (N. S.), 270.

8. The words, "He is mainsworn," were spoken in one of the northern counties where "mainsworn" is equivalent to "perjured," forsworn with his hand on the book. *Held* actionable. Slater v. Franks, Hob., 126; Coles v. Haviland, Cro. Eliz., 250; Hob., 12.

9. A. and B. were partners, and were conversing with the defendant. A. said they held some bills on the plaintiff's firm; the defendant said: "You must look out sharp that they are met by them." At the trial, B. was called as a witness and stated these facts. The counsel for the plaintiff then proposed to ask B., "What did you understand by that?" But the question was objected to, and disallowed by the judge (Pollock, C. B.) in that form, and the counsel would put it in no other shape. The jury found a verdict for the defendant, and the court of exchequer refused to grant a new trial. Daines v. Hartley, 3 Exch., 200; 18 L. J., Ex., 81; 12 Jur., 1093.

§ 14. **Fourth, Words Apparently Innocent but Capable of a Defamatory Meaning, and Words Spoken Ironically.**—Wherever the words complained of are capable both of a defamatory and an innocent meaning, it will be a question for the jury to decide which meaning the hearers or readers would on the occasion in question have reasonably given to the words.[1] An innuendo is essential to show the latent injurious meaning. Without it there would be no cause of action shown by the pleading. And such innuendo should be carefully drafted; for on it the plaintiff must take his stand at the trial. He cannot during the course of the case adopt a fresh construction. He may, it is true, fall back on the natural and obvious meaning of the words; but that we assume here not to be actionable. The innuendo must be specific; it must distinctly aver a definite actionable meaning. A general averment, such as, "using the words in a defamatory sense," or "for the purpose of creating an impression unfavorable to the plaintiff," would be insufficient.[2]

§ 15. **The Law Stated by Chief Justice Shaw.**—"Any words, though in their natural and ordinary sense doubtful or uncertain, or even innocent, but which in the ordinary mode of declaring by the aid of averments, colloquia and innuendoes, could be shown under the particular circumstances to be equivocal or ironical, and to be intended by the speaker and understood by the hearers, under whatever artful guise it may be concealed, to impute to the person the charge of crime, must be deemed slanderous, and competent, with the aid of the extraneous facts which go to show that they were used in such sense."[3]

[1] Brittain v. Allen, 3 Dev. (N. C.) L., 168; Smith v. Gafford, 33 Ala., 168.

[2] Cox v. Cooper, 12 W. R., 75; 9 L. T., 329; Riddell v. Thayer, 127 Mass., 487; Peterson v. Sentman, 37 Md., 140; Hansbrough v. Stinnett, 25 Gratt., 495.

[3] Pond v. Hartwell, 34 Mass., 269; Cooper v. Perry, Dudley (Ga.), 247.

§ 16. **Province of the Court and the Jury.**— The words must be fairly susceptible of the defamatory meaning put upon them by the innuendo, or the court at the trial may take the case from the jury. The court must decide if the words are reasonably capable of two meanings; if it so decide, then the jury must determine which of the two meanings was intended.[1]

§ 17. **Duty of the Jury in Determining the Meaning.**— In determining this question the jury will consider the whole of the circumstances of the case, the occasion of publication, the relationship between the parties, etc. A further question of fact may arise: Were there any facts known both to speaker and hearer which would reasonably lead the latter to understand the words in a secondary and a defamatory sense? And this is a question for the jury, if there be any evidence to go to them of such facts.[2] Also whenever the words of a libel are ambiguous, or the intention of the writer equivocal, subsequent libels are admissible in evidence to explain the meaning of the first, or to prove the innuendoes, even although such subsequent libels be written after action brought.

"If the defendant can get either the court or the jury to be in his favor, he succeeds. The prosecutor or plaintiff cannot succeed unless he gets both the court and the jury to decide for him."[3]

§ 18. **Illustrations — Digest of American Cases.**—

1. The words "she is sick" cannot be shown to have been understood by the hearers as meaning "she has had a child" without proper averments that they were so understood. Smith v. Gafford, 33 Ala., 168.

2. Words which in themselves do not import a slanderous meaning must be rendered so by an innuendo and an averment that they are spoken of the plaintiff. But if the words are slanderous in themselves it is only necessary to aver that they were spoken of the plaintiff. Brittain v. Allen, 3 Dev. (N. C.) L., 167.

3. Where the words were "he was seen afoul of a cow," it was held that they did not warrant an innuendo that he was guilty of bestiality; but if

[1] Sir Montague Smith, 6 App. Cas., p. 158; Jenner v. A'Beckett, L. R., 7 Q. B., 11; 41 L. J., Q. B., 14; 20 W. R., 181; 25 L. T., 464; Grant v. Yates, 2 Times L. R., 368; Patch v. Tribune Ass'n, 38 Hun, 368.

[2] Capital and Co. Bank v. Henty (C. A.), 5 C. P. D., 514; 49 L. J., C. P., 830; 28 W. R., 851; (H. L.) 7 App. Cas., 741; 52 L. J., Q. B., 232; 31 W. R., 157; 47 L. T., 662; 47 J. P., 214; Ruel v. Tatnell, 29 W. R., 172; 43 L. T., 507.

[3] Lord Blackburn, 7 App. Cas., p. 776.

the defendant had been in the practice by the words laid of imputing the offense, or if he had used them on the occasion in question in that sense and they were so understood by the hearers, there should have been a special averment to that effect. Harper v. Debb, 3 Ind., 225.

4. The words "this company for good and sufficient reasons has resolved to dismiss D. D. Maynard from its service," when entered on its books by an insurance company and published concerning one of its agents, are not libelous in themselves, but may sustain an action for libel upon a complaint which properly avers that the words were intended by the defendant to be understood as imputing wrong-doing, and that they were in fact so understood by those who read them. Maynard v. Fireman's F. Co., 47 Cal., 207.

5. The word "screwed" does not of itself import sexual intercourse; but in certain localities it may have this import. When this occurs, the pleading founded upon it, as slanderous, must affirmatively allege its import at the time and place of use. Miles v. Van Horn, 17 Ind., 245; Elam v. Badger, 23 Ill., 498.

6. In a suit for the words charging the plaintiff with having "had two pups," meaning thereby that she had been guilty of bestiality or the crime against nature, it was held that the latter crime embraces the former; that if the latter crime is not the correct inference from the words averred, still the sufficiency of those averments is not affected; that the court cannot say judicially whether it is possible for a woman to have connection with a dog or to have pups by him; but as it is not popularly believed to be impossible, the people not being presumed to know scientific facts, the injury to the plaintiff will be the same in either case. The action will lie. Ausman v. Veal, 10 Ind., 355.

7. In a count for words spoken charging the plaintiff with arson the language used was: "I next morning saw a track going to and returning from the house; the toes turned in, and I know but one man who owes me enmity enough to do such a thing, and you know whom I mean, B. D." (plaintiff). It was held that the words were not in themselves actionable; and as there was no averment of any matter of fact tending to identify the plaintiff as the person who made the tracks, the count was demurrable. Robinson v. Drummond, 24 Ala., 174.

8. A count alleging that the defendant used the words, "You moved the tree," adding: "The defendant thereby referring to and speaking of a corner tree between said plaintiff and the survey of said Chappel," was held insufficient without a distinct averment showing that the words were used in reference to some corner tree of a particular survey. Beswick v. Chappel, 8 B. Mon. (Ky.), 486.

9. The rule in verbal slander is that if the words spoken are susceptible of two meanings, one imputing a crime and the other innocence, the latter is not to be adopted and the other rejected as a matter of course. The sense in which the defendant used them must be left to the jury. Davis v. Johnston, 2 Bailey (S. C.), 592.

10. A ludicrous but innocent misprint in a communication ostentatiously puffing the writer, and describing a surgical operation by him, is not libelous. Sullings v. Shakespeare, 46 Mich., 408; 41 Am. Rep., 166; 9 N. W. Rep., 451.

11. And where a complaint for a libel in the "Medical Journal" charged the matter to be: "The late William H. Seward, when traveling around the world, and when at Yokahama, Japan, required the services of a dentist. Upon examination it was found that the inferior maxilla was comparatively useless for masticating purposes, there being a false joint at the seat of the original fracture; no union having taken place. This case will be remembered from the world-wide notoriety of the circumstances attending the injury, as well as the reports, which have been universally believed, that the patient was benefited by the treatment for the cure of his fracture." The plaintiff, by way of innuendo, further substantially alleged that he treated said Seward for fracture of the lower jaw, and that he publicly and privately reported that said Seward was benefited by said treatment, of which reporting the defendants knew at the time of the publication; that they charged and intended to charge him with falsely and fraudulently so reporting, and that said publication was false and defamatory and seriously injured the plaintiff in his reputation and practice as a dental surgeon. *Held*, that the language was not defamatory on its face; that no malice was presumable from the publication, and no right of action accrued to the plaintiff. Gunning v. Appleton, 58 How. (N. Y.) Pr., 471.

12. Plaintiff has no right to ask a witness what he considered the meaning of the words spoken except in the cases: 1st, where the words in the ordinary meaning do not import a slanderous charge, in which case, if they are susceptible of such a meaning and the plaintiff avers a fact from which it may be inferred that they were used for the purpose of making the charge, he may prove such an averment, and then the jury must decide whether the defendant used the words in the sense implied or not; and 2d, where a charge is made by using a cant phrase, or words having a local meaning, or a nickname, when advantage is taken of the fact, known to the persons spoken to, to convey a meaning which they understood by connecting the words (of themselves unmeaning) with such facts, in which case the plaintiff must make an averment to that effect, and may prove not only the truth of the averment, but also that the words were so understood by the person to whom they were addressed. Lasser v. Rouse, 18 Ired. (N. C.) Eq., 142.

§ 19. Digest of English Cases.—

(1) Libel.

1. A landlord sent to his tenants a notice: "Messrs. Henty & Sons hereby give notice that they will not receive in payment any checks drawn on any of the branches of the Capital and Counties Bank." Innuendo, "meaning thereby that the plaintiffs were not to be relied upon to meet the checks drawn upon them, and that their position was such that they were not to be trusted to cash the checks of their customers." *Held*, that the words in their natural and primary sense were not libelous; that the onus lay on the bank to show that they conveyed some secondary libelous meaning; and that as no evidence was offered of facts known to the tenants which could reasonably induce them to understand the words in the defamatory sense ascribed to them by the innuendo, there was no case to go to the jury, and the defendants were entitled to judgment. Capital, etc., Bank v. Henty

(C. A.), 5 C. P. D., 514; 49 L. J., C. P., 830; 28 W. R., 851; 43 L. T., 651; (H. L.) 7 App. Cas., 741; 52 L. J., Q. B., 232; 31 W. R., 157; 47 L. T., 662; 47 J. P., 214.

2. Defendant posted up several placards which ran thus: "W. Gee, Solicitor, Bishop's Stortford. To be sold by auction, if not previously disposed of by private contract, a debt of the above, amounting to £3,197, due upon partnership and mortgage transactions." There was no innuendo. Bramwell, B., instructed the jury that in his opinion this was no libel, "because it was not libelous to publish of another that he owed money." R. v. Coghlan, 4 F. & F., 316.

3. In an indictment for publishing a handbill, "B. Oakley, of Chillington, Game and Rabbit Destroyer, and his wife, the seller of the same in country and town," was quashed, there being no innuendo explaining the words or showing that they implied any offense or referred to the trade or calling of the prosecutor. Reg. v. Yates, 12 Cox, C. C., 233.

4. An action was brought for the following libel on the plaintiff in the way of his trade: "Society of Guardians for the Protection of Trade against Swindlers and Sharpers. I am directed to inform you that the persons using the firm of Goldstein & Co. are reported to this society as improper to be proposed to be balloted for as members thereof." After verdict for the plaintiff the court arrested judgment because there was no averment that it was the custom of the society to designate swindlers and sharpers by the term "improper persons to be members of this society." [There was an innuendo, "meaning thereby that the plaintiff was a swindler and a sharper," etc., which would be sufficient now; but before C. L. P. Act, 1852, section 61, an innuendo required a prefatory averment to support it.] The words in their natural and obvious meaning were held to be no libel. Goldstein v. Foss, 6 B. & C., 154; 1 M. & P., 402; 2 Y. & J., 146; 9 D. & R., 197; (in Ex. Ch.) 4 Bing., 489; 2 C. & P., 252; Capel and others v. Jones, 4 C. B., 259; 11 Jur., 396.

(2) SLANDER.

1. The plaintiff was a grocer, and had started what is known as a Christmas club, to which he endeavored to obtain one thousand subscribers. The defendant, a fellow-tradesman, said "His shop is in the market." Innuendo, "meaning thereby that the plaintiff was going away and was guilty of fraudulent conduct in his business, inasmuch as he had received subscriptions from members of the club, well knowing that they would be unable to obtain any benefit therefrom." *Held*, that the words not being in themselves defamatory, and there being no evidence to support the innuendo, the defendant was entitled to judgment. Ruel v. Tatnell, 43 L. T., 507; 29 W. R., 172.

2. The defendant said to an upholsterer: "You are a soldier; I saw you in your red coat doing duty; your word is not to be taken." These words are *prima facie* not actionable; but it was explained that there was then a common practice for tradesmen to sham enlisting so as to avoid being arrested for debt. The words were therefore held actionable as damaging the credit of a trader. Arne v. Johnson, 10 Mod., 111; Gostling v. Brooks, 2 F. & F., 76.

3. The defendant said of the plaintiff: "Foulger trapped three foxes in Ridler's wood." These words are *prima facie* not actionable; but the declaration averred that the plaintiff was a gamekeeper, that it is the duty of a gamekeeper not to kill foxes, that the plaintiff was employed expressly on the terms that he would not kill foxes, and that no one who killed foxes would be employed as a gamekeeper. *Held*, on demurrer, a good declaration; for the words so explained clearly imputed to the plaintiff misconduct in his office or occupation, and were therefore actionable without proof of special damage. Foulger v. Newcomb, L. R., 2 Ex., 327; 36 L. J., Ex., 169; 15 W. R., 1181; 16 L. T., 595.

4. Words complained of: "The old materials have been relaid by you in the asphalt work executed in the front of the Ordnance office, and I have seen the work done." Innuendo, "that the plaintiff had been guilty of dishonesty in his trade by laying down again the old asphalt which had before been used at the entrance of the Ordnance office, instead of new asphalt according to his contract;" and this innuendo was held not too large. Verdict for the plaintiff. Damages 40*s*. Baboneau v. Farrell, 15 C. B., 360; 24 L. J., C. P., 9; 3 C. L. R., 42; 1 Jur. (N. S.), 114.

5. To say that the plaintiff is "Man Friday" to another is not actionable, without an innuendo averring that the term imputed undue subserviency and self-humiliation. Forbes v. King, 2 L. J., Ex., 109; 1 Dowl., 672; Woodgate v. Ridout, 4 F. & F., 202.

4. "He is a healer of felons;" innuendo, a concealer of felons. Held actionable. Pridham v. Tucker, Yelv., 153; Hob., 126; Cart., 214.

5. "He has set his own premises on fire." These words are *prima facie* innocent, but may become actionable if it be averred that the house was insured, and that the words were intended to convey to the hearers that the plaintiff had purposely set fire to his own premises with intent to defraud the insurance office. There being no such averment, the court arrested judgment. Sweetapple v. Jesse, 5 B. & Ad., 27, 2 N. & M., 36.

6. "She secreted one and sixpence under the till, stating 'These are not times to be robbed.'" No innuendo. There being nothing to show that the 1*s*. 6*d*. was not her own money, the court arrested judgment; for, though special damage was alleged, it was not the necessary and natural consequence of the words as set out in the declaration. Kelly v. Partington, 5 B. & Ad., 645; 3 N. & M., 116.

7. The plaintiff, Mary Griffiths, was a butcher, and had a son, Matthew. Words spoken by defendant: "Matthew uses two balls to his mother's steelyard;" innuendo, "meaning that plaintiff by Matthew, her agent and servant, used improper and fraudulent weights in her said trade, and defrauded and cheated in her said trade." After verdict for the plaintiff, held that the words as stated and explained were actionable. Griffiths v. Lewis, 7 Q. B., 61; 8 Q. B., 841; 14 L. J., Q. B., 197; 15 L. J., Q. B., 249; 9 Jur., 370; 10 Jur., 711.

8. To say of a merchant, "He hath eaten a spider," Mr. Justice Wild said was "actionable with a proper averment what the meaning is." But the report does not vouchsafe any explanation of the meaning. Franklyn v. Butler, Pasch., 11 Car. I., cited in Annison v. Blofield, Carter, 214.

9. The words, "'Ware hawk there; mind what you are about," will,

with proper averments, amount to a charge of insolvency against the plaintiff, a trader; and so are actionable. Ornwood v. Barkes (vel Parkes), 4 Bing., 261; 12 Moore, 492.

§ 20. **Words Spoken Ironically.**— The plaintiff may also aver in his declaration that the words were spoken ironically; and it will then be a question for the jury *quo animo* the words were used.[1]

§ 21. **Illustrations — Digest of American Cases.—**

1. Words which are doubtful or even innocent in themselves, if proved to have a criminal signification according to the common understanding of them when used, will support an action of slander. Cooper v. Perry, Dudley (Ga.), 247.

2. "If, therefore, obscure and ambiguous language is used, or language which is figurative or ironical, courts and juries will understand it according to its true meaning and import; and the sense in which it was intended is to be gathered from the context and from all the facts and circumstances under which it was used." Shaw, C. J., Commonwealth v. Kneeland, 20 Pick., 206; Vanderlip v. Roe, 23 Pa. St. (11 Harris), 82.

§ 22. **Digest of English Cases.—**

1. Ironical praise may be a libel; *e. g.*, calling an attorney "an honest lawyer." Boydell v. Jones, 4 M. & W., 446; 1 H. & H., 408; 7 Dowl., 210.

2. It is actionable to say ironically: "*You* will not play the Jew or the hypocrite." R. v. Garret (Sir Baptist Hicks' Case), Hob., 215; Popham, 139.

3. Ironical advice to the lord keeper by a country parson, "to be as wise as Lord Somerset, to manage as well as Lord Haversham, to love the church as well as the Bishop of Salisbury," etc., is actionable. R. v. Dr. Brown, 11 Mod., 86; Holt, 425.

§ 23. **Fifth, Words Obviously Innocent and Incapable of a Defamatory Meaning.**— Where the words can bear but one meaning, and that is obviously not defamatory, no innuendo or other allegation in the pleadings can make them so, and no action lies. No parol evidence is admissible to explain the meaning of ordinary English words, in the absence of special circumstances showing that the words do not bear their usual signification. "It is not right to say that a judge is to affect not to know what everybody else knows — the ordinary use of the English language."[2] The fact that actual damage has in fact followed from the publication is immaterial in considering what is the true construction of the libel.[3]

[1] Com. v. Kneeland, 20 Pick. (Mass.), 206; Vanderlip v. Roe, 23 Pa. St., 82.

[2] Brett, J., 1 C. P. D., 572.

[3] Lord Coleridge, C. J., 2 C. P. D., 150.

§ 24. Illustrations — Digest of American Cases.—

(1) LIBEL.

1. It is no libel upon a dealer in coal in L., who had advertised genuine Franklin coal for sale, to publish the following advertisement: "Caution. The subscribers, the only shippers of the true and original Franklin coal, notice that other coal dealers in L. than our agent, J. S., advertise Franklin coal. We take this method of cautioning the public against buying of other parties than J. S. if they hope to get the genuine article, as we have neither sold nor shipped any Franklin coal to any party in L. except our agent, J. S." Boynton v. Remington et al., 85 Mass., 397.

2. The plaintiffs claimed to be the owners of a valuable patent-right and were engaged in the manufacture of the patented articles; and that the defendants had printed, published and circulated a circular or notice claiming to be the owners of various letters-patent securing such right and exclusively authorized to make and sell such patented articles, and threatening prosecutions for infringements of such rights, in consequence whereof the plaintiffs were injured in their trade, etc. In answer the defendants set up their letters-patent and alleged that plaintiffs' trade was an infringement upon the rights conferred. The court found the issuing of the circular and that it was injurious to the plaintiffs' business, but that it was issued in good faith, with the sole purpose of advising the public of what they considered their rights. Hovey v. Rubber T. P. Co., 57 N. Y., 119.

3. To publish of a saloon-keeper: "To get rid of a just claim in court he set up as a defense the existing prohibitory law. We feel it our duty to make such conduct publicly known in order to caution beer brewers and liquor dealers," was held not to be libelous. Horner v. Englehardt, 117 Mass., 539.

4. It is not libelous to allege of a husband in charge of a public office that his wife was given work in the office and paid for it in her maiden name, unless it is rendered so by some extrinsic matter properly alleged. It is not unlawful for a woman to use her maiden name after marriage, or, indeed, for persons to do business by any names they may choose to assume. Bell v. Sun Printing Co., 42 N. Y. Superior Ct., 567; 3 Abb. (N. Y.) N. Cas., 157.

5. To publish of one that he has acted in business matters under a contract or obligation entered into by an assumed name is not libelous. Bell v. Sun Printing Co., 42 N. Y. Superior Ct., 567; 3 Abb. (N. Y.) N. Cas., 157.

(2) SLANDER.

1. To charge a female with self-pollution is not actionable in itself, as the charge does not amount to the imputation of an indictable offense. Anonymous, 60 N. Y., 262.

2. To say of one he is a man of bad character in the neighborhood in which he lives, as regards truth and veracity, and that the speaker would not believe him under oath, is not actionable in itself. Studdord v. Trucks, 31 Ark., 726.

§ 25. Digest of English Cases.—

(1) LIBEL.

The plaintiff was a certificated art master, and had been master at the Walsall Science and Art Institute. His engagement there ceased in June,

1874, and he then started and became master of another school, which was called "The Walsall Government School of Art," and was opened in August. In September the following advertisement appeared in the Walsall "Observer," signed by the defendants as chairman, treasurer and secretary of the institute respectively: "Walsall Science and Art Institute. The public are informed that Mr. Mulligan's connection with the institute has ceased, and that he is not authorized to receive subscriptions on its behalf." The declaration set out this advertisement with an innuendo — "meaning thereby that the plaintiff falsely assumed and pretended to be authorized to receive subscriptions on behalf of said institute." At the trial Quain, J., directed a nonsuit on the ground that the advertisement was not capable of the defamatory meaning attributed by the innuendo. *Held*, that the nonsuit was right; that the advertisement was not capable of any defamatory meaning. Mulligan v. Cole and others, L. R., 10 Q. B., 549; 44 L. J., Q. B., 153; 33 L. T., 12; Brent v. Spratt, "Times" for February 3, 1882; Raven v. Stevens & Sons, 3 Times L. R., 67.

(2) SLANDER.

1. Words complained of: "We are requested to state that the honorary secretary of the Tichborne Defense Fund is not and never was a captain in the royal artillery, as he has been erroneously described." Innuendo, that the plaintiff was an impostor, and had falsely and fraudulently represented himself to be a captain in the royal artillery. Bovill, C. J., held that the words were not reasonably capable of the defamatory meaning ascribed to them by the innuendo, and nonsuited the plaintiff. *Held*, that the nonsuit was right. Hunt v. Goodlake, 43 L. J., C. P., 54; 29 L. T., 472.

2. "He was the ringleader of the nine-hours' system." "He has ruined the town by bringing about the nine-hours' system," etc. The declaration contained no innuendo, and no sufficient averment that the words were spoken of the plaintiff in the way of his trade, and on demurrer was held bad. Miller v. David, L. R., 9 C. P., 118; 43 L. J., C. P., 84; 22 W. R., 332; 30 L. T., 58.

CHAPTER XV.

INTERPRETATION OF DEFAMATORY LANGUAGE.

§ 1. **The General Rule.**— Where the defamatory matter is plainly unambiguous the question of its meaning and character is for the court; but where its meaning is ambiguous then the question is for the jury.[1]

§ 2. **A General Rule of Construction.**— *Shaw, C. J.:* It is a general rule of construction in actions of slander, indictments for libel and other analogous cases, where an offense can be committed by the utterance of language, orally or in writing, that the language shall be construed and understood in the sense in which the writer or speaker intended it. If, therefore, obscure and ambiguous language is used, or language which is figurative or ironical, courts and juries will understand it according to its true meaning and import, and the sense in which it was intended to be gathered from the context, and from all the facts and circumstances under which it was used.[2]

§ 3. **The Province of the Court.**— If there is any doubt of the meaning of a publication claimed to be libelous, so that extrinsic evidence is needed to determine its character as to its being actionable or not actionable, it is then a question for the jury, under proper instruction from the court, to find its true character and significance. If the article standing alone is plainly libelous, or manifestly wanting in any defamatory meaning, it is the duty of the court to declare either way and instruct the jury accordingly.[3]

§ 4. **A Rule of Construction — Duty of the Court — Province of the Jury.**— If the words are not reasonably susceptible of any defamatory meaning, the judge at the trial will

[1] Gabe v. McGinnis, 68 Ind., 538; Over v. Schiffling, 102 Ind., 191; Donaghue v. Gaffy, 53 Conn., 43, 1 Atl. Rep., 552; Mosier v. Stoll, 119 Ind., 244, 20 N. E. Rep., 752.

[2] Com. v. Kneeland, 20 Pick. (37 Mass.), 216.

[3] Hunt v. Bennett, 19 N. Y., 173; Haight v. Cornell, 15 Conn., 74; Levi v. Milne, 4 Bing., 195; Wagaman v. Meyers, 17 Md., 183; Pittock v. O'Niel, 63 Penn., 253; Thompson v. Grimes, 5 Ind., 385; Mix v. Woodward, 12 Conn., 262; Haire v. Wilson, 9 B. & C., 643; Boureseau v. Detroit Eve. News, 63 Mich., 425, 30 N. W. Rep., 376.

direct a nonsuit. But if the words are reasonably susceptible of two constructions, the one an innocent, the other a libelous construction, then it is a question for the jury which construction is the proper one;[1] and if the judge at the trial nonsuits the plaintiff it will be error.[2] The whole libel should be submitted to the jury. A word at the end may alter the whole meaning.[3] So if in one part appears something to the plaintiff's discredit, in another something to his credit, the "bane" and the "antidote" should be taken together. The law does not dwell on isolated passages, but judges of the publication as a whole.[4]

§ 5. **The Rule Stated by McAllister, P. J.**— "Where the words of an alleged libelous publication are not reasonably susceptible of any defamatory meaning the court is justified in sustaining a demurrer to the declaration. But if they are reasonably susceptible of two constructions, the one innocent and the other libelous, then it is a question for the jury which construction is the proper one. In such a case if the defendant demurs to the declaration his demurrer will be overruled." Or, in other words, the rule may be stated thus: It is for the court to decide whether a publication is capable of the meaning ascribed to it by an innuendo, and for the jury to determine whether such meaning is truly ascribed.[5]

§ 6. **Illustrations — Digest of American Cases.**—

1. In slander words are to be understood by courts and juries according to their plain and natural import — according to the ideas they are calculated to convey to those to whom they are addressed; and where doubts arise the jury are to decide whether the words are used maliciously and with a view to defame — this being a question of fact to be determined from all the concomitant circumstances. The court is to determine whether such words taken in the malicious sense imputed to them can alone, or by the aid of the circumstances stated upon the record, form the legal basis of an action. Demarest v. Haring, 6 Cow. (N. Y.), 76.

[1] Jenner and another v. A'Beckett, L. R., 7 Q. B., 11; 41 L. J., Q. B., 14; 20 W. R., 181; 25 L. T., 464.

[2] Hart and another v. Wall, 2 C. P. D., 146; 46 L. J., C. P., 227; 25 W. R., 373.

[3] Hunt v. Algar, 6 C. & P., 245.

[4] Lord Ellenborough, C. J., in R. v. Lambert and Perry, 2 Camp., 398; 31 How. St. Tr., 340; Lord Kenyon, C. J., in R. v. Reeves, Peake, Add. Cas., 84; Fitzgerald, J., in R. v. Sullivan, 11 Cox, C. C., 58.

[5] Hays v. Mather, 15 Brad. (Ill.), 30; Odgers on L. & S., 26; Blagg v. Sturt, 59 E. C. L., 899; Jenner v. A'Beckett, L. R., 7 Q. B., 11; Mulligan v. Cole et al., L. R., 10 Q. B., 549; Thompson v. Grimes, 5 Ind., 385.

2. Where one said of another, "That damned scoundrel knows all about it from beginning to end," and the plaintiff avers that the defendant in using this language meant to charge the plaintiff with having committed arson, it was held error to order a nonsuit. The question in what sense the words were spoken should have been submitted to a jury. Reeves v. Bowden, 97 N. C., 29.

§ 7. **Digest of English Cases.**—

1. The report of a trial for libel contained some strong observations against the plaintiff, which were indeed a necessary part of the report, as the defendant had justified. At the end it was stated that the jury found a verdict for the plaintiff for £30. *Held*, that the publication, taken as a whole, was not injurious to the plaintiff. Chalmers v. Payne, 2 C., M. & R., 156; 5 Tyrw., 766; 1 Gale, 69.

§ 8. **Defamation Connected with Extrinsic Matters—Proof.**—It is a settled rule of law that whenever a specific meaning is given to the terms of a libel or oral slander by connecting it with previous matter, the whole must be proved as being essential to the nature and identity of the charge. And where the extrinsic matter is required to be proved with its connection with the words spoken as a whole, in order to support the cause of action it is indispensable that such matter should be submitted to and found by the jury to exist as al leged, in order to find a verdict for the plaintiff.[1]

§ 9. **Defamatory Words Explained by Reference to Particular Transactions.**—Defamatory words which are apparently actionable, but which are susceptible of an explanation by reference to some particular transaction to which they were known by those in whose presence they were spoken to refer, are to be construed accordingly and with reference to such transaction. But the burden of proof is always on the defendant to show that they were so known to refer by the listeners.[2]

§ 10. **Illustrations—American Cases.**—

1. **A New York Case:** *Van Rensselaer v. Dole*, 1 Johns. Cas., 279 (1800). The declaration charged the defendant with speaking the following words: "John Keating is as damned a rascal as ever lived, and all who joined his party and procession on the fourth of July [meaning the said plaintiff, John Van Rensselaer, and the party and procession in which the said John

[1] Heller v. Howard, 11 Brad. (Ill.), 559; 2 Starkie on Ev., part 1, 629; 3 Selw. N. P.; 2 Greenleaf, Ev., § 413; Strader v. Snyder, 67 Ill., 404; Young v. Gilbert, 93 Ill., 595.

[2] Van Rensselaer v. Dole, 1 Johnson's Cases (N. Y.), 279; Hays v. Ball, 72 N. Y., 418; Thompson v. Bernard, 1 Camp., 48; Christie v. Howell, Peake, 4; Hankinson v. Bilby, 2 C. & K., 440; Quin v. O'Gara, 2 E. D. S. (N Y.), 338; Norton v. Ladd, 5 N. H., 209; Williams v. Cawley, 18 Ala., 206; Young v. Gilbert, 93 Ill., 595.

Keating acted as captain on the said fourth day of July], are a set of black-hearted highwaymen, robbers and murderers." At the trial the words were proved to have been spoken as alleged. On the part of the defendant it appeared that on the day previous to the speaking of the words there had been a public procession to a church in Lansingsburgh, where the parties resided, and that Keating commanded an artillery company which formed a part of the procession, attended with music. That a Mr. Bird claimed one of the instruments used, and went to the church to demand it. It was not given up and an affray ensued, in which Mr. Bird was dangerously wounded. It also appeared that the conversation in which the words were spoken was understood by those who heard it to relate to the transactions of the preceding day, and that the terms "highwaymen, robbers and murderers" were used in reference to the treatment of Mr. Bird in withholding the instrument and in wounding him. The jury having found a verdict for the plaintiff, on appeal in the supreme court it was held that as the words spoken by the defendant were clearly understood to apply to the transactions of the preceding day, and as these were known not to amount to the charge which the words would otherwise import, the verdict was set aside.

2. An Illinois Case: *Ayers v. Grider*, 15 Ill., 27 (1853).

Grider was a town constable in M., and as such had a few days before arrested one Ayers in the public square for a breach of the town ordinances and took away his knife and money, which he afterwards gave to one Pulley. Grider was in Pulley's store when Ayers came in and said to him: "Go and take up those men in the public square!" Grider replied he would not. Ayers rejoined, "You shall, for you took me up and stole my knife and money." Grider said, "I handed Pulley your knife," etc. The charge of stealing was understood to relate to the arrest. Grider brought a suit for speaking the words. On the trial the court refused to instruct the jury "that if the words proved to have been spoken by the defendant of the plaintiff were spoken about and in relation to a known act, and that act in law is not a felony, which is known to the by-standers, they will find the defendant not guilty." On appeal, Judge Scates held that the instruction was clearly sustained by decisions laying down the rule contained in it, and should have been given by the court, as the proofs clearly presented a case for its application. Citing Thompson v. Bernard, 1 Camp. R., 48; Brite v. Gill, 1 & 2 Monroe R., 65; Gill v. Bright, 6 Monroe, 130; Van Rensselaer v. Dole, 1 Johnson's Cases (N. Y.), 279; Edie v. Brooks, 2 Whart. Dig., 598, § 36; Christie v. Cowell. Peake's N. P. C., 4; Swag v. Gee, 2 Coke's R., 300; Jackson v. Adams, 29 Eng. C. L. R., 371.

3. A New York Case: *Phillips v. Barber*, 7 Wend., 439 (1830).

This was an action for slander tried at the Herkimer circuit. The words spoken in a public meeting were, "You have stolen my wood." All the witnesses examined on the trial testified that they understood the charge to relate to a transaction not felonious. It appeared that the plaintiff had purchased of one Rathbone a quantity of wood, cut on the land of the defendant, who had a pile of wood near the wood belonging to Rathbone; the plaintiff, supposing the wood belonging to defendant was included in the quantity purchased by him of Rathbone, took a part of it, but discovering his error he admitted he had taken it under a mistake, and made no

further claim to the wood belonging to the plaintiff. After which admission, known by the defendant to have been made, the defendant made the charge complained of in the declaration. The witnesses testified that they understood the charge to relate to the above transaction; the counsel for the defendant insisted that the plaintiff was not entitled to sustain his action, the words being spoken in reference to a transaction which did not amount to larceny. But the judge ruled that the words being actionable in themselves, the defendant was bound to show that they were spoken in reference to property which could not be the subject-matter of larceny, or that the transaction alluded to was so explained at the time of the speaking of the words; that the hearers must have known that the charge did not amount to larceny; and that unless the defendant had brought himself within those exceptions the plaintiff was entitled to a verdict. The defendant excepted. The jury found for the plaintiff, and the defendant moved to set aside the verdict.

By the Court, Nelson, J.: We perceive no objection to the charge of the judge or any essential difference in principle between the law as laid down by him and that which was insisted on by the counsel for the defendant. The words were actionable in themselves, and would only be deprived of that character by an explanation by the defendant at the time showing to the hearers that he did not intend a charge of larceny. It of course is not necessary that the explanation should be made by the defendant at the time of speaking the words, if all the hearers are in possession of the facts alluded to when the words were spoken, because this would be sacrificing to the terms of the rule its substance and meaning. It is enough that the hearers understood at the time to what the defendant referred, and that such reference gave to the words an innocent meaning. The case states that the witnesses who proved the charge all stated that it referred to the taking of the wood of the defendant by the plaintiff (which, as detailed in the case, was an innocent transaction), and that they so understood the charge at the time it was made. Whether the explanation as to the taking of the wood was made at the time of the charge of the defendant, or whether the witnesses understood the transaction from some other source and at some other time, does not appear. If they did not obtain the explanation at the time, but understood it in some other way, though they were in possession of facts which gave the words an innocent meaning, others present might not be; and it is fairly to be inferred from this case that others were present. It appears that after the defendant knew that the plaintiff had taken the wood through mistake, believing he had bought it, he persisted in making the charge of stealing and did make the one complained of, clearly intending to deny the explanation given, and to characterize it as a felony and in relation to a transaction which was a subject of felony. The case, we think, was fairly submitted to the jury, and there is no cause for disturbing the verdict.

§ 11. Digest of American Cases.—

1. In an action of slander the words, "You are a thief;" "You are no better than a thief;" "You are a confidence man," were proved to have been spoken with reference to the plaintiff's conduct in writing a letter to a third person to know if the latter had been paid a sum of money which the de-

fendant claimed to have been paid on behalf of the plaintiff, from whom he had demanded its repayment. *Held*, that the words, though actionable *per se*, yet if spoken in relation to a subject as to which no larceny or felony was capable of being committed, or was committed, were actionable. Accordingly, evidence was admissible to show that they were not intended to impute to the plaintiff a felony or other infamous crime. Fawsett v. Clark, 48 Md., 494.

2. The rule that one will not be held liable for a slander, if the poisonous words are accompanied with an antidote, was applied where a lessor accused his lessee of stealing corn, at the same time explaining to his hearers that the crop was security for the payment of the rent, and showing that the speaker honestly believed that a clandestine appropriation thereof by the lessee before a certain date was larceny and not merely a breach of trust. Hall v. Adkins, 59 Mo., 144.

3. The complaint charged the defendant with stating that the plaintiff adulterated sugar, that he cheated the government and swore he did not do so. It was held that these three charges, neither singly nor collectively, are actionable in themselves, but may become so by reason of the surrounding circumstances, to be properly pleaded and proved; and that these surrounding circumstances not being set forth, the meaning of the words cannot be enlarged by an innuendo. Havemeyer v. Fuller, 60 How. (N. Y.) Pr., 316.

4. The charging a person with being a thief, where from the circumstances the words must have been understood to refer to the person's having obtained money by fraud simply, is not actionable as imputing larceny. Brown v. Meyers, 40 Ohio St., 99.

5. In an action for slanderous words spoken of plaintiff, it appearing that during a heated altercation defendant called plaintiff a "thieving puppy and villain," *held*, that it was properly shown that plaintiff immediately committed a severe assault upon defendant, this being part of the *res gestæ*, and that defendant being sixty years old and the father-in-law of plaintiff, who was thirty-five, a verdict for defendant not only would not be disturbed, but was eminently just. Young v. Bridges, 34 La. Ann., 333.

§ 12. Digest of English Cases.—

1. Where the defendant said, "Thompson is a damned thief, and so was his father before him, and I can prove it;" but added, "Thompson received the earnings of the ship and ought to pay the wages," Lord Ellenborough held that the latter words qualified the former, and showed no felony was imputed, the person to whom the words were spoken being the master of the ship and acquainted with all the circumstances referred to. Thompson v. Bernard, 1 Camp., 48; Bittridge's Case, 4 Rep., 19; Cristie v. Cowell, Peake, 4; Day v. Robinson, 1 A. & E., 554; 4 N. & M., 884.

2. Defendant stated publicly that plaintiff had been detected taking dead bodies out of the church-yard and fined, etc. He meant it as a joke; but there was no evidence that the by-standers so understood it. The court set aside a verdict for the defendant. Per Joy, C. B.: "The principle is clear that a person shall not be allowed to murder another's reputation in jest. But if the words be so spoken that it is obvious to every by-stander

that only a jest is meant no injury is done, and consequently no action would lie." Donaghes v. Hayes, Hayes (Irish Exch.), 265.

8. Where words are used which clearly import a criminal charge (as "You thief," or "You traitor"), it is still open to the defendant to show if he can that he used them merely as vague terms of general abuse, and that the by-standers must have understood him as meaning nothing more than "You rascal" or "You scoundrel." When such words occur in a string of non-actionable epithets or in a torrent of vulgar abuse the jury may reasonably infer that no felony was seriously imputed. If however, the jury put the harsher constructions on defendant's language no new trial will be granted; for it is a question entirely for them. Minors v. Leeford, Cro. Jac., 114; Penfold v. Westcote, 2 Bos. & P. N. R., 335.

4. Where the defendant said to the plaintiff in the presence of others, "You are a thief, a rogue, and a swindler," it was held that the defendant could not call a witness to explain the particular transaction which he had in his mind at the time, since he did not in any way expressly refer to it in the presence of his hearers. Martin v. Loei, 2 F. & F., 654; Read v. Ambridge, 6 C. & P., 308; Hankinson v. Bilby, 16 M. & W., 442; 2 C. & K., 440.

5. Words complained of: "You stole my apples." The defendant cannot be allowed to state that he only meant to say, "You have tortiously removed my apples under an unfounded claim of right." The by-standers could not possibly have understood from the word used that a civil trespass only was imputed. Devrill v. Hulbert (Jan. 25, 1878); Odgers on L. & S., 108.

6. Words complained of: "Thou hast killed my wife." Defendant's wife was still alive, and the by-standers knew it. *Held*, that plaintiff was not put "in any jeopardy, and so the words vain, and no scandal or damage to the plaintiff." Snag v. Gee, 4 Rep., 16, as explained by Parke, B., in Heming v. Power, 10 M. & W., 569.

7. But where the words complained of are: "Thou art a thief; for thou tookest my beasts by reason of an execution, and I will hang thee," no action lies, for it is clear that the whole sentence taken together imports only a charge of trespass. Wilk's Case, 1 Roll. Abr., 51; Smith v. Ward, Cro. Jac., 674; Sibley v. Tomlins, 4 Tyrw., 90.

§ 13. **Words Used in Common Parlance.**— Where the slanderous words contain a word or phrase in a foreign language which has in common parlance, among the people who speak that language, a meaning somewhat different from that given by lexicographers, and is commonly understood by them in common speech, it is competent to prove that fact. It is but an application of the general rule that words are to be construed in the sense in which the hearers would naturally understand them.[1]

[1] Watcher v. Quenzer, 29 N. Y., 547; Blakeman v. Blakeman, 31 Minn., 396; 18 N. W. Rep., 103.

§ 14. **Illustrations — American Cases.—**

1. **A Minnesota Case:** *Blakeman v. Blakeman*, 31 Minn., 396.

The words constituting the cause of action were spoken in the German language to a person named Kock, and as charged in the complaint were: "Mein sohn hat se nicht verfuehrt; das ist den da Weber," which being translated into the English language is alleged to signify, "My son did not get her pregnant; it is from that one [meaning G. R.] there." Kock did not speak English. As a witness she was examined through an interpreter. As translated her evidence was that she had a conversation with the defendant soon after his son and his wife, the plaintiff, had parted (it appeared from the evidence they had separated through some family difficulty), in which the defendant said he was having trouble with his children, and that his son had not seduced (verfuehrt) her; that it was opposite, pointing to the side of the street where G. R. lived. Evidence was also offered against the defendant's objection and exception showing that the word "verfuehrt," used by the witness, and translated by the interpreter "seduced," while primarily and etymologically meaning to mislead or lead estray, is used in common parlance among Germans, and is so understood by them, in the sense of "getting in the family-way by another man." The witness Kock, to whom the words were addressed, also testified, under objection and exception, that she thought the defendant meant G. R.; that that was what she understood at the time, and that she so understood because he lived across the street where defendant pointed. On appeal it was held that as the word "verfuehrt" is a word in a foreign language it was competent to show that it had among the people who spoke that language a meaning somewhat different from that given to it by the lexicographers, and to show what that meaning was. And as the slanderous charge was not made in direct terms, but by equivocal expressions, insinuations and gestures, it was competent for witnesses who heard and saw them to state what they understood by them and to whom they understood them to be applied.

§ 15. **Digest of American Cases.—**

1. When it is desired to get at the peculiar or extraordinary meaning of language alleged to be libelous, the witness called to show a usage that gives a peculiar significance to the language used should first be asked whether there be such meaning expressed by the words. If yes, he may then state the means and extent of his knowledge thereupon, and if his knowledge appears adequate, he may be asked, "What did you understand by the words employed?" Newbold v. J. M. Bradstreet & Son, 57 Md., 38.

§ 16. **Technical Terms and Cant Phrases — Shaw, C. J.—** The rule is a sound one that the law cannot shut its eyes to what all the rest of the world can see; and let the slanderer disguise his language and wrap up his meaning in ambiguous givings out as he will, it shall not avail him, because courts will understand language, in whatever form it is used, as all mankind understands it. This is a correct rule and must be regarded as a most sound and salutary one, to be acted upon

by the court, and to be fully explained and enforced upon the trial of the facts before the jury. So language may be used ambiguously, or ironically, or technically, or conventionally. What are called cant terms and flash language are of the latter sort, where, among a particular class of persons, by usage or convention, words are used in a particular sense. But whenever this is the fact, it is in consequence of the existence of some usage or agreement, of some report in circulation of the time, place or manner in which the conversation was held; in short, of some fact capable of being averred in a traversable form, so that it may be put in issue and proved or disproved.[1]

§ 17. **Illustrations — Digest of American Cases.—**

1. In an action for libel the court may explain to the jury such expressions, occurring in the libelous publication, as "crim. con." and "*in flagrante delicto*," and no colloquium or innuendo is necessary to point out their meaning. Gibson v. Cincinnati Enquirer, 2 Flip. C. Ct., 121.

2. The defendant, the editor of a newspaper, owed plaintiff money under an award; and wrote and published in his newspaper these words: "The money will be forthcoming on the last day allowed by the award, but we are not disposed to allow him to put it into Wall street for shaving purposes before that period." "Shaving" in New York means (1) discounting bills or notes; (2) fleecing men of their goods or money by overreaching, extortion and oppression. The declaration contained no innuendo alleging that the words were used in the second defamatory sense. *Held* no libel, on demurrer. Stone v. Cooper, 2 Denio (N. Y.), 293.

3. Where an action for libel is based on the use of a certain word in a publication, and it is clear from a consideration of the whole publication that such word was used in its popular and ordinary meaning and not in a technical sense, the court should so decide, and no evidence should be permitted to go to the jury. Thus, in an action against the author of a publication characterizing a physician's treatment of a certain case as "malpractice," an instruction that the publication was actionable, if it be clear that the word "malpractice" was not used in a technical sense, was held to be erroneous. Rodgers v. Kline, 56 Miss., 808.

§ 18. **Digest of English Cases.—**

1. Libel complained of: "There are very few persons in society who do not look upon the whole affair to be got up for a specific occasion, and consider that it has been neither more nor less than a 'plant.' We have heard it roundly asserted that a clerk of Mr. Hamer, the notorious lawyer, was placed under a sofa at his lordship's residence when the Earl of Cardigan called there." The indictment stated "that the said Thomas Holt used the words 'a plant' for the purpose of expressing and meaning, and the said words used by him were by divers, to wit, all the persons to whom the said libel was published, understood as expressing and meaning, an artful and

[1] Carter v. Andrews, 33 Mass., 1.

wicked plan and contrivance made and entered into by the said William Paget, Esq., and other persons, by false and unfounded testimony and a wrongful and wicked perversion of facts to make out, support and establish the said charge, and by concert and arrangement falsely to fix upon the said earl the commission of the said trespass and assault for the purpose of obtaining divers of the moneys of the said earl to the use of the said William Paget, Esq.," and concluded with the following innuendo: "Thereby then and there meaning that the said William Paget, Esq., had with other persons artfully and wickedly planned and contrived to make a false and unfounded charge against the said earl of his having been guilty of the said trespass and assault upon the said wife of the said William Paget, Esq., and to make out, support and establish such charge by false and unfounded testimony and a wicked and wrongful perversion of facts for the purpose of extorting and obtaining from the said earl divers of his moneys to the use of the said William Paget, Esq." A reporter for one of the London newspapers was called to define "a plant," and his evidence justified the innuendo. The recorder left it with the jury whether they were satisfied that the word "plant" bore the meaning attributed to it by the prosecution; if so, the passage was libelous. Verdict, guilty. R. v. Holt, 8 J. P., 212.

2. Words complained of: "You are a bunter." No innuendo. Willes, J., nonsuited the plaintiff on the ground that the word had no meaning at all, and could not therefore be defamatory in ordinary acceptation; and he refused to allow the plaintiff to be asked what the word "bunter" meant. *Aliter*, had there been an innuendo averring a defamatory sense to the word "bunter." Rawlings et ux. v. Norbury, 1 F. & F., 341.

3. Words spoken to an attorney: "Thou art a daffadowndilly." Innuendo, meaning thereby that he is an "ambidexter," *i. e.*, one who takes a fee from both sides, and betrays the secrets of his client. *Held*, that an action lay. Anon. (Exch.), 1 Roll. Abr., 55; Annison v. Blofield, Carter, 214.

4. Pollock, C. B., thought the word "truckmaster" required no innuendo to explain its meaning, as it "is composed of two English words intelligible to everybody." Homer v. Taunton, 5 H. & N., 661; 29 L. J., Ex., 318; 8 W. R., 499; 2 L. T., 512. But so are "blackleg" and "blacksheep," and these words do require an innuendo. M'Gregor v. Gregory, 11 M. & W., 287; 12 L. J., Ex., 204; 2 Dowl. (N. S.), 769; O'Brien v. Clement, 16 M. & W., 166; 16 L. J., Ex., 77; Barnett v. Allen, 1 F. & F., 125; 27 L. J., Ex., 412; 4 Jur. (N. S.), 488; 3 H. & N., 376; Odgers on L. & S., 111.

5. It is actionable to say, "Thou art a clipper, and thy neck shall pay for it." "For though 'clipper' is general, and may be intended a clipper of wool, cloth, etc., yet the following words show it to be intended of clipping for which he shall be hanged." Naben v. Miecock, Skin., 183.

6. It is actionable to say of a stock-jobber that "He is a lame duck;" innuendo, "meaning thereby that the plaintiff had not fulfilled his contracts in respect of the said stocks and funds" (stock-jobbing being now legalized by 23 and 24 Vict., ch. 28). Morris and Langlade, 2 Bos. & Pul., 284.

7. It is libel on L. to write and publish of him that he is one of "a gang who live by card-sharping," there being an innuendo, "meaning thereby

that L. is a swindler and a cheat, and lives by cheating or playing at cards, and that he and B. and G. had, previous to the libel, conspired together in cheating divers persons in playing at cards." Reg. pros. Lambri v. Labouchere, 14 Cox, C. C., 419.

8. The defendant charged the plaintiff, a pawnbroker and silversmith, with "duffing;" an innuendo, "meaning thereby the dishonorable practice of furbishing up damaged goods and pledging them with other pawnbrokers as new," was held good. Hickinbotham v. Leach, 10 N. & W., 361; 2 Dowl. (N. S.), 270.

9. The words, "He is mainsworn," were spoken in one of the northern counties, where "mainsworn" is equivalent to "perjured" (forsworn with his hand on the book). *Held* actionable. Slater v. Franks, Hob., 126. And see Coles v. Haviland, Cro. Eliz., 250; Hob., 12.

§ 19. **Particular Expressions Spoken Ironically or Otherwise — Shaw, C. J.**— In illustrating the rule that courts will understand language as the rest of the world understands it, it may be proper to add that when particular expressions do assume a defamatory and slanderous character — that is, when spoken ironically or otherwise — they do impute a crime, in consequence of their connection with other words used at the same time; and if all the words thus taken together do impute such crime the court will so understand it, and will, as a conclusion of law, hold them to be actionable in themselves without averments or innuendoes, although none of the words separately used are descriptive of such crime, either in a legal or popular definition. But to enable the court to come to this conclusion, all the language which was used at the time and from which such conclusion results must be set out, and if traversed must be proved.[1]

§ 20. **Illustrations — Digest of American Cases.**—

1. In an action of libel for ambiguous or ironical words, evidence is competent to show the application and interpretation put on the words by the plaintiff's acquaintances; and evidence of subsequent hostile publications and oral declarations is admissible to show the animus. Knapp v. Fuller, 55 Vt., 311; 45 Am. Rep., 618.

§ 21. **Digest of English Cases.**—

1. Ironical advice to the lord keeper by a country parson, "to be as wise as Lord Somerset, to manage as well as Lord Haversham, to love the church as well as the Bishop of Salisbury," etc., is actionable. R. v. Dr. Brown, 11 Mod., 86; Holt, 425.

2. Ironical praise may be a libel; thus, calling an attorney "an honest lawyer." Boydell v. Jones, 4 M. & W., 446; 1 H. & H., 408; 7 Dowl., 210.

[1] Carter v. Andrews, 33 Mass., 1; Woolnoth v. Meadows, 5 East, 463; Roberts v. Camden, 9 East, 93.

8. It is actionable to say ironically, "You will not play the Jew or the hypocrite." R. v. Garret (Sir Baptist Hicks' Case), Hob., 215; Popham, 139.

§ 22. **Intent Immaterial.**— In actions for defamation it is immaterial what meaning the speaker intended to convey. He may have spoken without any intention of injuring another's reputation, but if he has in fact done so he must compensate the party. He may have meant one thing and said another; if so he is answerable for so inadequately expressing his meaning. If a man in jest conveys a serious imputation he jests at his peril.[1] Or he may have used ambiguous language which to his mind was harmless, but to which the by-standers attributed a most injurious meaning; if so he is liable for the injudicious phrase he selected. What was passing in his own mind is immaterial save in so far as his hearers could perceive it at the time. Words cannot be construed according to the secret intent of the speaker.[2] "The slander and the damage consist in the apprehension of the hearers."[3]

§ 23. **Illustrations — Digest of American Cases.—**

1. In an action by M., a clerk in the store of S., against S. and wife, for her alleged words to O., that if she "had not seen the shoes on O.'s feet S. would have never received a cent for them," meaning that M. had embezzled the shoes, it was held that she could not be permitted to testify that she only meant that M. had forgotten to charge the shoes. Sternan v. Marx, 58 Ala., 608.

2. In an action for slander the words proved were, "when he was highway commissioner he stole one thousand dollars from the town." The defendant attempted to show that he referred only to the fact of the plaintiff's failure to produce vouchers for that sum in accounting. None of the plaintiff's witnesses testified that the plaintiff explained the words, and only one that he understood them to relate to money which came to the plaintiff's hands as commissioner. It was held that the ordinary import of the words imputed larceny, and that a nonsuit was properly refused. It was for the jury to determine in what sense the words were uttered. Hayes v. Ball, 72 N. Y., 418.

§ 24. **The Former Rule in England.**— Formerly, however, the rule was very different. In England, after a verdict for the plaintiff, the defendant constantly moved in arrest of judgment, on the ground that a defamatory meaning was not shown on the record with sufficient precision, or, as it soon came to be, on the ground that it was just possible, in spite of

[1] Berry v. Massey, 104 Ind., 486; 3 N. E. Rep., 942; Donoghue v. Hayes, Hayes (Irish Exch.), 266.

[2] Hankinson v. Bilby, 16 M. & W., 445; 2 C. & K., 440.

[3] Fleetwood v. Curley, Hobart, 268; McKinley v. Rob, 20 Johns. (N. Y.), 351; Massuere v. Dickens, 70 Wis., 83; Curtis v. Mussey, 6 Gray, 261; Wynne v. Parsons, 57 Conn., 73; Com. v. Kneeland, 20 Pick., 206.

the record, to give the words an innocent construction. For it was said to be a maxim that words were to be taken *in mitiori sensu* (in the more lenient sense) whenever there were two senses in which they could be taken. And in these early times the English courts thought it their duty to discourage actions of slander. They would, therefore, give an innocent meaning to the words complained of, if by any amount of legal ingenuity such a meaning could be put upon them; and would altogether disregard the plain and obvious signification which must have been conveyed to by-standers ignorant of legal technicalities.

For example: Where a married woman falsely said, "You have stolen my goods," and the jury found a verdict for the plaintiff, the court entered judgment for the defendant on the ground that a married woman could have no goods of her own, and that therefore the words conveyed no charge of felony.[1] Again, where the words complained of were: "He hath delivered false evidence and untruths in his answer to a bill in chancery," it was held that no action lay; for though every answer to a bill in chancery was an oath, and was a judicial proceeding, still in most chancery pleadings "some things are not material to what is in dispute between the parties," and "it is no perjury, although such things are not truly answered!"[2]

§ 25. **The Rule Abolished.**— The old rule that words should be construed *in mitiori sensu* (in the more lenient sense) has long since been exploded, and it is now well settled that they are to be taken in that sense in which they would be understood by those who hear or read them. The court will neither torture them into guilt nor explain them into innocence, but take them in their usual acceptation and understand them according to their obvious import and meaning. Therefore, whatever mode of expression is used, if an assertion of guilt is implied or intended, the words will be actionable; as —

For example: "I have every reason to believe he burnt my barn." "From the evidence I have concerning the burning of

[1] Anon., Pasch., 11 Jac. I.; 1 Roll. Abr., 746; now overruled by Stamp and wife v. White and wife, Cro. Jac., 600.

[2] Mitchell v. Brown, 3 Inst., 167; 1 Roll. Abr., 70. For further instances of such refinements, see Peake v. Pollard, Cro. Eliz., 214; Cox v. Humphrey, id., 889; Holland v. Stoner, Cro. Jac., 315; Odgers on S. & L., 96.

my barn, I believe he burnt it."[1] So, also, it seems that the expressions, "I am persuaded in my conscience,"[2] "I am thoroughly convinced,"[3] "I think or I dreamt it," or "for aught I know," have been ruled to be a sufficient affirmation.[4]

§ 26. **Progress of the Law.**— In 1676, in the days of Charles II., the court of common pleas decided in a case of *scandalum magnatum*[5] that "words should not be construed either in a rigid or mild sense, but according to the general and natural meaning, and agreeable to the common understanding of all men." This decision soon became the law. In 1683[6] Levinz, J., said he was "for taking words in their natural, genuine and usual sense and common understanding, and not according to the witty construction of lawyers, but according to the apprehension of the by-standers."[7] In 1722 Fortescue, J., declared:[8] "The maxim for expounding words *in mitiori sensu* has for a great while been exploded, near fifty or sixty years."[9] Lord Mansfield commented severely on the constant practice of moving in arrest of judgment after verdict found: "What? After verdict shall the court be guessing and inventing a mode in which it might be barely possible for these words to have been spoken by the defendant, without meaning to charge the plaintiff with being guilty of murder? Certainly not. Where it is clear that words are defectively laid, a verdict will not cure them. But where, from their general import, they appear to have been spoken with a view to defame a party, the court ought not to be industrious in putting a construction upon them different from what they bear in the common acceptation and meaning of them."[9] "The rule that has now prevailed is that words are to be taken in that sense that is most natural and obvious, and in which those to whom they are spoken will be sure to understand them."[10]

[1] Logan v. Steele, 1 Bibb (Ky.), 593; Jones v. McDowell, 4 Bibb (Ky.), 189; Bar v. Gaines, 1 Dana (Ky.), 258.

[2] Cro. Jac., 407.

[3] 2 Black. Rep., 959.

[4] Logan v. Steele, 1 Bibb (Ky.), 593.

[5] Lord Townshend v. Dr. Hughes, 2 Mod., 159.

[6] Naben v. Miecock, Skin., 183.

[7] Somers v. House, Holt, 39; Skin., 364; Burgess v. Bracher, 8 Mod., 238.

[8] Button v. Hayward et ux., 8 Mod., 24.

[9] Peake v. Oldham, Cowp., 277, 278.

[10] Harrison v. Thornborough, 10 Mod., 197; Odgers on L. & S., 97; R. v. Horne, 2 Cowp., 682–689; of Buller, J., R. v. Watson and others, 2 T. R., 206; and the judgments Wool-

§ 27. **Defamatory Words to be Taken in the Sense which Fairly Belongs to Them.**— The courts no longer strain to find an innocent meaning for words *prima facie* defamatory; neither will they put a forced construction on words which may fairly be deemed harmless. Formerly it was the practice to say that words were to be taken in the more lenient sense, but that doctrine is now exploded; they are not to be taken in the more lenient or more severe sense, but in the sense which fairly belongs to them.

The rule which once prevailed, that words are to be understood *in mitiori sensu*, has been long ago superseded; and words are now to be construed by courts, as they always ought to have been, in the plain and popular sense in which the rest of the world naturally understand them.[1] Now the only question for the judge or the court is whether the words are capable of the defamatory meaning attributed to them; if they are, then it is for the jury to decide what is in fact the true construction.

So long as the words complained of are not absolutely unintelligible, a jury will judge of the meaning as well as other readers or hearers. All perplexity and obscurity will disappear under the narrow examination which the words will receive in a court of law. It matters not whether the defamatory words be in English or in any other language, whether they be spelt correctly or incorrectly, whether the phrase be grammatical or not, whether cant or slang terms be employed, or the most refined and elegant diction.[2] The insinuation may be indirect, and the allusion obscure; it may be put as a question or as an "on dit;" the language may be ironical, figurative or allegorical; still, if there be a meaning in the words at all, the court will find it out, even though it be disguised in a riddle or in hieroglyphics. In all cases of ambiguity it is purely a question for the jury to decide what meaning the words would convey to persons of ordinary intelligence.[3]

§ 28. **The Rule of Construction.**— The question always is: How did the persons to whom the words were originally

noth v. Meadows, 5 East, 463; 2 Smith, 28.

[1] Roberts v. Camden, 9 East, 95.

[2] R. v. Edgar, 2 Sess. Cas., 29; 5 Bac. Abr., 199.

[3] Grant v. Yates (C. A.), 2 Times L. R., 368; Odgers on L. & S., 98; McKinley v. Rob, 20 Johns. (N. Y.), 351; Massuere v. Dickens, 70 Wis., 83; Curtis v. Mussey, 6 Gray, 261; Wynne v. Parsons, 57 Conn., 73; Com. v. Kneeland, 20 Pick., 206.

spoken or published understand them?—the legal presumption being that they were persons of ordinary intelligence. We must assume, too, that they gave to ordinary words their ordinary meaning, to local or technical phrases their local and technical meaning. That being done, what meaning did the whole passage convey to the unbiased mind? Where the persons who hear a charge made against another know that a particular transaction is referred to, and know also that the transaction was not such as constituted a crime, no action of slander can be maintained.[1] It is essential that the defendant shall affirmatively show that the persons who heard the words spoken by him knew of the transaction to which the words referred.[2] But, while this is an essential element of the defense, still the court cannot exclude the evidence if there is direct testimony or circumstantial evidence tending to show that the persons who heard the alleged slanderous words had knowledge of the matter to which the words had reference.[3]

§ 29. **The Defamatory Matter to be Taken as a Whole.**— In answering the question it is the duty of the jury to weigh all the circumstances of the case — the occasion of speaking and the relationship between the parties. They should consider the words as a whole, not dwelling on isolated passages, but giving its proper weight to every part.[4] The sting of a libel may sometimes be contained in a word or sentence placed as a heading to it. The defendant will often be held liable merely in consequence of such prefix, where, without it, he would have had a perfect answer to the action. So, a word added at the end may altogether vary the sense of the preceding passage. The defendant is therefore entitled to have the whole of the alleged libel read as part of the plaintiff's case.[5] And for the purpose of showing that what he wrote was no libel, and will not bear the construction which plaintiff seeks to put upon it, he may give in evidence any other passages in the

[1] Hotchkiss v. Olmstead, 37 Ind., 74; Carmichael v. Sheil, 21 Ind., 66; Odgers on L. & S., 109.

[2] Williams v. Minor, 18 Conn., 464; Dempsey v. Paige, 4 E. D. Smith, 218; Van Aiken v. Caler, 48 Barb. (N. Y.), 58; Stone v. Clark, 21 Pick. (Mass.), 51.

[3] Berry v. Massey, 104 Ind., 486; 3 N. E. Rep., 942.

[4] Dexter v. Taber, 12 Johns. (N. Y.), 239; Shipley v. Todhunter, 8 C. & P., 680.

[5] Com. v. Snelling, 32 Mass., 337; Cooke v. Hughes, R. & M., 112.

same publication which plainly refer to the same matter, or which qualify or explain the passage sued on.[1]

So, too, with a slander; very often the words immediately preceding or following may much modify those relied on by the plaintiff.[2] When the language sued on is ambiguous, and some extrinsic evidence is necessary to construe it, evidence may even be given of other libels or slanders published by the defendant of the plaintiff which explain or qualify that sued on. But such evidence is not admissible where the meaning of the words is clear and undisputed.[3] And when such evidence is admitted the jury should be charged not to give any damages in respect of it.[4]

§ 30. **Illustrations — American Cases.—**

1. **A New York Case:** *Dexter v. Taber*, 12 Johns., 239 (1814).

In this suit the words charged were: "You are a thief; you are a damned thief." The words proved at the trial to have been spoken by the defendant were: "You are a thief; you stole hoop-poles and saw-logs from off Delancey's and Judge Myers' land." The witnesses said that they supposed the words spoken alluded to the cutting of standing timber, but they did not know the defendant's meaning. The judge told the jury that it was for them to decide whether the words, as proved, amounted to a charge of theft; but if they meant only that the plaintiff had secretly cut and carried timber from off the land in order to make hoop-poles, etc., it amounted to a charge of trespass only, and in that case the words were not actionable, and that this was his impression as to the meaning of the words. The jury found a verdict for the defendant, and a motion was made to set aside the verdict and for a new trial.

Per Curiam: The motion for a new trial must be denied. The slanderous words charged in the declaration were that the defendant said to the plaintiff: "You are a thief." The witness who proved the speaking of these words went on to explain in what connection and in reference to what subject the words were spoken. "You are a thief; you have stolen hoop-poles and saw-logs from off Delancey's and Judge Myers' land," alluded to certain wood lands belonging to those persons. The charge thus made may be equivocal and somewhat doubtful; and had the whole charge, as made and proved, been set out in the declaration, and if this was a motion in arrest of judgment, it might well be contended that the words im-

[1] R. v. Lambert and Perry, 2 Camp. 400; 31 Howell St. Tr., 340; Darby v. Ouseley, 25 L. J., Ex., 229; 1 H. & N., 1; 2 Jur. (N. S.), 497; Bolton v. O'Brien, 16 L. R., Ir., 97.

[2] Bittridge's Case, 4 Rep., 19; Thompson v. Bernard, 1 Camp., 48.

[3] Stuart v. Lovell, 2 Stark., 93; Pearce v. Ormsby, 1 M. & Rob., 455; Symmons v. Blake, id., 477; 2 C., M. & R., 416; 4 Dowl., 263; 1 Gale, 182; Traill v. Denham, Times for May 4, 1880.

[4] Tindal, C. J., in Pearson v. Lemaitre, 5 M. & Gr., 720; 12 L. J., Q. B., 253; 7 Jur., 748; 6 Scott, N. R., 607.

port a charge of felony. But it was correctly stated to the jury that if the defendant intended to charge the plaintiff with taking hoop-poles and saw-logs already cut, it was a charge of felony; but if he only meant to charge him with cutting and carrying them away, it was only charging him with having committed a trespass. And in what sense the words were intended to be used was for the jury to determine. This point is well settled, both in our own and in the English courts. 1 Johns. Cas., 279; Wm. Bl., 959; Cowp., 278; 9 East, 96. The terms "hoop-poles" and "saw-logs," in common parlance, are used indiscriminately as applicable both to standing and felled timber in these descriptions. And the jury have found that the words were used in the former sense, and, of course, not amounting to a charge of felony. And the facts in the case fully warrant the finding of the jury. Spencer, J., dissented.

§ 31. Digest of American Cases.—

1. A newspaper article headed, "An unwarranted outrage," etc., charging a deputy-sheriff with arresting peaceable and innocent men as tramps, merely to get the fees allowed by law for such services, is libelous and actionable in itself. Bourreseau v. Detroit Eve. Jour., 30 N. W. Rep., 376.

2. An article was headed, "Look out for thieves," and charged one Harrison and one Allen with having boasted that they had won certain sums of money by gaming on particular occasions. It also charged them with having drugged a horse previously to a race in which he was to run, by means of which they won a large sum of money. Held libelous. Com. v. Snelling, 32 Mass., 337; Stanley v. Webb, 4 Sandf. (N. Y.), 21.

§ 32. Digest of English Cases.—

1. The "Observer" gave a correct account of some proceedings in the insolvent debtor's court, but it was headed, "Shameful conduct of an attorney." The rest of the report was held privileged; but the plaintiff recovered damages for the heading. Clement v. Lewis, 3 B. & B., 297; 7 Moore, 200; 3 B. & Ald., 702. And see Mountney v. Watton, 2 B. & Ad., 673; Bishop v. Latimer, 4 L. T., 775; Boydell v. Jones, 4 M. & W., 446; 7 Dowl., 210; 1 H. & H., 408; Harvey v. French, 1 Cr. & M., 11; 2 M. & Scott, 591; 2 Tyr., 585; Lewis v. Levy, E., B. & E., 537; 27 L. J., Q. B, 282; 4 Jur. (N. S.), 970; Street v. Licensed Victualers' Society, 22 W. R., 553.

2. An action was brought for an alleged libel, published in the "True Sun" newspaper: "Riot at Preston. From the 'Liverpool Courier.' It appears that Hunt pointed out Counselor Seager to the mob, and said, 'There is one of the black sheep.' The mob fell upon him and murdered him. In the affray Hunt had his nose cut off. The coroner's inquest have brought in a verdict of wilful murder against Hunt, who is committed to gaol. Fudge." The plaintiff contended that the word "Fudge" was merely introduced with reference to the future, in order that the defendants might afterwards, if the paragraph were complained of, be able to refer to it, as showing that they intended to discredit the statement. Lord Lyndhurst, C. B., told the jury that the question was with what motive the publication was made. It was not disputed that if the paragraph, which was copied from another paper, stood without the word "Fudge," it would be a libel. If they were of opinion that the object of the paragraph was to vindicate the plaintiff's character from an unfounded charge, the action

could not be maintained; but if the word "Fudge" was only added for the purpose of making an argument at a future day, then it would not take away the effect of the libel. Verdict for the plaintiff. Damages, one farthing. Hunt v. Algar and others, 6 C. & P., 245.

§ 33. **Witnesses Not to Give Their Understanding of Defamatory Matter — A Question for the Jury.**— In actions for defamation witnesses cannot be allowed to testify as to the meaning which they understood the alleged defamatory matter to convey or the particular person to whom they understood it to apply. A witness may testify to the publishing of the defamatory matter, the speaking of slanderous words or publication of a libel, together with all the attendant circumstances and connections, the existing facts; and after having done so it is for the jury to determine from the evidence who was meant and what was meant.[1]

§ 34. **Illustrations — American Cases.**—

1. **A Minnesota Case:** *Gribble v. Pioneer Press Co.*, 37 Minn., 277.

The plaintiff brought an action to recover for an alleged libel contained in an article published in the issue of the defendant's newspaper of October 25, 1884, which, in commenting upon certain libel suits against the defendant then pending, stated: "In the great majority of cases, libel suits for pecuniary damages are only brought against reputable newspapers by the meanest sort of scalawags, shysters and adventurers. For the most part they are simply mercenary speculations upon the chance of obtaining a verdict from an ignorant and prejudiced jury by the aid of some crafty lawyer, who is usually a partner in the speculation; that is to say, the lawyer takes the case as a purely business venture on condition of his being paid half or some other proportion of the amount of damages awarded if he should succeed in bamboozling the jury. The 'Pioneer Press' has been pestered with a multitude of such libel suits, of which it has now on hand six or seven exclusive of Donnelly's mock contribution, almost without exception brought or instigated by notorious sharpers, shysters, confidence men, adventurers and other disreputable people as a means of raising the wind, or occasionally as a sham plea in arrest of judgment preparatory to their fleeing from the country. Mr. Donnelly is more than welcome to all the political advantage he can reap by enrolling himself in this congenial company. His able counsel, Mr. Brisbin, is to be congratulated in having been chosen to represent the common griefs of Mr. Gribble and Mr. Donnelly in the suits of these delectable worthies against the 'Pioneer Press.'"

[1] Gribble v. Pioneer Press Co., 37 Minn., 277; 34 N. W. Rep., 30; Van Vetchin v. Hopkins, 5 Johns. (N. Y.), 211; Gibson v. Williams, 4 Wend. (N. Y.), 320; Wright v. Paige, 42 N. Y., 581, 584; Snell v. Snow, 54 Mass., 278; White v. Sayward, 33 Me., 326; Rangler v. Hummell, 37 Penn. St., 130; McCue v. Ferguson, 73 Penn. St., 333; Daines v. Hartley, 3 Exch., 200; Anderson v. Hart, 68 Iowa, 400; 27 N. W. Rep., 289.

Upon the trial the court permitted several witnesses to testify that they at the time of the publication understood the article as using the term "shyster" as applicable to the plaintiff. The jury found a verdict for the plaintiff, but the court upon consideration of the matter having come to the conclusion that the evidence was inadmissible granted a new trial. From this order the case was taken to the supreme court for review. It was held that the court below was right in its conclusion that the evidence was not admissible.

Dickinson, J.: The question to be determined by the jury was not what interpretation these witnesses had put upon the article when they read it, but what was its meaning. This the jury could determine directly from a reading of the article itself, and by the aid of such other facts and circumstances as might affect the question. Whatever relevant facts outside the publication could have enabled these witnesses to form an intelligent opinion or understanding that the offensive term was intended to be applied to the plaintiff could have been placed before the jury, and the question in issue should have been determined by the jury from the established facts relevant to the issue, and not from the opinion or understanding of witnesses, which may have been based upon some insufficient reasons. It would be a dangerous practice, not in general to be resorted to, to apply in a court of justice for the interpretation of the conduct or of the language of men, the understanding, conclusions or opinions of others, which are too often formed under circumstances not conducive to an impartial, mature and correct judgment. That would be, in some degree and in some sense, to substitute the irresponsible, hasty opinions of perhaps prejudiced minds for the calm, deliberate judgment of juries acting under the sanctions and with the aids which attend their deliberations.

2. **A Massachusetts Case:** *Snell v. Snow*, 54 Mass., 278.

On the trial of an action for slander a witness testified as follows: "I went into the counting-room of the company to see if there was not some way in which matters could be fixed, so that the plaintiff could be employed. The defendant said he did not know or did not see any way it could be fixed. She was a bad girl, a very bad girl. I told him she had worked for me, and her reputation stood high then. He said she must have altered very much since, for she was now a very bad girl. I inquired of him what she had done to render her unfit. He replied that she was a bad girl, and ought not to be allowed around among other girls."

The plaintiff then inquired of the witness what meaning he understood the defendant to convey by these words. To this inquiry the defendant objected, and the court ruled that the witness might testify as to any existing facts or circumstances to which the defendant referred, if any, but that as the witness had proposed to give the whole conversation, it was for the jury to determine what was meant by the language; and that it was not competent for the witness to testify as to his understanding of the meaning of the defendant in the words made use of. The jury found for the defendant. Exceptions being taken to the ruling of the court as to the competency of the inquiry put to the witness, it was held that the court properly decided that it was not competent for the witness to testify to his understanding of the defendant's meaning in the language used.

Shaw, C. J.: "If the words in their ordinary sense, according to the rules

of language, imputed a charge of unchasteness and crime, or if taken in connection with other facts or words they would bear that meaning, we are to presume that the jury would so find. If in their natural import, or with accompanying words and facts, they would not bear that meaning, the witness' understanding of them could not legitimately govern or aid the jury, and would therefore be incompetent. It would make the defendant's liability depend, not on his own malicious intent and purpose in using the language, which might be quite innocent and free from blame, but upon the misconception or morbid imagination of the person in whose hearing they were spoken."

3. **A New York Case:** *Van Vetchin v. Hopkins*, 5 Johns., 211.

Van Vetchin sued Hopkins for a libel. At the trial the plaintiff proved that the defendant was the author and publisher of the libel; that he (the plaintiff), at the time when a certain corrupt agreement set out in the declaration is charged in the libel to have been made by certain members of the legislature, and at the publication thereof, was recorder of the city of Albany, and at the former period was a member of the assembly; that he was the only person of the name of Van Vetchin in the city of Albany, and kept an office there. He then offered to prove by a witness that from reading the libel he applied it to the plaintiff, and understood him to be the person intended as one of the members of the legislature who had subscribed to the corrupt agreement charged in the libel. The offer was refused by the court on the ground that it was the province of the court to determine whether it was the intention of the defendant to charge the plaintiff as being one of the members of the legislature who subscribed the corrupt agreement; it being admitted by the plaintiff's counsel that there were no circumstances within the knowledge of the witness except what he obtained from reading the paper itself to influence his belief as to the person intended. Upon this and other questions the case was taken to the supreme court. In the opinion of the court upon the question in point, Van Ness, J., says: "There is another point in the case upon which, in the view I have taken of the subject, it would not be necessary for me to express an opinion. As it may, however, embarrass the parties on a future trial, it may as well be disposed of. I allude to the exclusion by the judge of the testimony of the witness who was called to say that, from reading the libel, he applied it to the plaintiff. This evidence was properly overruled. The intention of the defendant is not the subject of proof by witnesses in the way here attempted. It is the mere opinion of the witness, which cannot and ought not to have any influence on the verdict. I consider the evidence as inadmissible because it goes to prove the correctness of an innuendo."

4. **An Iowa Case:** *Anderson v. Hart*, 68 Iowa, 400.

In an Iowa case the petition stated that the defendant published of and concerning the plaintiff the following false, malicious and defamatory libel: "John Hart, being duly sworn, deposeth and saith that a note presented to him by Hiram Larabee, in favor of J. D. Larabee, with Alfred Anderson's name and mark, C. J. Gustafson and John Hart's names, is a note he knows nothing about; and the name of John Hart was not written by him or his orders, and therefore is a forgery." The defendant pleaded the general issue, justification and privileged communication. Larabee was a witness

at the trial. On the stand he was asked by the plaintiff's counsel, "To whom did you understand this affidavit to refer? To what person?" The witness replied, "He did not refer to no particular person as doing it." "I am not asking you about him, but about the affidavit. To whom did you understand it to refer?" The witness replied, "Well, I understood it to refer to Anderson, or procured by him — that is, the forgery; that is the way I understood it at the time." The objection was that the evidence sought to be elicited was the conclusion or opinion of the witness. The overruling of the objection was assigned for error in the supreme court. On the consideration of the error, Seevers, J., said: "It will be observed that the witness was asked to construe the libel. In effect, he was asked to look at the affidavit and state who the defendant meant to charge with the crime of forgery. There was no ambiguity as to the crime charged, and no person was indicated as having committed it. There were no circumstances surrounding the transaction which had any tendency to show who the defendant meant, unless such meaning could be legitimately inferred from the fact that the names of the plaintiff, the defendant and another person were signed to the note. When a libelous communication on its face, directly or indirectly, or by way of innuendo or otherwise, refers to any person, it is possibly true that a witness may be asked who or what person was meant. Subject to this rule the decided weight of authority, we think, is that the alleged libel must be construed by the court and jury. When the note was presented to him, the defendant simply said in writing, 'it is a forgery;' and therefore the witness was allowed to draw the inference and express the opinion that he charged the plaintiff with the crime of forgery. In so ruling we think the court erred." The judgment was reversed. Citing Van Vetchin v. Hopkins, 5 Johns. (N. Y.), 211; Gibson v. Williams, 4 Wend. (N. Y.), 320; Snell v. Snow, 13 Met. (Mass.), 278; Rangler v. Hummell, 37 Penn. St., 130; White v. Sayward, 33 Me., 332.

§ 35. **Unsettled State of the Law — General Discussion of the Subject.**— There is some conflict of opinion in regard to the doctrine laid down in the text, and it would seem that the law is not to be regarded as completely settled upon this question. The rule laid down by Pollock, C. B., in Hawkinson v. Bilby, 16 M. & W., 442, is, "the words must be construed in the sense which hearers of common and reasonable understanding would ascribe to them." "It may well be asked," says Lawrence, J., in Nelson v. Borchenius, 52 Ill., 236, "what better guide there is in that inquiry than to ascertain how they were really understood by the by-standers. The essence of the inquiry is the effect created by the slanders upon the minds of the hearers; and it seems to us extraordinary that a person having used language concerning another which all his hearers understood in a slanderous sense should be permitted to escape the legal consequences by saying he did not use the

words in that sense. We do not deem that their construction would be conclusive upon the jury, but it is admissible as tending to show what meaning hearers of common understanding would and did ascribe to them. Hobart says, page 268, the slander and damage consist in the apprehension of the hearers; and in Gilbert's Cases on Law and Equity, page 117, the rule is laid down that the words shall be taken in the sense in which the hearers understood them. This rule is so far modified that the understanding of the hearers is not conclusive upon the jury; but that they should be permitted to state what it was we entertain no doubt. In cases of this kind the impression made upon the minds of the hearers goes to the gist of the action, and hence a slander in a language unknown to the bystanders is not actionable." And Baron Parke in Hawkinson v. Bilby, 16 M. & W., 442, in reply to counsel, who had quoted Starkie on Slander, said the drift of Mr. Starkie's remarks is to show that the effect of the words used, and not the meaning of the party in uttering them, is the test of their being actionable; that is, first ascertain the meaning of the words themselves, and then give them the effect any reasonable bystander would affix to them. A man must be taken to mean what he utters."

Lord Ellenborough, in Woolnoth v. Meadows, 5 East, 463, in passing upon the sufficiency of the declaration, said the plaintiff on the trial would be obliged to show, not only that the defendant intended to impute a crime to him, but that the words were so understood by the hearers. The New York and Massachusetts cases, although not in perfect harmony, support the rule as announced in the text. On the other hand, in Smart v. Blanchard, 42 N. H., 146, the authorities are all reviewed and the contrary doctrine is held. Such evidence is also held admissible in Vermont,[1] Indiana,[2] Illinois, and perhaps some other states. In Illinois, quoting from 2 Greenleaf on Evidence, 417, the rule is stated thus: "From the nature of the case, witnesses must be permitted in these cases to state to some extent their opinion, conclusion and belief, leaving the grounds of it to be inquired into on cross-examination."[3]

[1] Smith v. Miles, 15 Vt., 245.
[2] Smawley v. Stark, 9 Ind., 386.
[3] Nelson v. Borchenius, 52 Ill., 241.

Upon the theory that circumstances never conspire to commit perjury, and that witnesses may and sometimes do, it is probably in this class of cases — dangerous at best, and where the witnesses are frequently partisans of the plaintiff or defendant, the temptation to commit perjury great and the danger of detection extremely remote — for who can tell the impressions on the minds of others or their secret thoughts — the safer rule to allow the witnesses to testify to the publishing of the defamatory matter, together with all the surrounding circumstances and existing facts, and after having done so let the jury determine from the evidence who was meant and what was meant.[1]

[1] Callahan v. Ingram, 122 Mo., 355.

CHAPTER XVI.

MALICE.

I. Malice in Actions for Defamation.

II. Evidence of Malice.

I. Malice in Actions for Defamation.

§ 1. **Malice as a Term of Law.**— The word malice as a term of law has a meaning somewhat different from that which it possesses in ordinary parlance. In its ordinary sense "malice" denotes ill-will, a sentiment of hate or spite, especially when harbored by one person towards another. The word is so employed in the well-known sentence in the litany of the Church of England, "From envy, hatred and malice," etc. This is what the law terms "malice in fact," "actual" or "personal" malice, to distinguish it from the legal sense attributed to the term, and which, from being used in such sense, is accordingly designated "malice in law." "Malice in fact" is, to use the language of a late eminent judge, "of two kinds — either personal malice against an individual, or that sort of general violation of the right consideration due to all mankind which may not be personally directed against any one."[1] And Lord Jus-

[1] Sherwin v. Swindall, 12 M. & W., 783; L. J. (Ex.), C. B., 237; Osborn v. Troup, 60 Conn., 485; 23 Atl. Rep., 157; Hallam v. Post Pub. Co., 55 Fed. Rep., 456; Turton v. New York Recorder, 144 N. Y., 144; Weber v. Butler, 81 Hun, 244; Republican Pub. Co. v. Conroy, 5 Colo. App., 262; Owen v. Dewey (Mich., 1896), 65 N. W. Rep., 8; Pokrok Zapadu Pub. Co. v. Ziskovsky, 42 Neb., 64; 60 N. W. Rep., 358; Strode v. Clement, 90 Va., 553.

tice Brett, in a comparatively recent case where a question of privilege arose, said: "By malice here I mean, not a pleading expression, but actual malice, or what is termed 'malice in fact;' *i. e.*, a wrong feeling in the defendant's mind."[1]

§ 2. **Malice — General Discussion — Treat, C. J.** — There is a class of cases where the occasion of the speaking of the words may, without regard to their truth or falsity, afford an excuse or justification to the party; such, for instance, as the statements of a master respecting the character of a servant; communications addressed to the appointing power, relative to the conduct of a public officer, or concerning the qualifications of an applicant for office; expressions used in the course of a judicial proceeding by a judge, attorney, witness, juror or party; and communications made to others in confidence or in the way of admonition or advice. In such cases an action cannot be sustained without proof of actual malice. If the party acted from honest motives and for justifiable purposes, the law, from reasons of public policy, excuses him. But he is not permitted, under the pretense of discharging a duty to himself or society, to inflict an injury to the reputation of another.

If he makes use of the occasion for the purpose of traducing another, the occasion will not protect him, and he will be answerable for the consequences. But the reverse is the rule in the case of actionable words, where no excuse or justification can arise from the particular circumstances under which they were uttered. The plaintiff is not bound to prove that the charge was maliciously made; nor can the defendant relieve himself from liability by showing the absence of express malice. He makes the publication at his peril, and, if untrue, he is responsible for all the consequences naturally flowing from the act. The real motive by which he was actuated is unimportant, except upon the question of damages. The injury to the plaintiff may be as serious, where the charge is made without an actual intention to defame, as if it proceeds from the most malignant motives. It would be a great reproach to the law if a party who had causelessly ruined the reputation of another should be exempted from civil responsibility merely because he did not design to produce such a result.[2]

[1] Clark v. Molyneux, L. R., 3 Q. B., 237 (C. A.); 47 L. J. (C. L.), 230; Stevens v. Sampson, 49 L. J. (C. L.), 120; Flood on L. & S., 32.

[2] Gilmer v. Eubanks, 13 Ill., 271. See Root v. King et al., 7 Cow. (N. Y.), 613.

§ 3. **Express Malice Defined.**— Express malice is when one with a sedate, deliberate mind and formed design doth kill [or injure] another, which formed design is evidenced by external circumstances discovering that inward intention, as lying in wait, antecedent menaces, former grudges, and concerted schemes to do him bodily [or other] harm.[1]

§ 4. **Malice Refers to Motive, Not to Intention.**— Mr. Justice Stephen says of the word "malice:" "It seldom has any meaning except a misleading one. It refers not to intention but to motive, and, in almost all legal inquiries, intention, as distinguished from motive, is the important matter."[2]

§ 5. **Necessary Ingredients of Malice — Chief Justice Shaw.**— It is not necessary, to render an act malicious, that the party be actuated by a feeling of hatred or ill-will toward the individual, or that he entertain and pursue any general bad purpose or design. On the contrary, he may be actuated by a general good purpose, and have a real and sincere design to bring about a reformation of matters; but if in pursuing that design he wilfully inflicts a wrong on others which is not warranted by law, such act is malicious.

A man may, by his example and by his conduct, be doing great injury to society; he may in fact be guilty of the most ruinous crimes, and that well known to an individual; that individual may be actuated by the most pure and single-hearted desire to rid society of a mischievous character, and entertain the firmest conviction that he would be doing great good by it; and yet it is very certain that in contemplation of law any attempt upon his life, his liberty, his person or property, made in the accomplishment of such a purpose, would be unlawful, and therefore malicious. This is founded upon a principle essential to the very existence of a government of laws and of civil liberty, that no man can be punished except by the operation of law, and after a trial according with the forms of law, with such aids and shields as the law affords him; that individuals cannot take the execution of the law into their own hands; and that it is the duty of every good citizen, if he knows of any offense against society, not to as-

[1] 4 Black. Com., 199; Flood on L. & S., 34.

[2] Flood on L. & S., 38. See, also, Delaney v. Kaetel, 81 Wis., 353; Walker v. Wickens, 49 Kan., 42; Brueshaber v. Hertling, 78 Wis., 498; Colby v. McGee, 48 Ill. App., 294; State v. Clyne, 53 Kan., 8; Pokrok Zapadu Pub. Co. v. Ziskovsky, 42 Neb., 64; 60 N. W. Rep., 358; State v. Brady, 44 Kan., 435; 24 Pac. Rep., 948.

sail the offender, but to bring the matter before proper tribunals for inquiry, trial and punishment.[1]

§ 6. **The Law Implies Malice, when.**— "In many cases where no malice is expressed the law will imply it, as when a man wilfully poisons another; and in such a deliberate act the law presumes malice, though no particular enmity can be proved." To present this subject in a few words, malice in law is such as the law infers to exist without just or lawful excuse; also in malice of either kind "you cannot have shades and degrees."[2]

§ 7. **Malice in Fact Immaterial, when.**— Malice in fact is not material so far as regards the accomplishment or completion of an offense, and it matters not in this respect whether the malice was entertained by the wrong-doer five minutes or five years before the commission of the offense. In libel and slander suits, where no question of privilege arises, it is quite sufficient if malice in law is shown, although if both these elements appear the existence of the former would probably be taken into account in awarding punishment or damages where they would be the proper compensation for the injury done.[3]

§ 8. **Malice in Law — A Wider Meaning.**— "Malice in law," however, is an expression of much wider meaning than "malice in fact." By this term we are to understand much more than spite or ill-will; we are to understand what the Latin word from which "malice" itself is derived conveys to us. That word is *malitia*. Hence "malice in law" simply means a general wickedness of intent on the part of a person; a depraved inclination to do harm, or to disregard the rights or safety of mankind generally — the existence of which sentiments is made manifest by mischievous or injurious acts on the part of him who entertains them.[4]

§ 9. **The Distinction between Malice in Law and Malice in Fact.**— The distinction between "malice in law" and "malice in fact" is certainly not one that would be evolved naturally and as a matter of course out of a person's "inner consciousness." It exists, however, and must be understood by those

[1] Com. v. Snelling, 32 Mass., 337; Com. v. Bonner, 9 Met. (Mass.), 410.

[2] Stevens v. Sampson, 49 L. J., C. L., 120; Flood on L. & S., 35. See note 3.

[3] Delaney v. Kaetel, 81 Wis., 353; Walker v. Wickens, 49 Kan., 42; Colby v. McGee, 48 Ill. App., 294; State v. Clyne, 53 Kan., 8; Pokrok Zapadu Pub. Co. v. Ziskovsky, 42 Neb., 64; 60 N. W. Rep., 358; State v. Brady, 44 Kan., 435; 24 Pac. Rep., 948.

[4] Flood on L. & S., 32.

who would rightly comprehend the English law on the subject of wrongs.[1]

§ 10. **The Consequences of the Distinction.**— It is in consequence of the distinction between "malice" in its ordinary sense and in its legal acceptation that judges, when engaged in the trials of persons indicted for murder, almost invariably tell the jury that malice prepense or aforethought merely signifies a preconceived wicked intent to kill, and that the period of time elapsing between such conception of a design and the carrying it into execution is of no consequence in law. The fact of a person having been known to previously harbor and express ill-will against the individual whose life he subsequently takes may of course be a matter of evidence as to the intent with which he committed the crime, but it would in no way intensify the gravity of the charge against him, so far as the legal offense itself is concerned.[2]

§ 11. **Malice in Connection with the Law of Defamation.**— These statements quite serve our purpose in dealing with malice in connection with the law of defamation, and we may sum the matter up in the terms of that maxim of our law which declares every man who commits an act to intend the consequences which flow therefrom. As to this feature of the offense now under notice, it has been correctly said that "malice is the gist — that is, the main point whereon rests an action for libel or slander;" also that "unless the injurious communication is privileged the law implies malice in the legal sense," although it might be added, circumstances may appear which will rebut such implication. If they do not, then the very terms themselves of the libel are sufficient evidence of malice.[3]

§ 12. **Every Defamation Presumed to be Malicious.**— Generally speaking, therefore, every defamation is presumed by the law to be malicious. This presumption, however, may be rebutted by facts adduced in evidence; and the nature of such facts as will serve to repel the presumption of malice in him who publishes a libel will appear as we proceed. But we may here state, in concluding our remarks on that feature in the law of defamation now under consideration, that whenever,

[1] Flood on L. & S., 37.
[2] Flood on L. & S., 38.
[3] Flood on L. & S., 35.

during the trial of a case of libel, whether before a civil or criminal tribunal, the question arises as to whether malice exists or not, such question is to be decided solely by the jury under the guidance and instruction of the court.[1]

§ 13. **Malice Defined by Starkie.**— A wanton disregard of the feelings of others is, in point of law as well as morals, inexcusable, so that it is no defense for the publisher of a libel to say that he was but in jest; for, as has been observed by a learned writer, the mischief to the party grieved is no way lessened by the merriment of him who makes so light of it. The mere absence of malice in particular against the party whose reputation is destroyed, and the excuse that the real motive was not malice, but a desire of gain, is no better plea than that which might be used by a hired assassin.[2]

§ 14. **Malice Explained by Blackstone.**— Blackstone explains the subject of malice in dealing with the crime of murder. We quote some of his statements thereon, placing in brackets certain words which will adapt his remarks to our present subject. He says that "malice prepense or *malitia præcogitata* is not so properly spite or malevolence to the deceased [or injured person] in particular as any evil design in general — the dictate of a wicked, depraved and malignant heart: *une disposition à faire une male chose* [a disposition to commit a wicked act], and it may be either express or implied in law.[3]

§ 15. **The Law of Malice Stated by Starkie.**— It seems to be clear, as well upon legal principles as on those of morality and policy, that where the wilful act of publishing defamatory matter derives no excuse or qualification from collateral circumstances, none can arise from a consideration that the author of the mischief was not actuated by any deliberate and malicious intention to injure beyond that which is necessarily to be inferred from the very act itself. For if a man wilfully does an act likely to occasion mischief to another and to subject him to disgrace, obloquy and temporal damage, he must, in point of law as well as morals, be presumed to have con-

[1] Davis v. Maxhausen, 103 Mich., 315; Youmans v. Paine, 86 Hun, 479; Thomas v. Bowen, 45 Pac. Rep., 758; Wimbish v. Hamilton, 47 La. Ann., 246; 16 So. Rep., 856; Childers v. San Jose, etc., Pub. Co., 105 Cal., 284; 38 Pac. Rep., 903; Cooper v. Phipps, 24 Or., 357.

[2] 1 Starkie on Slander, 215; 9 Co., 59; Moore, 627; Hawkins' Pleas of the Crown, ch. 73, sec. 14.

[3] 4 Black. Com., p. 199; Flood on L. & S., 34.

templated and intended the evil consequences which were likely to ensue.[1]

§ 16. **By Champlin, J.**—"Malice is understood as having two significations: 1st. Its ordinary meaning of ill-will against a person, and the other its legal signification, which is a wrongful act done intentionally without just cause or excuse. These distinctions have been denominated malice in fact and malice in law. The first implies a desire and an intention to injure; the latter is not necessarily inconsistent with an honest purpose. But if false and defamatory statements are made concerning another without sufficient cause or excuse, they are legally malicious; and in all ordinary cases malice is implied from the defamatory nature of the statements and their falsity. The effect, therefore, of showing that the communication was made upon a privileged occasion is *prima facie* to rebut the quality or element of malice, and casts upon the plaintiff the necessity of showing malice in fact; that is, that the defendant was actuated by ill-will in what he did and said, with a design to causelessly or wantonly injure the plaintiff; and this malice in fact, resting as it must upon the libelous matter itself and the surrounding circumstances tending to prove fact and motive, is a question to be determined by the jury. The question whether the occasion is such as to rebut the inference of malice, if the communication be *bona fide*, is one of law for the court; but whether *bona fides* exist is one of fact for the jury.[2] And the jury may find the existence of actual malice from the language of the communication itself, as well as from extrinsic evidence."[3]

§ 17. **By Erle, C. J.**—"The plaintiff does not sustain the burden of proof which is cast upon him by merely giving evidence which is equally consistent with either view of the matter in issue. When the presumption of malice is neutralized by

[1] Gilmer v. Eubank, 13 Ill., 274; 1 Starkie on Slander, 210.

[2] Bacon v. Mich. Cent. R. Co., 55 Mich., 224; 33 N. W. Rep., 183; 1 Am. Leading Cases (5th ed.), 193; Smith v. Youmans, 3 Hill (S. C.). 85; Hart v. Reed, 1 B. Mon. (Ky.), 166; Gray v. Pentland, 4 Serg. & R. (Penn.), 420; Flitcraft v. Jenks, 3 Whart., 158.

[3] Hastings v. Lusk, 22 Wend. (N. Y.), 410; Howard v. Wellington, 7 Car. & P., 531; Wright v. Woodgate, 2 Cromp., M. & R., 573; Jackson v. Hopperton, 16 C. B. (N. S.), 829.

circumstances attending the utterance of the slander or publication of the libel the plaintiff must give further evidence of actual or express malice in order to maintain his action."[1]

§ 18. **By Lord Justice Brett.**—"When there has been a writing or a speaking of defamatory matter, and the judge has held — and it is for him to decide the question — that although the matter is defamatory the occasion on which it is either written or spoken is privileged, it is necessary to consider how, although the occasion is privileged, yet the defendant is not permitted to take advantage of the privilege. If the occasion is privileged it is so for some reason, and the defendant is only entitled to the protection of the privilege if he uses the occasion for that reason. He is not entitled to the protection if he uses the occasion for some indirect and wrong motive. If he uses the occasion to gratify his anger or his malice, he uses the occasion not for the reason which makes the occasion privileged, but for an indirect and wrong motive. If the direct and wrong motive suggested to take the defamatory matter out of the privilege is malice, then there are certain tests of malice. Malice does not mean malice in law, a term in pleading, but actual malice, that which is popularly called malice. If a man is proved to have stated that which he knew to be false, no one need inquire further. Everybody assumes thenceforth that he was malicious, that he did do a wrong thing for some wrong motive. So if it be proved that out of anger, or for some other wrong motive, the defendant has stated as true that which he does not know to be true, and he has stated it whether it is true or not, recklessly, by reason of his anger or other motive, the jury may infer that he used the occasion, not for the reason which justifies it, but for the gratification of his anger or other indirect motive."[2]

§ 19. **Malice, the Gist of the Action.**— The term "malice" has a twofold signification. There is malice in law as well as malice in fact. In the former and legal sense it signifies a wrongful act, intentionally done without any justification or excuse. In the latter and popular sense it means ill-will to-

[1] Jackson v. Hopperton, 16 C. B. (N. S.), 829. 246, 247; 47 L. J., Q. B., 230; 26 W. R., 104; 37 L. T., 696, 697.

[2] Clark v. Molyneux, 3 Q. B. D.,

wards a particular person; in other words, an actual intention to injure or defame him.[1]

§ 20. **Illustrations — Digest of American Cases.—**

1. Malice is an essential ingredient in actions for slander, and the petition must allege that the defamatory matter was spoken maliciously. This allegation cannot be supplied by implication or be presumed from the false publication of words which are in themselves slanderous. Williams v. Gordon, 11 Bush (Ky.), 693.

2. To maintain an action for a publication as a libel merely because it is injurious to the plaintiff's business, it must be shown not only that the defamatory publication was not justified in fact, but that it was published with malice or a wilful purpose of inflicting injury. Hovey v. Rubber T. P. Co., 57 N. Y., 119.

3. In order to make out a case of verbal slander two things are indispensable: (1) Malice in the utterance of actionable words, and (2) malice in their publication. It should be averred that the defendant maliciously published the matter, but any equivalent expression, as wrongfully and falsely, will be sufficient. Hanning v. Bassett, 12 Bush, 361.

§ 21. **A Question for the Jury.**— The question of malice or no malice is for the jury. The presumption in favor of the defendant arising from the privileged occasion remains till it is rebutted by evidence of malice; and evidence merely equivocal, that is, equally consistent with malice or *bona fides*, will do nothing towards rebutting the presumption.

The facts tendered as evidence of malice must always go to prove that the defendant himself was actuated by personal malice against the plaintiff. In an action against the publisher of a magazine, evidence that the editor or author of any article, not being the publisher, had a spite against the plaintiff is inadmissible.[2]

II. Evidence of Malice.

§ 22. **The Burden of Proof.**— "In an ordinary action for defamation, though evidence of malice may be given to increase the damages, it never is considered as essential; nor is there any instance of a verdict for the defendant on the ground of a want of malice."[3] An accidental or inadvertent publication

[1] Gilmer v. Eubank, 13 Ill., 274; Williams v. Gordon, 11 Bush (Ky.), 693.

[2] York v. Pease, 2 Gray (68 Mass.), 282; Robertson v. Wylde, 2 Moo. & Rob., 101; Clark v. Newsam, 1 Ex., 131, 139; Carmichael v. Waterford & Limerick R'y Co., 13 Ir. L. R., 313.

[3] Bromage v. Prosser, 4 B. & C., p. 257; 6 Dowl. & R., 295; and per Mansfield, C. J., in Hargrave v. Le Breton, 4 Burr., 2425.

of defamatory words is ground for an action. Even a lunatic is, it is said, liable for a libel.[1] The courts for this purpose look at the tendency of the publication, not at the intention of the publisher.[2] Where a party has in fact spoken words which have injured the plaintiff's reputation he must be taken to have intended the consequences naturally resulting therefrom.[3]

§ 23. **Privileged Communications.**— When the matter complained of is privileged the burden of proving malice lies on the plaintiff; the defendant cannot be called on to prove he did not act maliciously till some evidence of malice, more than a mere *scintilla*, has been adduced by the plaintiff.[4]

§ 24. **Evidence of Malice.**— Such evidence may either be extrinsic — as of previous ill-feeling or personal hostility between the parties, threats, rivalry, squabbles, other actions, former libels or slanders, and the like; or intrinsic — the violence of defendant's language, the mode and extent of its publication, etc. But in either case, if the evidence adduced is equally consistent with either the existence or non-existence of malice, there can be no recovery, for there is nothing to rebut the presumption which has arisen in favor of the defendant from the privileged communication.[5]

§ 25. **Strong Words No Evidence of Malice.**— The fact that the words in question are strong is no evidence of malice, if on defendant's view of the facts strong words were justified;[6] or that the statement was volunteered is no evidence of malice,

[1] Per Kelly, C. B., in Mordaunt v. Mordaunt, 39 L. J. Prob. & Matr., 59.

[2] Haire v. Wilson, 9 B. & C., 643; 4 Man. & Ry., 605; Fisher v. Clement, 10 B. & C., 472; 5 Man. & Ry., 730.

[3] Wenman v. Ash, 13 C. B., 845; 22 L. J., C. P., 190; 17 Jur., 579; 1 C. L. R., 592; Huntley v. Ward, 6 C. B. (N. S.), 514; 6 Jur. (N. S.), 18; 1 F. & F., 552; Blackburn v. Blackburn, 4 Birg., 395; 1 M. & P., 33, 63; 3 C. & P., 146.

[4] Fowles v. Bowen, 30 N. Y., 20; Lathrop v. Hyde, 25 Wend. (N. Y.), 448; Taylor v. Hawkins, 16 Q. B., 321; 15 Jur., 746; 20 L. J., Q. B., 313; Cooke and another v. Wildes, 5 E. & B., 340; 24 L. J., Q. B., 367; 1 Jur. (N. S.), 610; 3 C. L. R., 1090; Laughton v. Bishop of Sodor & Man, L. R., 4 P. C., 495; 42 L. J., P. C., 11; 21 W. R., 204; 28 L. T., 377; 9 Moore, P. C. C. (N. S.), 318; Clark v. Molyneux (C. A.), 3 Q. B. D., 237; 47 L. J., Q. B., 230; 26 W. R., 104; 37 L. T., 694; 14 Cox, C. C., 10. See chap. 19.

[5] Somerville v. Hawkins, 10 C. B., 590; 20 L. J., C. P., 131; 15 Jur., 450; Harris v. Thompson, 13 C. B., 333; Taylor v. Hawkins, 16 Q. B., 308; 20 L. J., Q. B., 313; 15 Jur., 746.

[6] Spill v. Maule, L. R., 4 Ex., 232; 38 L. J., Ex., 138; 17 W. R., 805; 20 L. T., 675.

if it was defendant's duty to volunteer it.[1] The fact that the statement is admitted or proved to be untrue is no evidence that it was made maliciously;[2] though proof that defendant knew it was untrue when he made it would be conclusive evidence of malice. If the defendant is in a position to prove the truth of his statement, "he has no need of privilege: the only use of privilege is in cases where the truth of the statement cannot be proved."[3] A mere mistake innocently made through excusable inadvertence cannot in any case be evidence of malice.[4]

§ 26. **Illustrations — Digest of American Cases.—**

1. A subsequent refusal to retract the defamatory words or to apologize is admissible to show actual malice. Klewin v. Bauman, 53 Wis., 244; 10 N. W. Rep., 398.

2. On demurrer to a complaint alleging that defendant published a statement falsely and maliciously charging that an inspector of weights and measures "doctored" and "tampered" with them, the question of privilege does not extend to false charges maliciously made. Eviston v. Cramer, 47 Wis., 659; 3 N. W. Rep., 392.

3. The defendant in his answer in a libel suit admitted the fact of publication but denied malice. It was held that any evidence was admissible which would throw light upon his motive, not in mitigation of actual but of exemplary damages. Thompson v. Powning, 15 Nev., 195.

4. A false and injurious publication made in a newspaper "for sensation and increase of circulation" is malicious. Maclean v. Scripps, 52 Mich., 214.

5. In a suit by A. against B. for writing a letter to an insurance company to the effect that A. had burned his store in order to get the insurance money, B. denied that he had written the letter with any malice. It was held he might be cross-examined as to the effect of A.'s business on his, inasmuch as they were rivals in business. Hubbard v. Rutledge, 57 Miss., 7.

6. Evidence that defendants refused to publish a card expressing a belief in plaintiff's innocence save as an advertisement, *held* admissible on the question of intent. Barnes v. Campbell, 60 N. H., 27.

7. Evidence tending to show that defendant did not act wantonly or rashly, and that he had probable cause for what he said, is admissible under

[1] Gardner v. Slade et ux., 13 Q. B., 798; 18 L. J., Q. B., 336.

[2] Caulfield v. Whitworth, 16 W. R., 936; 18 L. T., 527.

[3] Howe v. Jones, 1 Times L. R., 462; Lewis and Herrick v. Chapman, 2 Smith (16 N. Y.), 369; Vanderzee v. McGregor, 12 Wend., 546; Fowles v. Bowen, 3 Tiffany (30 N. Y.), 20.

[4] Harrison v. Bush, 5 E. & B., 350; 1 Jur. (N. S.), 846; 25 L. J., Q. B., 25; Brett v. Watson, 20 W. R., 723; Kershaw v. Bailey, 1 Ex., 743; 17 L. J., Ex., 129; Scarll v. Dixon, 4 F. & F., 250; Pater v. Baker, 3 C. B., 831; 16 L. J., C. P., 124; 11 Jur., 370; Tompson v. Dashwood, 11 Q. B. D., 43; 52 L. J., Q. B., 425; 48 L. T., 943; 48 J. P., 55.

a defense of privileged communication, it tending to rebut the presumption of malice which might be inferred from the language. Mayo v. Sample, 18 Iowa, 306.

8. The defendant in an action of slander, for the purpose of disproving malicious intent, should be allowed to show that what he said was public rumor, and was so spoken of by him, or had been told to him by another, whose name he mentioned at the time. Tarr v. Rasee, 9 Mich., 353. See Binns v. Stokes, 27 Mich., 239.

9. Circumstances tending to disprove malice are admissible in a slander suit in mitigation of damages. But evidence of the apparent good humor of the defendant, when uttering language clearly slanderous, does not so tend to disprove malice. Weaver v. Hendricks, 30 Mo., 572.

10. In a legal sense malice, as an ingredient of an action of libel or slander, signifies nothing more than a wrongful act done intentionally without just cause or excuse. Where the publication imputes a crime so as to be actionable *per se*, or is actionable only on averment and proof of special damages, if the publication is not justified by proof of its truth, or by the privileged occasion of publication, the law conclusively presumes malice such as is essential to the action. King v. Patterson (N. J.), 9 Atl. Rep., 705.

11. In slander the question of malice is for the jury to determine upon all the facts and conversations in connection with which the words were spoken. McKee v. Ingalls, 5 Ill. (4 Scam.), 30.

12. The defendant may show, to disprove malice and mitigate damages, that when the words were spoken his mind was so besotted by a long course of dissipation, and his character so depraved, that no one who knew him would pay any attention to what he might utter, or give any credence to a slanderous charge he might make. Gates v. Meredith, 7 Ind., 440.

13. The belief of the defendants in the truth of the charges contained in the publication does not destroy the presumption of malice. Malice need not be proved, but will be implied if the charge be false; and in determining the question of justification, the motives of the defendant will not be taken into consideration. Malice, said to be the gist of the action in suits for libel or verbal slander, does not mean malice or ill-will toward the individuals affected, in the ordinary sense of the term. In ordinary cases of slander the term "maliciously," without any legal ground of excuse. Malice is an implication of law from the false and injurious nature of the charge, and differs from actual malice or ill-will toward the individual frequently given in evidence to enhance the damages. King v. Root, 4 Wend., 113.

14. The words spoken charged the plaintiff with attempting to produce a "bogus baby;" the defendant admitted their falsity and set up in mitigation of damages that, in common with others, he believed the charge; he offered to show that the physical condition of the father was such as to induce a sincere belief that at the time he was incapable of procreation. *Held*, that the evidence was proper on the question of damages, as going to show absence of malice and a well-founded belief. Weed v. Bibbins, 32 Barb. (N. Y.), 315.

15. Certain butchers, including defendant, had formed a union to exclude western meat. Defendant was accused of having bought western meat,

and withdrew from the union. He was twitted with doing so, and replied charging plaintiff, who was the only butcher then engaged in killing, with killing diseased cattle. *Held*, that a refusal to charge that there was no evidence of express malice was proper, especially as defendant pleaded the truth of the defamatory utterances. Blumhardt v. Rohr, 70 Md., 328, 17 Atl. Rep., 266.

16. It was proper to instruct that the word "malicious" is not to be considered in the sense of spite or hatred, but as meaning that the person is actuated by improper and indirect motives other than the mere purpose of protecting the public health, or vindicating public justice. Id.

17. In ordinary cases of slander or libel it is not necessary to allege in the declaration that the words were spoken or the publication made maliciously; it is sufficient to aver that it was done falsely and injuriously. King v. Root, 4 Wend., 113.

§ 27. Digest of English Cases.—

1. Plaintiff was town clerk and clerk to the borough justices. Defendant said that he should feel great pleasure in ridding the borough of men like the plaintiff. So he sent a petition, charging plaintiff with corruption in his office and praying for an inquiry, to an official who had no jurisdiction over the matter. Verdict for the plaintiff. Damages £100. Blagg v. Sturt, 10 Q. B., 899; 16 L. J., Q. B., 39; 11 Jur., 101; 8 L. T. (O. S.), 135.

2. It is some evidence of malice that plaintiff and defendant are rivals in trade, or that they competed together for some post and plaintiff succeeded, and that then defendant being disappointed wrote the libel. Warman v. Hine, 1 Jur., 820; Smith v. Mathews, 1 Moo. & Rob., 151.

3. The defendant tendered to Brown at Crickhowell, two £1 notes on the plaintiffs' bank, which Brown returned to him, saying there was a run upon that bank, and he would rather have gold. The defendant the very next day went into Brecon and told two or three people confidentially that the plaintiffs' bank had stopped, and that nobody would take their bills. *Held*, that this exaggeration was some evidence of malice to go to the jury. Verdict for the defendant. Bromage v. Prosser, 4 B. & Cr., 247; 6 D. & R., 296; 1 C. & P., 475. And see Senior v. Medland, 4 Jur. (N. S.), 1039.

4. A gentleman told the second master of a school that he had seen one of the under-masters of the school on one occasion coming home at night "under the influence of drink," and desired him to acquaint the authorities with the fact. The second master subsequently stated to the governors that it was notorious that the under-master came home "almost habitually in a state of intoxication." There was no other evidence of malice. *Held*, that Cockburn, C. J., was right in not withdrawing the case from the jury. Hume v. Marshall, Times for November 23, 1877.

5. The justices were about to swear in the plaintiff as a paid constable, when defendant, a parishioner, came forward and stated that the plaintiff was an improper person to be a constable. *Held*, that the fact that several other persons besides the justices were present as usual did not destroy the privilege attaching to such *bona fide* remark. Kershaw v. Bailey, 1 Ex., 743; 17 L. J., Ex., 129.

6. Where a master has given a servant a bad character, the circumstances under which they parted, any expressions of ill-will uttered by the master

then or subsequently, the fact that the master never complained of the plaintiff's misconduct whilst she was in his service, or when dismissing her would not specify the reason for her dismissal and give her an opportunity of defending herself, together with the circumstances under which the character was given, and its exaggerated language, are each and all evidence of malice. Kelly v. Partington, 4 B. & Adol., 700; 2 N. & M., 460; Jackson v. Hopperton, 16 C. B. (N. S.), 829; 12 W. R., 913; 10 L. T., 529.

7. And in such a case plaintiff is permitted to give general evidence of his or her good character in order to show that the defendant must have known she did not deserve the bad character he was writing. Fountain v. Boodle, 3 Q. B., 5; 2 G. & D., 455; Rogers v. Sir Gervas Clifton, 3 B. & P., 587.

8. A colonel was dismissed from his command in consequence of charges made by the defendant. A member of parliament gave notice that he would ask a question in the house of commons relative to this dismissal. Defendant thereupon called on the member, whom he knew, to explain matters. The conversation that ensued was held to be *prima facie* privileged; but on proof that the charges were made not from a sense of duty, but from personal resentment on account of other matters, and that the object of the conversation was to prejudice the plaintiff by reason of such personal resentment, *held*, that there was actual malice, taking away the privilege. Dickson v. The Earl of Wilton, 1 F. & F., 419.

9. It is usual for a former master to give the character of a servant on application, and not before. Hence, if a master hears a discharged servant is applying for a place at M.'s house and writes at once to M. to give the servant a bad character, the fact that the communication was uncalled for will be apt to tell against the master. M. would almost certainly have applied to the defendant for the information sooner or later; and the eagerness displayed in thus imparting it unasked will be commented on as proof of malice, and if there be any other evidence of malice, however slight, may materially influence the verdict. But if there be no other evidence of malice, the communication is still privileged. Pattison v. Jones, 8 B. & C., 578; 3 M. & R., 101.

10. The defendant on being applied to for the character of the plaintiff, who had been his saleswoman, charged her with theft. He had never made such a charge against her till then; he told her that he would say nothing about it if she resumed her employment at his house; subsequently he said that if she would acknowledge the theft he would give her a character. *Held*, that there was abundant evidence that the charge of theft was made *mala fide*, with the intention of compelling plaintiff to return to defendant's service. Damages, £60. Jackson v. Hopperton, 16 C. B. (N. S.), 829; 12 W. R., 913; 10 L. T., 529; Rogers v. Clifton, 3 B. & P., 587.

11. The defendant made a charge of felony against his former shopman to his relatives during his absence in London, with a view of inducing them to compound the alleged felony, and not for the purpose of prosecution or investigation. He actually received £50 from plaintiff's brother as hush-money. *Held*, that the charge of felony was altogether unprivileged. Hooper v. Truscott, 2 Bing. N. C., 457; 2 Scott, 672.

12. Even though a report of judicial proceedings be correct and accurate,

still if it be published from a malicious motive, whether by a newspaper reporter or any one else, the privilege is lost. Stevens v. Sampson, 5 Ex. D., 53; 49 L. J., Q. B., 120; 28 W. R., 87; 41 L. T., 782.

§ 28. **Malice Inferred.**— When the speaking or publishing of slanderous words is once proved malice is inferred. If the words are used in an unqualified manner, whether the speaker was in jest or in earnest, whether he expected to be believed or disbelieved, the mischief is the same, and no legal distinction can be drawn in favor of the guilty party.[1]

§ 29. **Illustrations — Digest of American Cases.**—

1. The wilful publication of injurious statements for no good purpose or justifiable end is malicious, even if done without actual personal ill-will. Maclean v. Scripps, 17 N. W. Rep., 815, and 18 N. W. Rep., 209; 52 Mich., 214.

2. In the case of oral defamation, as in the case of written, if the words uttered are not privileged the law implies malice. Byam v. Collins, 19 N. Y. S. R., 581; 19 N. E. Rep., 75.

3. Malice is the gist of an action of slander, and the speaking of actionable words is evidence of malice; but this may be rebutted by proof of other parts of the same conversation explanatory of the alleged slanderous words. M'Kee v. Ingalls, 5 Ill. (4 Scam.), 30.

4. In an action against a railroad company for libel in publishing plaintiff's name on the "black-list" as an employee discharged for incompetency, it is error to instruct that the malice essential to such a libel is express malice, which means wicked intent, and that such intent must be proved like any other fact, and is never to be presumed, since the jury may infer the intent from the fact that the publication was false and injurious. Bebee v. Missouri Pac. R'y Co. (Tex.), 9 S. W. Rep., 449.

5. But though malice is generally to be inferred from the libelous nature of a publication, or its falsity — and it is to be taken as false till proved true by the defendant — yet the inference of malice in either case may be repelled by the circumstances of the publication, as the manner and the occasion. For example, a master, on inquiry, giving a character to a servant; publication in the course of legal or judicial proceedings; in the exercise of church discipline; an application to the proper authority for redress of grievances, or for the removal of an officer to the person possessing the power to remove. In such case express malice must be proved in order to maintain an action. But the publication in a newspaper of a false libel in relation to a candidate for office (for example, a candidate for the office of lieutenant-governor), though such publication be by a voter, the editor of the paper, in the course of a contested election, is not an exception to the general rule. Malice will, therefore, in such case, be implied from the publication of the falsity; and in an action for such a libel the defendant is bound to show its truth in order to justify. Root v. King, 7 Cow. (N. Y.), 613.

6. If the plaintiff has been injured in his character or feelings by an un-

[1] Hatch v. Potter, 2 Gilm. (Ill.), 725; Hamilton v. Eno, 81 N. Y., 116.

authorized publication, it is the duty of a jury to award him full compensation in damages without reference to any particular ill-will entertained against him by the defendant. Ill-will or malice will enhance the damages, but need not be shown to entitle a plaintiff to a recovery. King v. Root, 4 Wend., 113.

7. In all cases of defamation, whether oral or written, malice is an essential ingredient and must be averred. But when it is averred and the language is proved the law will infer malice until the proof, in the event of denial, be overthrown, or the language itself satisfactorily explained. Dillard v. Collins, 25 Gratt. (Va.), 343.

8. The fact that a statement in a newspaper concerning a person tending to vex or injure him is false is conclusive of malice. Dakota Territory v. Taylor, 1 Dak. Ty., 471.

9. An instruction in an action for libel that malice cannot be presumed, but must be proved like any other fact, is erroneous where it is not explained to the jury that it may be inferred from acts or words, and need not be established by direct evidence. Bebee v. Missouri Pac. R. Co., 71 Tex., 424, 9 S. W. Rep., 499.

10. Malice is implied as well from oral as from written defamation, where the communication is not privileged. Danforth, J., dissenting. Byam v. Collins, 111 N. Y., 143, 19 N. E. Rep., 75.

11. While the law implies malice from the use of words actionable in themselves, the implication may be explained and rebutted by circumstances. The words may be shown to have been used with reference to a known act, and to have been so understood by those present, and that such act was not in point of law a felony. It is proper to submit the intent of the publication to the jury. Welker v. Butler, 15 Brad. (Ill.), 209.

§ 30. Digest of English Cases.—

1. A gentleman told the second master of a school that he had seen one of the under-masters of the school on one occasion coming home at night "under the influence of drink," and desired him to acquaint the authorities with the fact. The second master subsequently stated to the governors that it was notorious that the under-master came home "almost habitually in a state of intoxication." There was no other evidence of malice. *Held*, that Cockburn, C. J., was right in not withdrawing the case from the jury. Hume v. Marshall, Times for November 23, 1877.

2. Defendant changed his printer, and on a privileged occasion stated in writing, as his reason for so doing, that to continue to pay the charges made by his former printer, the plaintiff, would be "to submit to what appears to have been an attempt to extort money by misrepresentation." *Held*, that these words, imputing improper motives to the plaintiff, were evidence of malice to go to the jury. Cooke v. Wildes, 5 E. & B., 328; 24 L. J., Q. B., 367; 1 Jur. (N. S.), 610; 3 C. L. R., 1090; O'Donoghue v. Hussey, Ir. R., 5 C. L., 124.

3. Plaintiff sued defendant on a bond; defendant in public, but on a privileged occasion, denounced the plaintiff for attempting to extort money from him. *Held*, that the words were in excess of the occasion. Robertson v. M'Dougall, 4 Bing., 670; 1 M. & P., 692; 3 C. & P., 259. See Tuson v. Evans, 12 A. & E., 733.

§ 31. **Repetition of Defamatory Matter Competent to Show Malice.**— Any other words written or spoken by the defendant of the plaintiff, either before or after those sued on, or even after the commencement of the action, are admissible to show the *animus* of the defendant; and for this purpose it makes no difference whether the words tendered in evidence be themselves actionable or not, or whether they be addressed to the same party as the words sued on or to some one else.[1] Such other words need not be connected with or refer to the defamatory matter sued on, provided they in any way tend to show malice in defendant's mind at the time of publication.[2] And not only are such other words admissible in evidence, but also all circumstances attending their publication, the mode and extent of their repetition. The more the evidence approaches proof of a systematic practice of libeling or slandering the plaintiff, the more convincing it will be.[3] The jury no doubt should be instructed, whenever the other words so tendered in evidence are in themselves actionable, that they must not give damages in respect of such other words, because they might be the subject-matter of a separate action;[4] but the omission by the judge to give such an instruction will not amount to a misdirection.[5] The defendant is always at liberty to prove the truth of such other words so given in evidence; for he could not plead a justification as to them, as they were not set out in the pleadings.[6]

§ 32. **Illustrations — Digest of American Cases.**—

1. A plaintiff in action for libel cannot adduce in evidence for any purpose a publication of the defendant made subsequently to that sued on unless it be an explanation or confession or an express admission of the malicious intent of the latter. Sanders v. Baxter, 6 Heisk. (Tenn.), 869.

2. It is competent, in an action for slander, to prove a repetition of the slanderous words in order to show malice, without pleading the repetition. Haeley v. Gregg (Iowa), 38 N. W. Rep., 416.

3. In an action for publishing a libel upon a plaintiff, evidence of other

[1] Ward v. Dick, 47 Conn., 300; 36 Am. Rep., 75; Pearson v. Lemaitre, 5 M. & Gr., 700; 12 L. J., Q. B., 253; 7 Jur., 748; 6 Scott, N. R., 607; Mead v. Daubigny, Peake, 168.

[2] Barrett v. Long, 3 H. L. C., 395; 7 Ir. L. R., 439; 8 Ir. L. R., 331; Bolton v. O'Brien, 16 L. R., Ir., 97, 483.

[3] Bond v. Douglas, 7 C. & P., 626; Barrett v. Long, 3 H. L. C., 414; Odgers on L. & S., 277.

[4] Pearson v. Lemaitre, 7 Jur., 748.

[5] Darby v. Ouseley, 1 H. & N., 1; 25 L. J., Ex., 227; 2 Jur. (N. S.), 497.

[6] Stuart v. Lovell, 2 Stark., 93; Warne v. Chadwell, 2 Stark., 457. See ch. 17.

publications by the defendant containing substantially the same imputation as that sued upon, whether made before or after the latter or even after suit brought upon it, may be admitted as evidence for the purpose of proving actual malice in the publication prosecuted for, and thereby aggravating the damages recoverable thereof. Gribble v. Pioneer Press Co., 34 Minn., 342; 25 N. W. Rep., 710.

4. In an action for libel to show actual malice other libelous publications by the defendant, containing substantially the same imputation against the plaintiff as the article sued on, are admissible. Larrabee v. Minnesota Tribune Co., 36 Minn., 141, 30 N. W. Rep., 462.

5. The utterance of other slanderous words of similar import with those charged, and so connected with them as to amount to a continuance of the same slander (at least if uttered before the commencement of the action), may be admitted as evidence of malice. Reitan v. Goebel, 33 Minn., 151, 22 N. W. Rep., 291.

§ 33. **Digest of English Cases.—**

The defendant, the tenant of a farm, required some repairs to be done at his house; the landlord's agent sent up two workmen, one of whom was the plaintiff. They made a bad job of it; the plaintiff undoubtedly got drunk while on the premises, and the defendant was convinced from what he heard that the plaintiff had broken open his cellar-door and drunk his cider. Two days afterwards the defendant met the plaintiff and a mason called Taylor and charged the plaintiff with breaking open the cellar-door, getting drunk and spoiling the job. He repeated this charge later in the same day to Taylor alone in the absence of the plaintiff, and also to the landlord's agent. *Held*, that the communication to the landlord's agent was clearly privileged, as he was the plaintiff's employer; that the statement made to the plaintiff in Taylor's presence was also privileged if made honestly and *bona fide*, and that the circumstance of its being made in the presence of a third person did not of itself make it unauthorized; and that it was a question to be left to the jury to determine from the circumstances, including the style and character of the language used, whether the defendant acted *bona fide* or was influenced by malicious motives. But that the statement to Taylor in the absence of the plaintiff was unauthorized and officious, and therefore not protected, although made in the belief of its truth, if it were in point of fact false. Defendant had, in fact, repeated the charge once too often. Toogood v. Spyring, 1 Cr., M. & R., 181; 4 Tyr., 582.

§ 34. **Reiteration of Libels or Slanders after Suit Brought.**— If the defendant re-asserts the libel in numbers of his paper appearing after commencement of the action;[1] or in private letters written after action,[2] unless such letters be themselves privileged;[3] or if the defendant continues to sell copies

[1] Chubb v. Westly, 6 C. & P., 436.

[2] Pearson v. Lemaitre, 5 M. & Gr., 700.

[3] Whiteley v. Adams, 15 C. B. (N. S.), 392; 33 L. J., C. P., 89; 10 Jur. (N. S.), 470; 12 W. R., 153; 9 L. T., 483.

of the libel at his shop up to the trial,[1]— these facts are admissible as evidence of deliberate malice, though no damages can be given in respect of them.

§ 35. **Repetition after Suit Brought.**— Proof of a repetition of slanderous statements after the commencement of the action is competent to show the animus with which they were first uttered. The decided weight of authority is that proof of the speaking after the commencement of the suit of the same words charged, or of words of similar import, is admissible for the purpose of showing malice, or the intent with which the words were originally spoken. But the jury ought to be cautioned not to enhance the damages because of the proof of words spoken after the commencement of the suit; for in all cases where the words are of such a character as to create a presumption of malice, proof of such repetition to show malice would be unnecessary, and as such proof cannot affect the measure of damages it would be useless in such cases. Yet in that class of cases where from the circumstances of the speaking a doubt arises as to the animus, proof of repetitions of similar charges after suit is commenced may have weight in determining the intent with which the words were spoken in the first instance.[2]

§ 36. **Illustrations — Digest of American Cases.**—

1. The plaintiff may, in aggravation of damages, prove that the slander had been repeated at any time within the statute of limitations, even after the commencement of the suit. Hatch v. Potter, 2 Gilm. (Ill.), 725.

2. The repetition of the words first spoken in the presence of a third person does not prove that they were originally spoken in the presence of another; and the repetition being made at the special request of the plaintiff does not of itself constitute such a legal injury as will give rise to an action. An admission by a stranger cannot be received as evidence against any party. Heller v. Howard, 11 Brad. (Ill.), 554.

3. Evidence of the repetition of the slander charged, or of the speaking of

[1] Chamberlain v. Vance, 51 Cal., 75; Plunket v. Cobbet, 5 Esp., 136; Barwell v. Adkins, 2 Scott, N. R., 11; 1 M. & Gr., 807.

[2] Hinkle et al. v. Davenport et al., 38 Iowa, 355; Bodwell v. Swan, 3 Pick., 376; Little v. Young, 2 Met. (Ky.), 558; Smith v. Wyman, 16 Maine, 13; Robbins v. Fletcher, 101 Mass., 115; Benson v. Edwards, 1 Carter (Ind.), 164; Palmer v. Anderson, 33 Ala., 78; Merrill v. Peasley, 17 N. H., 540; Smith v. Lovelace, 1 Duval (Ky.), 215; Forbes v. Meyers, 8 Blackf. (Ind.), 74; Hessler v. Degant, 3 Ind., 501; Kennedy v. Gifford, 19 Wend. (N. Y.), 296; Cavanaugh v. Austin, 42 Vt., 576; True v. Plumby, 36 Minn., 466. See chap. 17.

other slanderous words by the defendant, after the commencement of the action, is not admissible in New York, even for the purpose of showing malice, or in aggravation of damages. Frazier v. McCoskey, 60 N. Y., 337. But in California it is held that words substantially the same as those declared on, spoken by the defendant after the commencement of the action, are admissible in evidence on the question of malice; but the plaintiff can recover no additional damage for such words. Chamberlain v. Vance, 51 Cal., 75.

§ 37. **Digest of English Cases.—**

1. A long practice by the defendant of libeling the plaintiff is cogent evidence of malice; therefore other libels of various dates, some more than six years old, some published shortly before that sued on, are all admissible to show that the publication of the culminating libel sued on was malicious and not inadvertent. Barrett v. Long, 3 H. L. C., 395; 7 Ir. L. R., 439.

2. A libel having appeared in a newspaper, subsequent articles in later numbers of the same newspaper, alluding to the action and affirming the truth of the prior libel, are admissible as evidence of malice. Chubb v. Westley, 6 C. & P., 436; Barwell v. Adkins, 1 M. & Gr., 807; 2 Sc. N. R., 11; Mead v. Daubigny, Peake, 168. So if there be subsequent insertions of substantially the same libel in other newspapers. Delegal v. Highley, 8 C. & P., 444; 5 Scott, 154; 3 Bing. N. C., 950; 3 Hodges, 158. So if the defendant persists in repeating the slander or disseminating the libel pending action. In Pearson v. Lemaitre, 5 M. & Gr., 700; 6 Scott, N. R., 607; 12 L. J., Q. B., 253; 7 Jur., 748, a letter was admitted which had been written subsequently to the commencement of the action, and fourteen months after the libel complained of. In Macleod v. Wakley, 3 C. & P., 311, Lord Tenterden admitted a paragraph published only two days before the trial.

3. Defendant was director of a company of which plaintiff was auditor. Defendant made a charge against plaintiff in his absence at a meeting of the board. At the next meeting of the board plaintiff attended with his solicitor, having in the meantime written to defendant threatening an action. Defendant in consequence refused to make any charge or produce any evidence against the plaintiff in the presence of his solicitor. *Held*, no evidence of malice. Harris v. Thompson, 13 C. B., 333.

4. Defendant accused the plaintiff, in the presence of a third person, of stealing his wife's brooch; plaintiff wished to be searched; defendant repeated the accusation to two women, who searched the plaintiff and found nothing. Subsequently it was discovered that defendant's wife had left the brooch at a friend's house. *Held*, that the mere publication to the two women did not destroy the privilege attaching to charges, if made *bona fide;* but that all the circumstances should have been left to the jury. Padmore v. Lawrence, 11 A. & E., 280; 4 Jur., 458; 3 P. & D., 209. And see Amann v. Damm, 8 C. B. (N. S.), 597; 29 L. J., C. P., 313; 7 Jur. (N. S.), 47; 8 W. R., 470.

§ 38. **Former and Subsequent Defamation — When Evidence of Malice.—** Evidence of former or subsequent defamation is only admissible to determine the motive with which the words sued on were published. They are only admissible

when malice in fact is in issue. If there is no question of malice, no such other libels would be admissible unless they had immediate reference to the libel sued on, or helped to explain or modify it.[1] For such other libels are clearly independent substantive causes of action, and should not be used unfairly to enhance the damages in this action. It is now well settled that whenever the intention of the defendant is equivocal, that is, whenever the question of malice or good faith is properly about to be submitted to a jury, evidence of any previous or subsequent libel is admissible, even though it be barred by the statute of limitations, and even though a former action has been brought for the libel now tendered in evidence and damages recovered therefor.[2]

§ 39. **Illustrations — Digest of American Cases.—**

1. Where the plaintiff, to prove malice and aggravate the damages, gives in evidence other and different words, spoken subsequent to those laid in the declaration, the defendant, to repel malice and in mitigation of damages, may give the truth of such new matter in evidence under the plea of not guilty, even though such new words would be in themselves actionable. Wagner v. Holboumner, 7 Gill (Md.), 296.

2. Other similar publications made by the defendants on the same or the following day are held competent evidence in an action for libel, as bearing on the question of malice. Whittemore v. Weiss, 33 Mich., 348.

3. Evidence of other slanderous utterances than those charged in the petition is admissible for the purpose of showing malice. Prime v. Eastwood, 45 Iowa, 640.

4. Proof that the same words were uttered before the time set forth in the complaint is admissible upon the question of malice; and this although a suit for the utterance of such words has been begun and discontinued upon settlement. Flanders v. Groff, 25 Hun (N. Y.), 553.

5. The defendant in an action for a libel claimed that certain letters charged as libelous were written and sent in good faith and without malice, and were privileged communications. But another letter, written two years afterwards, referring to the plaintiff and the same transaction, and substantially repeating the same charge, was held admissible to show actual malice. Austin v. Remington, 46 Conn., 16.

6. Plaintiff, upon the trial of his action for libel, was refused permission to introduce in evidence the copy of his complaint containing the alleged libel published after its service in the defendant's newspaper, for the purpose of showing a repetition of the libel. He was also refused permission to introduce a paragraph copied by the defendant into his newspaper from

[1] Finnerty v. Tipper, 2 Camp., 72; Stuart v. Lovell, 2 Stark., 93; Defries v. Davis, 7 C. & P., 112. See, also, Charlter v. Barrett, Peake, 32; Lee v. Huson, Peake, 223; Fowles v. Bowen, 3 Tiffany (30 N. Y.), 20. See ch. 17.

[2] Symmons v. Blake, 1 M. & Rob., 477; Jackson v. Adams, 2 Scott, 599.

another newspaper commenting upon the suit, and announcing the opinion that it was a clear case of bulldozing and an underhand scheme to ruin the defendant financially. *Held*, that the evidence was properly excluded. Thompson v. Powning, 15 Nev., 195.

7. Separate publications made concerning the plaintiff which are not themselves actionable are admissible in a suit for libel. If they are actionable, *it seems* that they are still admissible whenever the question of malice in fact is to be left to the jury. McDermott v. Evening Journal Ass'n, 43 N. J. L., 488.

§ 40. **Digest of English Cases.**—

1. Where the defendant verbally accused plaintiff of perjury, evidence that subsequently to the slander defendant preferred an indictment against the plaintiff for perjury, which was ignored by the grand jury, was received as evidence that the slander was deliberate and malicious, although it was a fit subject for an action for malicious prosecution. Tate v. Humphrey, 2 Camp., 73, n.; Finden v. Westlake, Moo. & Malkin, 461.

2. A long practice by the defendant of libeling the plaintiff is cogent evidence of malice; therefore other libels of various dates, some more than six years old, some published shortly before that sued on, are all admissible to show that the publication of the culminating libel sued on was malicious and not inadvertent. Barrett v. Long, 3 H. L. C., 395; 7 Ir. L. R., 439; 8 Ir. L. R., 331.

3. A libel having appeared in a newspaper, subsequent articles in later numbers of the same newspaper, alluding to the action and affirming the truth of the prior libel, are admissible as evidence of malice. Chubb v. Westley, 6 C. & P., 436; Barwell v. Adkins, 1 M. & Gr., 807; 2 Sc. N. R., 11; Mead v. Daubigny, Peake, 168. So if there be subsequent insertions of substantially the same libel in other newspapers. Delegal v. Highley, 3 C. & P., 444; 5 Scott, 154; 3 Bing. N. C., 950; 3 Hodges, 158.

4. So if the defendant persists in repeating the slander or disseminating the libel pending action. In Pearson v. Lemaitre, 5 M. & Gr., 700; 6 Scott, N. R., 607; 12 L. J., Q. B., 253; 7 Jur., 748, a letter was admitted which had been written subsequently to the commencement of the action and fourteen months after the libel complained of. In Macleod v. Wakley, 3 C. & P., 311, Lord Tenterden admitted a paragraph published only two days before the trial. Odgers on L. & S., 280. But where the defendant was director of a company of which plaintiff was auditor, defendant made a charge against plaintiff in his absence at a meeting of the board. At the next meeting of the board plaintiff attended with his solicitor, having in the meantime written to defendant threatening an action. Defendant in consequence refused to make any charge or produce any evidence against the plaintiff in the presence of his solicitor. *Held*, no evidence of malice. Harris v. Thompson, 13 C. B., 333.

§ 41. **Extrinsic Evidence of Malice.** — The existence of malice may be shown by extrinsic evidence that the defendant bore a long-standing grudge against the plaintiff; that there were former disputes between them; that defendant had formerly been in the plaintiff's employ and was dismissed for

misconduct, or any previous quarrels, rivalry or ill-feeling between the parties. Anything defendant has ever said or done with reference to the plaintiff may be urged as evidence of malice. It is very difficult to say what possible evidence is inadmissible on this issue. The plaintiff has to show what was in the defendant's mind at the time of publication, and of that no doubt the defendant's acts and words on that occasion are the best evidence. But if plaintiff can prove that at any other time, before or after, defendant had any ill-feeling against him, that is some evidence that the ill-feeling existed also at the date of publication; therefore, all defendant's acts and deeds that point to the existence of any such ill-feeling at any date are evidence admissible for what they are worth.[1] In fact, whenever the state of a person's mind on a particular occasion is in issue, everything that can throw any light on the state of his mind then is admissible, although it happened on some other occasion.[2]

§ 42. **Illustrations — American Cases.—**

1. **In a Wisconsin Case** (*Templeton v. Graves*, 59 Wis., 95), the evidence showed that on June 18, 1881, in the afternoon, the defendant was engaged in a heated discussion in front of the plaintiff's store with the assessor of the town relative to the assessment, by the latter, of the defendant's property, when the plaintiff said to the assessor from the stoop of his store, "Are you having a prayer meeting?" And the assessor replied, "I guess so." Thereupon the defendant turned toward the plaintiff and said to him, "You G—d d—d son of a b—h," and started towards plaintiff. Plaintiff then said, "You are a bastard." Defendant continued to advance towards the plaintiff and said, "G—d d—n you, you couldn't break Cooling's will. G—d d—n you, you broke open a granary and stole my wheat." He also charged plaintiff with having stolen wheat when in Boorman's mill. These epithets and charges of theft were repeated several times by the defendant in a loud and angry tone. There were twenty or thirty people present and in hearing when the charges were made, including the plaintiff's family. This appears to have been the first and only conversation between the parties concerning the wheat. This action is predicated upon the charge of theft then and there made by the defendant. To establish the express malice of the defendant in making these charges, the plaintiff proved that on January 1, 1881, the defendant, in the presence and hearing of three other persons, said that the plaintiff broke open a granary and stole his wheat, and used other vulgar and dirty language; also, that on May 2, 1881, he told another

[1] Cooper v. Blackmore and others, 2 Times L. R., 746; Odgers on L. & S., 276.

[2] R. v. Francis, L. R., 2 C. C. R., 128; Blake v. Albion Assurance Society, 4 C. P. D., 94; 48 L. J., C. P., 169; 27 W. R., 321; 40 T., 211.

person that plaintiff broke a lock off a granary and stole his wheat; and then in November of that year, after the action was commenced, such person having expressed his regret that defendant had said anything to him about the matter, defendant replied, "That's all right, I am going to prove that he stole the wheat." Still further, it was proved that while the defendant was on the way to Sussex (a village in Lisbon, in which plaintiff's store was situated), on the afternoon of the same 18th of June, and shortly before the altercation between the parties occurred, he said in the presence of two persons that he was going up to give the plaintiff a piece of his mind; that he had been using Richard Cooling mean, and he would go up and give him a piece of his mind. On the foregoing proofs, notwithstanding the circumstances under which the slanderous words were spoken, the jury were justified in finding the express malice of the defendant. It is very strong evidence of such malice — of the ill-will and malevolent intent of the defendant — that he made the same charges in cool blood, at different times and to different persons, months before the act was committed, and deliberately repeated them months afterwards, and that, confessedly, he went to the place of the plaintiff's residence, at the time he made the charge for which his action was brought, for the purpose of upbraiding him for conduct of which he disapproved. Under these circumstances the jury might well find that he was moved to utter the slanderous words by his preconceived hatred of and ill-will toward the plaintiff, rather than by any sudden provocation to which he was then subject.

§ 43. Digest of American Cases.—

1. The defendant, in order to rebut the inference of malice from certain statements made by him of the plaintiff's difficulties with his wife, offered to prove "that the plaintiff's wife had in fact complained of his abuse in connection with his leaving him at a certain time." *Held*, that an exception to a refusal to admit this evidence could not be sustained. Collins v. Stephenson, 8 Gray (Mass.), 438.

2. In an action for libel, defendant is not to be made responsible for malice and hatred of a person who supplied him with the facts upon which the publication was based, in the absence of malice in defendant himself, such person not being a servant of defendant. Bradley v. Cramer, 66 Wis., 297, 28 N. W. Rep., 372.

3. In an action of slander for charging an infant with larceny, evidence of a previous quarrel between the defendant and plaintiff's father and next friend is inadmissible to prove malice in the defendant and against the plaintiff. York v. Pease, 2 Gray (63 Mass.), 282.

§ 44. Digest of English Cases.—

1. In an action for libel and slander on privileged occasions, the only evidence of malice was vague abuse of the plaintiff, uttered by the defendant on the Saturday before the trial in a public house at Rye. Such abuse had no reference to the slander or the libel or to the action. *Held*, that this evidence was admissible; but that the judge should have called the attention of the jury to the vagueness of the defendant's remarks in the public house, to the fact that they were uttered many months after the alleged slander and libel, and that therefore they were but very faint evidence that the defendant bore the plaintiff malice at the time of the pub-

lication of the alleged slander and libel. A new trial was ordered. Hemmings v. Gasson, E., B. & E., 346; 27 L. J., Q. B., 252; 4 Jur. (N. S.), 834.

2. Where the defendant verbally accused plaintiff of perjury, evidence that subsequently to the slander defendant preferred an indictment against the plaintiff for perjury, which was ignored by the grand jury, was received as evidence that the slander was deliberate and malicious, although it was a fit subject for an action for malicious prosecution. Tate v. Humphrey, 2 Camp., 73, n.; Finden v. Westlake, Moo. & Malkin, 461.

3. Where a master has given a servant a bad character, the circumstances under which they parted, any expressions of ill-will uttered by the master then or subsequently, the fact that the master never complained of the plaintiff's misconduct whilst she was in his service, or when dismissing her would not specify the reason for her dismissal and give her an opportunity of defending herself, together with the circumstances under which the character was given, and its exaggerated language, are each and all evidence of malice. Kelly v. Partington, 4 B. & Adol., 700; 2 N. & M., 460; Jackson v. Hopperton, 16 C. B. (N. S.), 829; 12 W. R., 913; 10 L. T., 529.

4. In such a case plaintiff is permitted to give general evidence of his or her good character in order to show that the defendant must have known she did not deserve the bad character he was writing. Fountain v. Boodle, 3 Q. B., 5; 2 G. & D., 455; Rogers v. Sir Gervas Clifton, 3 B. & P., 587; Odgers on L. & S., 281, 203.

5. Defendant charged the plaintiff, his porter, with stealing his bedsticks, and, with plaintiff's permission, subsequently searched his house, but found no stolen property. The jury found that the defendant *bona fide* believed that a robbery had been committed by the plaintiff, and made the charge with a view to investigation; but added, "the defendant ought not to have said what he could not prove." *Held*, that this finding was immaterial; that the occasion was privileged, and that there was no evidence of malice. Judgment for the defendant. Howe v. Jones, 1 Times L. R., 19, 461; Fowler and wife v. Homer, 3 Camp., 294.

6. The defendant was a customer at the plaintiff's shop, and had occasion to complain of what he considered fraud and dishonesty in the plaintiff's conduct of his business; but, instead of remonstrating quietly with him, the defendant stood outside the shop-door and spoke so loud as to be heard by every one passing down the street. The language he employed, also, was stronger than the occasion warranted. *Held*, that there was evidence of malice to go to the jury. Damages 40*s*. Oddy v. Lord George Paulet, 4 F. & F., 1009; Wilson v. Collins, 5 C. & P., 373.

§ 45. **The Mode and Extent of Publication.**—The plaintiff is not restricted to extrinsic evidence of malice;[1] he may rely on the words of the libel itself and the circumstances attending its publication; or, in the case of slander, upon the exaggerated language used, or the fact that third persons were present who were not concerned in the matter, and other like attendant circumstances.

[1] Wright v. Woodgate, 2 C., M. & R., 573; 1 Tyr. & G., 12; 1 Gale, 329.

§ 46. **Digest of English Cases.**—

1. Defendant wrote to his wife's uncle telling him that his son and heir was leading a fast, wild life, and was longing for his father's death, and that all his inheritance would not be sufficient to satisfy his debts. The court of star chamber were satisfied that this letter was written with the intention of alienating the father from the son, and inducing the father to leave his lands and money to the defendant or his wife, and not from an honest desire that the son should reform his life; and they fined defendant £200. Peacock v. Reynal, 2 Brownlow & Goldesborough, 151.

2. Plaintiff assaulted the defendant on the highway; the defendant met a constable and asked him to arrest the plaintiff. The constable refused to arrest the plaintiff unless he was charged with a felony. The defendant knowing full well that the plaintiff had committed a misdemeanor only, viz., the assault, charged him with felony in order to get him locked up for the night. *Held*, that the charge of felony was malicious, as being made from an indirect and improper motive. Smith v. Hodgeskins, Cro. Car., 276.

3. A near relative may warn a lady not to marry a particular suitor and assign his reasons for thus cautioning her, provided this be done from a conscientious desire for her welfare and in the *bona fide* belief that the charges made are true. Todd v. Hawkins, 2 M. & Rob., 20; 8 C. & P., 888.

§ 47. **Intemperate Expressions, Exaggerated and Unwarrantable.**—"It is sometimes difficult to determine when defamatory words in a letter may be considered as by themselves affording evidence of malice."[1] But the test appears to be this: Taking the facts as they appeared to the defendant's mind at the time of publication, are the terms used such as the defendant might have honestly and *bona fide* employed under the circumstances? If the defendant honestly believed the plaintiff's conduct to be such as he described it, the mere fact that he used strong words in describing it is no evidence of malice.[2] The fact that the expressions are angry and intemperate is not enough; the proof must go further and show that they are malicious.[3]

But where the language used, though taken in connection with what was in defendant's mind at the time, is "much too violent for the occasion and circumstances to which it is applied," or "utterly beyond and disproportionate to the facts," or where improper motives are unnecessarily imputed, there

[1] Bramwell, L. J., 3 Q. B. D., 245.
[2] Spill v. Maule, Exch. Ch., L. R., 4 Exch., 232; W. R., 805; 20 L. T., 675; 38 L. J., Ex., 138; Odgers on L. & S., 284.
[3] Shipley v. Todhunter, 7 C. & P., 690.

is evidence of malice to go to the jury.[1] For in such a case it may be inferred that the defendant bore plaintiff a grudge, or had some sinister motive in writing as he did.

§ 48. **Illustrations — Digest of American Cases.—**

1. In an action for slander, the words alleged were: "You are a thief, a rogue and a robber, and I can prove it." There was evidence tending to show that plaintiff had gone into defendant's house in his absence, and taken a boy away by force for an alleged crime, and in the affair used harsh language to, and greatly terrified, defendant's wife, with whom he was unacquainted. Returning a few moments later, defendant, finding his wife much excited, and learning the cause, went to plaintiff for an explanation, and, according to some of the testimony, was received with insult, whereupon a quarrel ensued, in which he used the language complained of. The court charged that if defendant's language was a mere outburst of passion, induced by plaintiff's conduct towards his wife and himself, and was neither intended nor understood by the by-standers to charge plaintiff with the commission of a crime, they should find for defendant. *Held* a proper instruction. Ritchie v. Stenius, 73 Mich., 563, 41 N. W. Rep., 687.

2. Under such circumstances it is not improper to charge, as bearing upon defendant's provocation, that plaintiff's entry into defendant's house to arrest the boy was unlawful, as that question is immaterial; the important matter being whether the defendant uttered the language in a passion, produced by a knowledge of plaintiff's misbehavior towards his wife, and his subsequent insult to himself, and without malice. Ritchie v. Stenius, 73 Mich., 563, 41 N. W. Rep., 687.

3. A gross and brutal communication made a husband to his wife in a stormy interview, while an action brought by her for the annulment of their marriage was pending, in which he makes slanderous charges against a woman who had testified in behalf of the wife in such suit, may warrant the jury in inferring malice, and in finding that it was not privileged, under California Civil Code, section 47, by reason of the relation of the parties. Sesler v. Montgomery, 78 Cal., 486, 19 Pac. Rep., 686.

§ 49. **Digest of English Cases.—**

1. The defendant wrote a letter to be published in the newspaper. The careful editor struck out all the more outrageous passages, and published the remainder. The defendant's manuscript was admitted in evidence, and the obliterated passages read to the jury, to show the animus of the defendant. Tarpley v. Blaby, 2 Scott, 642; 2 Bing. N. C., 437; 1 Hodges, 414; 7 C. & P., 395.

2. Defendant changed his printer, and on a privileged occasion stated in writing, as his reason for so doing, that to continue to pay the charges made by his former printer, the plaintiff, would be "to submit to what appears to have been an attempt to extort money by misrepresentation." *Held*, that these words, imputing improper motives to the plaintiff, were

[1] Fryer v. Kinnersley, 15 C. B. (N. Ex., 615; 23 L. J., Ex., 152; 18 Jur., S.), 422; 33 L. J., C. P., 96; 12 W. R., 293.
155; 9 L. T., 415; Gilpin v. Fowler, 9

evidence of malice to go to the jury. Damages £50. Cooke v. Wildes, 5 E. & B., 328; 24 L. J., Q. B., 367; 1 Jur. (N. S.), 610; 3 C. L. R., 1090; O'Donoghue v. Hussey, Ir. R., 5 C. L., 124.

3. Plaintiff sued defendant on a bond; defendant in public, but on a privileged occasion, denounced the plaintiff for attempting to extort money from him. *Held*, that the words were in excess of the occasion. Robertson v. M'Dougall, 4 Bing., 670; 1 M. & P., 692; 3 C. & P., 259. See Tuson v. Evans, 12 A. & E., 733.

4. Defendant charged the plaintiff, his porter, with stealing his bed-sticks, and with plaintiff's permission subsequently searched his house, but found no stolen property. The jury found that the defendant *bona fide* believed that a robbery had been committed by the plaintiff, and made the charge with a view to investigation; but added, "the defendant ought not to have said what he could not prove." *Held*, that this finding was immaterial, that the occasion was privileged, and that there was no evidence of malice. Judgment for the defendant. Howe v. Jones, 1 Times L. R., 19, 461; Fowler and wife v. Homer, 3 Camp., 294.

5. Where the defendant verbally accused plaintiff of perjury, evidence that subsequently to the slander defendant preferred an indictment against the plaintiff for perjury, which was ignored by the grand jury, was received as evidence that the slander was deliberate and malicious, although it was a fit subject for an action for malicious prosecution. Tate v. Humphrey, 2 Camp., 73, n.; Finden v. Westlake, Moo. & Malkin, 461.

6. Plaintiff brought an action against defendant, and applied for an injunction. Defendant applied at the same time for a receiver, which was refused. Thereupon the defendant said that he would "make it d——d hot for Dodson," and inserted in a newspaper he owned a report of the application, setting out all his own counsel had said against plaintiff's solvency, etc., at full length, but omitting all mention of plaintiff's affidavit. *Held*, ample evidence of malice. Damages £250. Dodson v. Owen, 2 Times L. R., 111.

§ 50. **The Method of Communication Employed** (see *Publication*).— If the mode and extent of a privileged publication be deliberately made more injurious to the plaintiff than necessary, this is evidence of malice in the publisher. Confidential communications should not be shouted across the street for all the world to hear.[1] Defamatory remarks, if written at all, should be sent in a private letter properly sealed and fastened up, not written on a post-card, or sent by telegraph; for two strangers at least read every telegram; many more most post-cards.[2] Letters as to the plaintiff's private affairs should not be published in the newspaper, however meritorious the writer's purpose may be: unless, indeed, there is no other

[1] Wilson v. Collins, 5 C. & P., 373.

[2] Williamson v. Freer, L. R., 9 C. P., 393; 43 L. J., C. P., 161; Whitfield v. S. E. R'y Co., E., B. & E., 115; Robinson v. Jones, 4 L. R., Ir., 391.

way in which the writer can efficiently effect his purpose and discharge the duty which the law has cast upon him. But where it is usual and obviously convenient to print such a communication as that complained of, before circulating it among the persons concerned, the privilege will not be lost merely because of the necessary publication to the compositors and printers employed in printing it.[1] So with an advertisement inserted in a newspaper defamatory of the plaintiff; if such advertisement be necessary to protect the defendant's interests, or if advertising was the only way of effecting the defendant's object, and such object is a legal one, then the circumstances excuse the extensive publication. But if it was not necessary to advertise at all, or if the defendant's object could have been equally well effected by an advertisement which did not contain the words defamatory of the plaintiff, then the extent given to the announcement is evidence of malice to go to the jury.[2] The law is the same as to posting libelous placards,[3] or having a libelous notice cried by the town crier.[4]

§ 51. **Illustrations — Digest of American Cases.—**

1. In an action for slander it is competent for the defendant to show that the words were uttered before a tribunal of a religious society of which the plaintiff and defendant were both members, for the purpose of disproving malice. The decision of such tribunal, however, is incompetent evidence. Whitaker v. Carter, 4 Ired. (N. C.) L., 461.

2. It is admissible to show that a newspaper article ridiculing the plaintiff was inserted as a joke, and arose out of a mutual banter. Sulling v. Shakespeare, 46 Mich., 408; 9 N. W. Rep., 451.

3. A printer's mistake, without wrongful intent, cannot be held a malicious libel. Sulling v. Shakespeare, 46 Mich., 403; 9 N. W. Rep., 451.

§ 52. **Digest of English Cases.—**

1. If libelous matter which would have been privileged if sent in a sealed letter be transmitted unnecessarily by telegraph, the privilege is thereby lost. Williamson v. Freer, L. R., 9 C. P., 393; 43 L. J., C. P., 161; 22 W. R., 878; 30 L. T., 332.

2. An Irish court will take judicial notice of the nature of a post-card, and will presume that others besides the person to whom it is addressed will read what is written thereon. Robinson v. Jones, 4 L. R., Ir., 391.

[1] Lawless v. Anglo-Egyptian Cotton and Oil Co., L. R., 4 Q. B., 262.

[2] Smith v. Smith (Mich.), 41 N. W. Rep., 499; Brown v. Croome, 2 Stark., 297; and Lay v. Lawson, 4 A. & E., 795, explaining Delany v. Jones, 4 Esp., 191.

[3] Cheese v. Scales, 10 M. & W., 488.

[4] Odgers on L. & S., 286; Woodard v. Dowsing, 2 Man. & Ry., 74.

3. The defendant was a customer at the plaintiff's shop, and had occasion to complain of what he considered fraud and dishonesty in the plaintiff's conduct of his business; but instead of remonstrating quietly with him, the defendant stood outside the shop-door, and spoke so loud as to be heard by every one passing down the street. The language he employed also was stronger than the occasion warranted. *Held*, that there was evidence of malice to go to the jury. Oddy v. Lord George Paulet, 4 F. &. F., 1009. And see Wilson v. Collins, 5 C. & P., 373.

4. While the defendant was engaged in winding up the affairs of the plaintiff's firm, of which defendant was also a creditor, the plaintiff took from the cash-box a parcel of bills to the amount of £1,264. Thereupon the defendant wrote to another creditor of the firm that the conduct of the plaintiff "has been most disgraceful and dishonest, and the result has been to diminish materially the available assets of the estate." *Held*, that the occasion was privileged, and that though the words were strong, they were, when taken in connection with the facts, such as might have been used honestly and *bona fide* by the defendant; for the plaintiff's conduct was equivocal, and might well be supposed by the defendant to be such as he described it; and that the judge was right in directing a verdict to be entered for the defendant, there being no other evidence of actual malice. Spill v. Maule (Exch. Ch.), L. R., 4 Ex., 232; 38 L. J., Ex., 133; 17 W. R., 805; 20 L. T., 675.

§ 53. **Privileged Communications — Undue Publicity.**— The distinction should be observed between publications which are not privileged, and circumstances showing malice which render a clearly privileged publication actionable. To deliberately give any unnecessary publicity to statements defamatory of another raises a suspicion of malice. But if a person accidentally or inadvertently communicates the statement to another who is unconcerned in its subject-matter, having no formed intention or desire of defaming the plaintiff to him, it is no evidence of malice; though it may be that the publication to him is not privileged from the beginning.[1] If, in writing or speaking on a privileged occasion, a person breaks out into irrelevant charges against another, wholly unconnected with the occasion from whence the privilege is derived, such excess may be regarded as evidence of malice, making the relevant matter actionable; but it is more accurate to say that such irrelevant charges are wholly unprivileged, and no question of actual malice arises as to them.[2] So the fact that a person volunteered the information is no evidence of malice if it

[1] Tompson v. Dashwood, 11 Q. B. D., 43; 52 L. J., Q. B., 425; 48 L. T., 943; 48 J. P., 55.

[2] Huntley v. Ward, 6 C. B. (N. S.), 514; 6 Jur. (N. S.), 18; Warren v. Warren, 1 C., M. & R., 251; 4 Tyr., 850.

was his duty to volunteer it. But if the interference was officious and uncalled for, then the communication never was privileged, and no inquiry need be made as to the existence of malice.

In a privileged oral communication it is important to observe who is present at the time it is made. A desire should be shown to avoid all unnecessary publicity. It is true that the accidental presence of an uninterested by-stander will not alone take the case out of the privilege, and there are some communications which it is wise to make in the presence of witnesses; but if it can be proved that defendant purposely chose a time for making the communication when others were by, whom he knew would act upon it, this is evidence of malice.[1]

§ 54. Illustrations — Digest of American Cases.—

1. Where the alleged slanderous statement has been shown to be privileged the burden then rests on the plaintiff to prove express malice. Fahr v. Hayes 50 N. J. L. 275, 13 Atl. Rep., 261.

2. Privileged communications are *prima facie* excusable from the cause or occasion of the speaking or writing; but even in the case of such communications an action will lie if the party making the communication knows the charge to be false and adopts that mode of gratifying his ill-will or malice. In such case, however, actual malice must be shown, and the question will be submitted to the jury; in ordinary slander the question of malice is never submitted to a jury except as to the amount of damages. King v. Root, 4 Wend., 113.

§ 55. Digest of English Cases.—

1. A shareholder in a railway company himself invited reporters for the press to attend a meeting of the shareholders which he had summoned, and at which he made an attack upon one of the directors. *Held*, that the privilege was lost thereby. Parsons v. Surgey, 4 F. & F., 247. See Davis v. Cutbush, 1 F. & F., 487.

2. That defendant caused the libel to be industriously circulated is evidence of malice. Gathercole v. Miall, 15 M. & W., 319; 15 L. J., Ex., 179; 10 Jur., 337.

3. Defendant, having lost certain bills of exchange, published a handbill offering a reward for their recovery, and adding that he believed they had been embezzled by his clerk. His clerk at that time still attended regularly at his office. *Held*, that the concluding words of the handbill were quite unnecessary to defendant's object, and were a gratuitous libel on the plaintiff. Finden v. Westlake, Moo. & Malk., 461.

4. Defendant accused the plaintiff, in the presence of a third person, of stealing his wife's brooch; plaintiff wished to be searched; defendant repeated the accusation to two women, who searched the plaintiff and found

[1] Odgers on L. & S., 288. See chap. 19.

nothing. Subsequently it was discovered that defendant's wife had left the brooch at a friend's house. *Held*, that the mere publication to the two women did not destroy the privilege attaching to charges, if made *bona fide*, but that all the circumstances should have been left to the jury. Padmore v. Lawrence, 11 A. & E., 280; 4 Jur., 458; 3 P. & D., 209. And see Amann v. Damm, 8 C. B. (N. S.) 597; 29 L. J., C. P., 313; 7 Jur. (N. S.), 47; 8 W. R., 470.

5. In an action for libel and slander on privileged occasions, the only evidence of malice was some vague abuse of the plaintiff, uttered by the defendant on the Saturday before the trial in a public house at Rye. Such abuse had no reference to the slander or the libel or to the action. *Held*, that this evidence was admissible; but that the judge should have called the attention of the jury to the vagueness of the defendant's remarks in the public house, to the fact that they were uttered many months after the alleged slander and libel, and that therefore they were but very faint evidence that the defendant bore the plaintiff malice at the time of the publication of the alleged slander and libel. A new trial was ordered. Costs to abide the event. Hemmings v. Gasson, E., B. & E., 346; 27 L. J., Q. B., 252; 4 Jur. (N. S.), 834.

6. The fact that defendant's wife was present on a privileged occasion, and heard what her husband said, will not take away the privilege so long as her presence, though unnecessary, was not improper. Jones v. Thomas, 34 W. R., 104; 53 L. T., 678; 50 J. P., 149.

7. Where a master about to dismiss his servant for dishonesty calls in a friend to hear what passes, the presence of such third party will not destroy the privilege. Taylor v. Hawkins, 16 Q. B., 308; 20 L. J., Q. B., 313; 15 Jur., 746.

8. Where a master discharged his footman and cook, and they asked him his reasons for doing so, and he told the footman, in the absence of the cook, that "he and the cook had been robbing him," and told the cook in the absence of the footman that he had discharged her "because she and the footman had been robbing him," *held*, that these were privileged communications as respected the absent parties, as well as those to whom they were respectively made. Manby v. Witt and Eastmead v. Witt, 18 C. B., 544; 25 L. J., C. P., 294; 2 Jur. (N. S.), 1004.

9. The defendant, in a petition to the house of commons, charged the plaintiff with extortion and oppression in his office of vicar-general to the bishop of Lincoln. Copies of the petition were printed and delivered to the members of the committee appointed by the house to hear and examine grievances, in accordance with the usual order of proceeding in the house. No copy was delivered to any one not a member of parliament. *Held*, that the petition was privileged, although the matter contained in it was false and scandalous, and so were all the printed copies; for, though the printing was a publication to the printers and compositors, still it was the usual course of proceeding in parliament; and it was not so great a publication as to have so many copies transcribed by several clerks. Lake v. King, 1 Lev., 240; 1 Saund., 131; Sid., 414; 1 Mod., 58. See Lawless v. Anglo-Egyptian Cotton and Oil Co., Limited, L. R., 4 Q. B., 262; 10 B. & S., 229; 38 L. J., Q. B., 129; 17 W. R., 498.

10. A speech made by a member of parliament in the house is absolutely privileged; but if he subsequently causes his speech to be printed and published with the malicious intention of injuring the plaintiff, he will be liable both civilly and criminally. R. v. Lord Abingdon, 1 Esp., 226; R. v. Creevey, 1 M. & S., 273.

11. The rector dismissed the parish schoolmaster for refusing to teach in the Sunday school. The schoolmaster opened another school on his own account in the parish. The rector published a pastoral letter warning all parishioners not to support "a schismatical school," and not to be partakers with the plaintiff "in his evil deeds," which tended "to produce disunion and schism," and "a spirit of opposition to authority." *Held*, that there was some evidence to go to the jury that the rector cherished anger and malice against the schoolmaster. Gilpin v. Fowler, 9 Ex., 615; 23 L. J., Ex., 152; 18 Jur., 293.

§ 56. **Plea of Justification — When Evidence of Malice.**— A plea of justification may be a re-assertion of the libel or slander. No doubt where the words are privileged the mere fact that a plea of justification was put on the record is not of itself evidence of malice sufficient to go to the jury.[1] But if there be other circumstances suggesting malice, the plaintiff's counsel may also comment on the justification pleaded; and, in special circumstances, as where the defendant at the trial will neither abandon the plea nor give any evidence in support of it, obstinately persisting in the charge to the last without any sufficient reason, this alone may be sufficient evidence of malice.[2]

§ 57. **The Unsettled State of the Law.**— Some of our courts hold that a plea of justification in suits for defamation, if unsupported by evidence, is in itself an aggravated repetition of the original defamation and evidence of continuing malice.[3] Other courts hold the contrary doctrine.[4] In some jurisdictions

[1] Wilson v. Robinson, 7 Q. B., 68; Caulfield v. Whitworth, 16 W. R., 936; 18 L. T., 527; Brooke v. Avrillon, 42 L. J., C. P., 126.

[2] Warwick v. Foulkes, 12 M. & W., 508; Simpson v. Robinson, 12 Q. B., 511; 18 L. J., Q. B., 73. See ch. 21, § 68 *et seq.*

[3] Fero v. Ruscoe, 4 N. Y., 162; Wilson v. Robinson, 14 Law Jour. Rep., 196, Q. B.; 9 Jurist, 726; Lee v. Robertson, 1 Stew., 138; Richardson v. Roberts, 23 Ga., 215; Pool v. Devers, 30 Ala., 672; Updegrove v. Zimmerman, 13 Penn. St. R. (1 Harris), 619; Gorman v. Sutton, 32 id., 247; Doss v. Jones, 5 How. (Miss.), 158; Robinson v. Drummond, 24 Ala., 74; Beasley v. Meigs, 16 Ill., 139; Spencer v. McMasters, id., 405; Smith v. Wyman, 4 Shep., 13.

[4] Aird v. Fireman's Jour. Co., 10 Daly (N. Y.), 254; Murphy v. Stout, 1 Smith, 256; Shortley v. Miller, id., 395; Shank v. Case, 1 Carter (Ind.), 170; Millison v. Sutton, id., 508; Starr

it is held that when the justification is not fully established the circumstances may be considered in mitigation of damages.[1]

§ 58. **The Better Rule.**— In this state of the authorities we may at least suggest the rule which will best promote the ends of justice. In many of the states a defendant is allowed to file as many pleas as he may deem necessary for his defense, and he therefore has as much right to file a plea of justification as that of not guilty; and, if he acts in good faith, why should he be any more censurable in one case than the other? If he pleads a justification in the honest belief that he will be able to sustain it on the trial he ought not to be punished for so doing though he fail to establish it to the satisfaction of the jury. He may be innocently mistaken in the evidence, or he may be unable to make full proof of the defense by reason of the death or absence of his witness. His mere failure to justify should not as a matter of course aggravate the damage.

But if he pleads a justification in bad faith, with a view of injuring the plaintiff or without any expectation of supporting it by proof, the jury may properly consider the plea as a reiteration of the defamatory charge and in aggravation of damages. It is a question of fact for a jury to decide in each case whether the justification was interposed in good or in bad faith.[2]

v. Harrington, id., 515. And see Swails v. Butcher, 2 Carter, 84; Sloan v. Petrie, 15 Ill., 425; Thomas v. Dunaway, 30 Ill., 373; Rayner v. Kinney, 14 Ohio (N. S.), 283; Pallet v. Sargent, 36 N. H., 496.

[1] McAllister v. Sibley, 2 Me., 474; Chalmers v. Shackell, 6 Car. & P., 475; Morehead v. Jones, 2 B. Monroe (Ky.), 210; Shoulty v. Miller, 1 Carter, 544.

[2] Sloan v. Petrie, 15 Ill., 425.

CHAPTER XVII.

REPETITION OF DEFAMATORY MATTER.

§ 1. Repetition by the Originator — Competent to Show Malice.— It is always competent in an action for defamation to prove a repetition of slanderous charges for the purpose of showing malice, and it is wholly unnecessary to plead the repetition of the words. They are merely evidence upon the question of malice.[1]

§ 2. Illustrations — Digest of American Cases.—

1. Haeley, the plaintiff, brought an action for defamation against Gregg. The first count of his petition was based upon an alleged libel. It appears that the plaintiff was a station agent of the Chicago & Northwestern Railroad at the village of Nashville, in Iowa, and that the defendant wrote and signed an affidavit and sent it to the superintendent of the company, in which it was charged that Haeley had hired the station-house to two fallen women, for the purpose of carrying on their business therein, for which they paid him the sum of $2. A separate paragraph was added to the petition, in which it was averred that the defendant had repeated the slanderous charges upon which the action was founded. A motion to strike out this paragraph as redundant and irrelevant was sustained. On appeal it was held that the motion was properly sustained — it being unnecessary to

[1] Hinkle v. Davenport, 38 Ia., 355; Com. v. Damon, 136 Mass., 448; Randall v. Evening News, 97 Mich., 136; 56 N. W. Rep., 361; Ellis v. Whitehead, 95 Mich., 105; Enos v. Enos, 135 N. Y., 609; 32 N. E. Rep., 123; Ranson v. McCurley, 140 Ill., 626; Fredrichson v. Johnson, 60 Minn., 327; Bailey v. Bailey, 63 N. W. Rep., 341.

plead a repetition of the words, as evidence of a repetition bears only upon the question of malice. Haeley v. Gregg, 38 N. W. Rep. (Iowa), 416.

2. Under allegations as to a libel, plaintiff can prove republication or a continuous publication of the alleged libel, or of other words written or spoken by defendant before or after the commencement of the action, going to show malice. Behee v. Missouri Pac. R. Co. (Tex.), 9 S. W. Rep., 449.

§ 3. **Repetition of Slanders — Statute of Limitations.**— It is well settled that every utterance of slanderous words is a distinct cause of action; and if recovery is sought for repeating a slander the repetition must be declared upon as a separate cause of action. The mere general allegation of the repetition of the slander is but pleading evidence which is admissible without pleading; for under a single count the plaintiff may show repetitions, not for the purpose of sustaining the action, but for the purpose of showing malice in the speaking of the words declared upon, and thereby aggravating the damages.[1] And where the alleged cause of action is barred by the statute of limitations, it cannot be claimed by the plaintiff that because the alleged defamatory words were repeated at various times up to the commencement of the suit the statute of limitations has no application.[2]

§ 4. **Repetition of Slanders Originated by Others.**— Every repetition of a slander originated by a third person is a wilful publication of it, rendering the person so repeating it liable to an action. "Tale-bearers are as bad as tale-makers." And it is no defense that the speaker did not originate the scandal, but heard it from another, even though it was a current rumor and he in good faith believed it to be true.[3] Nor is it any defense that the speaker at the time named the person from whom he heard the scandal.[4] A man cannot say there is a story in circulation that A. poisoned his wife or B. picked C.'s pocket in the omnibus, or that D. has committed adultery, and relate the story, and when called upon to answer say: "There was such a story in circulation; I but repeated what I heard,

[1] Jean v. Hennesey, 69 Iowa, 273; 28 N. W. Rep., 645; Campbell v. Butts, 3 N. Y., 173; Howard v. Sexton, 4 N. Y., 157; Bassell v. Elmore, 48 N. Y., 551; Gribble v. Pioneer Press Co., 25 N. W. Rep., 710.

[2] Vickers v. Stoneman (Mich., 1889), 41 N. W. Rep., 495; Jean v. Hennesey, 69 Iowa, 273; 28 N. W. Rep., 645.

[3] Watkin v. Hall, L. R., 3 Q. B., 396; 37 L. J., Q. B., 125; 16 W. R., 857; 18 L. T., 561; Harris v. Minvielle, 48 La. Ann., 908; 19 So. Rep., 925; Fitzpatrick v. Daily State Pub. Co., 48 La. Ann., 1116; 20 So. Rep., 177.

[4] M'Pherson v. Daniels, 10 B. & C., 270; 5 M. & R., 251; Wheeler v. Shields, 2 Scam. (Ill.), 348.

and had no design to circulate it or confirm it;" and for two very plain reasons: (1) The repetition of the story must in the nature of things give it currency; and (2) the repetition without the expression of disbelief will confirm it. The danger — an obvious one — is that bad men may give currency to slanderous reports, and then find in that currency their own protection from the just consequences of a repetition.[1]

§ 5. **Illustrations — American Cases.—**

1. **In a Massachusetts Case** (*Kinney v. McLaughlin*, 71 Mass., 3), a witness testified that she met McLaughlin's wife, the female defendant, in the street and was asked by her, "If she had heard the story?" to which she answered, "What story?" Defendant replied, "Nothing less than that Agnes is Mr. Moran's kept Miss." Witness replied, "I do not believe it." Defendant said, "It is all over the glass-house." Witness said, 'That could not be; for her husband, who worked in the glass-house, would have heard of it." Defendant said, "It was not in the upper but the lower glass-house." The defendant claimed that there were such reports current in the community, and she had spoken of them, without in any degree sanctioning them or confirming them. Evidence was offered and admitted, against the plaintiff's objection, to sustain the defendant's position. The court instructed the jury that if the defendant merely said there was a report in circulation of the kind set forth in the writ, and did not say so with any design to extend its circulation, or in any degree to cause the person whom she addressed to believe or suspect the charge which the story imputed to be true, or to add to it any sanction or authority of her own or to give it any further circulation or credit, and it was true that such story was in circulation, it would not be actionable to say so. On appeal the court held the instruction not in conformity to the law as understood in Massachusetts. "The story uttered or repeated by the defendant contained a charge against the plaintiff of a nature to destroy her reputation. It is no answer in any forum to say that she only repeated the story as she heard it. If it was false and slanderous she must repeat it at her peril. There is safety in no other rule. Often the origin of slander cannot be traced. If it were, possibly it might be harmless. He who gives it circulation gives it power of mischief. It is the successive repetitions that do the work. A falsehood often repeated gets to be believed."

2. **An Indiana Case:** *Funk v. Beverly*, 112 Ind., 190.

In a case recently decided in Indiana a paragraph of the answer intended as a justification of a charge imputing a want of chastity in the plaintiff averred generally that the words spoken and written were true, and then proceeded specifically to affirm their truth. So far as concerned the libelous words quoted from the complaint, the specific allegations were these: "That he was also approached by W. W., then a single man, and was told by him that he (W.) had been with plaintiff at a camp meeting, and that

[1] Funk v. Beverly, 112 Ind., 190; 13 N. E. Rep., 573; Kinney v. McLaughlin, 71 Mass., 3.

while there he had taken her into a tent by themselves and had laid in there with her; and said W. gave the defendant to believe that he had intercourse with her at said camp meeting; and when the defendant asked him if it was true that he had intercourse with her, he said he had." In the concluding part of the answer it was alleged: "So that all the words charged to have been spoken and published by the defendant of and concerning the plaintiff were and are true in the sense in which it is alleged they were spoken." On appeal it was held that the theory of the answer that the defendant is justified because he repeated what was told him, and that it was true that he was told what he repeated, is radically unsound in law. The court say: "The fact that the publisher of libelous words avers that he heard them from another, and that it is true that he did hear them, is no justification. To constitute a justification it must be averred that the plaintiff was guilty of the wrong or crime imputed by the libelous or slanderous words. It is the charge contained in the words that must be justified. It is not enough for the defendant to aver that he heard the words spoken," etc.

§ 6. Digest of American Cases.—

1. Where a witness testifies in an action of slander that the defendant charged the plaintiff with a certain offense, the defendant cannot be permitted to prove by the witness that he (the witness) had before told the defendant that the plaintiff was guilty of that offense. Clark v. Munsell, 6 Met. (Mass.), 373.

2. A repetition of oral slander already in circulation, without expressing any disbelief in it, or any purpose of inquiring as to its truth, though written without design to extend its circulation or credit, or cause the person to whom it is addressed to believe or suspect it to be true, is actionable. Kinney v. McLaughlin, 5 Gray (Mass.), 3.

3. A person who utters a slander is not responsible, either as a distinct cause or in aggravation of damages, for its voluntary and unjustifiable repetition, without his authority or request, by others over whom he has no control, and who thereby render themselves liable to the person slandered. Hastings v. Stelson, 126 Mass., 329.

4. It is no justification that the defendant at the time he spoke the slanderous words accompanied them with an explanation that such was the common report, and that he spoke the words as merely giving the report. Wheeler v. Shields, 2 Scam. (Ill.), 348.

5. In 1813 the case of Dole v. Lyon, 10 Johns. R., 447, came before the supreme court of the state of New York for adjudication. It was an action for a libel published by the defendant, in which he gave the name of the author, viz., one G. D. Young. The plaintiff recovered a verdict, and the defendant asked for a new trial on the ground, among others, that having given the name of the author he was not liable to an action. Chief Justice Kent pronounced the judgment of the court. After adverting to the rule laid down in the Earl of Northampton's Case, 12 Co., 132, and in Davis v. Lewis, 7 T. R., 17, he observed that in neither of those cases was that rule the point in judgment, and proceeded: "It may well be questioned whether this rule, even as to slanderous words, ought not to depend upon the *quo animo* with which the words with the name of the author are repeated.

Words of slander, with the name of the author, may be repeated with a malicious intent and with mischievous effect. The public may be ignorant of the worthlessness of the original author, and may be led to attach credit to his name and slander, when both are mentioned by a person of undoubted reputation. There is, however, a distinction between oral and written or printed slander, which is noticed in all the books; and the latter is deemed much more pernicious, and will not so easily admit of justification. There is no precedent of such a justification in an action for a libel." He concludes his opinion upon this part of the case in these words: "Individual character must be protected, or social happiness and domestic peace are destroyed. It is not sufficient that the printer by naming the author gives the party grieved an action against him. This reason of the rule is mentioned in Lord Northampton's Case and repeated by Lord Kenyon. But this remedy may afford no consolation and no relief to the injured party. The author may be some vagrant individual, who may easily elude process; and if found, he may be without property to remunerate in damages. It would be no check on a libelous printer, who can spread the calumny with ease and rapidity throughout the community. The calumny of the author would fall harmless to the ground without the aid of the printer. The injury is inflicted by the press, which, like other powerful engines, is mighty for mischief as well as for good. I am satisfied that the proposition contended for on the part of the defendant is as destitute of foundation in law as it is repugnant to principles of public policy." Dole v. Lyon, 10 Johns. (N. Y.), 447.

§ 7. Digest of English Cases.—

1. Mr. and Mrs. Davies wrote a libelous letter to the directors of the London Missionary Society, and sent a copy to the defendant, who published extracts from it in a pamphlet. The defendant stated that the letter was written by Mr. and Mrs. Davies, and at the time he wrote the pamphlet he believed all the statements made in the letter to be true. *Held*, no justification for his publishing it. Tidman v. Ainslie, 10 Exch., 63; Mills and wife v. Spencer and wife, Holt, N. P., 533; M'Gregor v. Thwaites, 3 B. & C., 24; 4 D. & R., 695.

2. A rumor was current on the stock exchange that the chairman of the S. E. R'y Co. had failed, and the shares in the company consequently fell; thereupon the defendant said, "You have heard what has caused the fall — I mean the rumor about the S. Eastern chairman having failed?" *Held*, that a plea that there was in fact such a rumor was no answer to the action. Watkin v. Hall, L. R., 3 Q. B., 396; 37 L. J., Q. B., 125; 16 W. R., 857; 18 L. T., 561; Richards v. Richards, 2 Moo. & Rob., 557.

3. Woor told Daniels that M'Pherson's horses had been seized from the coach on the road, that he had been arrested, and that the bailiffs were in his house. Daniels went about telling every one, "Woor says that M'Pherson's horses have been seized from the coach on the road, that he himself has been arrested, and that the bailiffs are in his house." *Held*, that Daniels was liable to an action by M'Pherson for the slander, although he named Woor at the time as the person from whom he had heard it; that it was no justification to prove that Woor did in fact say so; defendant must

go further and prove that what Woor said was true. M'Pherson v. Daniels, 10 B. & C., 263; 5 M. & R., 251.

4. The defendant said to the plaintiff in the presence of others: "Thou art a sheep-stealing rogue, and farmer Parker told me so." *Held*, that an action lay. It was urged that the plaintiff ought not to have judgment, because it was not averred that farmer Parker did not tell the defendant so; but the court was of opinion that such an averment was unnecessay, it being quite immaterial whether farmer Parker did or did not tell the defendant so. Gardiner v. Atwater, Say., 265; Lewes v. Walter, 3 Bulstr., 225; Cro. Jac., 406, 413; Rolle's Rep., 444; Meggs v. Griffith, Cro. Eliz., 400; Moore, 408; Read's Case, Cro. Eliz., 645.

5. The defendant said to the plaintiff, a tailor, in the presence of others: "I heard you were run away;" *scilicet*, from your creditors. *Held*, that an action lay. Davis v. Lewis, 7 T. R., 17.

6. If at a meeting of a board of guardians charges were made against the plaintiff, this does not justify the owner of a newspaper in publishing them to the world; it is no justification to plead that such charges were in fact made, and that the alleged libel was an impartial and accurate report of what took place at such meeting. Purcell v. Sowler, 1 C. P. D., 781; 2 C. P. D., 215; 46 L. J., C. P., 308; 25 W. R., 362; 36 L. T., 416; Davison v. Duncan, 7 E. & B., 229; 26 L. J., Q. B., 104; 3 Jur. (N. S.), 613; 5 W. R., 253; 28 L. T. (O. S.), 265; Popham v. Pickburn, 7 H. & N., 891; 31 L. J., Ex., 133; 8 Jur. (N. S.), 179; 10 W. R., 324; 5 L. T., 846.

§ 8. **State of the Law in England.**—The text, it is presumed, correctly states the existing law on the point; but it would certainly not have been accepted in England as the law in the last century. The difficulty was presented by a resolution in Lord Northampton's Case in the star chamber, 1613, which appears as follows: "In a private action for slander of a common person, if J. S. publish that he hath heard J. N. say that J. G. was a traitor or thief, in an action of the case, if the truth be such, he may justify. But if J. S. publish that he hath heard generally without a certain author that J. G. was a traitor or thief, there an action *sur le case* lieth against J. S. for this, that he hath not given to the party grieved any cause of action against any but against himself who published the words, although that in truth he might hear them; for otherwise this might tend to a great slander of an innocent; for if one who hath *læsam phantasiam*, or who is a drunkard, or of no estimation, speak scandalous words, if it should be lawful for a man of credit to report them generally that he had heard scandalous words, without mentioning of his author, that would give greater color and probability that the words

were true in respect of the credit of the reporter than if the author himself should be mentioned."[1]

§ 9. **Lord Northampton's Case.**— The doctrine of Lord Northampton's Case as above laid down has at all times been looked at with disapprobation, and in England has been wholly denied to be law; and it has been held that it is not an answer to an action for oral slander for a defendant to show that he heard it from another, and named the person at the time, without showing that he, the defendant, believed it to be true, and that he spoke the words on a justifiable occasion.[2] Every publication of slanderous matter is *prima facie* a violation of the right which every individual has to his good name and reputation. The law, upon grounds of public policy and convenience, permits under certain circumstances the publication of slanderous matter, although it be injurious to another. But such act being *prima facie* wrongful, it lies upon the person charged with uttering slander, whether he were the first utterer or not, to show that he uttered it on some lawful occasion. So, even if the doctrine be upheld, it will be necessary for the defendant to aver in his plea that he heard the slander — for he must offer himself as a witness[3]— and that the person from whom he heard it spoke it falsely and maliciously; for otherwise he does not give the plaintiff any cause of action against the original speaker.[4] The better and more authoritative American doctrine is that it will afford no justification in an action for oral slander that the defamatory matter has been previously published by a third person; that the defendant at the time of his publication disclosed the name of that third person and believed all the statements to be true.[5]

[1] Odgers on L. & S., 163; 12 Rep., 134.

[2] M'Pherson v. Daniels, 10 Barn. & Cress., 263; 5 Mann. & Ry., 251; Ward v. Weeks, 7 Bing., 215; 4 Moore & Payne, 796; 1 Saund., 244*b*, 244*c* (6th ed.).

[3] M'Gregor v. Thwaites, 3 Barn. & Cress., 24; 4 Dowl. & Ry., 605.

[4] McPherson v. Daniels, 10 Barn. & Cress., 263; 5 Mann. & Ry., 521; 1 Saund., 244*c* (6th ed.).

[5] See 2 Kent, Comm., 20, note; Larkins v. Tarter, 3 Sneed, 681; Stevens v. Hartwell, 11 Met., 542, 549; Clark v. Munsell, 6 Met., 373, 389; Inman v. Foster, 8 Wend., 602; Mapes v. Weeks, 4 Wend., 659; Skinner v. Grant, 12 Ver., 456; Jones v. Clapham, 5 Blackf., 88; Clarkson v. McCarty, 5 Blackf., 574; Moberly v. Preston, 8 Mo., 462; Haynes v. Leland, 29 Me., 233; Ward v. Weeks, 7 Bing., 211; 4 M. & P., 796; Watkin v. Hall, L. R., 3 Q. B., 396; 37 L. J., Q. B., 125; 16 W. R., 857; 18 L. T.,

§ 10. **The Law in Starkie's Time.**— It is difficult to carry the doctrine of exculpation from hearsay further than this: that one who *bona fide* repeats scandal, which he has heard from the mouth of another, for the purpose of enabling an innocent party who has been calumniated to take measures for redressing the grievance, shall not be liable to an action. It is obvious that, if a man malevolently give a wide circulation to slander under the mere color and pretense of rendering friendly aid and assistance to the party calumniated, he stands in no situation which entitles him to legal protection; and consequently, as the act is in its own nature injurious, there is nothing to exempt him from the ordinary rule which obliges the propagator of a scandalous report, attended with actual or presumptive damage, to make compensation.[1]

§ 11. **The Distinction between Libel and Slander.**— The actual publisher of a libel may be an innocent porter or messenger — a mere hand, unconscious of the nature of his act, and for which, therefore, his employers shall be held liable, and not he. Whereas in every case of the republication of a slander the publisher acts consciously and voluntarily; the repetition is his own act. Therefore, if a person is in any way concerned in the making or publishing of a libel, he is liable for all the damage that ensues from its publication. But if one person slander another he is only liable for such damages as result directly from that one utterance of his own lips. If a third person hears him and chooses to repeat the tale, that is his own act, and he alone is answerable should damage ensue. In an action against the first person such special damage would be too remote. For each publication of a slander is a distinct and separate act, and every person repeating it becomes an independent slanderer, and he alone is answerable for the consequences of his own unlawful act.[2]

§ 12. **The Person Who Repeats the Slander is Liable.**— By the law as it stands at present, and the same is the law in

561. And see Bennett v. Bennett, 6 Conn., 408; Runkle v. Meyers, 3 Yeates (Penn.), 518; Dole v. Lyon, 10 Johns. (N. Y.), 447; Inman v. Foster, 8 Wend., 602; Heard on L. & S., § 148.

[1] 1 Starkie on Slander, 339; Borthwick's Law of Libel, p. 294.

[2] Odgers on L. & S., 167.

England, the person who invents a lie and maliciously sets it in circulation may sometimes escape punishment altogether, while a person who is merely injudicious may be liable to an action through repeating a story which he believed to be true, as he heard it told frequently in good society. For if one person originate a slander against another of such a nature that the words are not actionable in themselves, the utterance of them is no ground of action unless special damage follows. "If I myself tell the story to your employer, who thereupon dismisses you, you have an action against me; but if I only tell it to your friends and relations and no pecuniary damage ensues from my own communication of it to any one, then no action lies against me, although the story is sure to get round to your master sooner or later. The unfortunate man whose lips actually utter the slander to your master is the only person that can be made defendant; for it is his publication alone which is actionable as causing special damage."[1] But this apparent hardship only arises where the words are not actionable without proof of special damage. Where the words are actionable in themselves the jury find the damages generally, and will judge from the circumstances what the amount will be.[2]

§ 13. **Exceptions to the Rule.**— Odgers lays down two exceptions to this rule:

I. Where, by communicating a slander to A., the defendant puts A. under a moral necessity to repeat it to some other person immediately concerned; here, if the defendant knew the relation in which A. stood to this other person, he will be taken to have contemplated this result when he spoke to A. In fact, here A.'s repetition is a natural and necessary consequence of the defendant's communication to A.

II. Where there is evidence that the defendant, though he spoke only to A., intended and desired that A. should repeat his words, or expressly requested him to do so; here the defendant is liable for all the consequences of A.'s repetition of the slander, for A. thus becomes the agent of the defendant.[3]

[1] Gough v. Goldsmith, 44 Wis., 262; 28 Amer. Rep., 579; Shurtleff v. Parker, 130 Mass., 293; 39 Amer. Rep., 454.

[2] Harris v. Minvielle, 48 La. Ann., 908; 19 So. Rep., 925; Fitzpatrick v. Daily State Pub. Co., 48 La. Ann., 1116; 20 So. Rep., 177.

[3] Odgers on L. & S., 168.

§ 14. Illustrations — Digest of English Cases.—

1. H. told Mr. Watkins that the plaintiff, his wife's dressmaker, was a woman of immoral character. Mr. Watkins naturally informed his wife of this charge, and she ceased to employ the plaintiff. *Held*, that the plaintiff's loss of Mrs. Watkins' custom was the natural and necessary consequence of the defendant's communication to Mr. Watkins. Derry v. Handley, 16 L. T., 263; Gillett v. Bullivant, 7 L. T. (O. S.), 490; Kendillon v. Maltby, 1 Car. & Marsh., 402.

2. Weeks was speaking to Bryce of the plaintiff and said: "He is a rogue and a swindler; I know enough about him to hang him." Bryce repeated this to Bryer as Weeks' statement. Bryer consequently refused to trust the plaintiff. *Held*, that the judge was right in nonsuiting the plaintiff; for the words were not actionable *per se*, and the damage was too remote. Ward v. Weeks, 7 Bing., 211; 4 M. & P., 796.

3. The defendant's wife charged Mrs. Parkins with adultery. She indignantly told her husband, her natural protector; he was unreasonable enough to insist upon a separation in consequence. *Held*, that for the separation the defendant was not liable. Parkins et ux. v. Scott et ux., 1 H. & C., 153; 31 L. J., Ex., 331; 8 Jur. (N. S.), 593; 10 W. R., 562; 6 L. T., 394. See Dixon v. Smith, 5 H. & N., 450; 29 L. J., Ex., 125.

CHAPTER XVIII.

PARTIES.

§ 1. **Parties to the Action.**—The parties to the action for defamation are governed by the same general rule which governs in other actions of tort. With respect to those who may join or be joined in the same action it is to be observed that, regularly where two or more are jointly entitled or have a joint interest, they may join in the same action. It has always been held that, when words are spoken of two or more persons, they cannot join in an action for the words, because the wrong done to one is no wrong to the other. To this rule there appears to be two *exceptions:* (1) Defamatory words published of partners in the way of their business; and (2) slander of the title of joint owners of lands.[1]

§ 2. **Illustrations — Digest of American Cases.—**

1. For slanderous words spoken at the same time against several parties, a joint action cannot be maintained; each must seek a separate remedy. Hinkle v. Davenport, 38 Iowa, 355.

2. Several persons injured by the same libel must sue alone. Robinett v. McDonald, 65 Cal., 611.

3. Courts will not allow two persons to litigate a suit for libel, the libel consisting in an attack upon the chastity of a third person not a party. Langhead v. Bartholomew, Wright (Ohio), 90.

§ 3. **Corporations.—**

(1) *As plaintiffs:* A corporation may sue for any libel upon it as distinct from a libel upon its individual members. It may also sue for a slander upon it in the way of its business or trade. If, however, the corporation be not engaged in any business, it would probably be necessary to prove special damage in any case of slander, and this would be difficult.

A corporation "could not sue in respect of an imputation of

[1] Gazynski v. Colburn, 11 Cush., 10; 2 Saund., 116*a*, 117*a*, 117*b*, 6th ed.; 1 Walford on Parties, 514, 516; Smith v. Cooker, Cro. Car., 513; Bash v. Somner, 20 Penn. St., 159; Foster v. Lawson, 3 Bing., 452, 455; Forbes v. Johnson, 11 B. Mon., 50, 51. See Thompson on Corporations, §§ 6310, 6311.

murder, or incest, or adultery, because it could not commit those crimes. Nor could it sue in respect of a charge of corruption; for a corporation cannot be guilty of corruption, although the individuals composing it may be."[1]

(2) *As defendants:* A corporation is liable in damages for the publication of a libel as it is for other torts. To establish its liability the publication must be shown to have been made by its authority, or to have been ratified by it, or to have been made by one of its servants or agents in the course of the business in which he was employed.[2]

It may be difficult in many instances to distinguish between those cases where the agent of a corporation who publishes the libel is acting of his own malice, and those in which he is acting in the line of his duty towards his principal. Where he is acting in the latter character the corporation will be liable, but where he is acting in the former it will not.

But it will be liable to an action for a libel published by its servants or agents, whenever such publication comes within the scope of the general duties of such servants or agents, or whenever the corporation has expressly authorized or directed such publication.[3]

§ 4. Illustrations — Digest of American Cases.—

1. Incorporated companies, established for the purpose of transacting business, may maintain actions of libel the same as individuals for words affecting their business or property, if special damages are alleged and proved. Shoe & Leather Bank v. Thompson, 18 Abb. Pr. (N. Y.), 413.

2. An action for libel may be maintained by or against a corporation aggregate. Aldrich v. Press Printing Co., 9 Minn., 133; Trenton Ins. Co. v. Perrine, 23 N. J. L. (3 Zab.), 402.

3. An action for libel brought jointly by the members of a hose company

[1] Aldrich v. Press Printing Co., 9 Minn., 133; Shoe & Leather Bank v. Thompson, 18 Abb. Pr., 413; Pollock, C. B., 4 H. & N., 90; 4 H. & N., 87; 28 L. J., Ex., 201; 5 Jur. (N. S.), 226; 7 W. R., 265; 32 L. T. (O. S.), 281; Trenton Insurance Co. v. Perrine, 3 Zab. (N. J.), 402.

[2] Samuels v. Mail Co., 75 N. Y., 604; Fogg v. Boston & L. R. Co., 148 Mass., 513; Whitfield v. Railroad Co., El., Bl. & El., 115; Railroad Co. v. Quigley, 21 How., 202.

[3] Latimer v. Western Morning News Co., 25 L. T., 44; Abrath v. North Eastern R'y Co., 11 App. Cas., 253, 254; 55 L. J., Q. B., 460; 55 L. T., 65, 66; Aldrich v. Press Printing Co., 9 Minn., 133; Johnson v. St. Louis Dispatch Co., 65 Mo., 539; 2 Mo. App. R., 565; 27 Amer. Rep., 293; Philadelphia, etc., R. R. Co. v. Quigley, 21 How. (U. S.), 202; Howe Machine Co. v. Souder, 58 Ga., 64; Maynard v. Fireman's Fund Ins. Co., 34 Cal., 48; Vinas v. Merchants', etc., Ins. Co., 27 La. Ann., 367; Evening Journal v. McDermott, 44 N. J. L., 430; 39 Am. Rep., 606; 43 N. J. L., 488.

for a newspaper article that members of the company, without specifying individuals, had committed a theft, the members not being partners, nor being so situated that the charge could occasion them pecuniary damages as a company, cannot be maintained. Nor can defendants be put to their defense and compelled to disclose to whom the libel referred. Gerand v. Beach, 8 E. D. Smith (N. Y.), 337.

§ 5. **The Doctrine Discussed.**— The doctrine is now well established that a corporation in its corporate capacity is liable in a civil action for a libel, and it seems may also be indicted for the same offense.[1] "Theoretically a corporation is perhaps incapable of passion. We say perhaps, because upon an analysis of the construction and practical operation of these bodies the theory becomes invested with some doubt. That they should possess this attribute in law in order to harmonize their obligations and liabilities with those of individuals prosecuting the same enterprises there is not only no doubt but an imperative necessity. Corporations have almost entirely supplanted individual action in many branches of industry. If we set out on a journey we find ourselves at once almost exclusively in the hands of corporations, and we remain so until we return. The stages and the rail cars by which we are transported, and the hotels at which we are entertained, and even the newspapers by which we are informed of the events of the day, are, as a general rule, the property of and controlled by corporations. Almost every department of human industry is filled by corporations. It is difficult to see why these bodies should be exempt from the liabilities depending upon an evil intent or a bad passion when an individual committing the same offense would be held liable. Corporations may be composed of one man or several. In everything they do, although expressing themselves through agents and officers, they act with as much deliberation, design and intelligence as an individual. A corporation is established for the publication of a newspaper. Its members become hostile to a citizen and determine to injure him. They assemble in their corporate capacity and resolve to publish an infamous libel concerning him. One member writes it, the others approve it. The next morning it is read by thousands; and a citizen who was the day before above suspicion stands before the community branded with crime and infamy. The position that a corporation,

[1] 2 Bish. Crim. Law, § 935.

being a purely intellectual and ideal existence, is incapable of malice because malice is an emotion of the heart — a passion — is too refined a fiction for tolerance in the practical affairs of life at the present day. The old doctrine that corporations aggregate could not commit a tort was always considered questionable. We believe the law has now been fully established to the contrary.[1] Corporations have become the great motive power of society, governing and regulating its chief business affairs. And had Sir Edward Coke lived in modern times he would have seen something different in this from the soulless and unconscious beings of his age. The modern and correct doctrine holds them liable for all torts which work injuries to others, whether direct and intentional or arising from their own negligence.[2]

§ 6. **Liability to Indictment.**— In Tennessee an indictment presented against the Nashville Banner Publishing Company for publishing an article charging the existence of a "scoundrelly ring," a band of conspirators who had defrauded, cheated, swindled, plundered and robbed, with other equally choice and vigorous denunciations, was sustained by the supreme court;[3] though it has been held in Maine that where a crime or misdemeanor is committed under the color of corporate authority, the individual concerned, and not the corporation, should be indicted.[4]

§ 7. **Illustrations — Digest of American Cases.—**

1. Where a libelous article, indicating that a neighboring ticket agent is not responsible, is conspicuously posted forty days in the ticket office of a railroad company whose principal terminus and office are in the same city, and there is evidence that such office is used to publish general information of interest to purchasers of tickets, the jury may find that the company had knowledge of the character of the notice posted in its ticket office, and that the libel would not have remained so long posted had not the company au-

[1] Aldrich v. Press Printing Co., 9 Minn., 133.

[2] Goodspeed v. East Haddam B'k, 22 Conn., 531; Hooker v. New Haven, etc., Co., 14 Conn., 146; The N. Y. & W. Tel. Co. v. Dryburg, 35 Penn. (2 Casey), 302; McLelland v. Cumberland B'k, 24 Maine, 566; The Philadelphia, etc., R. R. Co. v. Quigley, 21 Howard (U. S.), 202.

[3] State v. Atchison et al., 3 Lea (Tenn.), 729; 31 Am. Rep., 663; Brennen v. Tracy, 2 Mo. App., 540; Pharmaceutical Society v. London and Provincial Supply Association, 5 App. Cas., 869, 870; 49 L. J., Q. B., 742; 28 W. R., 960; 43 L. T., 389; 5 Q. B. D., 313; 49 L. J., Q. B., 338.

[4] State v. Great W., etc., Co., 20 Maine, 41.

thorized or ratified it. Fogg v. Boston & L. R. Co., 148 Mass., 513, 20 N. E. Rep., 109.

2. An action for libel will lie against a corporation. McDermott v. Eve. Jour. Asso., 43 N. J. L., 488; 39 Am. Rep., 606. But a corporation is not liable for a libel by its agent, not in the course of his duty and not authorized nor approved by the corporation. Southern Express Co. v. Fitzner, 59 Miss., 581; 42 Am. Rep., 379.

3. A joint-stock association may be sued for a libel. Van Aernam v. McCune, 32 Hun (N. Y.), 316.

4. In an action against a corporation sued with others it was alleged that the corporation combined and confederated with the other defendants to injure the plaintiff by circulating false and slanderous statements to his injury, with the view of compelling him to become a subscriber to the publications of the corporation defendants, in pursuance of which combination the slanderous words were uttered by the other defendants. It was *held* upon demurrer that a cause of action was alleged against the corporation. Dodge v. Bradstreet, 59 How. (N. Y.) Pr., 104.

§ 8. **Digest of English Cases.**—

1. A joint-stock company, incorporated under the 19 and 20 Vict., ch. 47, may sue in its own corporate name for words imputing to it insolvency, dishonesty and mismanagement of its affairs, and this although the defendant be one of its own shareholders. Metropolitan Omnibus Co. v. Hawkins, 4 H. & N., 87; 28 L. J., Ex., 201; 5 Jur. (N. S.), 226; 7 W. R., 265; 32 L. T. (O. S.), 281.

2. Where, before the 19 and 20 Vict., ch. 47, a joint-stock insurance company, though not incorporated, was authorized by statute to sue in the name of its chairman, it was held that the chairman might bring an action for a libel which attacked the mode in which the company carried on its business. Williams v. Beaumont, 10 Bing., 260; 3 M. & Scott, 705.

3. A railway company was held liable for transmitting a telegram to the effect that the plaintiff's bank had stopped payment. Whitfield v. South Eastern Railway Co., E., B. & E., 115; 27 L. J., Q. B., 229; 4 Jur. (N. S.), 688.

§ 9. **Husband and Wife.**—The right of the husband to sue for words defamatory of his wife is somewhat anomalous, for his reputation is in no way assailed; and though he has sustained damage, is it not *damnum sine injuria*? Generally speaking, if words defamatory of one party but not actionable in themselves produce damage only to another, neither party can sue. But the reputation of a husband is so intimately connected with that of his wife that he has always been allowed to sue whenever he has received damage, just as though the words had been spoken of himself.[1]

[1] Gazynski et ux. v. Colburn, 11 Cush. (65 Mass.), 10.

This is the law laid down in Siderfin,[1] in the year 1667: "Nota si parols queux de eux m ne sont Actionable mes solement in respect del collateral dams. sont ple. (parlés) del feme covert, Le Baron sole port L'action, et si le feme soit joyn ove luy le Judgment serra pur ceo arrest, coment soit apres verdict." [2] In one case,[3] the wife's name was struck off the record by the judge at the trial, and the husband recovered for the damage to his business caused by words not actionable in themselves, spoken of his wife; though it is true the court based its judgment on the fact that the wife helped her husband in the shop, and was therefore his servant or assistant as well as his wife.[4]

§ 10. **Slander of the Wife before Marriage.**— The common-law rule applicable to actions of defamation for injuries to the wife committed before marriage, when the cause of action survives to the wife, requires her to join with her husband in the action, and if she die before judgment the action will abate.[5]

§ 11. **Extent of the Husband's Liability.**— A husband is only liable in civil actions for the acts of his wife. He is not responsible for her acts when they are criminal. And when they are joint defendants in actions for defamation the judgment, if rendered for the plaintiff, must be as well against the husband as the wife. The damages must be limited to a compensation for the injury sustained. The husband is liable for his wife's act to the same extent as if she alone were answerable. Vindictive or exemplary damages cannot be given.[6]

§ 12. **After Marriage.**— (1) *Words actionable in themselves:* In like manner the husband and wife must join in the action for slander of the wife in cases where the words are actionable in themselves. And the rule is the same though they are living apart under a deed of separation.[7] Where an injury is

[1] Siderfin, 346.

[2] Harwood v. Hardwick et ux. (1668), 2 Keble, 387; Coleman et ux. v. Harcourt, 1 Levinz, 140; Grove et ux. v. Hart, Sayer, 33; B. N. P., 7.

[3] Riding v. Smith, 1 Ex. D., 91; 45 L. J., Ex., 281; 24 W. R., 487; 34 L. T., 500.

[4] Odgers on L. & S., 394.

[5] 1 Chitty's Pleading, 83; Gibson v. Gibson, 43 Wis., 24. But see Leonard v. Pope, 27 Mich., 145.

[6] Austin et ux. v. Nelson et ux., 4 Cush. (58 Mass.), 273; Thorley v. Lord Kerry, 4 Taunt., 355; Whitney v. Hitchcock, 4 Denio (N. Y.), 461; Taylor v. Carpenter, 2 W. & M., 122.

[7] Savile v. Sweeney, 4 B. & A., 514; Horton v. Byles, Siderfin, 387; Beach v. Ranney, 2 Hill, 309; Enders v. Beck, 18 Iowa, 86; Hart v. Crow, 7 Blackf., 351.

committed to a wife during her coverture by defamation she cannot in the absence of statutory enactments sue alone in any case.[1]

(2) *Words not actionable in themselves:* Where the words are not actionable, but become so by reason of special damages, the wife cannot join in the action.[2]

§ 13. **The Rule Stated by Taunton, J.**—"The doctrine with respect to the joinder of the wife with the husband, in an action, is this: If there be a personal wrong or violence done to the wife, so that an action would survive to her, she ought to be joined; and it is not less the action of the wife, because the husband inserts in the declaration a statement of some special damage accruing to himself. But when there is no particular cause of action in the wife, and the right of action would not survive to her, but the gist of the action is the damage to the husband alone, she ought not to be joined."[3]

§ 14. **Defamation of Husband and Wife.**— For defamatory words spoken or written of husband and wife, there must necessarily be two actions, since the wife cannot join in an action for the defamation of her husband: one action by the husband alone for the injury done to him, and one by him and his wife for the injury done to her.[4]

§ 15. **The Rule under Statutes.**— In New York and Pennsylvania and some other states, a married woman has for many years been enabled by special statute to sue for libel or slander without joining her husband; but even in those states she cannot sue her husband for defaming her.[5] It seems, however, that in England if a married woman carried on a separate trade or profession, and her husband libeled or slandered her in the way of such trade or profession, she could sue him. Such an action was held by Brett, J., to be "a remedy for the protection and security" of her separate property within the act

[1] 1 Chitty's Pleadings, 73.

[2] 1 Chitty's Pleadings, 73; 1 Siderfin, 346; 2 Keb., 387; 1 Lev., 140; 2 Mod., 185; 1 Salk., 119.

[3] Saville v. Sweeney, 1 N. & M., 254; 4 B. & A., 514; Colman v. Harcourt, 1 Lev., 140.

[4] Gazynski and wife v. Colburn, 11 Cush. (Mass.), 10; Smith v. Hobson, Style, 112; Ebersol v. Krug, 3 Binney, 555; Hart v. Crow, 7 Blackf. (Ind.), 351; Hinkle v. Davenport, 38 Iowa, 355; Smith v. St. Joseph, 55 Mo., 456; Whitcomb v. Barry, 37 Vt., 148.

[5] Freethy v. Freethy, 43 Barb. (N. Y.), 641; Tibbs v. Brown, 2 Grant's Cas. (Penn.), 39.

of 1870.[1] But he cannot in any case — not even after they are divorced — sue her for defamatory words published by her during coverture.[2]

§ 16. **The Husband's Liability at Common Law.**— For all libels published, or slanders uttered by the wife before coverture, her husband was at common law liable to the full extent. But in later times his liability is restricted in this respect by statutory enactments in nearly all of the states of the Union. By the Married Woman's Property Act of England (1882), a woman after her marriage continues to be liable in respect to the extent of her separate property for all wrongs committed by her before her marriage, and she may be sued for any liability in damages or otherwise in respect of any such wrong; and all sums recovered against her in respect thereof, or for any costs relating thereto, are payable out of her separate property; and, as between her and her husband, unless there is a contract between them to the contrary, her separate property is deemed to be primarily liable for all such wrongs, and for all damages or costs recovered in respect thereof. And similar provisions exist in most of the states of the Union.

§ 17. **Abatement of the Action.**— If the husband die before judgment the action continues against the widow; if, however, the wife die in the life-time of her husband before judgment, the action abates, whether it was for a post-nuptial or an ante-nuptial tort,[3] unless he himself joined in or authorized it. If they be divorced the wife must be sued alone; the husband is released from all liability, even though the words complained of were published before the divorce.[4] So in England, if the wife has before action obtained a judicial separation or a protection order still in force. But if the husband and wife voluntarily live apart under a separation deed, the common-law rule prevails: the husband is liable for her misconduct, and may be joined as a defendant.[5]

[1] Summers v. City Bank, L. R., 9 C. P., 580; 43 L. J., C. P., 261.

[2] Phillips v. Barnet, 1 Q. B. D., 436; 45 L. J., Q. B., 277; 24 W. R., 345; 34 L. T., 177.

[3] Bell v. Stocker, 10 Q. B. D., 129; 52 L. J., Q. B., 49; 47 L. T., 624; Saltmarsh v. Candia, 51 N. H., 71; Norcross v. Stewart, 50 Me., 87.

[4] Capel v. Powell and another, 11 C. B. (N. S.), 743; 34 L. J., C. P., 161; 10 Jur. (N. S.), 1255; 13 W. R., 159; 11 L. T., 421.

[5] Head v. Briscoe et ux., 5 C. & P., 485; 3 L. J., C. P., 101.

A married woman will be held criminally liable for a libel she has published.[1] Her coverture will, it seems, be no defense to an indictment for a misdemeanor.[2]

§ 18. Illustrations — Digest of American Cases.—

1. Where a married woman was living apart from her husband under articles of separation, wherein her husband had covenanted that she might use his name in suing for any injury to her person or character, and the wife brought an action for slander in the joint names of her husband and herself, and the defendant induced the husband to execute a deed releasing the cause of action, and pleaded the release in bar of the wife's action, the court was compelled to hold this deed a good answer to the action. Beach et ux. v. Beach, 2 Hill (N. Y.), 260.

2. A husband cannot maintain an action for the loss of his wife's services caused by illness or mutual depression resulting from defamatory words, not actionable in themselves, being spoken of her by the defendant, for the wife, if sole, could have maintained no action. "The facility with which a right to damages could be established by pretended illness, where none exists, constitutes a serious objection to such an action." Wilson v. Goit, 17 N. Y., 445.

3. A wife may maintain an action in Maryland for slanderous words imputing a crime committed by her jointly with her and her husband; nor is it any defense to such action that no crime was charged against her, inasmuch as the law would presume she was acting under coercion. Nolan v. Trober, 49 Md., 460.

§ 19. Digest of English Cases.—

1. Words directly defamatory of the wife may also be defamatory of the husband, who may therefore sue alone. Thus, where defendant said to plaintiff's wife: "You are a nuisance to live beside of. You are a bawd, and your house is no better than a bawdy-house," it was held unnecessary to make the wife a party to the action, although the husband proved no special damage. For had the charge been true the plaintiff might have been indicted as well as his wife. Huckle v. Reynolds, 7 C. B. (N. S.), 114.

2. Where the defendant said to the plaintiff, an innkeeper: "Thy house is infected with the pox and thy wife was laid of the pox," it was held that the husband could sue; for even if small-pox was only meant the words were still actionable, "for it is a discredit to the plaintiff, and guests would not resort hither." Damages £50. Levet's Case, Cro. Eliz., 289.

3. "If an innkeeper's wife be called 'a cheat,' and the house lose the trade, the husband has an injury by the words spoken of his wife." Per Wythens, J., in Baldwin v. Flower, 3 Mod., 120; Grove et ux. v. Hart, B. N. P., 7; Sayer, 33.

4. Where the libel imputed that the plaintiff, a married man, kept a gaming-house, and that his wife was a woman of notoriously bad character, and the wife fell ill and died in consequence, evidence of such damage was

[1] R. v. Carlile, 3 B. & Ald., 167. Cruse and wife, 2 Moo. C. C., 53; 8
[2] R. v. Ingram, 1 Salk., 384; R. v. C. P., 541.

excluded in an action brought by the surviving husband. Guy v. Gregory, 9 C. & P., 584.

5. Mrs. Harwood slandered Mrs. White; wherefore White and wife sued Harwood and wife. Pending action Harwood died, and his widow remarried. The court was very much puzzled, and gave no judgment, apparently, though inclining to think that the writ abated. [I think it would now depend on whether the widow had any property at the date of her second marriage: if so, the second husband could be added as a co-defendant, or the action might proceed against her alone; if not, it would certainly be but little use continuing it.] White et ux. v. Harwood et ux., Style, 138; Vin. Abr., "Baron and Feme," A., a.; Odgers on L. & S., 405.

6. Mrs. Clayworth slandered plaintiff, who recovered 40s. damages and costs against her and her husband, and took her in execution under a *ca. sa.* The court refused to discharge her out of the custody of the sheriff without the clearest proof that she had no separate property. Ferguson v. Clayworth and wife, 6 Q. B., 269; 13 L. J., Q. B., 329; 8 Jur., 709; 2 D. & L., 165. But now see Draycott v. Harrison, 17 Q. B. D., 147; 34 W. R., 546.

7. Plaintiff sued Orchard and his wife for slanderous words. The jury found that Orchard had spoken the words, but not Mrs. Orchard. Judgment against the husband. It was moved in arrest of judgment that the speaking of the words could not be a joint act, and that if the husband alone uttered them the wife ought never to have been made a party to the action. But it was held that this defect was cured by the verdict, and that the plaintiff was entitled to retain his judgment. Burcher v. Orchard et ux., Style, 349. But see Swithin et ux. v. Vincent et ux., 2 Wils., 227.

§ 20. **Infants.**—The fact that an infant has been defamed gives his parents no right of action, unless in some very exceptional case it deprives the parent of services which the infant formerly rendered, in which case an action on the case may lie for the special damage thus wrongfully inflicted, provided it be the natural and probable consequence of the defendant's words. An infant will be held to be the servant of his parents, provided he is old enough to be capable of rendering them any act of service.[1]

(1) *As plaintiffs:* An infant may bring an action of defamation. He may trade, and may therefore have an action of slander for words which would damage him in his trade.[2] An infant sues by his next friend, who is personally liable for the costs of the suit;[3] but security for costs will not as a rule be

[1] Odgers on L. & S., 406; Dixon v. Bell, 5 Maule & S., 198; Hall v. Hollander, 4 B. & C., 660; 7 D. & R., 133; Evans v. Walton, L. R., 2 C. P., 615; 15 W. R., 1062.

[2] Wild v. Tomkinson, 5 L. J., K. B., 265.

[3] Stewart v. Howe, 17 Ill., 71; Odgers on L. & S., 405; Caley v. Caley, 25 W. R., 528.

required from him, lest the infant should lose his rights altogether.

(2) *As defendants:* The infancy of the defendant is no defense to an action of libel or slander. In England a lad of fifteen was imprisoned for default in payment of damages and costs for a slander.[1]

An infant will also be criminally liable for any libel if he be above the age of fourteen. If he be under fourteen he might possibly be found guilty of a libel if evidence were given of a disposition prematurely wicked. But more than the proof of malice ordinarily given in cases of privilege would probably be required.[2]

§ 21. **Illustrations — Digest of American Cases.—**

1. Sophia Howe, an infant under ten years of age, commenced an action by her next friend against Amos Stewart for slanderous words charging her with theft. On the trial the jury found for the plaintiff. Motions for a new trial and in arrest of judgment were made and overruled. The ground of the defense was that, as an infant under the age of ten years by statute of Illinois could not be found guilty of any criminal offense, imputing a crime to such an one could not be actionable. In affirming the judgment in the supreme court, Scates, C. J., said: "I am not called upon to say how young a plaintiff may sustain this action for words imputing crime, but as called upon in this case I am compelled to say that this plaintiff shall not shield himself from accountability by alleging the defendant's infancy, which should have afforded a conclusive reason for a charitable forbearance of his malice, and shall not constitute a shield and ground of defense to him." Stewart v. Howe, 17 Ill., 71.

§ 22. **Lunatics.—**

(1) *As plaintiffs:* It is almost inconceivable that an admitted lunatic should bring an action of libel or slander. But should such an event happen he ought to sue by his next friend, if he has not yet been found of unsound mind by inquisition; if he has been, then by his conservator or guardian.[3]

(2) *As defendants:* Lunacy, in England, is said to be no defense to an action for defamation.[4] In America, however, the rule is otherwise. Insanity at the time of speaking the words is considered a defense, "where the derangement is

[1] Defries v. Davis, 7 C. & P., 112; 8 Dowl., 629; Conway v. Reed, 66 Mo., 346; Oliver v. McClellen, 21 Ala., 675; Eaton v. Hill, 50 N. H., 235; Marshall v. Wing, 50 Me., 62.

[2] Stewart v. Howe, 17 Ill., 71; Chambers v. White, 2 Jones, 383; Odgers on L. & S., 406.

[3] Odgers on L. & S., 406.

[4] Mordaunt v. Mordaunt, 39 L. J. Prob. & Matr., 59.

great and notorious, so that the speaking the words could produce no effect on the hearers," because then "it is manifest no damage would be incurred." But where the degree of insanity is slight, or not uniform, there evidence of it is only admissible in mitigation of damages.[1]

A lunatic cannot be held criminally liable for a libel published under the influence of mental derangement; but the *onus* of proving this defense lies on the accused.[2]

§ 23. **Bankrupts.**— An undischarged bankrupt may sue for and recover damages for a personal wrong, such as libel or slander; nor will such damages pass to his trustee under the English bankruptcy act.[3] The right of action is not assignable, and the trustee cannot interfere.[4] But a judgment recovered for a personal wrong is assignable.[5]

§ 24. **Partners.**— Two or more partners may join in an action of slander for words spoken of them in the way of their trade, whereby they have sustained special damage. They may sue jointly for slander of them in respect of their trade without showing the proportion of their respective shares. But damages cannot be given in such an action for any injury to the private feelings of the plaintiffs, but only for such injury as they may have sustained in their joint trade or business.[6] And where words imputing insolvency in trade are spoken of one of the partners of a firm, such individual partner may maintain an action of slander and recover damages for the injuries done to him; and it is not necessarily to be considered as an injury to the partnership, for which a joint action only can be maintained.[7]

[1] Dickinson v. Barber, 9 Tyng (Mass.), 218; Yeates et ux. v. Reed et ux., 4 Blackford (Ind.), 463; Horner v. Marshall's Administratrix, 5 Munford (Va.), 466; Gates v. Meredith, 7 Ind., 440.

[2] Odgers on L. & S., 406; Yeates v. Reed, 4 Blackf. (Ind.), 463.

[3] Dowling v. Brown, 4 Ir. C. L. R., 265; Ex parte Vine, In re Wilson, 8 Ch. D., 364; 26 W. R., 582; 38 L. T., 730.

[4] Brooks v. Hanford, 15 Abb., 342; Benson v. Flower, Sir Wm. Jones, 215; Odgers on L. & S., 407; Hylop v. Randall, 11 How., 97.

[5] Zogbaum v. Parker, 66 Barb. (N. Y.), 34.

[6] Ludwig v. Cramer, 53 Wis., 193; 10 N. W. Rep., 81; Cook v. Batchellor, 3 Bos. & Pull., 150; Foster v. Lawson, 3 Bing., 452; 11 Moore, 360.

[7] Harrison v. Bevington, 8 C. & P., 708.

§ 25. Illustrations — Digest of American Cases.—

1. For a publication, libelous in itself, concerning a partnership, one partner may sue alone for the injury sustained by him. Rosenwald v. Hammastein, 12 Daly (N. Y.), 377.

2. Where a printing press and newspaper establishment were assigned to a person merely as security for a debt, and the press remained in the sole possession and management of the assignor, the ownership of the assignee is not such as to render him liable to an action, as proprietor, for a libelous publication. Andres v. Wills, 7 Johns. (N. Y.), 260.

3. A partner is not necessarily liable for a libel published by his copartner. Woodling v. Knickerbocker, 31 Minn., 268.

4. All the copartners owning a newspaper are responsible for the express malice of one of them in publishing a libel, although a statute exacts proof of actual malice. Lathrop v. Adams, 133 Mass., 471; 43 Am. Rep., 528.

5. Where a business firm is injured by the speaking of slanderous words against one of its members, if such member is the proper party plaintiff in a suit for damages, the words being actionable only by reason of the influence upon the business of the firm, it is necessary that the plaintiff's interest should be specially averred, and special damages must be alleged. Havemeyer v. Fuller, 60 How. (N. Y.) Pr., 316.

§ 26. Digest of English Cases.—

1. Where two persons, woolstaplers and copartners, who had bought a quantity of wool to be weighed by themselves and paid for according to weight, brought an action against another for saying of them, in the way of their trade, that when the wool was weighed by the plaintiffs there was a pound weight concealed under the brass weight, stating special damage by reason of speaking the words, it was held on a general demurrer that they might well join in the action, because the damages were joint and entire to plaintiffs as copartners, who were jointly interested, and a multiplicity of actions would be created if the contrary doctrine were to be maintained. Though there was special damage laid in the declaration in this case, yet Mr. Sergeant Williams said: "If words are actionable only because they were spoken of persons in the way of their trade, I conceive that two or more partners may join in an action for the words though they had sustained no special damage thereby." 2 Saunders, 117*a*, 117*b* (6th ed.); Foster v. Lawson, 8 Bing., 452.

2. The declaration stated that the plaintiff was a banker in partnership with A. and B., and that the defendant spoke words of the plaintiff, and of him in his said trade, imputing to him insolvency; by means whereof divers persons believed him to be indigent and refused to deal with him in his said trade, and one C. withdrew his account from the bank of the plaintiff and his partners. The defendant pleaded in abatement that the plaintiff carried on the business jointly and undividedly with A. and B., and not otherwise, and that all the damage mentioned in the declaration accrued to A. and B. jointly with the plaintiff, and not to him alone; and that at the time of the commencement of the suit A. and B. were living. The plea was held bad in itself as a plea in abatement, and good for no purpose. Robinson v. Marchant, 7 Q. B., 918.

3. If one partner be libeled in his private capacity he cannot recover for any special damage which has resulted to the business of the firm. All the partners should sue for that jointly. They may now do so in the same action. Solomons v. Medex, 1 Stark., 191; Robinson v. Marchant, 7 Q. B., 918; 15 L. J., Q. B., 134; 10 Jur., 156; Cook v. Batchellor, 3 Bos. & Pul., 150; Maitland v. Goldney, 2 East, 426.

4. Similarly, if the firm be libeled as a body, they cannot jointly recover for any private injury to a single partner; though that partner may now recover his individual damages in the same action. Haythorn v. Lawson, 3 C. & P., 196; Le Fanu v. Malcolmson, 1 H. L. C., 637; 13 L. T. (O. S.), 61; 8 Ir. L. R., 418.

5. But if insolvency be imputed to one member of a firm, this is a reflection on the credit of the firm as well; therefore either he, or the firm, or both, may sue, each for their own damages. Harrison v. Bevington, 8 C. & P., 708; Foster v. Lawson, 3 Bing., 452; 11 Moore, 360.

§ 27. **Liability for Act of Partner or Agent.**— If a partner in conducting the business of a firm causes a libel to be published, the firm will be liable as well as the individual partner. So if any agent or servant of the firm defames any one by the express direction of the firm or in accordance with the general orders given by the firm for the conduct of their business. To hold either of the members of a partnership it is not necessary that the partner should publish the libel himself. It is sufficient if he authorized, incited or encouraged any other person to do it; or if, having authority to forbid it, he permitted it, the act was his.[1]

§ 28. **Illustrations — American Cases.**—

1. **In a Minnesota Case** (*Woodling v. Knickerbocker*, 31 Minn., 268; 17 N. W. Rep., 387) the libels alleged in the complaint were placards placed upon a table belonging to and standing upon the sidewalk in front of the place of business of the "Knickerbocker Furniture Company," a firm engaged in dealing at wholesale and retail in furniture and draperies in Minneapolis. The defendants are alleged to be partners in that firm, and the complaint charges that they, and each of them, put the placards on the table. The first placard read, "Taken back from Dr. Woodling, who could not pay for it; to be sold at a bargain." This was removed by plaintiff, and soon after another was placed on the table, which read, "This is taken from Dr. Woodling, as he would not pay for it; for sale at a bargain;" and near this at the same time was placed another, "Moral: Beware of deadbeats." It appeared on the trial that the defendants Layman and S. E. Knickerbocker were members of the firm. How George Knickerbocker was connected with it did not appear; and it did not appear that S. E. Knickerbocker had anything to do with or knew anything of the placing of the placards on the table. The court held that she cannot be held liable unless by reason of its having been done by her partner or by some one in the serv-

[1] Woodling v. Knickerbocker, 31 Minn., 268; 17 N. W. Rep., 387; Haney Mfg. Co. v. Perkins, 78 Mich., 1; 43 N. W. Rep., 1073.

ice of the firm. One can be held liable for a libel published by another only because he has authorized him to make the publication. There is nothing in the nature of the business of the firm — that of dealing in furniture and draperies — from which authority to one partner or to a servant to gratuitously publish a libel can be implied. The case is different from that of a partnership whose business is publishing or selling either books or newspapers, where each partner is supposed to have authority to publish or sell, and to determine what shall be published or sold; and also from that of the necessary correspondence of a firm, where each partner is presumed authorized to conduct it and to determine on its substance and terms. As to George Knickerbocker and Layman there was evidence to go to the jury — pretty strong evidence — that George Knickerbocker either placed or incited others to place all the placards on the table; and from the fact that Layman was present and saw certainly the last two placards, knew they were put on his property by one of his servants and acquiesced in George Knickerbocker's refusal to remove them at plaintiff's request, the jury might well conclude that all were placed on the table either by his express authority or his assent. To hold either of the defendants it was not necessary that the placards should have been placed on the table with his own hand. If he authorized, incited or encouraged any other person to do it, or if, having authority to forbid it, he permitted it, or, having authority to remove them, he allowed them to remain, the act was his.

§ 29. **The Law of England.**— In England partners could always jointly sue for a libel defamatory of the firm.[1] But in such an action no damages could formerly have been given for any private injury thereby caused to any individual partner; nor for the injury to the feelings of each member of the firm. Only joint damages could be recovered in the joint action; for the basis of such action was the injury to their joint trade.[2] But under recent enactments claims by plaintiffs jointly may be joined with claims by them or any of them separately against the same defendant. So in England it is no longer necessary to bring two actions for the same words; each individual partner is named on the writ, and he can recover separate damages for any special injury done to himself, the firm at the same time recovering their joint damages.[3] If, however, one partner be defamed as to his private life, the conduct of the firm not being attacked directly or indirectly, nor any special damage resulting to them from defendant's words, then the individual partner should sue alone.[4]

[1] Ward v. Smith, 6 Bing., 749; 4 C. & P., 302; Le Fanu v. Macolmson, 1 H. L. C., 637.

[2] Haythorn v. Lawson, 3 C. & P., 196; Robinson v. Marchant, 7 Q. B., 918; 15 L. J., Q. B., 134.

[3] Booth v. Briscoe, 2 Q. B. D., 496; 25 W. R., 838.

[4] Odgers on L. & S., 418; Barbour on Parties (2d ed.), 295.

§ 30. **Personal Representatives — Executors and Administrators.** — At common law actions for slander and libel abate upon the death of either party,[1] but by statute in some of the states the law has been somewhat modified. If after a judgment has been entered the plaintiff dies pending an appeal his representatives may be substituted without an abatement of the action. The maxim *actio personalis cum persona moritur* applies to all actions of libel and slander. If, therefore, either party die before verdict the action is at an end. But if interlocutory judgment be signed and a writ of inquiry issue, and then plaintiff die, final judgment cannot be entered.[2] If, however, final judgment has once been entered in the plaintiff's favor and then plaintiff dies and defendant appeals, the action will not abate, but the executors or administrators of the late plaintiff may appear as respondents to the appeal.[3] So if either party die after final judgment execution can issue.

An action in the nature of slander of title survives to the plaintiff's executor to the extent that damage can be shown to the plaintiff's estate.[4]

§ 31. **Principal and Agent — Master and Servant.** — If a servant or apprentice be libeled or slandered he can of course sue in his own right. In some cases his master also can sue in an action on the case, if the words have directly caused him pecuniary loss; as, if the servant has been arrested and the master deprived of his services in consequence of the defendant's words; or if in any other way the natural consequence of the words spoken has been to injure the master in the way of his trade. And this appears to be the law whether the words be actionable in themselves or not.[5]

§ 32. **Agents' and Servants' Liability.** — If any agent or servant be in any way concerned in writing, printing, publishing or selling a libel, he will be both civilly and criminally

[1] Struthers v. Peacock, 11 Phil., 287.

[2] 8 and 9 Will. III., ch. 11, sec. 6; Ireland v. Champneys, 4 Taunt., 884.

[3] Twycross v. Grant (C. A.), 4 C. P. D., 40; 47 L. J., Q. B., 676; 27 W. R., 87; 39 L. T., 618; Sandford v. Bennett, 24 N. Y., 20.

[4] Hatchard v. Mege and others, 3 Times L. R., 546; Weekly Notes, 1887, p. 80; 51 J. P., 277.

[5] Riding v. Smith, 1 Ex. D., 91; 45 L. J., Ex., 281; 24 W. R., 487; 34 L. T., 500; Garrett v. Taylor, Cro. Jac., 567; 1 Roll. Abr., 108; Springhead Spin. Co. v. Riley, L. R., 6 Eq., 551; 37 L. J., Ch., 889; 16 W. R., 1138; 19 L. T., 64.

liable. If a clerk or servant copy a libel, and deliver the copy he has made to a third person, he will be liable as a publisher. That his master or employer ordered him to do so will be no defense.[1] "For the warrant of no man, not even of the king himself, can excuse the doing of an illegal act; for although the commanders are trespassers, so are also the persons who did the fact."[2] The agent or servant cannot recover any contribution from his employer;[3] and any previous promise to indemnify him against the consequences of the publication, or against the costs of an action brought for the libel, will be void.[4]

The principal is responsible for the wilful or malicious acts of his agent, if they are done in the course of his employment and within the scope of his authority; but he is not liable for such acts, unless previously expressly authorized or subsequently ratified, when they are done outside of the course of the agent's employment, and beyond the scope of his authority.

§ 33. **Masters' and Principals' Liability.**— A master or principal will be liable to an action if false defamatory words be spoken or published by his servant or agent with his authority and consent. The mere fact that the actual publisher was the servant or agent of the defendant is not alone sufficient; for authority to commit an unlawful act will not in general be presumed. It must be further proved that the servant or agent had instructions from the defendant to speak or publish the words complained of.

The liability of the principal grows out of the ruling principle in the law of agency that the principal is responsible for the acts of his agent within the general scope of the authority which he has conferred upon the agent.[5] The maxim is *respondeat superior.*

[1] Maloney v. Bartley, 3 Camp., 210.
[2] Sands v. Child, 3 Lev., 352.
[3] Merryweather v. Nixan, 2 Sm. L. Cases (8th ed.), 546; 8 T. R., 186.
[4] People v. Clay, 86 Ill., 147; Odgers on L. & S., 410; Clifford v. Cochrane, 10 Brad. (Ill.), 577; Shackell v. Rosier, 2 Bing. N. C., 634.
[5] Blackwell v. Wiswall, 14 How. Pr., 258; Odgers on L. & S., 409; Folkard's Starkie, 426. 427; Wright v. Wilcox, 19 Wend., 343; 32 Am. Dec., 507; Craker v. Chicago, etc., Ry. Co., 36 Wis., 657; Stewart v. Brooklyn, etc., R. Co., 90 N. Y., 588; Chicago, etc., R. R. Co. v. Flexman, 103 Ill., 546; Mechem on Agency, § 740.

§ 34. **Acts of Agents under Instructions, etc.**— Where the instructions are express there can be no difficulty. But the inclination of courts has of late years been not to press the doctrine of implied authority so far as was done in older cases. However, it is clear law that the proprietor of a newspaper is both civilly and criminally responsible for whatever appears in its columns, although the publication may have been made without his knowledge and in his absence. For he must be held to have instructed his servants to print and publish whatever the editor might send them for that purpose. The proprietor trusts to the discretion of the editor to exclude all that is libelous; if the editor fails in this duty, still the paper and all its contents will be printed and published by the proprietor's servants, by virtue of his general orders. So if a master-printer has contracted to print a monthly magazine, he will be liable for any libel that may appear in any number printed at his office. Every bookseller must be taken to have told his shopmen to sell whatever books or pamphlets are in his shop for sale; if any one contain libelous matter the bookseller is *prima facie* at least liable for its publication by his servant by reason of such general instructions. But where a master's orders are such that they can be obeyed without any illegality, he is not liable because his servant chooses to carry them out illegally and tortiously, even although the servant honestly believes that he is best serving his master's interests by thus executing his business.[1]

§ 35. **Ratification of Unauthorized Acts.**— But although the master has not authorized the act of the servant, still if it was done for his benefit and on his behalf he may subsequently ratify it. *Omnis ratihabitio priori mandato æquiparatur.* But "in order that there may be a valid ratification there must be both a knowledge of the fact to be ratified and an intention to ratify it."[2] The master must do something more than merely stand by and let the servant act. Non-intervention is not ratification.[3]

[1] Andres v. Wells, 7 Johns. (N. Y.), 260; Odgers on L. & S., 412.

[2] Keating, J., in Edwards v. London & N. W. R'y Co., L. R., 5 C. P., 449.

[3] Moon v. Towers, 8 C. B. (N. S.), 611; Weston v. Beeman, 27 L. J., Ex., 57.

§ 36. **Illustrations — Digest of American Cases.—**

1. The proprietor of a newspaper on going away for a holiday expressly instructed his acting editor to publish nothing exceptionable, personal or abusive, and warned him especially to scan very particularly any article brought in by B., who was known to be a "smart" writer. The editor permitted an article of B.'s to appear which contained libelous matter. The proprietor was held liable, though the publication was made in his absence and without his knowledge. Dunn v. Hall, 1 Carter (Ind.), 345; 1 Smith, 288.

2. Where a discourse was delivered pending the canvass for the election of a member of congress, upon the opinion and decision of a commissioner of the circuit court of the United States remanding a fugitive from service under the fugitive slave law, and upon the expediency and constitutionality of the law, containing passages accusing the commissioner of "legal Jesuitism," of prejudice and want of feeling, of a "partisan and ignoble act," and comparing him to Pilate and Judas, it was held that the want of actual intent to vilify is no excuse for a libel, and that the publication is not excused by the publisher's ignorance that it contains libelous matter. Curtis v. Mussey, 6 Gray (Mass.), 261.

3. A libelous article stating that a neighboring ticket agent was not responsible was conspicuously kept posted in the office of the Boston & L. Railroad Company, such office being used to publish general information of interest to persons purchasing tickets. On the trial of an action against the railroad company for libel it was held that the facts authorized the jury in finding that the company had knowledge of the character of the notice so posted in its office, and that it would not have remained so long posted if the company had not authorized or ratified it. Fogg v. Boston & L. R. Co., 148 Mass., 153, 20 N. E. Rep., 109.

4. The defendant voluntarily made a statement of facts to a reporter of a newspaper, and the reporter, after writing part of an article embodying the facts thus given him, communicated them to the editor of the Streator "Pioneer," who thereupon wrote and published the article, which proved to be libelous. The article, when it was in type, was read to the defendant from the proof-sheets. He said it was a little rough, but it was true and let it go, and it was so published. The defendant was afterward indicted, convicted and fined for the publication. Upon appeal it was held that he could not escape conviction on the ground that he did not write and publish the article himself. Clay v. The People, 86 Ill., 147.

5. A client cannot be held in damages for slanderous words uttered by his attorney at law; as, for instance, an insurance company, in an answer in a suit against it, charging the plaintiff therein with arson. Bayly v. Fourchy, 32 La. Ann., 136.

§ 37. **Digest of English Cases.—**

1. Mrs. Riding assisted her husband in his shop. Words not actionable *per se* were spoken of her which by natural consequence injured the trade of the shop. Mrs. Riding sued the speaker, joining her husband for conformity. At the trial it became clear that the only special damage was to the husband. Thereupon the plaintiff's counsel applied to have the wife's name struck off the record. The learned judge made the required amend-

ment, and the action then became an action by a master for injury to his business caused by slander of his assistant in that business. *Held*, that the action lay. Riding v. Smith, 1 Ex. D., 91; 45 L. J., Ex., 281; 24 W. R., 487; 34 L. T., 500.

2. If defendant threaten plaintiff's workmen, so that they dare not go on with their work, and the plaintiff in consequence loses the profit he would have made on the sale of his goods, an action lies. Garret v. Taylor, Cro. Jac., 567; 1 Roll. Abr., 108; Springhead Spinning Co. v. Riley, L. R., 6 Eq., 551; 37 L. J., Ch. 889; 16 W. R., 1138; 19 L. T., 64.

3. Kelly, C. B: "Supposing the statement made not to be slander, but something else calculated to injure the shopkeeper in the way of his trade — as, for instance, a statement that one of his shopmen was suffering from an infectious disease, such as scarlet fever — this would operate to prevent people coming to the shop; and whether it be slander or some other statement which has the effect I have mentioned, an action can, in my opinion, be maintained on the ground that it is a statement made to the public which would have the effect of preventing their resorting to the shop and buying goods of the owner." Riding v. Smith, 1 Ex. D., 94.

4. A porter who, in the course of business, delivers parcels containing libelous handbills, is not liable in an action for libel, if shown to be ignorant of the contents of the parcel; for he is but doing his duty in the ordinary way. Day v. Bream, 2 M. & Rob., 54.

5. A compositor will be criminally libel for setting up the type of a libel. So will the man whose business it is merely to clap down the press. R. v. Knell, 1 Barnard., 305; R. v. Clerk, 1 Barnard., 304.

6. The defendant's daughter, a minor, was authorized to make out his bills and write his general business letters; she chose to insert libelous matter in one letter. The father was held not liable for the wrongful act of his daughter in the absence of any direct instructions. Harding v. Greening, 8 Taunt., 42; 1 Moore, 477; Holt, N. P., 531. See Moon v. Towers, 8 C. B. (N. S.), 611.

7. The defendant Moyes regularly printed "Fraser's Magazine," but had nothing to do with preparing the illustrations. One number contained a libelous lithographic print. The defendant, the printer, was held liable for this print, though he had never seen it, because it was referred to in a part of the accompanying letter-press which had been printed by his servants. A rule on this point was refused. The editor was of course liable also. Watts v. Fraser and Moyes, 7 C. & P., 369; 6 A. & E., 223; 1 Jur., 671; 1 M. & Rob., 449; 2 N. & P., 157; W., W. & D., 451.

8. The proprietor of a newspaper will be held liable for an accidental slip made by his printer's man in setting up the type. Shepheard v. Whitaker, L. R., 10 C. P., 502; 32 L. T., 402.

9. And for a libelous advertisement inserted by the editor without his knowledge. Harrison v. Pearce, 1 F. & F., 567; 32 L. T. (O. S.), 298.

10. At a meeting of a board of guardians, at which reporters were present, the chairman made a statement reflecting on the plaintiff, and added: "I am glad gentlemen of the press are in the room, and I hope they will take notice of it; publicity should be given to the matter." A report accordingly appeared in two local papers. *Held*, by the majority of the ex-

chequer chamber, that there was some evidence to go to the jury that the defendant had expressly authorized the publication of the alleged libel in the newspapers. Parkes v. Prescott, L. R., 4 Ex., 169; 38 L. J., Ex., 105; 17 W. R., 773; 20 L. T., 537; Tarpley v. Blabey, 2 Bing. N. C., 437; 2 Scott, 612; 1 Hodges, 414; 7 C. & P., 395.

§ 38. **Criminal Liability.**— A master or principal is criminally liable for any libel published by his servant or agent with his authority or consent. At common law he was criminally liable for such libel, even although he had no knowledge of it, if his servant was acting in pursuance of general orders. Whenever an employer was civilly liable at common law for a libel published by his servants he was also criminally liable. But in England this liability has been changed. Under Lord Campbell's act it is competent for the defendant to prove that the publication was made without his authority, consent or knowledge, and that it did not arise from want of due care or caution on his part. Hence, in England, the proprietor of a newspaper is no longer criminally liable for a libel which has appeared in it without his knowledge or consent, merely because he has given the editor a general authority to insert what he thinks fit therein.[1]

§ 39. **Illustrations — Digest of American Cases.**—

1. A person who makes a defamatory statement to the agent of a newspaper for publication is liable both civilly and criminally, and his liability is shared by the agent and all others who aid in publishing it. One Cassius M. Clay gave a report to a reporter of the Streator "Free Press" of what he claimed were the facts of an assault. A report of the matter was written up under the head of "Brutality — Two young women maltreat their mother." After the matter was in type it was read to Clay, who said it was "a little rough, but it was true; let it go." He was indicted for a libel, and upon trial was convicted and fined $300. People v. Clay, 86 Ill., 147.

§ 40. **Digest of English Cases.**—

1. A libel was published in a London newspaper, "The Morning Journal." At the time of publication, Mr. Gutch, one of the proprietors, was away ill in Worcestershire, in no way interfering with the conduct of the paper, which was managed entirely by Alexander. Lord Tenterden directed the jury to find Gutch guilty, on the ground that it was with his capital that the paper was carried on, that he derived profit from its sale, and that he had selected the editor who had actually inserted the libel. Lord Tenterden the next day admitted (p. 438) that some possible case might occur in

[1] People v. Clay, 86 Ill., 147; R. v. Holbrook, 3 Q. B. D., 60; 47 L. J., Q. B., 35; 26 W. R., 144; 37 L. T., 530; 13 Cox, C. C., 650; 4 Q. B. D., 42; 48 L. J., Q. B., 113; 27 W. R., 313; 39 L. T., 536; 14 Cox, C. C., 185; Pledger v. State, 77 Ga., 242; State v. Mason, 26 Or., 273. See Com. v. Morgan, 107 Mass., 199.

which the proprietor of a newspaper might be held not criminally answerable for a libel which had appeared in it. Gutch was convicted, but subsequently discharged on his own recognizances. R. v. Gutch, Moo. & Mal., 433; R. v. Walter, 3 Esp., 21. And see Attorney-General v. Siddon, 1 Cr. & J., 220.

2. The defendant told the editor of a newspaper several good stories against the Rev. J. K., and asked him to "show Mr. K. up;" and the editor subsequently published the substance of them in the paper, and the defendant read it and expressed his approval. This was held a publication by the defendant, although the editor knew of the facts from other quarters as well. R. v. Cooper, 8 Q. B., 533; 15 L. J., Q. B., 206.

3. The defendant kept a pamphlet-shop; she was sick and upstairs in bed; a libel was brought into the shop without her knowledge, and subsequently sold by her servant on her account. She was held criminally liable for the act of her servant, on the ground that "the law presumes that the master is acquainted with what his servant does in the course of his business." R. v. Dodd, 2 Sess. Cas., 33; Nutt's Case, Fitzg., 47; 1 Barnard., K. B., 306. [But I doubt if later judges would have been quite so strict; the sickness upstairs would surely have been held an excuse, even before the 6 and 7 Vict., ch. 96, sec. 7, became law. See R. v. Almon, 5 Burr., 2686.] Odgers on L. & S., 415.

UNDER LORD CAMPBELL'S ACT.

1. The defendants were the proprietors of the Portsmouth "Times and Naval Gazette;" each of them managed a different department of the newspaper, but the duty of editing what was called the literary department was left by them entirely to an editor whom they had appointed, named Green. The libel in question was inserted in the paper by Green without the express authority, consent or knowledge of the defendants. At the trial of a criminal information the judge directed a verdict of guilty against the defendants. *Held*, by Cockburn, C. J., and Lush, J., that there must be a new trial; for upon the true construction of 6 and 7 Vict., ch. 96, sec. 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. By Mellor, J., dissenting, 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 and 7 Vict., ch. 96, sec. 7, had no application to the facts proved, and that the case was properly withdrawn from the jury. R. v. Holbrook, 3 Q. B. D., 60; 47 L. J., Q. B., 35; 26 W. R., 144; 37 L. T., 530; 13 Cox, C. C., 650.

2. On the new trial Green was called as a witness, and stated that he had general authority to conduct the paper; that the defendants left it entirely to his discretion to insert what he pleased, and that he had allowed the letter complained of to appear in the paper without the knowledge or express authority of the defendants, one of whom was absent from Portsmouth at the time. The jury found all the defendants guilty. On a motion

for a new trial on the ground that the verdict was against evidence, and of misdirection, held by Cockburn, C. J., and Lush, J. (Mellor, J., still dissenting), that the general authority given to the editor was not *per se* evidence that the defendants had authorized or consented to the publication of the libel, within the meaning of 6 and 7 Vict., ch. 96, sec. 7, and that as the learned judge at the trial had summed up in terms which might have led the jury to suppose that it was, and the jury had apparently given their verdict on that footing, there must be another new trial. R. v. Holbrook, 4 Q. B. D., 42; 48 L. J., Q. B., 113; 27 W. R., 313; 39 L. T., 536; 14 Cox, C. C., 185.

3. The prosecutor, Mr. John Howard, clerk of the peace for the borough of Portsmouth, died shortly afterwards, so the proceedings dropped, and no third trial ever took place. Odgers on L. & S., 418; R. v. Bradlaugh, 15 Cox, C. C., 217; R. v. Ramsey and Foote, 15 Cox, C. C., 231.

§ 41. **Receivers.**— If receivers appointed by the court in an administration suit to carry on a gazette publish a libel therein, they are of course personally liable for damages and costs. The damages, it would seem, may be paid out of the estate, but not the costs; those the receivers must pay out of their own funds.[1]

§ 42. **Joint Defendants.**— A joint action cannot be maintained against two or more persons for slander. Even if husband and wife utter similar words simultaneously, there are at common law two separate publications, and an action must be brought against the husband alone for what he said; against both husband and wife for her words.[2] But with libel it is different; the publication of a libel might well be the joint act of two or more persons, who might in such a case be sued either jointly or separately at the election of the plaintiff. Thus, if a master and servant jointly published a libel, they might always have been jointly sued in the same action. But if there were two distinct publications of the same libel, one by A. separately, the other by B., two actions must be brought — one for each publication.

But the plaintiff is not obliged to join as a defendant every person who is liable. He may sue only one or two; and the

[1] Martin v. Van Schaick, 4 Paige (N. Y.), 479; Stubbs v. Marsh, 15 L. T., 312; Odgers on L. & S., 407; Smith on Receivers, § 109, p. 202.

[2] Thomas v. Ramsey, 6 Johns. (N. Y.), 26; Odgers on L. & S., 420; Harris v. Huntington, Tyler (Vt.), 147; Wilson v. Reed, 2 F. & F., 149; Burcher v. Orchard et ux., Style, 349; Swithin et ux. v. Vincent et ux., 2 Wils., 227; Tait v. Culbertson, 57 Barb., 9.

liability of the others will be no defense for those sued, or mitigate the damages recoverable. The defendants sued cannot recover any share of damages or costs from the others, who might have been but are not sued,[1] though the judgment is a bar to any subsequent action on the same publication against any one else who was jointly liable with them therefor.

[1] Colburn v. Patmore, 1 C., M. & R., 73; 4 Tyr., 677.

CHAPTER XIX.

PRIVILEGED COMMUNICATIONS.

PRIVILEGED OCCASIONS.

Second Class — Qualified Privilege.

§ 1. **Privileged Communication Defined.** — A privileged communication is one made in good faith upon any subject-matter in which the party communicating has an interest or

in reference to which he has, or honestly believes he has, a duty, to a person having a corresponding interest or duty, and which contains matter which, without the occasion upon which it is made, would be defamatory and actionable.[1]

§ 2. **The Proper Meaning of a Privileged Communication** is only this: That the occasion on which the communication was made rebuts the inference of malice *prima facie* arising from a statement prejudicial to the character of the plaintiff, and puts upon him the burden of proving that there was malice. In short, that the defendant was actuated by motives of personal spite or ill-will, independent of the occasion on which the communication was made.[2]

§ 3. **The Doctrine of Privileged Communications.**— The great underlying principle upon which the doctrine of privileged communications rests is public policy. This is more especially the case with absolute privilege, where the interests and the necessities of society require that the time and occasion of the publication or utterance, even though it be both false and malicious, shall protect the defamer from all liability to prosecution for the sake of the public good. It rests upon the same necessity that requires the individual to surrender his personal rights, and to suffer loss for the benefit of the common welfare. Happily for the citizen, this class of privilege is restricted to narrow and well-defined limits. Qualified privilege exists in a much larger number of cases. It extends to all communications made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty to a person having a corresponding interest or duty; and the privilege embraces cases where the duty is not a legal one, but where it is of a moral or social character of imperfect obligation.[3]

[1] Harrison v. Bush, 5 E. & B., 344; 25 L. J., Q. B., 28; Whitely v. Adams, 15 C. B. (N. S.), 892; 33 L. J., C. P., 89.

[2] Wright v. Woodgate, 2 Cr., M. & R., 573; 1 T. & G., 12; Taylor v. Hawkins, 16 Q. B., 308; 20 L. J., Q. B., 313; Flood on L. & S., 208.

[3] Bacon v. Mich. C. R. R. Co., 33 N. W. Rep., 181; Lewis v. Chapman, 16 N. Y., 372; Henwood v. Harrison, 41 Law J., C. P., 206; Edwards v. Chandler, 14 Mich., 471; Washburn v. Cooke, 3 Denio (N. Y.), 110; Knowles v. Peck, 42 Conn., 386; Easley v. Moss, 9 Ala., 266; Van Wick v. Aspenwall, 17 N. Y., 190; Cockayne v. Hodgkisson, 5 Car. & P., 543; McDougal v. Claridge, 1 Camp., 267; Wetherston v. Hawkins,

§ 4. Illustrations.—

A person is called as a witness and sworn to speak the truth, the whole truth, and nothing but the truth. He may do so without fear of any legal liability, even though he is thus compelled to defame his neighbor.

A person is asked for a character of his late servant by one who has applied for a situation. He may state in reply all he knows against him without being liable to an action, provided he does so honestly and truthfully to the best of his knowledge.

A party comes to live in the town and privately asks his neighbor's opinion as to such a lawyer, doctor, tradesman or workman. His neighbor may tell him in answer all he knows concerning each of them, both as to their skill and ability in their business, and also as to their private character, their integrity or immorality; provided he does not maliciously exaggerate or deliberately misstate the facts. Odgers on L. & S., 181.

If a witness in the box volunteers a defamatory remark quite irrelevant to the cause in which he is sworn, with a view of gratifying his own vanity and of injuring the professional reputation of the plaintiff, still if it has reference to the matter in issue or fairly rises out of any question asked him by counsel, no action lies against such witness; the words are still absolutely privileged, for they were spoken in the box. Seaman v. Netherclift, 1 C. P. D., 540; 45 L. J., C. P., 798; 24 W. R., 884; 34 L. T., 878; 2 C. P. D., 53; 46 L. J., C. P., 128; 25 W. R., 159; 35 L. T., 784.

But if I maliciously give a good servant a bad character in order to prevent her "bettering herself," and so compel her to return to my own service, the case is thereby taken out of the privilege, and the servant may recover damages. Jackson v. Hopperton, 16 C. B. (N. S.), 829; 12 W. R., 913; 10 L. T., 529.

§ 5. Every Defamatory Publication Implies Malice — Privileged Communications an Exception.—Every defamatory publication, whether expressed by words spoken or by writing, printing, pictures, effigies, or otherwise charging or imputing to any person that which renders him liable to punishment, or which is calculated to make him infamous or odious or ridiculous, *prima facie* implies malice in the author and publisher towards the person concerning whom such publication is made, and proof of malice is not in such cases to be required of the party complaining beyond the proof of the publication itself. The justification, excuse or extenuation, if

1 Term R., 110; Lawton v. Bishop, etc., L. R., 4 P. C., 495; Thompson v. Dashwood, 11 Q. B. Div., 45; Davies v. Snead, L. R., 5 Q. B., 611; Waller v. Lock, 45 Law T. (N. S.), 243; Sommerville v. Hawkins, 10 C. B., 583; 20 Law J., C. P., 131; Twogood v. Spyring, 1 Cromp., M. & R., 181; Bank v. Henty, 7 App. Cas., 741; Delaney v. Jones, 4 Esp., 193; Harrison v. Bush, 5 El. & Bl., 344; 25 Law J., Q. B., 25; Whitely v. Adams, 15 C. B. (N. S.), 392; 33 Law J., C. P., 89; Shipley v. Todhunter, 7 Car. & P., 680; Harris v. Thompson, 13 C. B., 333; Wilson v. Robinson, 7 Q. B., 68; 14 Law J., Q. B., 196; Taylor v. Hawkins, 16 Q. B., 308; 20 Law J., Q. B., 313; Mandy v. Witt, 18 C. B., 544; 25 Law J., C. P., 294.

either can be shown, must proceed from the defendant. But privileged communications are an exception, and the rule of evidence as to such communications is so far changed as to require of a party to bring home to the alleged defamer the existence of malice as the true motive of his conduct.[1]

§ 6. **Burden of Proving Malice.**— A communication made in good faith upon any subject-matter in which the party communicating has an interest or in reference to which he has a duty, either legal, moral or social, if made to a person having a corresponding interest or duty, is privileged, and the burden of proving the existence of malice is cast upon the person claiming to have been defamed.[2]

§ 7. **Requisites of the Occasion.**— A communication, to be privileged, must be made upon a proper occasion, from a proper motive, and must be based upon reasonable or proper cause. When so made in good faith the law does not imply malice from the communication itself, as in ordinary cases. Actual malice must be proved before there can be a recovery.[3]

§ 8. **A Legal Defense to an Action for Defamation.**— It is a legal defense to an action for defamation, if satisfactorily proven, that the circumstances under which the defamatory words were published were such as to render it right and proper that the defendant should plainly state what he honestly believed to be the plaintiff's character — to speak his mind fully and freely concerning him. In such cases the communication is said to be privileged; and though it may be false, still its publication on such an occasion is excused for the sake of the common convenience and welfare of society at large.[4]

§ 9. **The Question of Privilege is for the Court, Malice for the Jury.**— The theory of privilege in connection with

[1] White v. Nichols, 3 How. (U. S.), 286.

[2] Briggs v. Garrett, 111 Penn. St., 414; Addison on Torts, sec. 1091; Quinn v. Scott, 22 Minn., 456; Marks v. Baker, 12 Rep., 530; Laughton v. Bishop, etc., L. R., 4 P. C., 495; Twogood v. Spyring, 1 C., M. & R., 193; Harrison v. Bush, 5 E. & B., 344; Strode v. Clement, 90 Va., 553; 19 S. E. Rep., 177; Bearce v. Bass, 88 Me., 521; 34 Atl. Rep., 411.

[3] Briggs v. Garrett, 111 Penn. St., 404, and cases cited under note 2.

[4] Conroy v. Pittsburgh Times, 139 Pa. St., 334; 27 W. N. C., 239; 21 Atl. Rep., 154; Rude v. Nass, 79 Wis., 321; Billings v. Fairbanks, 139 Mass., 36; 29 N. E. Rep., 544; Etchison v. Pergerson, 88 Ga., 620; 15 S. E. Rep., 680; Alabama & V. Ry. Co. v. Brooks, 69 Miss., 168; 13 So. Rep., 847; Werner v. Ascher, 86 Wis., 349; 56 N. W. Rep., 869; Howland v. Flood, 160 Mass., 509; 36 N. E. Rep., 482; Reusch v. Roanoke Cold Storage Co., 91 Va., 534; Piper v. Woolman, 43 Neb., 280; 61 N. W. Rep., 588.

the law of defamation involves a variety of conditions of some nicety, and also a doctrine not always of easy application to a set of facts; and such being the case in any trial, whether civil or criminal, while the question of libel or no libel, malice or no malice, are matters of fact for a jury, the question of privilege or no privilege is entirely one of law for the judge.[1] That is to say, it is exclusively for the judge to determine whether the occasion on which the alleged defamatory statement was made was such as to render the communication a privileged one. The jury, however, will be the proper tribunal to determine the question of express malice where evidence of ill-will is forthcoming; but if, taken in connection with admitted facts, the words complained of are such as must have been used honestly and in good faith by the defendant, the judge may withdraw the case from the jury and direct a verdict for the defendant.[2]

§ 10. **Duty of the Court when the Communication is Privileged.**—When the court holds the communication to be entitled to the privilege, the jury should be instructed to consider and determine whether or not the defendant used the occasion for the sole reason and purpose which conferred the privilege upon his statement; and if the jury find from the surrounding circumstances, as shown by the evidence, that he did so use it solely for such reason and purpose, the verdict will be for the defendant. But if, on the other hand, they find that he employed the occasion in bad faith, to gratify or to further some indirect or malicious motive, or for some other improper reason, the verdict will be for the plaintiff. Where the communication is entitled to the privilege, the burden of proof is then upon the plaintiff to show actual malice in the sense of oblique design or bad faith.[3]

§ 11. **Circumstances Determine the Question of Privilege.**—The court in deciding whether a communication is privileged or not will of course have regard to all the circumstances of the case disclosed by the evidence.[4] If the com-

[1] Stace v. Griffith, L. R., 2 P. C., 420.

[2] Spill v. Maule, 4 Exch., 232; 38 L. J., Ex., 138; Flood on L. & S., 212.

[3] Clark v. Molyneux, L. R., 3 Q. B., 237; 47 L. J., C. L., 230; Flood on L. & S., 220; Shelley v. Dampman, 1 Lack. Leg. N., 77; Childers v. San Jose Mercury P. & P. Co., 105 Cal., 284; 38 Pac. Rep., 903; Hupfer v. Rosenfeld, 162 Mass., 131; 38 N. E. Rep., 197; Osborn v. Troup, 60 Conn., 485; 23 Atl. Rep., 157; Garn v. Lockard (Mich., 1896), 65 N. W. Rep., 764; Urban v. Helmick, 15 Wash., 155; 45 Pac. Rep., 747.

[4] Spill v. Maule, 38 L. J., Ex., 138.

munication, whether written or oral, be of such a character that the expressions contained in it are beyond what common sense even indicates to be justifiable, it cannot be held as privileged.[1]

§ 12. **The Law Stated by Bronson, C. J.**— In the common case of a libelous publication or the use of slanderous words, a charge of malice in the declaration calls for no proof on the part of the plaintiff beyond what may be inferred from the injurious nature of the accusation. The principle is a broad one. In all cases where a man intentionally does a wrongful act without just cause or excuse, the law implies a malicious intent towards the party who may be injured; and that is so even though the wrong-doer may not have known at the time on whom the blow would fall. But in actions for defamation, if it appear that the defendant had some just occasion for speaking of the plaintiff, malice is not a necessary inference from what, under other circumstances, would be a slanderous charge; and it would often be necessary for the plaintiff to give every evidence of a malicious intent. There may be many of these privileged communications; as where the charge is made in giving the character of a servant, or in a regular course of discipline between members of the same church; in answering an inquiry concerning the solvency of a tradesman or banker, or where the communication was confidential between people having a common interest in the subject to which it relates. In these and other cases of the same nature, the general rule is that malice is not to be inferred from the publication alone. The plaintiff must go further and show that the defendant was governed by a bad motive, and that he did not act in good faith, but took advantage of the occasion to injure the plaintiff in his character or standing.[2]

§ 13. **Privileged Communications — Illustrations — Digest of American Cases.—**

(1) THE GENERAL DOCTRINE.

1. Where in an action for defamation the defense is that of privileged communication, the question for the jury is not whether the language used was true, nor whether the defendant had reasonable ground to believe it to be true, but whether he honestly believed it to be true, and used it without

[1] Fryer v. Kinnersly, 15 C. B. (N. S.), 422; 33 L. J., C. P., 96; Flood on Y.), 110. L. & S., 212.

[2] Washburn v. Cooke, 3 Den. (N.

malice in the reasonable protection of his own interests, or in the proper defense of an attack upon his character. Provided the language used is a necessary part of his defense, and fairly arises from the charges made against him, and is not unnecessarily defamatory, nor more extensively circulated than the circumstances of the case require, and plaintiff fails to show that defendant did not so believe and properly use the statements complained of — that is, fails to show actual malice in the defendant — the verdict should be for defendant, whether the charge be true or false. Chaffin v. Lynch 84 Va., 834, 6 S. E. Rep., 474.

2. The defendant had suspected and declared his suspicions that a person's wife had committed larceny, but upon being inquired of by that person whether his suspicions continued, replied that he was now satisfied that A. B., a hired maid, stole it. *Held* that, if the communication was privileged at all, the defamatory matter, going further than to satisfy the inquirer that there were reasons for the suspicions to cease, went beyond the exigency of the occasion. Robinette v. Ruby, 13 Md., 95.

3. Privileged communications are of four kinds, to wit: Where the publisher of the alleged slander acted in good faith in the discharge of a public duty, legal or moral, or in the prosecution of his own rights or interests; anything said or written by a master concerning the character of a servant who has been in his employment; words used in the course of legal or judicial proceedings; and publications duly made in the ordinary mode of parliamentary proceedings. White v. Nichols, 3 How. (U. S.), 266.

4. The principle on which privileged communications rest which of themselves would otherwise be libelous imports confidence and secrecy between individuals, and is inconsistent with the idea of communication made by a society or congregation of persons, or by a private company or corporate body. Beardsley v. Tappan, 5 Blackf. (Ind.), 497.

5. On the trial of an action on the case for libel the plaintiff offered in evidence a petition to the judge of the circuit court, signed by the defendant and others, charging the plaintiff with gross neglect of his duty as state's attorney of the circuit; with being wilfully and corruptly guilty of oppression in office, and of corrupt malfeasance in office; of taking bribes from parties accused and indicted, and pursuance of corrupt agreements releasing them from prosecution, and containing many and various specific charges, and concluding by asking the judge to suspend the plaintiff from the discharge of the duties of his office until the grand jury could investigate the charges. The circuit court on objection refused to admit the same as evidence, on the ground that it was a privileged communication. *Held*, that the court erred in refusing to admit the same. It should have been admitted, and then the question would be whether it was presented in good faith for the purpose of having a state's attorney *pro tem.* appointed to prepare and prosecute an indictment against the plaintiff, or prepared for a bad purpose and from malicious motives. Whitney v. Allen, 62 Ill., 472.

6. When a requisition is presented for the arrest of a fugitive from justice with the proper vouchers, according to the act of congress, it is the duty of an executive to cause the fugitive to be arrested and delivered to the agent appointed to receive him, and the governor has no power to entertain an application to recall or modify such warrant; and an affidavit to

support such an application is not a privileged communication. Hosmer v. Loveland, 19 Barb. (N. Y.), 111.

7. In general an action lies for the malicious publication of statements which are false in fact and injurious to the character of another (within the well-known limits as to verbal slander), and the law considers such publication as malicious unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases the occasion prevents the inference of malice which the law draws from unauthorized communications, and affords a qualified defense depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits. Swan v. Tappan, 5 Cush. (Mass.), 104, 110; Gassett v. Gilbert, 6 Gray (Mass.), 94, 97.

Where words imputing misconduct to another are spoken by one having a duty to perform, and the words are spoken in good faith, and in the belief that it comes within the discharge of that duty, or where they are spoken in good faith to those who have an interest in the communication and a right to know and act upon the facts stated, no presumption of malice arises from the speaking of the words, and therefore no action can be maintained in such case without proof of express malice. If the occasion is used merely as a means of enabling the party uttering the slander to indulge his malice, and not in good faith to perform a duty or make a communication useful and beneficial to others, the occasion will furnish no excuse. Shaw, C. J., in Bradley v. Heath, 12 Pick. (Mass.), 163, 164; Sheckell v. Jackson, 10 Cush. (Mass.), 25, 26.

8. The publication in a newspaper of false and defamatory matter is not privileged because made in good faith as a matter of news. The right to publish through the newspaper press such matters of interest as may be thus properly laid before the public does not go to the extent of allowing the publication, concerning a person, of false and defamatory matter, there being no other reason or justification for doing so than merely the purpose of publishing the news. Mallory v. Pioneer P. Co., 26 N. W. Rep. (Minn.), 904; Cooley on Torts, 219; Sheckell v. Jackson, 10 Cush. (Mass.), 25; Detroit Daily Post v. McArthur, 16 Mich., 447; Perrett v. New Orleans Times, 25 La Ann., 170; Smart v. Blanchard, 42 N. H., 137; Usher v. Severence, 20 Me., 9; Foster v. Scripps, 39 Mich., 376.

9. In a suit brought for charging the plaintiff with stealing two beds it is not competent for the plaintiff, for the purpose of showing malice, to prove that the defendant subsequently made a complaint against him before a magistrate for stealing a lot of wood and old iron, for the words used in the complaint do not relate to the charge which is the subject of the action, and because such using of the words is a proceeding in a court of justice, before a magistrate having jurisdiction of the supposed offense, and privileged as such. Watson v. Morse, 2 Cush. (56 Mass.), 133.

10. An advertisement warning the public against the negotiation of notes alleged to have been stolen, in the absence of any showing of express

malice, is a privileged communication and not a libel. Commonwealth v. Featherston, 9 Phil. (Penn.), 594.

11. Upon the parents' inquiry one may state his belief in good faith as to the conduct of a minor child, as in this case, "She stole one hair-brush," without being liable for slander. Long v. Peters, 47 Iowa, 239.

12. H., as assistant inspector of the board of health of New York city, made an official report, published in a public journal, in which he recommended a certain kind of street pavement, giving statistics. E. caused a communication to be published to the effect that the statements in the report were dictated by parties interested in the pavement, and that H. received a reward for their publication. In an action by H. against E. for libel, *held*, that the occasion did not justify an attack on H.'s private character, and in the absence of proof of the accusation E. was liable, however good his motives. Hamilton v. Eno, 81 N. Y., 116.

13. Statements made by a resident of a school district, having a daughter attending its school therein, to the trustees, charging bad character to a female teacher, are privileged communications, and the person making them is not liable for slander in the absence of malice. But the fact that the person making them had no reason to believe the statements to be true, or that he knew them to be false, would show malice which would render him liable. Harwood v. Keech, 6 Thompson & C. (N. Y.), 665; 4 Hun, 389.

14. In an action for words contained in a letter written by the defendant, where the letter itself contains nothing on its face to indicate that it was privileged or written under circumstances which would prevent it from being actionable, and could therefore only be made privileged if at all by extraneous evidence, the burden of proof is on the defendant to show that it was thus privileged; and when such letter is shown to have been a reply to one written to the defendant, and he has neither introduced the letter so sent him nor raised any objection at the time for the failure of the plaintiff to call for its introduction, he will not be entitled, on the basis of any presumption that his letter was strictly responsive to the one in reply to which it was sent, to raise the question of its admissibility in evidence unaccompanied by the other letter, by a request to have the jury instructed that if the defendant's letter was written in answer to the one sent him, and was strictly responsive and without malice, and written in the ordinary course of business, the defendant was entitled to a verdict. Day v. Backus, 31 Mich., 241.

15. A female employee of a deaf-mute asylum sued the superintendent for slander, in falsely stating to the executive committee that she wrote an obscene letter to his wife, by reason of which she was discharged. The answer alleged that the defendant believed the letter to have been written by the plaintiff, with whose handwriting he was well acquainted, and that he sent it, with specimens of her handwriting, to an expert, who pronounced it to have been written by her, and who stated in writing his reasons for his belief, and that the defendant, without malice, referred the papers to the committee for their action, and that he never charged the plaintiff with the offense. He alleged the foregoing in mitigation of damages and by way of justification, and claimed that his sayings and doings were privileged communications. *Held*, that they were privileged if so

made; that he was not excluded from proving them privileged by his allegation of the same facts in justification; that the reasons for the expert's belief should have been admitted in evidence, as well as the fact that the committee acted upon these reasons; that it was error to charge that the plaintiff could recover for her expenses in vindicating her character and for damages that might be occasioned in the future. Halstead v. Nelson, 24 Hun (N. Y.), 395.

16. One whose house has been set on fire may, with proper precaution and without malice, communicate to his family his suspicion as to who did it, without becoming liable to the one accused. But the fact that he repeated the accusation to others may be given in evidence to show that the communication to his family was made maliciously. Campbell v. Bannister, 79 Ky., 205.

17. A charge of dishonesty against the parish attorney, made in good faith in the discharge of their official duties by members of the police jury, does not render them liable in damages for a libel. Fisk v. Soniat, 33 La. Ann., 1400.

18. A letter to a woman containing libelous matter concerning her suitor cannot be justified on the ground that the writer was her friend and former pastor, and that the letter was written at the request of her parents, who assented to all its contents. "Joannes" v. Bennett, 87 Mass., 169.

19. Where A. had had a forged check passed on him by a stranger, and afterwards a relative of B., having heard that A. charged him with the forgery, of his own accord applied to A. — saying, however, he came at B.'s request — for information respecting the charge and to convince A. that he was mistaken. A. thereupon told him that B. was unquestionably guilty, and proposed to arrange the matter by receiving the amount obtained on the check, and on that occasion persisted in the charge after being warned not to do so. In an action for slander by B. against A., it was held that the communication was not privileged, and that the plaintiff was entitled to recover without proof of express malice. Van Tassell v. Capron, 1 Denio (N. Y.), 250.

20. The only effect of privilege on actionable words is to rebut the legal inference or presumption of malice, and to that extent constitutes a good defense to an action upon them. Garrett v. Dickerson, 19 Md., 418. Whether words in themselves sufficient to raise the legal presumption of malice are privileged is a question of law determinable from the circumstances attending their utterance. Words ascertained to be privileged as matter of law still involve the element of fact of good faith in speaking them; and in general evidence of any act or circumstance tending to show the want of good faith may be offered to remove the protection of privilege and show the existence of malice. Coffin v. Coffin, 4 Mass., 1.

21. Publications falsely charging the commission of a crime when not based upon facts legally tending to prove the crime are not privileged. Peoples v. Detroit Post & Trib. Co., 54 Mich., 457; 20 N. W. Rep., 528.

22. The cashier of a bank returned a draft stating that the drawee "pays no attention to notices." *Held*, in an action by the drawee for slander, the words were not actionable. Platto v. Geilfuss, 47 Wis., 491; 2 N. W. Rep., 1135.

23. Words actionable *per se*, if written or spoken to one whose business it is to know and who has a right to know and act upon the facts communicated, are conditionally privileged, and to give a right of action thereon malice must be shown. A communication made by defendant to the agent or president of an insurance company in which plaintiff's property was insured at the time of its destruction by fire, charging plaintiff with arson in setting fire thereto, and with perjury in making his proofs of loss, is conditionally privileged; and in an action for slander or libel for such communication the complaint must allege that defendant, when he made the same, knew it to be false, or must in some other form charge him with malice in making it. Noonan v. Orton, 32 Wis., 106.

24. In a case regarding disputed property, where a witness is asked to fix a certain date, a reply as follows: "Not knowing that a mistress or woman of Mr. Pitt would step in to claim the lawful wife's property, I did not keep an account of the date that way. If I would have, I would have noticed the date, and all those little particular incidents."—is not so wholly foreign to the case as to be beyond the privilege of a witness, and is therefore not actionable as slander. Robinson and Bryan, JJ., dissenting. Hunckel v. Voneiff, 69 Md., 179, 14 Atl. Rep., 500.

25. An action for libel will not lie for statements contained in a petition by a receiver against his co-receiver, that such co-receiver was unlawfully withholding a portion of the assets, and was obstructing their collection, and that he was acting in contempt of court, and had embezzled some of the trust money, even though they are malicious and false; such statements being made in the course of judicial proceedings. Bartlett v. Christhilf, 69 Md., 219, 14 Atl. Rep., 518.

26. The privilege of counsel in the trial of a cause is a qualified one, and slanderous words spoken by him, having no reference to the cause then on trial, nor to any subject-matter involved therein, nor to any judicial inquiry pending therein, are actionable. McSherry and Stone, JJ., dissenting. Maulsby v. Reifsnider, 69 Md., 143, 14 Atl. Rep., 505.

27. Words spoken by defendant's counsel, on the trial of an action by an attorney to recover for professional services, that the plaintiff, as attorney for the defendant, had collected and refused to pay over $5,000 of defendant's money, relate to the subject-matter of inquiry; and whether true or false, and whether spoken maliciously or in good faith, will not sustain an action for slander. Maulsby v. Reifsnider, 69 Md., 143, 14 Atl. Rep., 505.

28. One P., a merchant, applied to a justice for a warrant against a married woman on the ground that she had taken a pair of overshoes of the value of $1.15 from his store. The justice refused to issue the warrant. A few hours afterwards P. again applied for the warrant, saying in effect that she had stolen three pairs of shoes from his store and that he could prove it, but the justice again refused. On the next day P., with a constable, went to the residence of her husband without process and charged her in the presence of her husband and children with the larceny of the shoes, and procured payment under threats of arrest, etc., for the shoes, and $1.50 for costs. In an action for slander it was shown by a preponderance in the testimony that she had paid for the shoes when they were procured. *Held*, that the communications of P. with the magistrate, being without reason-

able and probable cause, were not privileged. Pierce v. Oard, 23 Neb., 823, 37 N. W. Rep., 677.

29. The fact that a privileged communication was made in the hearing of third persons not legally interested will afford no evidence of express malice when their presence appears to have been casual and not sought for by defendant.

The fact that the expression used by defendant on a privileged occasion was such as to evince indignation at plaintiff for a supposed crime will not destroy the privilege of the communication, if the substance of the statement was pertinent to the privileged matter and was honestly believed by defendant.

When one person applies to another for credit, and the latter seeks information from a third as to the trustworthiness of the applicant, a privileged occasion arises for communications bearing on that subject. Fahr v. Hayes, 50 N. J., 275, 13 Atl. Rep., 261.

30. A person who was discharged from service, on applying to his employer to know why, was told it was for stealing. In an action for slander it was held that as he had asked the question, and as the answer was given in good faith, there was no cause of action. Bieler v. Jackson, 64 Md., 589.

31. Publications in a newspaper which falsely charge the commission of a crime are actionable, and, when not based upon any fact legally tending to prove the crime imputed, the publication cannot be said to be privileged. Peoples v. Detroit P. & T. Co., 54 Mich., 457, 20 N. W. Rep., 528.

32. Where a false publication is privileged and believed to be true, malice must be shown by other evidence than its falsity. Behee v. Missouri Pac. R. Co., 71 Tex., 424, 9 S. W. Rep., 449.

33. In an action for slander it appeared that defendant's wife received an obscene anonymous letter, partly in writing, partly printed. Defendant was superintendent of a deaf-mute institution, and plaintiff an employee therein. Defendant took the letter to the chairman of the executive board, stated his belief plaintiff had written it, and they sent it to an expert in penmanship for comparison with some of plaintiff's known handwriting. He pronounced both written by the same person. The entire matter was then laid by them before the whole board, and, though plaintiff denied writing or sending the letter, she was discharged. *Held*, that defendant's statement to the chairman of the executive board was a privileged communication. Halstead v. Nelson, 1 N. Y. S., 280.

34. The plaintiff had been a clerk in the defendant's store. On his leaving, the firm of which the defendant was a member gave him a letter of recommendation saying that he had attended to his duties in a satisfactory manner. A few days after a letter was written to a Mr. Shiletto of Cincinnati, telling him that since the plaintiff had left there they had heard of his taking several trunks, larger than required for his clothing, and requesting him to have some officer watch him and examine his baggage. His trunks were examined, but he was not discharged. The defendant in his answer claimed that the matter was a privileged communication. No special damage was shown. It was held that after the firm had given the letter of general recommendation, if one of the partners was led by facts subsequently coming to his knowledge to change his opinion, it was his right and duty to

communicate the facts to a subsequent employer in order to guard him against being misled by the former recommendation of the firm, and the communication was privileged. Fowles v. Bowen, 30 N. Y., 20.

35. If the plaintiff, in an action for publishing disparaging statements concerning his goods whereby he has sustained special damage, proves that the publication is false in any material respect and that he has sustained any special damage therefrom, such proof makes a *prima facie* case, and malice is to be presumed. If the defendant then proves that the publication was honestly made by him, believing it to be true, and that there was a reasonable occasion therefor, in the conduct of his own affairs, which fairly warrants the publication, such proof renders the publication privileged and constitutes a good defense to the action, unless the plaintiff can show malice in fact, which is a question for the jury. Swan v. Tappan, 5 Cush. (Mass.), 104; Gott v. Pulsifer, 122 Mass., 235.

37. A New Orleans firm, in private correspondence with a New York house, repeated information received from its own correspondent at Mobile as to a firm at Mobile, as follows: "D. & Co. are people of no standing or credit whatever. Neither have they any means. Up to last July they were dealers in chickens, eggs, etc. Since that time they have been buying cotton quite freely, to the general astonishment of the community. . . . We told them we could never touch their bills again unless they wrote us a letter stating their means, and which we would forward to your good selves subject to your approval. They were furious enough, but up to now we never received that promised letter." *Held*, that the matter was privileged. Dunsee v. Norden, 36 La. An., 78.

38. It is a good defense in an action for libel that the alleged libel was in the nature of a privileged communication; and although it appears not true was believed to be so by the publishers, who acted without malicious intent. Holt v. Parsons, 23 Tex., 9.

39. An action for words will not lie against a party who speaks in the performance of any duty, legal or moral, public or private, or in the assertion of his own rights, or to vindicate or protect his interest, without proof of express malice, though the charge imputed be without foundation. Where the defendant had a forged check passed to him by a stranger, and afterwards a relative of the plaintiff, having heard that the defendant charged the plaintiff with the forgery, of his own accord applied to the defendant (saying, however, that he came at the plaintiff's request) for information respecting the charge and to convince the defendant that he was mistaken, and thereupon the defendant told him that the plaintiff was unquestionably guilty, and proposed to arrange the matter by receiving the amount obtained on the check, and on that occasion persisted in the charge after being warned not to do so, *held*, that the conversation was not privileged, and that the plaintiff was entitled to recover without proof of express malice. Thorn v. Moser, 1 Denio (N. Y.), 487.

40. The publication in a public journal of an article charging a member of the legislature with corruption is not privileged. Littlejohn v. Greely, 13 Abb. (N. Y.) Pr., 41.

41. Charges against a public officer contained in a petition to the council of appointment praying his removal from office, although the words used

are false and malicious in themselves, without proving express malice or that the petition was actually malicious and groundless, and presented merely to injure the plaintiff's character, were held in New York not to be libelous. Thorn v. Blanchard, 5 Johns. (N. Y.), 508. [The doctrine of the case, however, may be doubted. It does not seem to be in accord with the gist of American decisions.— M. L. N.]

(2) AGENCIES, MERCANTILE, ETC.

1. The principle that a communication which would otherwise be slanderous and actionable is privileged if made in good faith, upon a matter involving an interest or duty of the party making it, though such duty is not strictly legal, but an imperfect obligation to a person having a corresponding interest or duty, applies to an agent employed to procure information as to the solvency, credit and standing of another, who communicates confidentially and in good faith the information obtained to his principal, who has an interest in the subject-matter. Ormsby v. Douglass, 37 N. Y., 477.

2. The defendant, the head of a mercantile agency, whose object was to procure information of the pecuniary standing of country merchants for city merchants, to be communicated confidentially to the latter, was sued for libel and slander for communicating to others, through his clerks, facts damaging to the plaintiff's credit. *Held*, that it was not error to charge that, had the defendant communicated the information to a person applying to him for the purpose in good faith, the communication might have been a privileged one; but that the publicity given to it by recording the libelous words in a book to which others had access, and to whom they were communicated, though standing in the relation of clerks, deprived the communication of its otherwise privileged character. Beardsly v. Tappan, 5 Blatch. (U. S. C. C.) 497.

3. A communication to a commercial agency from its local correspondent as to the financial standing of a person doing business at any place is so far privileged in the hands of the persons conducting such agency that they may lawfully make known its contents confidentially to their subscribers seeking information on that subject, provided this is done without malice and in the belief that the statements are true. State v. Lonsdale, 48 Wis., 348; 4 N. W. Rep., 390.

4. The mayor of a city who was *ex officio* chief of police, upon the information of some boys who had been arrested for stealing, called at the store of M. for the purpose of finding the stolen property, and charged him (M.) with having purchased such goods, knowing them to be stolen. *Held*, that this was a privileged communication, which was not actionable without proof of malice in fact. Mayo v. Sample, 18 Iowa, 306.

5. The communication of an agent to his principal touching the business of his agency, and not going beyond it, is privileged, and is not actionable without proof that the defendant did not act honestly and in good faith, but intended to do a wanton injury to the plaintiff. The sheriff levied upon certain cattle of W., and they were wrongfully driven away, whereby he was likely to be damnified, and he employed C., a mere student at law, to ascertain the facts, and to advise what course it was best to pursue. *Held*,

that C.'s letter to the sheriff, stating facts implicating W., and advising his arrest for larceny of the cattle, was privileged. Washburn v. Cooke, 3 Den., 110.

6. If a mercantile agency makes misstatements in writing to its customers about the drinking habits and mercantile character of a merchant, saying, for instance, that he is drinking and failing in business, the company may be liable if the written statements are seen by the clerks of the subscribers and perhaps by other persons. Johnson v. Bradstreet Co., 77 Ga., 173.

7. Written information as to the standing of a merchant or business man, furnished by a mercantile agency to its subscribers voluntarily or in answer to inquiries from them, is a privileged communication if not defamatory and actuated by malice. Lake v. Bradstreet Co., 23 Fed. Rep., 771.

8. Information respecting a mercantile firm, communicated by the defendant to a person by whom he is employed for the purpose, and who was directly interested in ascertaining their credit, but afterwards printed by the defendant and furnished to merchants having no immediate interest in learning the standing of the firm, *held* not to be within the rule of privileged communications. Taylor v. Church, 1 E. D. Smith (N. Y.), 279.

9. The verbal statements of a mercantile agency, made in relation to the plaintiff's business, credit and standing as a merchant to their subscribers who had an interest in knowing the facts, and in answer to inquiries made by them, if made in good faith and upon information on which defendant relied, are privileged communications and cannot be made the foundation of an action. Erber v. Dun, 4 McCrary, C. Ct., 160; Trussell v. Scarlett, 18 Fed. Rep., 214.

10. Defendants, who conducted a mercantile agency, issued semi-weekly to subscribers a notification sheet. In an issue of this sheet it was untruly stated that plaintiff, a trader, had mortgaged his stock. Certain creditors of plaintiff saw this statement, and the result was that plaintiff's credit was affected and his business broken up. The sheet was sent to all subscribers and the information was intended not to go beyond them. The creditors who saw it were not subscribers. There was no malice in fact on defendant's part. *Held*, that the publication was privileged and that an action was not maintainable. [Dixon, Magie, Van Syckel, Clement and Whitaker, JJ., dissenting.] King v. Patterson, 49 N. J. L., 417.

11. A communication to a "commercial agency" from its local correspondent as to the commercial standing of a person doing business in any place is so far privileged in the hands of the persons conducting such agency that they may lawfully make known its contents confidentially to their subscribers seeking information upon that subject, provided it is done without malice and in the belief that the statements are true. State v. Lonsdale, 48 Wis., 348.

(3) Associations, Churches, etc.

1. A representation to an ecclesiastical authority having power to examine and redress grievances in respect to the character of a clergyman or a member of the church is *prima facie* a privileged communication, and if made in good faith is not a ground for an action of slander. O'Donaghue v. McGovern, 23 Wend. (N. Y.), 26.

2. The conduct and transactions of a member of the Detroit board of trade is a matter of public interest, and may form the subject of a privileged publication. Atkinson v. Detroit Free Press Co., 46 Mich., 341; 9 N. W. Rep., 501.

3. A communication of a church member complaining of the conduct or character of his clergyman to their common superior, and seeking his removal, if not malicious, is privileged. When the communication is *prima facie* privileged, the plaintiff must aver and prove that it was false and malicious. He may be held to this proof on the general issue; but if the defendant plead the privilege specially, he must deny all malice or insist upon probable cause. O'Donaghue v. McGovern, 23 Wend., 26.

4. A resolution introduced into a county medical society for the expulsion of a member upon the ground that he procured his admission by false pretenses and without the legal qualifications is not privileged, for the society has no power to expel a member for such a cause. Fawcett v. Charles, 13 Wend., 473.

5. In a suit for libel it appeared that the libel was in fact a report, made and submitted by the defendants, as a committee of the college of pharmacy in New York, to the board of trustees, showing various acts of incompetency by the plaintiff as inspector of drugs for the port of New York, and by the board transferred to the secretary of the treasury with a view to his removal. *Held*, that it was a privileged communication, if made in good faith and probable cause as to its truth, and its transmission to the secretary of the treasury did not alter its character. Vanwycke v. Guthrie, 4 Duer (N. Y.), 268; Van Wyck v. Aspinwall, 17 N. Y., 190.

6. The principal of an institution for deaf-mutes is justified in laying before the trustees evidence tending to show that a teacher has sent obscene matter through the mails. Halstead v. Nelson, 36 Hun (N. Y.), 149.

7. The action of a member of a congregation in publishing to all the world a libel concerning his minister or priest is not privileged, however it may be as to a like communication addressed to the church authorities. State v. Bienvenu, 36 La. Ann., 378.

8. A bank director is not justified in making a communication to a co-director in the public streets affecting the credit or responsibility of a merchant where there is no evidence of such communication being confidential. At a meeting of the board of directors he would be justified in communicating to his associates any report which he might have heard in relation to the solvency or circumstances of the customers of the bank, or probably of any other person. His motive in such cases would be presumed to be innocent, which presumption should only be repelled by proof of express malice. Sewall v. Catlin, 3 Wend. (N. Y.), 291.

9. A letter to a member of an association of ministers, containing libelous matter concerning another member, and written by a minister not a member of the association, is not a privileged communication. Shurtleff v. Parker, 130 Mass., 293.

10. In the absence of proof of malice the members of a session of a Presbyterian church are not liable to an action of libel for the excommunication from membership in the church. Landis v. Campbell, 79 Mo., 433; 49 Am. Rep., 239.

11. If words actionable in themselves be spoken between members of the same church in the course of their religious discipline and without malice, no action will lie. The existence of malice is a question for the jury to decide. Jarvis v. Hatheway, 3 Johns. (N. Y.), 180.

12. The publication by directors of an incorporated society for promoting female education, in their annual report, of a "caution to the public" against trusting a person who had formerly been employed to obtain and collect subscriptions in their behalf, but has since been dismissed, is justified so far only as it is made in good faith and required to protect the corporation and the public against false representations of that person. Gassett v. Gilbert, 6 Gray (Mass.), 94.

13. The report by the officers of a corporation to the stockholders of the result of their investigation into the conduct of their officers and agents, with their conclusions upon the evidence collected by them, is a privileged communication, in the absence of any malice or bad faith; but the privilege extends only to making the report, and not to the preservation of it in the form of a book, distributed among the stockholders and in the community. Philadelphia, etc., R. R. Co. v. Quigley, 21 How., 202.

14. A representation to a bishop or church judicatory having power to hear, examine and redress grievances in respect to the character or conduct of a minister of the gospel or a member of a church is *prima facie* a privileged communication, and if made in good faith an action of slander does not lie against the party presenting it; but if the representation is false or impertinent, made without probable cause or belief in the truth, the action lies. The burden of proving its falsehood and malice is, however, on the plaintiff. O'Donaghue v. McGovern, 23 Wend., 26.

15. In an action for slander, the plaintiff being a member and the defendant a priest of a Roman Catholic church, the words charged in the complaint were: "This P. S. (plaintiff) is excommunicated, because he laid hands on the priest to put him out of the church. I will not pray for him, and consider him a lost sheep, and withdraw all my pastoral blessings from him. If he shall die the burial rights of the church will be denied him." It was held that the words were actionable with proof of special damage accruing to the plaintiff therefrom, unless their publication was legally justifiable; and if the words were spoken by the defendant in the proper discharge of his clerical and pastoral duties and without malice, their publication was legally justifiable. Servatius v. Pichel, 34 Wis., 293.

(4) Attorneys and Counselors at Law.

1. The privilege of counsel in advocating the rights of his client, and of the party himself where he manages his own case in a judicial proceeding, is as broad as that of a member of a legislative body. However false and malicious may be the charge made by the counsel or the party upon such an occasion, affecting the reputation of another, an action of slander will not lie, provided that what is said be pertinent to the question under discussion. The remedy is by action on the case. Where, however, a verdict is rendered for the plaintiff in an action of slander, the judgment will not be arrested if the pertinency of the words and the time of the utterance are not in issue and found against the defendant, although from the decla-

ration it appears that the words were spoken in the course of a judicial inquiry. Hastings v. Lusk, 22 Wend., 410.

2. Where a sheriff, having levied upon certain cattle which were subsequently driven away, employed the defendant, a student at law, to ascertain the facts and advise him what to do, who afterwards wrote to the sheriff that he had ascertained that the plaintiff had been seen driving off the cattle, and he had no doubt but that the taking was felonious, and advised him to prosecute the plaintiff for larceny, *held*, a privileged communication, for which an action would not lie without proof of actual malice. Washburn v. Cook, 3 Den. (N. Y.), 110.

3. A publication charging attorneys in their conduct of a case with "betraying and selling innocence in a court of justice," and with doing acts "to be held up to the world as derelict in their sense of honor and obligation," is libelous, and not in the nature of a report of a proceeding in a court of justice, and not privileged. Ludwig v. Cramer, 53 Wis., 193; 10 N. W. Rep., 81.

(5) CANDIDATES AND APPLICANTS FOR PUBLIC POSITIONS, ETC.

1. A memorial presented to the board of excise, remonstrating against the granting of a license to a particular individual to keep a tavern, charging him with stirring up justice's suits with a view of having the causes tried in his tavern, is a privileged communication; and no action lies as for the publication of a libel, unless express malice is proved. The circulation of the memorial for the purpose of obtaining signatures thereto is within the privilege. Vanderzee v. McGregor, 12 Wend., 545.

2. The defendant, as marshal, said of the plaintiff, who was an applicant for a place under him, that "they say he is a church robber, and I'll have no man in my employ who has robbed a church." *Held*, that the communication was privileged, and that to make it slanderous express malice must be proved by the plaintiff. Brockerman v. Kyser, 1 Phil. (Penn.), 243.

3. A newspaper publication which falsely imputes crime to a candidate for an elective office is a libel, malice being imputable, and the charge not being privileged by the occasion; but under the law in Michigan the publisher's belief in the truth of the charge, after reasonable and proper investigation, may go in mitigation of damages. Bronson v. Bruce, 59 Mich., 467.

4. Libelous matter published in a newspaper in regard to a candidate for public office is not a privileged communication. Aldridge v. Press Printing Co., 9 Minn., 133. The publication in a newspaper of an attack upon a person not a candidate for the votes of the people, but for those of an appointive power, is not privileged. Hunt v. Bennett, 19 N. Y., 173.

5. The only limitation to the right of criticism of the acts or conduct of a candidate for an office in the gift of the people is that the criticism be *bona fide*. This right being confined to the acts or conduct of such candidate, whenever the facts which constitute the act or conduct criticised are not admitted they must be proven. But as respects his person there is no such large privilege of criticism, though he be such candidate. Whatever

imputes to him a crime or moral delinquency is not a privileged communication, either absolute or conditional, but is *per se* actionable. Sweeney v. Baker, 13 W. Va., 158.

6. Charges against the private character of a person holding an elective office, published more than a year before the occurrence of the next election, were held not privileged *prima facie*, though he had not disclaimed his intention to be a candidate for re-election. Com. v. Wardwell, 136 Mass., 164.

7. Words spoken without malice of a candidate for office in the belief of their truth and for the sole purpose of advising electors of what was believed to be the true character of the candidate are privileged. Bays v. Hunt, 60 Iowa, 251.

8. An article otherwise libelous may be privileged if circulated in good faith among the voters for the purpose of giving them information believed by the writer to be truthful and of importance to aid them in deciding how to vote. State v. Balch, 31 Kan., 465.

9. There is no obligation upon a citizen, when discussing the conduct of public servants in their official capacity, and who speaks the truth as he designs to be understood and as he is understood by his hearers, to employ any prescribed form of expression or language. So long as he speaks the truth he is not liable in damages whether his language be chaste or vulgar, refined or scurrilous. But where one exercises the citizen's right to denounce the actions of a public officer, it is unlawful for him to make a false and malicious charge of crime or misdemeanor in office. Rowand v. De Camp, 96 Pa. St., 493.

10. A publication by the editor of a newspaper affecting the character of a candidate for public office is not a privileged communication, relieving the publishers from the necessity of proving the truth of the charge made to shelter themselves from damages; and the burden of proof is upon the party slandered of showing actual malice or a knowledge of the falsity of the charge. Editors may publish what they please in relation to the character and qualifications of candidates for office, but they are responsible for the truth of the publication. King v. Root, 4 Wend., 113.

11. A communication to the proper authorities charging that a candidate was unfit for the position of a teacher and of bad moral character, made by persons interested in a particular school, is privileged when not maliciously made. Weiman v. Mabie, 45 Mich., 484; 8 N. W. Rep., 71.

12. Where a member of a board of education has, in an interview with a reporter, criticised adversely the action of the superintendent of schools in not recommending a teacher for re-appointment, and expressed the opinion that the superintendent was actuated by personal hostility towards the teacher, a reply to such statements, drawn from the superintendent by a reporter and published, explaining his action and alleging that the teacher in question was not a successful teacher of drawing, that she had many infirmities of temper and a vacillating disposition, is privileged by the occasion. O'Connor v. Sill, 60 Mich., 175; 27 N. W. Rep., 13.

13. Where a person addresses a complaint to persons competent to redress the grievance complained of, no action will lie against him whether his statement be true or false, or his motives innocent or malicious. Thorns v.

Blanchard, 5 Johns. (N. Y.), 508. But an action on the case lies for a communication to the head of the government department charging a subordinate with peculation and fraud. Such action is in the nature of an action for malicious prosecution, and to sustain it plaintiff must show malice and a want of probable cause. Where the conduct of such subordinate, with attending circumstances, is such as to excite honest suspicion of the person making the charge, the question of probable cause should be submitted to a jury. And plaintiff may rest his case on the ground of probable cause, except where it is a mere matter of mitigation. Howard v. Thompson, 21 Wend. (N. Y.), 319.

(6) Employer and Employee.

1. In an action for libel it appeared that the defendant was employed by the father of the plaintiff's wife to accompany her home on a visit to her parents, and that the defendant was directed to make inquiries concerning the general standing of the plaintiff. On the return of the defendant he reported the result of his inquiries to the father, and wrote a letter alleged to contain the libel, and to the same effect, to the mother of the plaintiff's wife. *Held*, that the trust which the defendant had assumed, and the relation in which he stood to the parents of the plaintiff's wife, created an occasion which made the communication privileged, if fairly made. *Held, also*, that it was for the jury to decide, on the question of express malice, whether the defendant had made an honest report justified by the relations in which he was placed, or whether it was made with a purpose wrongfully to defame the plaintiff. Atwill v. Mackintosh, 120 Mass., 177.

2. The defendant, a baker employing several drivers in delivering bread in T. and adjoining towns, inserted in a newspaper published in T. a notice that the plaintiff "having left my employ, and taken upon himself the privilege of collecting my bills, this is to give notice that he has nothing further to do with my business." In an action for libel in publishing this notice, the plaintiff requested the judge to rule that the community had no such interest in the subject-matter of it as would authorize the defendant to make it through the medium of a newspaper. The judge refused so to rule, and ruled that the publication was privileged if made in good faith, and the jury would find it was a necessary or reasonable mode of giving notice. *Held*, that the plaintiff had no ground for exception. Hatch v. Lane, 105 Mass., 394.

3. Words spoken by an employer to his overseer, intended to protect the employer's private interests and property, but not spoken maliciously, are not actionable, although no confidence was expressed at the time of speaking, and although the same words, published under other circumstances, would be slander. Easly v. Moss, 9 Ala., 266.

4. A letter written to the plaintiff's former employer stating that it is reported that the plaintiff has tools in his chest belonging to the employer, and suggesting that the letter be shown to a superior officer, and offering assistance to investigate the matter, was held on demurrer to be libelous in itself. Cochran v. Melendy, 59 Wis., 207; 18 N. W. Rep., 24.

(7) Judicial Proceedings, etc.

1. Words charging a witness with perjury, uttered by a party or his counsel in the course of a trial, may or not be actionable, accordingly as they were or were not spoken maliciously, were or were not pertinent to the issue, as there was or was not color for making the imputation, or as they were or were not spoken with a design to slander the witness, etc. The privilege of a party is the same on such an occasion as that of counsel; and if either of them speak slanderous words of a witness or party, impertinently or without proper cause, an action of slander lies. A declaration, therefore, charging an imputation of perjury to have been made in addressing referees by a party, upon the plaintiff, a witness in the cause against the party, and that it was made falsely and maliciously, the verdict being for the plaintiff, is good on motion in arrest of judgment. Ring v. Wheeler, 7 Cow., 725.

(8) Master and Servant.

1. For privileged communications, made with honest motives and for justifiable ends, the party making them is not responsible, the case being disrobed of one important element to constitute slander, that is, malice either in law or in fact. The most ample shield of protection is extended to those who act fairly and prudently, in order that men may not be deterred by the fear of civil actions or public prosecutions from making communications with or either important to themselves or beneficial to others. The most common cases of this kind are those which have arisen from actions brought by servants against their master. In the case of master and servant the convenience of mankind requires that what is said in fair communication between men upon the subject of character should be privileged if made *bona fide* and without malice. If, however, the party giving the character knows what he says to be untrue, that may deprive him of the protection which the law throws around such communications. Elam v. Badger, 23 Ill., 498.

2. After a mercantile firm has given to one of its clerks a general recommendation as such, if a partner is led by facts subsequently coming to his knowledge to change his opinion it is his right and duty to communicate the facts to a subsequent employer, in order to guard him against being misled by the previous recommendation of the firm. Such a communication, if true, is privileged, and in order to sustain an action thereon the plaintiff must show it to have been made maliciously. Fowles v. Bowen, 30 N. Y., 20.

(9) Public Meetings, etc.

1. At a town meeting having under consideration an application from the assessors of the town for reimbursement of expenses incurred in defending a suit on the ground that it was for acts done in their official capacity, which was opposed on the ground that the suit was brought against them for making false answers under oath to interrogatories propounded to them in another suit, the statement of a voter and tax-payer of the town that the assessors had therein perjured themselves is privileged, if made in good

faith with a belief in its truth and without actual malice towards the assessors. And the good faith and want of malice of the defendant, when material, may be shown by his own testimony. Smith v. Higgins, 82 Mass., 251.

2. Words spoken in good faith and within the scope of his defense by a party on trial before a church meeting are privileged, and do not render him liable to an action although they disparage private character. York v. Pease, 2 Gray (68 Mass.), 282.

3. There must be both a duty and an interest in the subject-matter of the communication. Thus, the charge was that the plaintiff had put two votes into the ballot-box. It appeared that the defendant was one of the selectmen of the town, and that the words were spoken in open town meeting, during an election at which the defendant was acting in his capacity as a public officer. This case falls under both branches of the rule. It was the duty of the defendant, charged with the proper conduct of the election, to give notice to the citizens there assembled if any one put in two votes, in order that an investigation might take place and the truth be ascertained, and that by a new ballot or otherwise, according to the circumstances, the error might be corrected. It was a communication also in which all the voters had an interest. Bradley v. Heath, 12 Pick. (Mass.), 163.

(10) PUBLIC OFFICERS, ETC.

1. It is a matter of privilege to call public attention to the act of a public judicial officer in ordering a person into confinement without a charge against him, or in requiring bail in an amount which, considering the prisoner's probable means and position in life, he is unable to give. Miner v. Detroit Post & Trib. Co., 49 Mich., 358; 13 N. W. Rep., 773.

2. An article in a public newspaper charging an officer with gross misconduct in office cannot be claimed to be privileged on the ground of its publication being a public good, as, if untrue, it is a public injury. Bourreseau v. Detroit Ev. Jour. (Mich.), 30 N. W. Rep., 376.

3. The plaintiff held the office of inspector of drugs imported into the city of New York. The college of pharmacy appointed a committee to ascertain whether complaints that spurious drugs had been imported were true. The committee made a report including charges against the plaintiff in his office to be sent, and it was sent, to the secretary of the treasury, who thereupon removed the plaintiff. *Held*, a privileged communication. Van Wyck v. Aspinwall, 3 Smith, 190; aff'g Van Wyck v. Guthrie, 4 Duer, 268.

§ 14. Digest of English Cases.—

1. The plaintiff was a London merchant who had had business relations with the London and Yorkshire Bank. The defendant, the manager of that bank, on being applied to by one Hudson for information about the plaintiff, showed Hudson an anonymous letter which the bank had received about the plaintiff, and which contained the libel in question. *Held*, that handing Hudson the letter in confidence was a privileged communication. Grove, J., in refusing a new trial made the following remarks: "The defendant did not act as a volunteer, but was applied to for information. When applied to he did give such information as he possessed. He might

have refused to give that information. He had no legal duty cast upon him to give any opinion. But he was entitled to give his opinion when asked, and *a fortiori*, as it seems to me, to show any letters he had received bearing on the subject. If one man shows another a letter he leaves him to estimate what value attaches to it; whereas any opinion he gives might be based on very insufficient grounds. It is better to state facts than to give an opinion. Every one owes it as a duty to his fellow-men to state what he knows about a person when inquiry is made; otherwise no one would be able to discern honest men from dishonest men. It is highly desirable, therefore, that a privilege of this sort should be maintained. An anonymous letter is usually a very despicable thing. But anonymous letters may be very important, not by reason of what they say, but because they lead to inquiry, which may substantiate what they have said. It seems to me, therefore, that he was fully entitled to show this anonymous letter for what it was worth." Robshaw v. Smith, 28 L. T., 423; Odgers on L. & S., 208.

2. Plaintiff had been tenant to the defendant. A wine-broker went to defendant to ask him plaintiff's present address. Defendant commenced to abuse the plaintiff. The broker said: "I don't come to inquire about his character, but only for his address; I have done business with him before." But the defendant continued to denounce the plaintiff as a swindler, adding, however: "I speak in confidence." The broker thanked defendant for his remarks, and declined in future to trust the plaintiff. *Held*, that it was rightly left to the jury to say if defendant spoke *bona fide* or maliciously. Picton v. Jackman, 4 C. & P., 257; Southam v. Allen, Sir T. Raymond, 231.

3. If A. is about to have dealings with B., but first comes to C. and confidentially asks him his opinion of B., C.'s answer is privileged. Every one is quite at liberty to state his opinion *bona fide* of the respectability of a party thus inquired about. Storey v. Challands, 8 C. & P., 234.

4. Watkins met the defendant in Brecon and addressing him said: "I hear that you say the bank of Bromage and Snead at Monmouth has stopped. Is it true?" Defendant answered: "Yes, it is. I was told so. It was so reported at Cricklewell, and nobody would take their bills, and I came to town in consequence of it myself." *Held*, that if the defendant understood Watkins to be asking for information by which to regulate his conduct, and spoke the words merely by way of honest advice, they were *prima facie* privileged. Bromage v. Prosser, 4 B. & Cr., 247; 1 C. & P., 475; 6 D. & R., 296.

5. The defendant was asked to sign a memorial, the object of which was to retain the plaintiff as trustee of a charity from which office he was about to be removed. The defendant refused to sign, and on being pressed for his reasons stated them explicitly. *Held*, a privileged communication. Cowles v. Potts, 34 L. J., Q. B., 247; 11 Jur. (N. S.), 946; 13 W. R., 858.

6. Where a communication, libelous in itself, but such that the occasion of it would have rendered it privileged if made by letter to the person alone to whom it was addressed, was in fact made by means of a telegram, *held*, not to be privileged, though made *bona fide*, because the mode of conveying the information necessarily involved publication to the postoffice

clerks. *Held*, also, it was not less a publication because section 20 of 31 and 32 Victoria, chapter 110, makes the disclosure of the contents of a telegraphic message by any official in the postoffice a misdemeanor. Williamson v. Freer, 7 Chi. Leg. N., 30; L. R., 9 C. P., 393; 43 L. J., C. P., 161; W. R., 868; 30 L. T., 362.

7. The plaintiff had been a major-general commanding a corps of irregular troops during the war in the Crimea. Complaint having been made of the insubordination of the troops, the corps commanded by the plaintiff was placed under the superior command of General Vivian. The plaintiff then resigned his command, and General Vivian directed General Shirley to inquire and report on the state of the corps, and particularly referred him for information on the matter to the defendant, who was General Vivian's private secretary and civil commissioner. All communications made by the defendant to General Shirley touching the corps and the plaintiff's management of it are privileged, if the jury find that the defendant at the time honestly believed that he was acting within the scope of his duty in making them. Beatson v. Skene, 5 H. & N., 838; 29 L. J., Ex., 430; 6 Jur. (N. S.), 780; 2 L. T., 378; Hopwood v. Thorn, 8 C. B., 293; 19 L. J., C. P., 94; 14 Jur., 87.

8. A., B. and C. are brother officers in the same regiment. A. meets B. and says: "I have learned that C. has been guilty of an atrocious offense; I wish to consult you whether I should divulge it — whether I should speak of it to the commanding officer." Such remark and the discussion that ensued would be privileged if *bona fide*. Bell v. Parke, 10 Ir. C. L. R., 284.

9. I am not justified in standing at the door of a tradesman's shop and voluntarily defaming his character to his intending customers. But if an intending customer comes to me and inquires as to the respectability or credit of that tradesman, it is my duty to tell him all I know. Storey v. Challands, 8 C. & P., 234.

10. At the hearing of a case in court Fulcher's solicitor commented severely on the conduct of the plaintiff, Nettleford's debt collector. Not content with that, Fulcher's solicitor sent a full report of the case to the Marylebone "Gazette," including his remarks on the plaintiff. The jury found that his report was substantially fair and accurate, but that it was sent to the newspaper "with a certain amount of malice." The court upheld this finding, laying especial stress upon the fact that the defendant was a volunteer, and not an ordinary reporter for that paper. Stevens v. Sampson, 5 Ex. D., 53; 49 L. J., Q. B., 120; 28 W. R., 87; 41 L. T., 782.

11. If a master, hearing that a discharged servant is seeking to enter M.'s service, writes to M. of his own accord to give the servant a bad character, and thus forestalls any inquiry by M., it will at all events require stronger evidence to prove that he acted *bona fide* than it would had he waited for M. to write and inquire. Pattison v. Jones, 8 B. & C., 578; 3 M. & R., 101.

12. Horsford was about to deal with the plaintiff, when he met the defendant, who said at once, without his opinion being asked at all, "If you have anything to do with Storey you will live to repent it; he is a most unprincipled man." Lord Denman directed a verdict for the plaintiff, because the defendant began by making the statement without waiting to be asked. Storey v. Challands, 8 C. & P., 234.

13. Nash selected plaintiff to be his attorney in an action. Defendant, apparently a total stranger, wrote to Nash to deprecate his so employing the plaintiff. This was held to be clearly not a confidential communication. Damages 1s. Godson v. Home, 1 B. & B., 7; 3 Moore, 223.

14. A husband asked a medical man to see his wife and ascertain her mental condition. He reported that she was insane. *Held*, a privileged communication. Weldon v. Winslow, Times for March 14 to 19, 1884.

15. A report by the comptroller of the navy to the board of admiralty upon the plans and proposals of a naval architect is clearly privileged. Henwood v. Harrison, L. R., 7 C. P., 606; 41 L. J., C. P., 206; 20 W. R., 1000; 26 L. T., 938.

16. A time-keeper employed on public works on behalf of a public department wrote a letter to the secretary of the department imputing fraud to the contractor. Blackburn, J., directed the jury that if they thought the letter was written in good faith and in the discharge of the defendant's duty to his employers it was privileged, although written to the wrong person. Scarll v. Dixon, 4 F. & F., 250.

17. A relation or intimate friend may confidentially advise a lady not to marry a particular suitor and assign reasons, provided he really believes in the truth of the statements he makes. Todd v. Hawkins, 2 M. & Rob., 20; 8 C. & P., 88; Adams v. Coleridge, 1 Times L. R., 84.

18. The defendant and Tinmouth were joint owners of The Robinson, and engaged the plaintiff as master; in April, 1843, defendant purchased Tinmouth's share; in August, 1843, defendant wrote a business letter to Tinmouth, claiming a return of £150 and incidentally libeled the plaintiff. *Held*, a privileged communication, as the defendant and Tinmouth were still in confidential relationship. Wilson v. Robinson, 7 Q. B., 68; 14 L. J., Q. B., 196; 9 Jur., 726.

19. The officers and men of the garrison of St. Helena gave an entertainment at the theater, at which considerable noise and disturbance took place. The commanding officer was informed that this was caused by the plaintiff, who was said to have been drunk. The plaintiff was an assistant master in the government school. The commanding officer reported the circumstances to the colonial secretary of the island, and the plaintiff was in consequence suspended from his appointment. Verdict for the plaintiff disapproved and set aside and judgment arrested. Stace v. Griffith, L. R., 3 P. C., 426; Moore, P. C. C. (N. S.), 18; 20 L. T., 197; Sutton v. Plumridge, 16 L. T., 741.

20. It is the duty of an under-master in a college school to inform the head-master that reports have been for some time in circulation imputing habits of drunkenness to the second-master. Hume v. Marshall, 42 J. P., 136.

21. The defendant, a linen-draper, dismissed his apprentice without sufficient legal excuse. He wrote a letter to her parents informing them that the girl would be sent home, and giving his reasons for her dismissal. Cockburn, C. J., held this letter privileged, as there was clearly a confidential relationship between the girl's master and her parents. James v. Jolly, Bristol Summer Assizes, 1879. See Fowler and wife v. Homer, 3 Camp., 294. So, of course, a letter to the girl herself stating in detail the faults her late

employer found with her. R. v. Perry, 15 Cox, C. C., 169. But a complaint of a man's conduct is not privileged if addressed by the employer to the man's wife. Jones v. Williams, 1 Times L. R., 572.

22. Where, after an election, the agent of the defeated candidate wrote a letter to the agent of the successful candidate, asserting that the plaintiff and another (both members of the successful candidate's committee) had bribed a particular voter, the latter was held not to be privileged, as there was no confidential relation existing between the two agents. Dickeson v. Hilliard and another, L. R., 9 Ex., 79; 43 L. J., Ex., 37; 22 W. R., 372; 30 L. T., 196.

23. A circular letter, sent by the secretary to the members of a society for the protection of trade against sharpers and swindlers, is not a privileged communication. Getting v. Foss, 3 C. & P., 160; Goldstein v. Foss, 2 C. & P., 252; 6 B. & C., 154; 4 Bing., 489; 2 Y. & J., 146; 4 D. & R., 197; 1 M. & P., 402; Humphreys v. Miller, 4 C. & P., 7. But see Waller v. Loch (C. A.), 7 Q. B. D., 619; 51 L. J., Q. B., 274; 30 W. R., 18; 45 L. T., 243; 46 J. P., 484; Clover v. Royden, L. R., 17 Eq., 190; 43 L. J., Ch., 665; 22 W. R., 254; 29 L. T., 639.

24. A former friend of the plaintiff, who knew all about plaintiff's past wild life, hearing plaintiff was about to be married, wrote, after consulting the clergyman of his parish, to the lady, to whom he was apparently a stranger, disclosing plaintiff's antecedents. Hill, J., said that if the jury thought the defendant reasonably believed that it was his duty to write the letter he should hold it to be privileged. But the jury found a verdict for the plaintiff. Damages 1*s*. Ex relatione Coleridge, Q. C., 15 C. B. (N. S.), 410, 411.

25. Defendant met Clark in the road and asked him if he had sold his timber yet. Clark replied that Bennett (plaintiff) was going to have it. Defendant asked if he was going to pay ready money for it, and, being answered in the negative, said, "Then you'll lose your timber, for Bennett owes me about £25, and I am going to arrest him next week for my money, and your timber will help to pay my debt." Clark consequently declined to sell the timber to the plaintiff. Plaintiff really did owe defendant about £23. Coltman, J., directed the jury that the caution was altogether unprivileged because volunteered; and they therefore found a verdict for the plaintiff. Damages 40*s*. The court of common pleas were equally divided on the question whether the judge was right in his direction, and therefore the verdict for the plaintiff stood. Bennett v. Deacon, 2 C. B., 628; 15 L. J., C. P., 289.

26. The plaintiff was a malster, and had bought a quantity of barley of Butler. The defendant said to Butler, "Don't trust that damned rogue, he will never pay you a farthing. Have you sold King some barley? You mind and have the money for it before it goes out of the wagon, or you will never have it." Butler, in consequence, refused to deliver the barley until he was paid for it. Lord Abinger, C. B., directed the jury that the defendant's words were unprivileged because they were volunteered. Verdict for the plaintiff accordingly. Damages one farthing. King v. Watts, 8 C. & P., 614.

27. So where defendant said of the plaintiff, who was a tradesman,

"He cannot stand it long; he will be a bankrupt soon," and it was laid as special damage in the declaration that one Lane had, in consequence, refused to trust the plaintiff for a horse. Lane was the only witness called for the plaintiff, and it appearing on his evidence that the words were not spoken maliciously, but in confidence and friendship to Lane, and by way of warning to him, and that in consequence of that advice he did not trust the plaintiff with the horse, Pratt, C. J., directed the jury that though the words were otherwise actionable, yet if they should be of opinion that the words were not spoken out of malice, but in the manner before mentioned, they ought to find the defendant not guilty, and they did so accordingly. Herver v. Dowson (1765), B. N. P., 8.

28. Defendant accused the plaintiff, in the presence of a third person, of stealing his wife's brooch; plaintiff wished to be searched; defendant repeated the accusation to two women, who searched the plaintiff and found nothing. Subsequently it was discovered that defendant's wife had left the brooch at a friend's house. *Held*, that the mere publication to the two women did not destroy the privilege attaching to charges if made *bona fide:* but that all the circumstances should have been left to the jury, who should determine whether or no the charge was made recklessly and unwarrantably, and repeated before more persons than necessary. Padmore v. Lawrence, 11 A. & E., 380; 4 Jur., 458; 3 P. & D., 209; Jones v. Thomas, 34 W. R., 104; 53 L. T., 678; 2 Times L. R., 95.

29. Barton, a friend of the defendant, employed a builder, the plaintiff's master, to build a house for him; the defendant informed Barton that the plaintiff while at work on his house had removed some quarterings. Barton complained to the master-builder, who came down to the defendant's and said: "I am told you say that you saw my man Kine take away some of the quarterings from Mr. Barton's premises." A repetition of the charge made then to the plaintiff's master without malice was held privileged, and as the plaintiff had not called Barton to prove the original remark, the jury found for the defendant, and a new trial was refused. Parke, B., said: "Is a man's mouth to be closed when I ask him if he has seen another man take away my timber?" Kine v. Sewell, 3 M. & W., 297.

30. Plaintiff was defendant's shopman in Plymouth till November 5, 1834, when he left and went to London, receiving from the plaintiff a good character for steadiness, honesty and industry. Early in December defendant found one of his female servants in possession of some of his goods. When charged with stealing them she said that the plaintiff gave them to her. Thereupon the defendant, though he knew the girl was of bad character, went to the plaintiff's relations in Plymouth and charged him with felony, and eventually induced them to give him £50 to say no more about the matter. *Held*, that the charge of felony was not made *bona fide* with any intention to promote investigation or prosecution, and was altogether unprivileged; and that no question as to malice in fact should have been left to the jury. Hooper v. Truscott, 2 Bing. N. C., 457; 2 Scott, 672.

31. A discharged servant of the defendant charged plaintiff, her former manager, with embezzlement. Defendant went to plaintiff's house, and, finding him out, said to his wife, "He has robbed me." This was held not to be privileged, though the jury found that defendant spoke in the per-

formance, as she believed, of a duty, and in the *bona fide* belief that what she said was true, and without malice. Judgment for the plaintiff. Damages £5. Jones v. Williams, 1 Times L. R., 572. Plaintiff assaulted defendant on the highway; defendant, meeting a constable, requested him to take charge of the plaintiff, and the constable refusing to arrest the plaintiff unless the defendant would charge him with felony, the defendant did so. *Held*, on demurrer to the defendant's plea setting up these circumstances, that they did not render the charge of felony a privileged publication. Smith v. Hodgeskins, Cro. Car., 276.

32. A letter written to the postmaster-general, or to the secretary of the general postoffice, complaining of misconduct in a postmaster, is not a libel if it was written as a *bona fide* complaint, to obtain redress for a grievance that the party really believed he had suffered; and particular expressions are not to be too strictly scrutinized if the intention of the defendant was good. Woodward v. Lander, 6 C. & P., 548; Blake v. Pilford, 1 Moo. & Rob., 198.

33. The defendant drafted a memorial to the home secretary on a matter within his jurisdiction, and read it to M. in the presence of M.'s wife, and asked M. to sign it. M. signed it, and the defendant then sent it to the home secretary. Grove, J., held that both the petition and the conversation with M. were *prima facie* privileged. Spackman v. Gibney, Bristol Spring Assizes, 1878.

34. The plaintiff was a sanitary inspector under the statute 41 and 42 Vict., ch. 74, sec. 42, appointed by the local authority, but removable by the privy council; the defendant addressed a letter to the privy council, charging the plaintiff with corruption and misconduct in his office. *Held*, that no action lay without proof of malice. Proctor v. Webster, 16 Q. B. D., 112; 55 L. J., Q. B., 150; 53 L. T., 765; Odgers on L. & S., 227.

35. A time-keeper employed on public works, on behalf of the board of works, wrote a letter to the secretary of the board, imputing fraud to the contractor. Blackburn, J., directed the jury that, if they thought the letter was written in good faith and in the discharge of what the defendant considered his duty to his employers, it was privileged, although such a complaint should have been addressed to Mr. Harris, the resident engineer. Scarll v. Dixon, 4 F. & F., 250; Tompson v. Dashwood, 11 Q. B. D., 43; 52 L. J., Q. B., 425; 48 L. T., 943; 48 J. P., 55.

36. An Irish coroner sent to the chief secretary of Ireland a report of an inquest he had held on the body of an outdoor pauper, and at which the plaintiff, who was the relieving officer, had given evidence. He mentioned in this report that the parish priest, who happened to be in court, stated publicly at the conclusion of plaintiff's evidence, "This is nothing short of perjury." *Held*, that this portion of the report, at all events, was not privileged, as the chief secretary could have no interest in hearing Father Callary's opinion of the plaintiff's evidence. Lynam v. Gowing, 6 L. R., Ir., 259; Odgers on L. & S., 229.

37. The plaintiff was a teacher in a district school. The inhabitants of the district prepared a memorial charging the plaintiff with drunkenness and immorality, which they sent to the local superintendent of schools. It ought strictly to have been sent to the trustees of that particular school

in the first instance, and such trustees would then, if they thought fit, in due course forward it to the local superintendent for him to take action upon it. *Held*, that the publication was still *prima facie* privileged, although by a mistake easily made it had been sent to the wrong quarter in the first instance. McIntyre v. McBean, 13 Up. Canada, Q. B. Rep., 534.

38. Where the defendant wrote a letter to the home secretary complaining of the conduct of the plaintiff, a solicitor, as clerk to the borough magistrates, this was held not to be privileged, because Sir James Graham had no power or jurisdiction whatever over the plaintiff. There was moreover evidence of malice. Blagg v. Sturt, 10 Q. B., 899; 16 L. J., Q. B., 39; 8 L. T. (O. S.), 135; 11 Jur., 101.

39. Lord Denman, in delivering the judgment of the court, said: "Some remark from the defendant on the refusal to pay the rent was perfectly justifiable, because his entire silence might have been construed into an acquiescence in that refusal, and so might have prejudiced his case upon any future claim, and the defendant would therefore have been privileged in denying the truth of the plaintiff's statement. But, upon consideration, we are of opinion that the learned judge was quite right in considering the language actually used as not justified by the occasion. Any one in the transaction of business with another has a right to use language *bona fide* which is relevant to that business, and which a due regard to his own interest makes necessary, even if it should directly or by its consequences be injurious or painful to another; and this is the principle on which privileged communication rests; but defamatory comments on the motives or conduct of the party with whom he is dealing do not fall within that rule. It was enough for the defendant's interest, in the present case, to deny the truth of the plaintiff's assertion; to characterize that assertion as an attempt to defraud and as mean and dishonest was wholly unnecessary." Robertson v. M'Dougall, 4 Bing., 670; 1 M. & P., 692; 3 C. & P., 259; Hancock v. Case, 2 F. & F., 711; Jacob v. Lawrence, 4 L. R., Ir., 579; 14 Cox, C. C., 321.

40. The defendant was clerk of the peace of the county of Kent, and as such it was his duty to have the register of county voters printed, the expense of such printing being allowed by the justices in quarter sessions. In 1854 the defendant employed a new printer, who charged less for the job; the defendant wrote a letter to the finance committee of the justices stating his reasons for the change, and added that to continue to pay the charges made by his former printer, the plaintiff, would be "to submit to what appears to have been an attempt to extort money by misrepresentation." *Held*, that the rest of the letter was privileged, as it was proper and necessary for the defendant to explain to the finance committee what he had done; but that the words imputing proper motives to the plaintiff were uncalled for and malicious. Damages £50. Cooke v. Wildes, 5 E. & B., 328; 24 L. J., Q. B., 367; 1 Jur. (N. S.), 610; 3 C. L. R., 1090.

41. The defendant owed the plaintiff £6 10*s.*; the plaintiff told his attorney to write and demand the money, and threaten proceedings. The defendant in reply wrote to the attorney denouncing the proceeding as a "miserable attempt at imposition," and proceeded to discuss the plaintiff's "transactions in matters generally," asserting that "his disgusting tricks

are looked upon by all respectable men with scorn." Williams, J., ruled that the letter was not privileged, and the court of common pleas upheld this ruling. Damages one farthing. The jury expressly found that there was no malice, but the judge certified for costs on the express ground that there was. Huntley v. Ward, 1 F. & F., 552; 6 C. B. (N. S.), 514; 6 Jur. (N. S.), 18.

42. An insurance company may inform a ship-owner that they must refuse to insure his vessel any longer if he put a particular master in command of her. Hamon v. Falle, 4 App. Cas., 247; 48 L. J., P. C., 45.

43. Defendant claimed rent of plaintiff; plaintiff's agent told defendant that plaintiff denied his liability; defendant thereupon wrote to the agent, alleging facts in support of his claim, and adding, "This attempt to defraud me of the produce of the land is as mean as it is dishonest." *Held*, that the publication, in these terms, was not privileged, for one can claim a debt without imputing fraud, and that the judge was justified in directing the jury that it was libel. Tuson v. Evans, 12 A. & E., 733.

44. Several fictitious orders for goods had been sent in the defendant's name to a tradesman, who thereupon delivered the goods to the defendant. The defendant returned the goods, and, being shown the letters ordering them, wrote to the tradesman that in his opinion the letters were in the plaintiff's handwriting. *Held*, that this expression of opinion was privileged, as both defendant and the tradesman were interested in discovering the culprit. Croft v. Stevens, 7 H. & N., 570; 31 L. J., Ex., 143; 10 W. R., 272; 5 L. T., 683.

45. A prominent member of the church of St. Barnabas, Pimlico, went to stay in the vacation at Stockcross, in Berkshire, and so conducted himself there as to gravely offend the parishioners. Letters passing between the curate of St. Barnabas and the incumbent of Stockcross relative to the charges of misconduct brought against the plaintiff were held privileged, as both were interested in getting at the truth of the matter. Whiteley v. Adams, 15 C. B. (N. S.), 392; 33 L. J., C. P., 89; 10 Jur. (N. S.), 470; 12 W. R., 153; 9 L. T., 483.

46. The defendant had a dispute with the Newry Mineral Water Company, which they agreed to refer to "some respectable printer, who should be indifferent between the parties," as arbitrator. The manager of the company nominated the plaintiff, a printer's commercial traveler. The defendant declined to accept him as an arbitrator, and when pressed for his reason wrote a letter to the manager stating that the plaintiff had formerly been in the defendant's employment and had been dismissed for drunkenness. The plaintiff thereupon brought an action on the letter as a libel concerning him in the way of his trade. *Held*, that the letter was privileged, as both parties were interested in the selection of a proper arbitrator. Hobbs v. Bryers, 2 L. R., Ir., 496.

47. Defendant was a haberdasher. On a Saturday evening while he was absent Mrs. Fowler came into his shop and bought some goods. Soon after she was gone his shopman missed a roll of ribbon and mistakenly supposed that she had stolen it, but did not then pursue her. On the following Monday as she was again passing the shop the shopman pointed her out to the defendant as the person who had stolen the ribbon. The defendant brought

her into the shop and accused her of the robbery, which she positively denied. He then took her into an adjoining room and sent for her father, to whom he repeated the accusation. After a good deal of altercation she was allowed to go home, and there the matter rested. Lord Ellenborough decided that no action lay. Fowler et ux. v. Homer, 3 Camp., 294.

48. Mensel sent his servant, the plaintiff, to the defendant's shop on business; while there the plaintiff had occasion to go into an inner room. Shortly after he left a box was missed from that inner room. No one else had been in the room except the plaintiff. The defendant thereupon went round to Mr. Mensel's, and, calling him aside into a private room, told him what had happened, adding that the plaintiff must have taken the box. Later on the plaintiff came to the defendant's house, and the defendant repeated the accusation to him; but, an English girl being present, defendant was careful to speak in German. Both communications were held privileged, if made without actual malice and in the *bona fide* belief of their truth. Aman v. Damm, 8 C. B. (N. S.), 597; 29 L. J., C. P., 313; 7 Jur. (N. S.), 47; 8 W. R., 470.

49. Defendant charged the plaintiff, his porter, with stealing his bedticks, and with plaintiff's permission subsequently searched his house, but found no stolen property. The jury found that defendant *bona fide* believed that a robbery had been committed by the plaintiff, and made the charge with a view to investigation, but added, "The defendant ought not to have said what he could not prove." *Held*, that this finding was immaterial, that the occasion was privileged, and that there was no evidence of malice. Judgment for the defendant. Howe v. Jones, 1 Times L. R., 19, 461; Fowler et ux. v. Homer, 3 Camp., 294.

Privileged Occasions.

§ 15. **The Subject Classified.**— The occasion upon which privileged communications are made may be classified as those absolutely privileged and those in which the privilege is qualified.

§ 16. **First, Absolute Privilege.**— In this class of cases it is considered in the interest of public welfare that all persons should be allowed to express their sentiments and speak their minds fully and fearlessly upon all questions and subjects; and all actions for words so spoken are absolutely forbidden, even if it be alleged and proved that the words were spoken falsely, knowingly and with express malice. This rule is, however, confined to cases in which the public service or the administration of justice requires complete immunity — for example, words spoken in legislative bodies, in debates, etc.; in reports of military officers on military matters to their superiors; words spoken by a judge on the bench and by witnesses on the stand.

In all such cases the privilege afforded by the occasion is in law an absolute bar to any action for defamation. In these cases the plaintiff cannot be heard to say that the defendant did not act under the privilege, that he did not intend honestly to discharge a duty, but maliciously availed himself of the occasion to injure his reputation.[1]

§ 17. **The Rule Founded on Public Policy — Pigott, C. B.**— "I take this to be a rule of law not founded, as is the protection in other cases of privileged statements, on the absence of malice in the party sued, but founded on public policy, 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."[2]

§ 18. **The General Rule.**— Defamatory words spoken by the parties to judicial proceedings, their counsel or attorneys, or by jurors or witnesses in the course of judicial proceedings, are privileged when they are material and pertinent to the issue.[3] But when not material or pertinent to the issue they are not privileged, and an action will lie upon them.[4]

§ 19. **A Further Classification.**— These cases are fortunately not numerous, and the courts refuse to extend their number. They are divided into three classes: (1) Proceedings of legis-

[1] Stevens v. Sampson, 5 Ex. D., 53; L. J., Q. B., 120; 28 W. R., 87; 41 L. T., 782.

[2] Kennedy v. Hilliard, 10 Ir. C. L., Rep., 209; Munster v. Lamb (C. A.), 11 Q. B. D., 604, 605.

[3] Ring v. Wheeler, 7 Cow. (N. Y.), 725; Marsh v. Ellsworth, 36 How. Pr., 332; 50 N. Y., 309; Hastings v. Luck, 22 Wend., 410; Garr v. Selden, 4 N. Y., 91; White v. Carroll, 42 N. Y., 161; 1 Am. Rep., 503: Spooney v. Keeler, 51 N. Y., 527; Aylesworth v. St. Johns, 25 Hun, 156; Lamson v. Hicks, 38 Ala., 279; Jennings v. Paine, 4 Wis., 358; Calkins v. Summer, 13 Wis., 193; Dunham v. Powers, 42 Vt., 1; Wyatt v. Buell, 47 Cal., 624; Rector v. Smith, 11 Iowa, 302; Shelfer v. Gooding, 2 Jones, 175; Hoar v. Wood, 44 Mass. (3 Met.), 193; White v. Nicholls, 44 U. S. (3 How.), 266; Randall v. Brigham, 74 U. S. (7 Wall.), 523; Rex v. Skinner, Lofft, 55; Scott v. Stansfield, L. R., 3 Exch., 220; Seaman v. Netherclift, 34 L. T. (N. S.), 878.

[4] Gilbert v. People, 1 Den., 41; White v. Carroll, 42 N. Y., 161; Wyatt v. Buell, 47 Cal., 625; Kean v. McLaughlin, 2 Serg. & R., 469; Smith v. Howard, 28 Iowa, 51; Ruohs v. Backer, 6 Heisk. (Tenn.), 395; 19 Am. Rep., 598; Hooper v. Truscott, 2 Bing. N. C., 457; Powel v. Plunket, Cro. Car., 52.

lative bodies; (2) Judicial proceedings; and (3) Military and naval officers.

§ 20. **First Class — Communications in the Course of Legislative Proceedings — The Doctrine Discussed.** — It is in our country a great principle of constitutional law, and one which prevails in favor of the members of every legislative assembly in the United States, that "for any speech or debate in either house members shall not be questioned in any other place." This privilege, though of a personal nature, is not so much intended to protect the members against prosecutions for their own individual advantage as to support the rights of the people by enabling their representatives to execute the functions of their office without fear of civil or criminal prosecution; and therefore it ought not to be construed strictly and confined within the literal meaning of the words in which it is expressed, but to receive a liberal and broad construction, commensurate with the design for which it is established. It is accordingly held that the privilege secures to every member an immunity from prosecution for anything said or done by him as a representative of the people in the exercise of the functions of the office — whether such exercise is regular according to the rules of the assembly, or irregular and against their rules; whether the member is in his place within the house delivering an opinion, uttering a speech, engaging in debate, giving his vote, making a written report, communicating information either to the house or to a member; or whether he is out of the house, sitting in committee, and engaged in debating or voting therein, or in drawing up a report to be submitted to the assembly. In short, that the privilege in question secures the members of a legislative assembly against all prosecutions, whether civil or criminal, on account of anything said or done by them, during the session, resulting from the nature and in the execution of their office.[1]

§ 21. **The Legislative Body Must be in Session.** — But a legislative assembly has no existence or authority as such except when regularly in session. The members cannot claim this privilege for anything said or done at any other time. It is

[1] Story, Comm. on Constitution, § 866; Cushing's Law and Practice of Legislative Assemblies, § 602; May's Law and Practice of Parliament, ch. IV, p. 93; Coffin v. Coffin, 4 Mass., 1; Cooley, Const. Lim., 551.

to be observed, however, that mere temporary adjournments, for the convenience of the members and not for the purpose of putting an end to the session, are in fact continuations and not terminations of it.[1] Taking care not to say anything disrespectful to the house, a member may state whatever he thinks fit in debate, however offensive it may be to the feelings or injurious to the character of individuals, and he is protected by his privilege from any action for defamation as well as from any other question or molestation.

§ 22. **The Law in England.**— No member of either house of parliament is in any way responsible in a court of justice for anything said in the house.[2] And no indictment will lie for an alleged conspiracy by members of either house to make speeches defamatory of the plaintiff.[3] But this privilege does not extend outside the walls of the house. Hence at common law, even if the whole house ordered the publication of parliamentary reports and papers, no privilege attached.[4] But now[5] all reports, papers, votes and proceedings ordered to be published by either house of parliament are made absolutely privileged, and all proceedings at law, civil or criminal, will be stayed at once on the production of a certificate that they were published by order of either house.

A petition to parliament is absolutely privileged, although it contain false and defamatory statements.[6] So is a petition to a committee of either house.[7] But a publication of such a petition to others, not members of the house, is of course not privileged.[8]

§ 23. **Illustrations — American Cases.**—

1. **A Massachusetts Case:** *Coffin v. Coffin*, 4 Mass., 1.

William Coffin, the plaintiff, applied to one Benjamin Russell, a member of the Massachusetts legislature, to move a resolution in the house author-

[1] Cushing's Parliamentary Law, § 603; Coffin v. Coffin, 4 Mass., 1.

[2] Bill of Rights, 1 Will. & Mary, stat. 2, ch. 2.

[3] Ex parte Wason, L. R., 4 Q. B., 573; 38 L. J., Q. B., 302; 40 L. J. (M. C.), 168; 17 W. R., 881.

[4] R. v. Williams, 2 Shower, 471; Comb., 18 (see comments on this case in R. v. Wright, 8 T. R., 293); Stockdale v. Hansard (1839), 2 Moo. & Rob., 9; 7 C. & P., 731; 9 A. & E., 1-243; 2 P. & D., 1; 3 Jur., 905; 8 Dowl., 148, 522.

[5] By Stat. 3 and 4 Vict., ch. 9; Stockdale v. Hansard (1840), 11 A. & E., 253, 297.

[6] Lake v. King, 1 Saund., 131; 1 Lev., 240; 1 Mod., 58; Sid., 414.

[7] See Kane v. Mulvany, Ir. R., 2 C. L., 402.

[8] Odgers on L. & S., 186.

izing the appointment of an additional notary public for Nantucket. Russell asked and obtained leave to lay a resolution on the table for that purpose. Micajah Coffin, the defendant, also a member of the legislature, arose in his seat and asked Russell where he obtained his information of the facts upon which the proposed resolution was founded. To which Russell replied, "From a respectable gentleman from Nantucket." The resolution passed and other business was taken up, when the defendant crossed the house to where Russell was talking with some gentlemen, in the passage-way, within the walls of the house, and asked him who the respectable gentleman was from whom he had obtained the information which he had communicated to the house. Russell observed, carelessly, it was perhaps one of his relations, and named Coffin, as very many of the Nantucket people were of that name. On perceiving the plaintiff sitting without the bar, behind the speaker's chair, Russell pointed to him, and told the defendant that was the gentleman from whom he received the information. The defendant looked at him and said, "What, that convict?" Russell then asked the defendant what he meant. He replied: "Don't thee know the business of the Nantucket bank?" Russell replied: "Yes; but he was honorably acquitted." The defendant then said: "That does not make him the less guilty, thee knows." It appears that the conversation took place a little before one o'clock; that the election of notaries was not then before the house but was made that afternoon or the next day; and that the plaintiff was not a candidate for the office. There was no evidence that the resolution in question or the subject-matter of it was afterwards called up in the house. To the action the defendant filed a special plea justifying the speaking of the words, because at the time they were spoken he and Russell, to whom they were spoken, were members of the house of representatives then in session, and that he spoke the words to Russell in deliberation in the house concerning the appointment of a notary public, and that the words had relation to the subject of their deliberation. The jury returned a verdict for the plaintiff. The defendant made a motion for a new trial on the grounds: (1) On the question of law reserved by the judge. (2) Excessive damages. On the hearing of the motion it was held that the words were not within the privilege, for the reason that they were not spoken on a subject before the house, either in an address to the chair or by way of deliberation or advice with another member. In delivering the opinion, Parsons, C. J., says: "I do not consider any citizen, who is a representative, answerable in a prosecution for defamation, where the words charged were uttered in the execution of his official duty, although they were spoken maliciously; or where they were not uttered in the execution of his official duty, if they were not spoken maliciously with an intent to defame the character of any person. And I do consider a representative holden to answer for defamatory words, spoken maliciously, and not in discharging the functions of his office. But to consider every malicious slander uttered by a citizen who is a representative as within his privilege because it was uttered in the walls of the representatives' chamber to another member, but not uttered in executing his official duties, would be to extend the privilege farther than was intended by the people, or than is consistent with sound policy, and would render the representatives' chamber a sanctuary for calumny."

§ 24. **Digest of American Cases.**—

1. A member of the legislature is not liable to an action of slander for words spoken in the discharge of his official duties, even though spoken maliciously. But this privilege is not extended to words spoken unofficially, though in the legislative hall while the legislature is in session. Thus, where one member informally communicated to another, within the representatives' hall and while the house was in session, that the statement which he had just made to the house upon some question lately under consideration and likely again to be acted upon was founded upon misrepresentation, and that his informant was a person not to be believed, using some slanderous expression in regard to the informant, *held*, that the slander was not privileged by the place or occasion. Coffin v. Coffin, 4 Mass., 1. See Com. v. Blanding, 3 Pick. (Mass.), 310.

§ 25. **Digest of English Cases.**—

1. If a member of either house of parliament publishes to the world the speech he delivered in his place in the house he will be liable to an action as any private individual would be. R. v. Lord Abingdon, 1 Esp., 226; R. v. Creevey, 1 M. & S., 273. Though if a member of the house of commons merely printed his speech for private circulation among his constituents it will be conditionally privileged; *i. e.*, if there be no malicious intent to injure the plaintiff. Davison v. Duncan, 7 E. & B., 233; 26 L. J., Q. B., 107; Wason v. Walter, L. R., 4 Q. B., 95; 8 B. & S., 730; 38 L. J., Q. B., 42; 17 W. R., 169; 19 L. T., 416.

2. Evidence given before a select committee of the house of commons is privileged. Goffin v. Donnelly, 6 Q. B. D., 307; 50 L. J., Q. B., 303; 29 W. R., 440; 44 L. T., 141; 45 J. P., 439. But a letter written to the privy council touching the conduct of one of their officers is not absolutely privileged: it is open to the plaintiff to prove express malice if he can. Proctor v. Webster, 16 Q. B. D., 112; 55 L. J., Q. B., 150; 53 L. T., 765.

3. Reports in the newspapers of parliamentary proceedings are conditionally, not absolutely, privileged. Odgers on L. & S., 263–5.

§ 26. **Second Class — Communications in the Course of Judicial Proceedings — Conduct and Management — The Administration of Public Justice.**— Great latitude of remark and observation is properly allowed to all persons, both parties and counsel, in the conduct and management of all proceedings in the course of the administration of justice. It is for the interest of the public that great freedom be allowed in complaints and accusations, however severe, if honestly made, with a view to have them inquired into, to have offenses punished, grievances redressed, and the laws carried into execution. And this extends not merely to regular courts of justice, but to all inquiries before magistrates, referees, municipal, military and ecclesiastical bodies; and they are only restrained by this rule, viz., that they shall be made in good faith, to courts or tri-

bunals having jurisdiction of the subject, and power to hear and decide the matter of complaint or accusation, and that they are not resorted to as a cloak for private malice.[1]

§ 27. **The Rule Stated by Lord, J.**— It seems to be settled by the English authorities that judges, parties, counsel and witnesses are absolutely exempted from liability to an action for defamatory words published in the course of judicial proceedings; and the same doctrine is generally held in the American courts, with the qualification as to parties, counsel and witnesses that their statements made in the course of an action must be pertinent and material to the case. The qualification of the English rule is adopted in order that the protection given to individuals in the interest of an efficient administration of justice may not be abused as a cloak from beneath which to gratify private malice.[2]

§ 28. **Words Uttered in the Course of a Trial.**— Nor does it make any difference if the words are uttered in the course of a trial, whether in form they are addressed to the witness or to the court or jury. The remarks addressed to a witness in the form of putting a question, reminding him of his duty or recurring to what he had before stated, indicating a contradiction in different parts of his testimony, or calling upon him to show how he can reconcile them, though in form directed to the witness, are made in the hearing of the court or magis-

[1] Hart v. Baxter, 47 Mich., 198, 10 N. W. Rep., 198; McLaughlin v. Cowley. 127 Mass., 316; Hoar v. Wood, 44 Mass. (3 Met.), 193; Molton v. Clapham, March, 20; S. C., Sir W. Jones, 431, sub nom. Boulton v. Clapham; Dawling v. Wenman, 2 Show., 446; Brook v. Montague, Cro. Jac., 90; 1 Saund., 130, 131c (6th ed.); Astley v. Younge, 2 Burr., 807; Trotman v. Dunn, 4 Camp., 411; Hodgson v. Scarlett, 1 B. & Ald., 232; S. C. at Nisi Prius, Holt, 621, and notes; Flint v. Pike, 4 B. & Cress., 473; 6 Dow. & Ry., 528; Jekyll v. Moore, 2 New Reports, 341; Wilson v. Collins, 5 C. & P., 373; Home v. Bentinck, 2 Brod. & Bing., 130; 4 Moore, 563; Doyle v. O'Doherty, Carr. & M., 418; Kendillon v. Maltby, Carr. & M., 402; Ring v. Wheeler, 7 Cow. (N. Y.), 725; Burlingame v. Burlingame, 8 Cow. (N. Y.), 141; Hastings v. Lusk, 22 Wend. (N. Y.), 410; Mower v. Watson, 11 Vt., 536; Torrey v. Field, 10 Vt., 353; M'Millan v. Birch, 1 Binn. (Pa.), 178; Gilbert v. The People, 1 Den., 41; Coffin v. Coffin, 4 Mass., 1; Com. v. Blanding, 3 Pick. (Mass.), 314; Spaids v. Barrett, 57 Ill., 289; Rice v. Coolidge, 121 Mass., 393.

[2] McLaughlin v. Cowley, 127 Mass., 316; Rice v. Coolidge, 121 Mass., 393.

trate, and may constitute a part of that comment upon the evidence, which has a bearing on the result.[1]

§ 29. **Extent of the Privilege.**— This privilege extends not only to parties, counsel, witnesses, jurors and judges in a judicial proceeding, but also to proceedings in legislative bodies, and to all who, in the discharge of public duty or the honest pursuit of private right, are compelled to take part in the administration of justice or in legislation.[2]

§ 30. **The Privilege is Limited,** and that limit is this: That a party or counsel shall not avail himself of his situation to gratify private malice by uttering slanderous expressions, either against a party, witness or third person, which have no relation to the cause or subject-matter of the inquiry. Subject to this restriction, it is on the whole for the public interest, and best calculated to subserve the purposes of justice, to allow counsel full freedom of speech in conducting the causes and advocating and sustaining the rights of their constituents; and this freedom of discussion ought not to be impaired by numerous and refined distinctions.[3]

§ 31. **No Action Lies for Defamatory Statements Made in the Course of Judicial Proceedings.**— No action will lie for defamatory statements made or sworn in the course of a judicial proceeding before any court of competent jurisdiction. Everything that a judge says on the bench, a witness while on the stand, counsel in arguing a client's cause, or a juror to his fellow-jurors while in the jury-room considering a case, is absolutely privileged so long as it is in any way connected with the inquiry. So are all documents necessary to the conduct of the cause, such as pleadings, affidavits and instructions to counsel. This immunity rests on obvious grounds of public policy and convenience.[4]

§ 32. **Judges of Courts.**—The judge of a court has an absolute immunity, and no action can be maintained against him, even though it be alleged that he spoke maliciously, knowing

[1] Hoar v. Wood, 44 Mass., 193; McLaughlin v. Cowley, 127 Mass., 316; Hart v. Baxter, 47 Mich., 198; 10 N. W. Rep., 198.

[2] Hart v. Baxter, 47 Mich., 198; 10 N. W. Rep., 198; Hoar v. Wood, 44 Mass., 193; McLaughlin v. Cowley, 127 Mass., 316.

[3] Hoar v. Wood, 44 Mass., 193; McLaughlin v. Cowley, 127 Mass., 316.

[4] Flood on L. & S., 156.

his words to be false, and also that his words were irrelevant to the matter in issue before him and wholly unwarranted by the evidence. It is essential to the highest interests of public policy to secure the free and fearless discharge of high judicial functions.[1]

The judge of an inferior court enjoys the same immunity in this respect as the judge of a superior court so long as he has jurisdiction over the matter before him. For any act done in any proceeding in which he either knows or ought to know that he is without jurisdiction, he is liable as an ordinary citizen.[2] And so he would be for words spoken after the business of the court is over.[3] A justice of the peace enjoys an equal immunity. An action will lie against him for defamatory words spoken maliciously and without reasonable or probable cause if they do not arise out of any matter properly before him.[4] But if the conduct of the plaintiff be a matter in any way relevant to the inquiry, and the proceedings are within the jurisdiction of the magistrate, he may express his opinion of such conduct with the utmost freedom, and no action will lie.[5]

§ 33. **Illustrations — Digest of American Cases.—**

1. Whatever is said or written in a legal proceeding pertinent or material to the matter in controversy is privileged and no action can be maintained upon it. Story v. Wallace, 60 Ill., 51; Spaids v. Barrett, 57 Ill., 289.

2. No proceeding according to the regular course of justice will make a complaint or other proceeding amount to a libel for which an action can be maintained; and a distress warrant is a proceeding given to the party by law for the purpose of enforcing a legal right, and comes directly within the reason of the rule. Bailey v. Dean, 5 Barb., 297.

3. Words spoken or written in a legal proceeding pertinent and material to the controversy are privileged, and the proof of the statement cannot be drawn in question in an action for slander or libel. Garr v. Selden, 4 N. Y. (4 Comst.), 91; Bailey v. Dean, 5 Barb. (N. Y.), 297; Marsh v. Ellsworth, 36 How. (N. Y.) Pr., 532; Vausse v. Lee, 1 Hill (S. C.), 197; Lea v. White, 4 Sneed (Tenn.), 111.

4. Where the defense to an action of libel is that the words charged were used in the course of a judicial proceeding, and therefore privileged, the

[1] Floyd v. Barker, 12 Rep., 24; Flood on L. & S., 158; Scott v. Stansfield, L. R., 3 Ex., 220; 37 L. J. Ex., 155; McLaughlin v. Coolidge, 127 Mass., 316.

[2] Houlden v. Smith, 14 Q. B., 841; Calder v. Halket, 3 Moo. P. C. C., 28.

[3] Paris v. Levy, 9 C. B. (N. S.), 342; 30 L. J., C. P., 22; 7 Jur. (N. S.), 289; 9 W. R., 71; 3 L. T., 324.

[4] Kirby v. Simpson, 10 Exch., 358; Gelen v. Hall, 2 H. & N., 379.

[5] Odgers on L. & S., 188.

question is whether or not the words alleged were pertinent and relevant to the matter before the court. Warner v. Paine, 2 Sandf. (N. Y.), 195.

§ 34. **Digest of English Cases.**—

1. A county court judge, while sitting in court and trying an action in which the plaintiff was defendant, said to him: "You are a harpy, preying on the vitals of the poor." The plaintiff was an accountant and scrivener. *Held*, that no action lay for words so spoken by the defendant in his capacity as county court judge, although they were alleged to have been spoken falsely and maliciously, and without any reasonable or probable cause or any foundation whatever, and to have been wholly irrelevant to the case before him. Scott v. Stansfield, L. R., 3 Ex., 220; 37 L. J., Ex., 155; 16 W. R., 911; 18 L. T., 572.

2. No action lies against a coroner for anything he says in his address to the jury impaneled before him, however defamatory, false or malicious it may be, unless the plaintiff can prove that the statement was wholly irrelevant to the inquisition and not warranted by the occasion, the coroner's court being "a court of record of very high authority." Thomas v. Churton, 2 B. & S., 475; 31 L. J., Q. B., 189; 8 Jur. (N. S.), 795; Yates v. Lansing, 5 Johns., 283; 9 Johns., 395.

3. A chairman of quarter sessions may denounce the grand jury as a "seditious, scandalous, corrupt and perjured jury." R. v. Skinner, Lofft, 55.

4. The judgment of a court-martial containing defamatory matter is absolutely privileged, though it is not a court of record. Jekyll v. Sir John Moore, 2 B. & P., N. R., 341; 6 Esp., 63; Home v. Bentinck, 2 B. & B., 130; 4 Moore, 563; Oliver v. Bentinck, 3 Taunt., 456.

5. A magistrate commented severely on the conduct of a policeman which came under his judicial notice, and in consequence the policeman was dismissed from the force. *Held*, that no action lay. Kendillon v. Maltby, 2 M. & Rob., 438; Car. & Mar., 402; Allardice v. Robertson, 1 Dow (N. S.), 514; 1 Dow & Clark, 495; 6 Shaw & Dun., 242; 7 Shaw & Dun., 691; 4 Wil. & Shaw, App. Cas., 102. But a magistrate's clerk has no right to make any observation on the conduct of the parties before the court; and no such observation will be privileged. Delegal v. Highley, 3 Bing. N. C., 950; 5 Scott, 154; 3 Hodges, 158; 8 C. & P., 444.

6. No action will lie against a judge of one of the superior courts for any judicial act, though it be alleged to have been done maliciously and corruptly. Fray v. Blackburn, 3 B. & S., 576; Floyd v. Barker, 12 Rep., 24; Groenvelt v. Burwell, 1 Ld. Raym., 454, 468; 12 Mod., 388; Dicas v. Lord Brougham, 6 C. & P., 249; 1 M. & R., 309; Taaffe v. Downes, 3 Moo. P. C. C., 36, n.; Kemp v. Neville, 10 C. B. (N. S.), 523; 31 L. J., C. P., 158; 4 L. T., 640.

7. No action lies against a judge for unjustly censuring and denouncing a counsel then engaged in the cause before him, even although it be alleged that it was done from motives of private malice. Miller v. Hope, 2 Shaw, Sc. App. Cas., 125.

§ 35. **Attorneys and Counselors at Law.**— No action will lie against an attorney for defamatory words spoken as counsel in the course of any judicial proceeding with reference

thereto, even though they were unnecessary to support the case of his client, and were uttered without any justification or excuse and from personal ill-will or anger towards the plaintiff arising from some previously existing cause, and are irrelevant to every question of fact which is in issue before the tribunal.[1] Great latitude of remark and observation is properly allowed to all persons, both parties and counsel, in the conduct and management of all proceedings in the course of the administration of justice. It is for the interest of the public that great freedom be allowed in complaints and accusations, however severe, if honestly made, with a view to have them inquired into, to have offenses punished, grievances redressed, and the laws carried into execution. And this extends not merely to regular courts of justice, but to all inquiries before magistrates, referees, municipal and ecclesiastical bodies; and they are only restrained by this rule, viz., that they shall be made in good faith, to courts or tribunals having jurisdiction of the subject, and power to hear and decide the matter of complaint or accusation, and that they are not resorted to as a cloak for private malice.[2] The recent decisions of the English court of appeal removes all limitations whatever on the absolute privilege of the advocate for all words uttered in the course of his duty in the English courts.[3] The rule is made so wide not to protect counsel who deliberately and maliciously slander others, but in order that innocent counsel who act *bona fide* may not be unrighteously harassed with suits. It may be doubted, however, whether the rule has been carried to such extreme limits in the American courts.

[1] Munster v. Lamb (C. A.), 11 Q. B. D., 588; 52 L. J., Q. B., 726; 32 W. R., 243; 49 L. T., 252; 47 J. P., 805; Brook v. Montague, Cro. Jac., 90; Wood v. Gunston, Styles, 462; Flint v. Pike, 4 B. & C., 473; 10 Ir. L. R., 120. See, also, Hodgson v. Scarlett, 1 B. & Ald., 232; Holt, N. P., 621; Needham v. Dowling, 15 L. J., C. P., 9; R. pros. Armstrong, Q. C., v. Kiernan, 7 Cox, C. C., 6; 5 Ir. C. L. R., 171, and Taylor v. Swinton (1824), 2 Shaw's Scotch App. Cas., 245.

[2] Hoar v. Wood, 3 Metc., 193; Marsh v. Ellsworth, 50 N. Y., 309; Lester v. Thurmond, 51 Ga., 118; Jennings v. Paine, 4 Wis., 358; Morgan v. Booth, 13 Bush, 480; Rice v. Coolidge, 121 Mass., 393; Lawson v. Hicks, 38 Ala., 279; Garr v. Selden, 4 Comst. (N. Y.), 91; Hastings v. Lusk, 22 Wend., 410; Spaides v. Barrett, 57 Ill., 289; Hardin v. Cumstock, 2 A. K. Marsh., 480; Mower v. Watson, 11 Vt., 536.

[3] Brett, M. R., 11 Q. B. D., 604.

§ 36. Privilege of Counsel — Discussion of the Subject.— Several cases in which the question of absolute and qualified privilege attaching to communications in the course of judicial proceedings were recently before the Maryland court of appeals for decision. In one of these cases the declaration alleged the speaking by the defendant, as counsel for Byers and wife in a suit against them by the plaintiff to recover money alleged to be due him as attorney fees, of the following words: "He, as attorney for Mrs. Byers, collected for her five thousand dollars of her money, and refused to account to her for it, and kept it, and still has it, and refused to pay it over to her; and I am determined to rip up and expose the whole disgraceful transaction." The majority of the court held that, in order to come within the limit of the absolute privilege, the words spoken must have reference to the subject-matter of the cause on trial. From this opinion McSherry, J., dissented, writing for the absolute privilege, no matter whether the words related to the subject-matter of the suit or not. As the opinions involve the question under discussion, both are here given:

FOR LIMITING THE PRIVILEGE TO WORDS HAVING REFERENCE TO THE SUBJECT-MATTER OF THE LITIGATION.

ROBINSON, J. This is a suit against an attorney at law for slander. The defendant pleads in bar of the action that the alleged defamatory words set out in the declaration were spoken by him in his capacity as counsel in the trial of a cause in a court of justice. To this the plaintiff replied that the words thus spoken were not spoken in reference to said cause; and "had no reference to said action, or to any subject-matter involved in said action, or to any judicial inquiry which was going on or being had in said action." To this replication the defendant demurred, and in sustaining the demurrer the court decided, as matter of law, that if the defamatory words were spoken by the defendant as counsel in the trial of a cause in a court of justice, the action could not be maintained, even though the plaintiff should prove that the words thus spoken were false, and were known to be false by the defendant, and even though they were spoken maliciously, and even though they had no reference to said cause, or to any subject-matter, or to any judicial inquiry involved in said action. In other words, the court decided that the privilege of counsel in the trial of a cause is an absolute and unqualified privilege; and although he is subject to the authority of the court for the abuse of this privilege, and may be punished for misbehavior or misconduct, he cannot be held liable in an action of slander brought by the person injured.

The question, which is thus presented for the first time for the decision of the court, is one of great importance, involving on the one hand the rights

and privileges of counsel in the trial of causes in the discharge of a professional duty, and on the other the rights of the citizen whose character may have been maliciously and wantonly assailed. The case has been very fully and ably argued on both sides, and reference has been made to nearly all the decisions, both in England and in this country, on the subject. All agree that counsel are privileged and protected, to a certain extent at least, for defamatory words spoken in a judicial proceeding; and words thus spoken are not actionable which would in themselves be actionable if spoken elsewhere. He is obliged, in the discharge of a professional duty, to prosecute and defend the most important rights and interests, the life it may be, or the liberty or the property of his client; and it is absolutely essential to the administration of justice that he should be allowed the widest latitude in commenting on the character, the conduct and the motives of parties and witnesses and other persons directly or remotely connected with the subject-matter in litigation. And to subject him to actions of slander by every one who may consider himself aggrieved, and to the costs and expenses of a harassing litigation, would be to fetter and restrain him in that open and fearless discharge of duty which he owes to his client, and which the demands of justice require. Not that the law means to say that one, because he is counsel in the trial of a cause, has the right, abstractly considered, deliberately and maliciously to slander another; but it is the fear that if the rule were otherwise actions without number might be brought against counsel who had not spoken falsely and maliciously. It is better, therefore, to make the rule of law so large that counsel acting *bona fide* in the discharge of duty shall never be troubled, although, by making it so large, others who have acted *mala fide* and maliciously are included. The question whether words spoken by counsel were spoken maliciously or in good faith are, and always will be, open questions, upon which opinion may differ, and counsel, however innocent, would be liable, if not to judgments, to a vexatious and expensive litigation. The privilege thus recognized by law is not the privilege merely of counsel, but the privilege of clients, and the evil, if any, resulting from it must be endured for the sake of the great good which is thereby secured. But this privilege is not an absolute and unqualified privilege, and cannot be extended beyond the reason and principles on which it is founded. The question, then, is, What is the extent and limit to this privilege? This can best be answered by a consideration of the cases in which it has been determined.

In the earliest of the leading cases on the subject (Brook v. Montague, Cro. Jac., 90, decided in 1605, and argued by Lord Coke and Yelverton), it was held that this privilege protected counsel, provided the slanderous words spoken were relevant or pertinent to the matter. "But matter," said Popham, J., "not pertinent to the issue or matter in question he need not deliver, for he is to discern in his discretion what he is to deliver and what not; and although it be false he is excusable, being pertinent to the matter." Subsequently, in the noted case of Hodgson v. Scarlett (afterwards Lord Abinger), 1 Barn. & Ald., 232, the rule laid down in Brook v. Montague was expressly recognized and approved. This case was elaborately argued, and was decided after full consideration, each of the judges delivering his own views. Lord Ellenborough, while admitting that the

language used by the defendant was too strong, and too much to say as between man and man, yet held that the action could not be maintained because the words spoken were pertinent to the issue. Justice Bayley said: "The rule seems to be correctly laid down in Brook v. Montague that a counselor hath a privilege to enforce anything which is informed unto him for his client, and to give it in evidence, it being pertinent to the matter in question, and not to examine whether it be true or false. No mischief will ensue in allowing the privilege to that extent." Mr. Justice Abbott: "The words were spoken in a course of judicial inquiry, and were relevant to the matter in issue. It would be impossible that justice could be well administered if counsel were to be questioned for the too great strength of their expressions." Mr. Justice Holroyd, after referring to Buckley v. Wood, 4 Coke, 14, and Cutler v. Dixon, id., says: "These cases show the privilege possessed by parties themselves; and from these authorities it appears that no action is maintainable against the party, nor, consequently, against counsel, who is in a similar situation, for words spoken in the course of justice, if they be fair comments upon the evidence, and be relevant to the matter in issue." Again, in Mackay v. Ford, 5 Hurl. & N., 790, Pollock, C. B., referring to the slanderous matter complained of, said: "The question is, Was it relevant? I think it was, because it was pertinent to the question whether the agreement had been fully determined. The words were used by the defendant in the character of counsel in a court of justice, and, being relevant to the matter in hand, the speaking of them was justifiable." Bramwell, J.: "The words spoken having been pertinent to the question, . . . the rule must be absolute to enter a nonsuit." Channell, B.: "The words in question were spoken in the course of a judicial proceeding in which they were not irrelevant." It thus appears that from the decision in Brook v. Montague, in 1605, to Mackay v. Ford, decided in 1860, a period of more than two hundred and fifty years, relevancy of the words spoken was considered essential to justify the privilege. And so the law was understood by all the most eminent commentators on the subject. Blackstone says: "A counselor is not answerable for any matter spoken relative to the cause in hand. . . . If it be impertinent to the cause in hand he is then liable to an action from the party injured." In Folk. Starkie, Sland. (4th Eng. ed.), § 362, and Add. Torts (ed. 1870), p. 934, note *m*, the privilege of counsel is limited expressly to words relative to the inquiry.

We come now to Munster v. Lamb, 11 Q. B. Div., 588, decided in 1883, which is relied on in support of the ruling below. In that case it was held that no action will lie against counsel for slanderous words spoken with reference to and in the course of an inquiry before a judicial tribunal, although they were uttered maliciously and without any justification or even excuse, and from personal ill-will towards the person slandered arising out of a previously existing cause, and are irrelevant to every issue of fact contested before the court. Brett, master of the rolls, said: "For the purpose of my judgment I shall assume that the words complained of were uttered by the solicitor maliciously; that is to say, not with the object of doing something useful towards the defense of his client. I shall assume that the words were uttered without any justification or even excuse, and from the indirect motive of personal ill-will or anger towards the prosecutor, arising

out of some previously existing cause; and I shall assume that the words were irrelevant to every issue of fact which was contested in the court where they were uttered. Nevertheless, inasmuch as the words were uttered with reference to and in the course of the judicial inquiry which was going on, no action will lie against the defendant, however improper his behavior may have been. The rule is founded upon public policy. With regard to counsel the question of malice, *bona fides* and relevancy cannot be raised. The only question is whether what is complained of has been said in the course of the administration of the law. If that be so the case against counsel must be stopped at once. No action of any kind, no criminal prosecution, can be maintained against a defendant when it is established that the words complained of were uttered by him as counsel in the course of a judicial inquiry." Fry, L. J., was of the same opinion. A judgment thus deliberately rendered by judges so eminent is entitled, of course, to the highest consideration; but with deference we must say that the absolute and unqualified privilege as thus laid down is not in our opinion supported by Revis v. Smith, Henderson v. Broomhead, Dawkins v. Rokeby or Seaman v. Netherclift, the cases relied on by the court; nor can it be sustained by any sound principle of public policy. Now, in Revis v. Smith, 18 C. B., 125, the count in the declaration was not for libel, but for maliciously and without reasonable and probable cause making a false affidavit in a cause pending in chancery, containing injurious representations against the plaintiff as an auctioneer, by means of which the court declined to appoint him as auctioneer to sell certain real estate. Mr. Justice Cresswell rested his judgment on the ground that the action was without precedent, and that it would be highly inconsistent to hold a witness liable where he gave evidence relevant to the cause. Mr. Justice Crowder treated the case as an attempt to introduce an entirely new form of action — in substance an action for defamation against a witness for giving evidence to the best of his belief in a court of justice. Mr. Justice Willes said: "I apprehend the law to be that, however harsh or hasty, or even untrue, may be the conduct of a person speaking on a privileged occasion, if he honestly and *bona fide* believes what he utters to be true no action will lie." Lord Chief Justice Jervis was of the opinion that the action was a novel one, and without precedent to sustain it, and indorsed fully the law of privilege as laid down by Holroyd, J., in Hodgson v. Scarlett. Now, in Henderson v. Broomhead, 4 Hurl. & N., 567, the court decided that an action would not lie against a party who, in a cause pending in court, makes affidavit in support of a summons taken out in such cause, which is scandalous, false and malicious, and though the person slandered was not a party to the cause. But there the scandalous matter was pertinent to the subject-matter before the court. Erle, J., said: "I do not assent to the proposition that the matters which form the subject of this charge were irrelevant. I can easily see how they might be relevant." Crompton and Crowder, JJ., state broadly, it is true, that no action will lie for words spoken or written in the course of any judicial proceeding; but it must be borne in mind they were speaking in reference to defamatory words which, in the opinion of all the judges, were relevant to the then pending litigation.

We come then to Dawkins v. Rokeby, L. R., 7 H. L., 752, about which

so much has been said. There the defendant, a military man, was sued for slanderous words spoken and written by him as a witness before a military court. The case was tried before Mr. Justice Blackburn, who held that inasmuch as the verbal and written statements were made by the defendant, being a military man, in the course of a military inquiry in relation to the conduct of the plaintiff, being a military man, and with reference to the subject of that inquiry, the action could not be maintained, although the plaintiff should prove that the defendant had acted *mala fide*, and with actual malice, and with a knowledge that the statements so made by him were false. In other words, the defamatory words having been spoken and written by the defendant as a witness before a military court, and having reference to the subject-matter before that court, they were privileged, and whether they were spoken maliciously and falsely were questions altogether immaterial. Upon appeal to the house of lords Lord Chancellor Cairns said: "My lords, I think it is of great importance that your lordships should bear in mind these precise expressions which I have now read, because I feel sure that your lordships would not desire your decision upon the present occasion to go farther than the circumstances of this particular case would warrant. Now, my lords, adopting the expressions of the learned judges with regard to what I take to be settled law as to the protection of witnesses in judicial proceedings, I am certainly of opinion that upon all principles, and certainly upon all considerations of convenience and of public policy, the same protection which is extended to a witness in a judicial proceeding, who has been examined on oath, ought to be extended and must be extended to a military man who is called before a court of inquiry of this kind for the purpose of testifying there upon a matter of military discipline in connection with the army. It is not denied that the statements which he made — both those which were made *viva voce* and those which were made in writing — were relative to that inquiry." Now in this case the house of lords decided that a witness testifying before a military court was entitled to the same privilege as a witness testifying in a judicial proceeding, and that no action would lie against the defendant because both what he said and what was written by him had reference ("relative" is the term used) to the military discipline of the army, which was the matter of inquiry before the military court. The lord chancellor was careful to say that he did not desire the decision to go further than the circumstances of that particular case would warrant.

The question was again very fully considered in Seaman v. Netherclift, 2 C. P. Div., 53, decided in 1876, one year after Dawkins v. Rokeby, in which all the judges delivered opinions *seriatim*. Cockburn, C. J., after stating in a general way that it was well settled that a witness was privileged to the extent of what he says in course of his examination, and that this privilege was not affected by the relevancy or irrelevancy of his testimony, qualifies the broad declaration thus made by him by saying that "if a man, when in the witness box, were to take advantage of his position to utter something having no reference to the cause or matter of inquiry in order to assail the character of another, as if he were asked, 'Were you at York on a certain day?' and he were to answer 'Yes; and A. B. picked my pocket there,' it certainly might well be said in such a case

that the statement was altogether *dehors* the character of witness, and not within the privilege." In that case, however, he said the words spoken were relevant." Bramwell, J. A.: "The judgment of the common pleas affirmed two propositions: *First*, that what the defendant said was said as a witness, and was relevant to the inquiry before the magistrate; and, *secondly*, that being so, the lord chief justice should have stopped the trial of the action by nonsuiting the plaintiff. As to the first proposition, I am by no means sure that the word 'relevant' is the best word that could be used. The phrases used by the lord chief baron and the lord chancellor in Dawkins v. Rokeby would seem preferable, having reference or made with reference to the inquiry. I can scarcely think a witness would be protected for anything he might say in the witness box wantonly and without reference to the inquiry." Mr. Justice Amphlett considered there was but one question open for the decision of the court, and that was whether the answer was relevant, and, being of opinion that it was, the defendant was within the privilege. Now, in all these cases, the slanderous words spoken were relevant or had reference to the matter of inquiry before the court, and this being so, what was said by the several witnesses was according to all the authorities strictly within the well-recognized law of privilege. In all these cases the answers of the several witnesses had, in the opinion of the court, reference to the subject-matter of inquiry, and in neither of these cases was it decided that the privilege even of a witness was an absolute privilege, and that he could take advantage of his position to utter something, in the language of Cockburn, C. J., having no reference to the cause or matter of inquiry in order to assail the character of another."

We should not stop to consider the *dictum* of Lord Mansfield in Rex v. Skinner, decided in 1772, and only reported in Lofft, 55, but for the fact that it is relied on by the court in Munster v. Lamb. In that case a motion was made to quash an indictment against a magistrate for slanderous words spoken to a grand jury at a general session of the county. The indictment was quashed on the ground that it would be subversive of the constitution to hold a judicial officer answerable, either civilly or criminally, for words spoken in office. Lord Mansfield is reported as saying in that case: "What Mr. Lucas, the defendant's counsel, has said is very just. Neither party, counsel nor judge, can be put to answer civilly or criminally for words spoken in office." Now in Brook v. Montague the court after full argument had expressly decided that counsel was protected, provided the words spoken were relevant or pertinent to the matter of inquiry, but that for words not pertinent he was liable. We can hardly suppose so eminent a judge as Lord Mansfield meant in this off-hand way to overrule or even question the law of privilege as laid down in that case; and when speaking of counsel we must conclude he meant that they were not liable civilly or criminally for words spoken relevant to the subject-matter before the court. And besides, in the subsequent case of Hodgson v. Scarlett, in which the question of privilege of counsel was directly involved, and which was argued by distinguished counsel on both sides, this reported *dictum* of Lord Mansfield is neither referred to by counsel nor by either of the judges who delivered opinions in that case. And all the judges held, relying upon the

decision in Brook v. Montague as authority, that the defendant was protected because the words spoken by him were relevant and pertinent; and the same rule was again laid down in Mackay v. Ford. So if Lord Mansfield was correctly reported, this *dictum* was not understood as qualifying in any manner the well-settled law on the subject.

Passing, then, from the English to the American decisions, we find that the highest courts in this country have uniformly held that the privilege of counsel is limited to words spoken which are pertinent or which have relation to the matter of inquiry. In the early case of McMillan v. Birch, 1 Bin., 178, Chief Justice Tilghman, speaking of counsel and party, said: "If any man should abuse this privilege, and under pretense of pleading his cause wander designedly from the point in question, and maliciously heap slander upon his adversary, I will not say that he is not responsible in an action at law." In Hoar v. Wood, 3 Metc., 193, Shaw, C. J., said: "Still this privilege must be restrained by some limit, and we consider that limit to be this: that a party or counsel shall not avail himself of his situation to gratify private malice by uttering slanderous expressions, either against a party, witness or third person, which have no relation to the cause or subject-matter of the inquiry." And in Hastings v. Lusk, 22 Wend., 410, Chancellor Walworth says: "Upon a full consideration of all the authorities on the subject, I think that the privilege of counsel in advocating the causes of their clients, and of parties who are conducting their own causes, belongs to the same class where they have confined themselves to what was relevant and pertinent to the question before the court." We may also refer to the following cases, in which this privilege has been held to be a limited and not an unqualified privilege: Ring v. Wheeler, 7 Cow., 725; Shelfer v. Gooding, 2 Jones (N. C.), 175; Jennings v. Paine, 4 Wis., 372; Lea v. White, 4 Sneed, 111; Johnson v. Brown, 11 W. Va., 73; Stackpole v. Hennen, 6 Mart. (N. S.), 481; McLaughlin v. Cowley, 127 Mass., 319; Mower v. Watson, 11 Vt., 536. In view, then, of this unbroken line of decisions both in England and in this country, we cannot accept the absolute and unqualified privilege laid down in Munster v. Lamb. It is in the teeth of the decisions in Brook v. Montague and Hodgson v. Scarlett, and Mackay v. Ford, and is not sustained by Revis v. Smith, Henderson v. Broomhead, Dawkins v. Rokeby, or Seaman v. Netherclift. We cannot agree with Brett, M. R., that in a suit against counsel for slander the only inquiry is whether the words were spoken in a judicial proceeding, and if so, the case must be stopped. We quite agree, however, with Bramwell, J., in Seaman v. Netherclift, that "relevant" and "pertinent" are not the best words that could be used. These words have in a measure a technical meaning, and we all know the difficulty in determining in some cases what is relevant or pertinent. With Lord Chancellor Cairnes we prefer the words "having reference," "or made with reference," or, in the language of Shaw, C. J., "having relation to the cause or subject-matter." And if counsel, in the trial of a cause, maliciously slanders a party or witness or any other person in regard to a matter that has no reference or relation or connection with the case before the court, he is and ought to be answerable in an action by the party injured. This qualification of his privilege in no manner impairs the freedom of discussion so necessary to the proper administration of

law, nor does it subject counsel to actions for slander except in cases in which, upon reason and sound public policy, he ought to be held answerable. We cannot agree that for the abuse of his privilege he is amenable only to the authority of the court. Mere punishment by the court is no recompense to one who has thus been maliciously and wantonly slandered.

We are of opinion, therefore, that the twelfth replication in this case, that the words spoken by the defendant were not spoken in reference to the cause then on trial, and had no reference to any subject-matter involved in said action or to any judicial inquiry which was going on or being had in said action, is a good replication, and the demurrer thereto ought to have been overruled. But as the demurrer filed by the plaintiff mounts up to the first error in pleading, we are also of opinion that this action cannot be maintained, because it appears upon the face of the declaration that the alleged defamatory words spoken by the defendant had reference to the subject-matter involved in the cause then on trial. The words were spoken by the defendant, as counsel for Byers and wife, in a suit against them by the plaintiff in this case to recover money alleged to be due to him for professional services. The words set out in the declaration are as follows: "He [meaning the plaintiff], as attorney for Mrs. Byers, collected for her five thousand dollars of her money, and refused to account to her, and kept it, and still has it, and refused to pay it over to her; and I am determined to rip up and expose the whole disgraceful transaction." Whether the defendants in that case could have offered evidence to prove these facts under the pleadings filed at that time we shall not stop to consider. Admit that such evidence would have been inadmissible, under the state of pleadings, yet the defendants had the right to amend their pleas at any time before the jury retired to make up the verdict, and it is plain that under a plea of set-off such evidence would have been admissible. But, be that as it may, the plaintiff in that case, who is the plaintiff in this, was claiming to recover money alleged to be due him by the defendants for professional services, and in such a case the words alleged to have been spoken by the defendant in that case in his capacity as counsel, to the effect that plaintiff had in his possession money which he had collected for and which belonged to the defendants, had reference to the subject-matter of inquiry before the court; and if they had reference or relation to the case on trial, then they are strictly within the rule of privilege, and whether they were true or false, or whether they were spoken maliciously or in good faith, are questions altogether immaterial — being privileged, no action will lie against the defendant. This being so, the evidence offered by the plaintiff for the purpose of proving them to be false, and that they were maliciously spoken, was inadmissible, and there was no error in the ruling of the court in this respect. And for the same reason the defendant's prayer, that there was no proof legally sufficient upon which the jury could find a verdict for the plaintiff, was properly granted; and although the court erred in sustaining the demurrer to the plaintiff's twelfth replication, yet, inasmuch as the words set out in the declaration were spoken by the defendant as counsel, and had reference to the subject-matter then before the court, this action cannot be maintained, and the judgment must therefore be affirmed.

FOR THE ABSOLUTE PRIVILEGE.

McSHERRY, J. (*dissenting*). I am of the opinion that the judgment in this case ought to be affirmed; but I base that conclusion upon the broad ground that the privilege pleaded by the appellee is an absolute and not a qualified one. If the question as to the character of the privilege be an open one in this state since the decision in Maurice v. Worden, 54 Md., 233, there is ample authority elsewhere to support either view that may be taken. But it seems to me that the cases which uphold the absolute privilege of an attorney are grounded upon correct principles, are supported by the most satisfactory reasoning, and are sustained by a sound and conservative public policy. Lord Mansfield observed, in Rex v. Skinner, Lofft, 56, that "neither party, witness, counsel, jury nor judge can be put to answer civilly or criminally for words spoken in office." Some refined distinctions were subsequently ingrafted on this doctrine, but they have been swept away; and finally the courts of England have re-asserted and enforced this rule with emphasis, and it stands to-day the settled and undisputed law of that country. The correctness of this decision of Lord Mansfield, in so far as it applied the privilege to judges, has never, that I am aware of, been questioned in England or in this country. It is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions without apprehension of personal consequence to himself. Liability to answer to every one who might feel himself aggrieved by the action of the judge would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful. The principle which exempts judges of courts of superior or general authority from liability in a civil action for acts done by them in the exercise of their judicial functions obtains in all countries where there is any well-ordered system of jurisprudence. Bradley v. Fisher, 13 Wall., 335. Nor does the motive which influences the act affect the question of liability, because an inquiry into the motive of the judge would, as said in Floyd v. Barker, 12 Coke, 25, "tend to the scandal and subversion of all justice, and those who are the most sincere would not be free from continual calumniations." This immunity, remarked Chancellor Kent in Yates v. Lansing, 5 Johns., 291, has "a deep root in the common law;" and he likewise observed in the same case, "that it has been steadily maintained by an undisturbed current of decisions in the English courts amidst every change of policy and through every revolution of their government." "No man," he further said, "can foresee the disastrous consequences of a precedent in favor of such suits. Whenever we subject the established courts of the land to the degradation of private prosecutions, we subdue their independence and destroy their authority. Instead of their being venerable before the public they become contemptible, and we thereby embolden the licentious to trample upon everything sacred in society and to overturn those institutions which have hitherto been deemed the best guardians of civil liberty."

The courts have, with equal emphasis, applied this privilege to witnesses. In the language of Cockburn, C. J., in Seaman v. Netherclift, 2 C. P. Div., 53: "If there is anything as to which the authority is overwhelming it is

that a witness is privileged to the extent of what he says in course of examination. Neither is that privilege affected by the relevancy or irrelevancy of what he says, for then he would be obliged to judge of what is relevant or irrelevant; and questions might be, and are, constantly asked which are not strictly relevant to the issue. But that beyond all question this unqualified privilege extends to a witness is established by a long series of cases, the last of which is Dawkins v. Rokeby, after which to contend to the contrary is hopeless. It was there decided that the evidence of a witness with reference to the inquiry is privileged, notwithstanding it may be malicious; and to ask us to decide to the contrary is to ask us what is beyond our power. . . . A long series of authorities, from the time of Elizabeth to the present time, has established that the privilege of a witness while giving evidence is absolute and unqualified." And in the same case Amphlett, C. J., said: "It is clear, therefore, that the case comes within the rule that has been laid down for two or three hundred years; and it is important that a rule so long established should be strictly adhered to — a rule which was established not for the benefit of witnesses, but for that of the public and the advancement of the administration of justice to prevent witnesses from being deterred by the fear of having actions brought against them from coming forward and testifying to the truth." In the case of Dawkins v. Rokeby, referred to by Chief Justice Cockburn, the judges, on the opinion expressed by them in obedience to the request of the house of lords, said: "A long series of decisions has settled that no action will lie against a witness for what he says or writes in giving evidence before a court of justice. . . . The principle we apprehend is that public policy requires that witnesses should give their testimony free from any fear of being harassed by an action on an allegation, whether true or false, that they acted from malice." 14 Moak (Eng. R.), 127.

What conceivable reason is there for applying to an attorney a less liberal rule than the one so clearly and explicitly laid down in the cases of judges and witnesses? It seems to me that the same reasons and the same public policy which support this absolute privilege, when invoked by a judge or by a witness, apply with at least equal force and pertinency to the case of an attorney. It is likely, from the very situation which he occupies, that he will need the protection of such a rule for the furtherance of public justice, more than either a judge or a witness. What he says in the trial of causes is often said on the impulse of the moment, under the influence of strong excitement, without opportunity for calm reflection or time to measure or to weigh his words. He is called upon to confront vice, to denounce crime, to unmask fraud, to expose its disguises, to explore the hidden and secret ways of the crafty, the cunning and the dishonest. Innocence confides its vindication to his skill, and his fiercest conflicts are often the causes of the weak, the helpless and the oppressed. The property and the reputations of the living, the estates of the dead, and the inheritance of the orphan, may all be the subjects of his watchful vigilance and anxious solicitude in the trial of causes. Vast pecuniary interests, and the most delicate social and domestic relations, when dragged into litigation, demand his ceaseless attention. He becomes identified with the strifes of others, and is often visited with the unmerited criticism which the

bitter feelings, engendered by an angry lawsuit, frequently provoke. He becomes, unconsciously, from the force of circumstances, a partisan in his client's cause. If he is to stop during each of the many occasions when he may thus be engaged in aiding in the administration of justice, and to measure each word before using it, lest he incur the perils of a civil suit, whether successfully maintained or not is immaterial, his efficiency would be greatly diminished, and his usefulness most seriously impaired.

The doctrine announced by Lord Mansfield in Rex v. Skinner, as respects an attorney, is fully supported by the following statement of the rule in 2 Add. Torts (Wood's ed.), § 1133: "If a counsel [or an attorney acting as an advocate] speaks scandalous words against one in defending his client's cause, an action lies not against him for so doing; for it is his duty to speak for his client, and it shall be intended to be spoken according to his client's instructions. The freedom of speech of the bar is the privilege of the client vested in the counsel who represents him. It would be impossible properly to conduct a cause in court unless considerable latitude were allowed to the advocate, and if any evil happen therefrom it must be endured for the sake of the greater good which attends it." See, also, Wood v. Gunstoe, Style, 462; Mackay v. Ford, 29 L. J., Exch., 404; Odgers on S. & L., 193; Poll. Torts, top p. 175; Munster v. Lamb, 11 Q. B. Div., 588. In this last case the question is fully met and explicitly decided. Brett, M. R., there said: "This action is brought against a solicitor for words spoken by him before a court of justice, while acting as the advocate for a person charged in that court with an offense against the law. For the purpose of my judgment I shall assume that the words complained of were uttered by the solicitor maliciously; that is to say, not with the object of doing something useful towards the defense of his client. I shall assume that the words were uttered without any justification, or even excuse, and from the indirect motive of personal ill-will or anger towards the prosecutor, arising out of some previously existing cause; and I shall assume that the words were irrelevant to every issue of fact which was contested in the court where they were uttered. Nevertheless, inasmuch as the words were uttered with reference to and in the course of the judicial inquiry which was going on, no action will lie against the defendant, however improper his behavior may have been." Then, after speaking of the privilege of judges and witnesses, he proceeded: "Of the three classes—judges, witnesses and counsel—it seems to me that a counsel has a special need to have his mind clear from all anxiety. . . . The rule of law is that what is said in the course of the administration of the law is privileged; and the reason of that rule covers a counsel even more than a judge or a witness. . . . The rule may be taken to be the rule of the common law. That rule is founded upon public policy. With regard to counsel, the questions of malice, *bona fides* and relevancy cannot be raised. The only question is whether what is complained of has been said in the course of the administration of the law. If that be so, the case against a counsel must be stopped at once." And Fry, J., was equally emphatic. 'If such actions," he remarked, "were allowed, persons performing their duty would be constantly in fear of them." That this privilege is liable to be abused is not denied. It is also true that its abuse may be productive of great hardships. Rolfe, B., in

Winterbottom v. Wright, 10 Mees. & W., 115, answering a similar objection, urged, however, in a case not analogous to this, observed: "This is one of those unfortunate cases in which there certainly has been *damnum;* but it is *damnum absque injuria.* It is no doubt a hardship upon the plaintiff to be without a remedy, but by that consideration we ought not to be influenced. Hard cases, it has been frequently observed, are apt to introduce bad law." It is obvious, therefore, that such a consideration ought not to prevail as a sufficient reason for qualifying the privilege, if it be otherwise well founded and correct in principle. Far greater mischiefs will result, and the administration of justice will be more seriously interfered with, by a relaxation of this doctrine and by the toleration of suits against attorneys, witnesses and parties for "words spoken in office," than can possibly grow out of the rare instances where, in an honorable profession, the privilege may be abused, or availed of for purely malevolent purposes.

There is no unbending rule of law which does not or may not work at some time some hardship to some individual. In the very nature of things this is essentially so. But where the reasons for its adoption are plain and unmistakable, and where the public security and tranquillity and the due, untrammeled administration of justice outweigh the private interest or the private right, the latter must yield in obedience to a principle that is universal in its application, though frequently harsh in its consequences; or, as the doctrine is more clearly stated in Broom. Leg. Max., 41: "In the imperfection of human nature, it is better even that an individual should occasionally suffer a wrong than that the general course of justice should be impeded and fettered by constant and perpetual restraints and apprehensions on the part of those who are to administer it." The principle in all such cases is that the law will rather suffer a private mischief than a public inconvenience. Johnston v. Sutton, 1 Term R., 512. When it is remembered that the trial court has full authority to check and to punish summarily any violation of this privilege, to the extent even of disbarring the offender, the danger of its being abused in actual practice greatly diminishes. Nor is there any greater force, it seems to me, in the argument drawn from the maxim that wherever there is a wrong there also should be a remedy. Considerable stress is laid upon this in many of the cases restricting the privilege. The maxim, when rightly understood and applied, is both salutary and reasonable; but some confusion has arisen from a misconception of its scope and from unguarded and incautious applications of it to cases where properly it was wholly inapposite. To assert that words spoken by an attorney in a court of law during the progress of judicial proceedings, in the conduct or defense of which he is engaged in his professional capacity, are, because defamatory and false, a wrong in the sense in which that word is used in the maxim quoted, and then to conclude from that assertion that an action lies against the attorney who used the words, is to assume as proved the very question at issue — the very point to be determined. Now, it is very well known that it is not literally and universally true that there is a remedy for every wrong; because there are many invasions of rights for which there exist no remedies, and each of these is denominated in legal nomenclature a *damnum absque injuria.* To attribute, therefore, to the maxim a universal application when it is not in

fact universal, and then to assume, as the argument does, that the words spoken under the conditions indicated are within that application, is palpably illogical and erroneous. Words thus spoken would occasion an actionable wrong unless they are privileged; and thus, notwithstanding the maxim, the fundamental question recurs, Are such words, so spoken, privileged or not?

I am aware that most of the American cases have not gone to the length of holding the privilege to be an unqualified one, and that they generally have decided that the attorney was exempt from liability, provided the words spoken or written by him were relevant, pertinent, or had reference to the subject-matter under judicial investigation. But this qualification deprives the privilege of its only value. If the attorney may be sued for words spoken in the course of a judicial inquiry because the words are assumed to be irrelevant to that inquiry, he would be subjected to the vexation and harassment incident to the defense of such a suit, even though he should succeed in demonstrating the pertinency of the language complained of. The liability to be sued is the thing which will fetter and trammel the counsel in the discharge of his duty quite as much as any apprehension of the consequences of such a suit. If he is liable to be sued for the speaking of words alleged to be irrelevant, he can never know with certainty what, upon the trial of such an action against him, the court may consider irrelevant; and thus the apprehension of being called upon to defend a suit against himself for words which he may have thought relevant would deter him from discharging his duty as fully and freely as he would otherwise have been able to do. The fear of being sued by a totally irreponsible person for words in fact relevant, but alleged to be irrelevant, might, and most naturally would, cause him an anxiety not consistent with a free and uncramped fulfillment of his obligations to his client. Whether the words which he uses are or are not relevant he is still, under this qualified privilege, liable to be sued for them, even though the action would ultimately fail, and much of his time would be necessarily occupied in establishing the relevancy of his words as a defense to the suits which the disappointment or chagrin of defeated parties or impeached witnesses might in a spirit of resentment prompt them to bring against him. It is no answer to say that if he has kept within the limits of the qualified rule he will escape being punished in damages, because the mere fact that he is liable to be sued at all, and that he must make a defense founded on the relevancy of his words, deprives those persons whom he represents of the benefits which a freedom and fearlessness on his part would secure to them in the administration of the law. It is therefore infinitely better that the door be closed against all suits. If "what is complained of has been said in the course of the administration of the law, . . . the case against a counsel must be stopped at once." Otherwise it seems to me the qualification of the privilege defeats the beneficial effects of the rule itself, and, instead of merely abridging its application, practically neutralizes and destroys it altogether.

Then again, who is, under this qualification of the English rule, to determine whether the language complained of is or is not relevant or pertinent? In some of the cases it is said to be a question for the court, and in others

it is said to be a question for the jury. In at least one of the American cases (Hastings v. Lusk, 22 Wend., 410) this question of relevancy and pertinency was not only submitted to but was passed upon by the jury. It seems to me too plain for argument that a jury is surely not the proper tribunal to decide whether remarks made by an attorney in the progress of a judicial investigation are relevant or pertinent to that proceeding. And yet, if the privilege be held to be a merely conditional or qualified one, depending upon the relevancy of the objectionable words, I do not see how it is possible to prevent a jury in Maryland from exercising that function, if the words are written or printed in a brief instead of being spoken orally, and the attorney is indicted instead of being sued civilly; because in this state, under the constitution, juries are made, in criminal cases, judges of the law as well as of the facts. To subject an attorney to the annoyance of an indictment and then to the perils of a conviction by a jury, who may happen to think that words used by him in a brief filed, for instance, in this court were irrelevant to the cause he was arguing, would fatally destroy his freedom of action, and utterly cripple his usefulness as an essential officer of the court in the due administration of justice. This would be against the plainest dictates of public policy, and ought not under any circumstances to be tolerated. The observations of Chief Justice Coleridge are as apposite here as they were to the case in which he used them, viz.: "But if a rule is established, as the rule as to the privilege of a witness is established, it is the duty of a judge to give it a reasonable interpretation, and not, while admitting it in terms, to attempt to evade it or fritter it away in its application to particular cases." Seaman v. Netherclift, *supra*. Again, it is expressly provided by section 18 of article 3 of the constitution of this state that "no senator or delegate shall be liable in any civil action or criminal prosecution whatever for words spoken in debate." It is obvious that this provision was made for some useful purposes, and it is equally clear that those purposes must have been considered of sufficient consequence to outweigh all the evils and hardships which might possibly flow from the abuse of such an unrestricted privilege. The framers of that instrument, and the people who by their votes adopted it, manifestly deemed it unwise and impolitic that those who were charged with the responsibility of making and enacting laws should be held answerable for words spoken by them in the performance of that important duty; and this could only have proceeded upon the theory that they ought to be perfectly free and untrammeled when discussing and considering measures affecting the public interest and concerning the welfare of the state. The privilege thus accorded them is an absolute one, in no manner depending upon the relevancy, good faith or truth of the words that may be spoken. Why, then, should there be upon principle a different rule applied to those whose duty difficult always, and of an equally important character) is to aid in the just and impartial administration of those very same laws? What principle can be imagined as a justification for the rule in the one case that will not be equally cogent as a reason for its application in the other? Inasmuch as the most formal declaration of the organic law of the state exempts the law-maker from liability in this instance, we would be warranted, in my judgment, even if there were no other reasons for doing so, in extending

that exemption to the advocate and attorney when the reasons therefor are precisely and identically the same, and the necessity is equally as urgent, if not in fact greater.

But, apart from all other considerations, the question, it appears to me, has been distinctly settled in this state by the decision of this court in Maurice v. Worden, 54 Md., 233. That was an action for an alleged libel. Maurice was a teacher at the naval academy in Annapolis. Worden was the superintendent of the academy. Maurice tendered his resignation, and Worden indorsed upon it the alleged libelous words, and forwarded it, as required by the regulations governing the navy, to the secretary of the navy. Suit was thereafter brought by Maurice against Worden. The court of common pleas of Baltimore instructed the jury that no evidence had been given legally sufficient to entitle the plaintiff to recover, and, the verdict and judgment being against him, Maurice appealed to this court. The question was then directly raised as to whether the indorsement on the resignation furnished a cause of action; and that turned upon the inquiry whether that indorsement or communication to the secretary of the navy was within the limits of a privilege, either absolute or qualified. As the case was presented, before it could be held that the action was maintainable it was necessary for the court to determine that Worden was not, under the circumstances, entitled to invoke in his defense either the absolute or the qualified privilege. In other words, it was necessary for the court to decide whether his communication fell within the scope of any privilege. To intelligently do that it was requisite for the court to clearly define the two classes of privileged communications. In approaching that subject this court said: "There are two classes of privileged communications which form exceptions to the general law of libel. The one is absolutely privileged, and cannot be sued upon, while the other may be the cause of action, and the suit upon it maintained on proof of actual malice." The court then proceeded to define the cases where the absolute privilege applies. "A great number of authorities," says the opinion, "have been referred to, and they have been examined with care. There is but little conflict among them in relation to the class of communications which are regarded as absolutely privileged."

The classification in Starkie on Slander and Libel well states the conclusion drawn from the great bulk of the cases. Those enumerated by the author as being absolutely privileged, though false and malicious, and made without reasonable or probable cause, "are communications made in the course of judicial proceedings, whether civil or criminal, and whether by a suitor, prosecutor, witness, counsel or juror; or by a judge, magistrate, or person presiding in a judicial capacity over any court or other tribunal, judicial or military, recognized by and constituted according to law; and so also communications made in the course of parliamentary proceedings, whether by a member of either house of parliament or by petition of individuals who are not members, presented to either house or to a committee thereof." Folk. Starkie, Sland., § 688. After thus recognizing and adopting this classification of absolute privileges the court adds: "Beyond this enumeration we are not prepared to go." The court then proceeds to determine that the communication in question in that case did not belong to

that class of absolute privileges, but that it fell within the rule relating to qualified privileges, and reversed the judgment and awarded a new trial; Judge Miller dissenting. Here, then, was a case in which the absolute privilege was claimed to be applicable. The mind of the court was distinctly called to the subject of such a privilege, to its scope and its extent. It was necessary, in deciding the case, to define and clearly lay down the limits of an absolute privilege in order to determine whether the case then before the court belonged to that class. The court did so define and lay down those limits, and did distinctly embrace within them the case of an attorney, by the adoption, with approval, of the text of Mr. Starkie. This was manifestly not an *obiter dictum*. I cannot, therefore, imagine how it is possible now to apply to the case of an attorney the qualified rule without at the same time holding that this court was manifestly wrong when, in Maurice v. Worden, it adopted, with its sanction, the doctrine announced by Starkie that the privilege of an attorney was absolute. Judge Miller placed his strong dissenting opinion upon the distinct ground that the communication in that case "ought to be absolutely privileged." Holding, as I do very decidedly, these views in regard to this question, which is one of great importance, I place my assent to the affirmance of the judgment of the learned court below entirely upon the ground that the words spoken by the appellee were, having been spoken in a court of justice during a judicial investigation in which he was engaged as counsel, absolutely privileged, without any reference whatever to their relevancy. Maulsby v. Reifsnider (Court of Appeals of Maryland, 1888), 6 Atl. Rep., 505.

§ 37. Illustrations — Digest of American Cases.—

1. The communications of counsel and parties, made in the due course of judicial proceedings, if relevant, will not support an action for defamation, and although irrelevant will not constitute a cause of action if the party had reasonable and probable cause for believing the matter to be relevant and without proof of actual malice. Lawson v. Hicks, 38 Ala., 279.

2. Words spoken by a party or counsel in the course of judicial proceedings, though they be such as if spoken elsewhere would be actionable in themselves, are not actionable if pertinent and applicable to the subject of the inquiry. Hoar v. Wood, 3 Met. (Mass.), 193; Hastings v. Lusk, 22 Wend. (N. Y.), 410; Marsh v. Ellsworth, 36 How. (N. Y.), 532.

3. The privilege of parties to legal proceedings, their attorneys, counselors and solicitors, as to matter material or pertinent, is complete, and malice cannot be predicated of what is so said or written. A., in opposing a motion for an injunction against him, contradicted a material fact in the moving affidavit of W., and swore that W. knew its falsity, and had been guilty of perjury. *Held*, that an action for the libel could not be maintained. Warner v. Paine, 2 Sand., 195.

4. Whatever may be said or written by a party to a judicial proceeding or by his attorney, solicitor or counsel therein, if pertinent and material to the matter in controversy, is privileged, and lays no foundation for a private or public prosecution. The protection is absolute, and no one shall be permitted to allege that it was said or written with malice. But if a party or his agent pass beyond the prescribed limit to asperse or vilify another, he is without protection and must abide the consequences. As where a

person acting as counsel in a justice's court prepared and presented a declaration charging the defendant with a trespass, and alleging that the defendant was "reputed to be fond of sheep," "in the habit of biting sheep," and that "if guilty he ought to be shot," *held*, that an indictment therefor, as a libel alleging malice, was good. Gilbert v. People, 1 Den., 41.

5. An attorney, who in the course of his employment files specifications of opposition to an insolvent's discharge, alleging that the insolvent has been privy to making false and fraudulent entries in his books with intent to defraud creditors, and had sworn falsely in relation to his estate, and while acting in a fiduciary capacity had fraudulently converted property to his own use, of which facts he had been informed by his client, cannot be held for libel; the matter is absolutely privileged. Hollis v. Meux, 69 Cal., 625; 68 Am. Rep., 574.

6. The speech of an attorney upon a trial may, if scandalous, afford ground for an action for libel against one publishing it. Commonwealth v. Godshalk, 13 Phil. (Penn.), 575.

§ 38. Digest of English Cases.—

1. A woman was charged before a court of petty sessions with administering drugs to the inmates of the plaintiff's house in order to facilitate the commission of a burglary there. The plaintiff was the prosecutor, and the defendant, who was a solicitor, appeared for the defense of the woman. It was admitted that she had been at the plaintiff's house on the evening before the burglary; and there was some evidence, though very slight, that a narcotic drug had been administered to the inmates of the plaintiff's house on that evening. During the proceedings before the magistrates the defendant, acting as advocate for the woman, suggested that the plaintiff might be keeping drugs at his house for immoral or criminal purposes. There was no evidence called or tendered that the plaintiff kept any drugs in his house at all. *Held*, that no action would lie against the defendant for these words. Munster v. Lamb (C. A.), 11 Q. B. D., 588; 52 L. J., Q. B., 726; 32 W. R., 243; 49 L. T., 252; 47 J. P., 805.

2. Plaintiff made an affidavit in an action he had brought against defendant in the king's bench. Defendant (apparently conducting his own case) said in the court, in answer to this affidavit: "It is a false affidavit, and forty witnesses will swear to the contrary." *Held*, that no action lay for these words. Boulton v. Chapman (1640), Sir W. Jones, 431; March, 20, p. 45.

3. A servant summoned his master before a court of conscience for a week's wages. The master said: "He has been transported before, and ought to be transported again. He has been robbing me of nine quartern loaves a week." Lord Ellenborough held the remarks absolutely privileged, if the master spoke them in opening his defense to the court; but otherwise if he spoke them while waiting about the room and not for the purpose of his defense. Trotman v. Dunn, 4 Camp., 221.

§ 39. Parties Litigant Entitled to the Same Privilege.—

An attorney acting as an advocate in a county court or a police court enjoys the same immunity as counsel.[1] So with a

[1] York v. Pease, 2 Gray (Mass.), N., 792; 29 L. J., Ex., 404; 6 Jur. 282; Brow v. Hathaway, 13 Allen (N. S.), 587; 6 W. R., 586. (Mass.), 22; Mackay v. Ford, 5 H. &

proctor in an ecclesiastical court.[1] The party himself, because of his ignorance of the proper mode of conducting a case, is allowed even greater latitude.[2] Any observation made by one of the jury during the trial is equally privileged, provided it is pertinent to the inquiry.[3] And so is any presentment by a grand jury.[4]

§ 40. **Illustrations — Digest of American Cases.–**

1. Words spoken in good faith and within the scope of his defense by a party on trial before a church meeting are privileged, and do not render him liable to an action, although they disparage private character. York v. Pease, 2 Gray (Mass.), 282.

2. Words spoken by the defendant in an action of tort for slander which relate to a subject-matter in which he is immediately interested, and are said for the purpose of protecting his own interests and in the full belief that they are true, are privileged though made in the presence of others than the parties immediately interested; and it is necessary for the plaintiff to show malice in fact in order to recover. Brow v. Hathaway, 13 Allen (Mass.), 22.

3. When a party in an application to the supreme court for an extension of time to file a transcript goes outside of the facts material to procure the order, and states matter wholly foreign to the application, wherein he charges his attorney with having entered into a collusive agreement with the attorney of the other party, this charge against his attorney is not a privileged communication, but is libelous *per se*. Wyatt v. Buell, 47 Cal., 624.

4. An action will not lie for words spoken by a party in his defense in the course of a trial. Badgley v. Hedges, 2 N. J. L. (1 Pen.), 233.

§ 41. **Prosecuting Witnesses before Justices Entitled to the Same Privilege.**— In England, as we understand the law, the complainant in a criminal proceeding is in many respects regarded as a party, and is familiarly called the prosecutor. In some cases he is required to give security for the costs. In the early ages of the common law criminal prosecutions with a view to the punishment of offenders, under the name of appeals, were commenced and carried on by the party aggrieved in his own name. In this country in many cases the complainant has a pecuniary interest in the result of a criminal prosecution carried on in the name of the people, and by general usage he is recognized as in some respects the manager of the prosecution before the magistrate, unless of course the man-

[1] Higginson v. Flaherty, 4 Ir. C. L. R., 125.

[2] Badgley v. Hedges, 2 N. J. L. (1 Pen.), 233; Hodgson v. Scarlett, 1 B. & Ald., 244.

[3] R. v. Skinner, Lofft, 55.

[4] Little v. Pomeroy, Ir. R., 7 C. L., 50.

agement is assumed by an authorized public prosecutor. But whether or not it is the legal right of a complaining witness to manage the prosecution and support his complaint before the magistrate by calling and examining witnesses, cross-examining the witnesses called by the prisoner, and offering such arguments and comments upon the testimony as the case may seem to require, or to retain counsel for the same purpose, it certainly seems to be competent for the magistrate to permit him to do so. Upon this point Chief Justice Shaw was of the opinion that when, in the absence of the prosecutor, a complaining witness is acting as party or counsel before a magistrate, either as a matter of right or by permission of the magistrate, he is entitled to the same privilege as a party or counsel in other judicial proceedings.[1]

§ 42. **Illustrations — American Cases.—**

1. **A Massachusetts Case:** *Hoar v. Wood*, 44 Mass., 194.

In the trial of an action of slander in the court of common pleas before Strong, J., the plaintiff introduced evidence tending to prove that the defendant uttered the words set forth in the writ and declaration. It also appeared that the words were spoken to the plaintiff, in the presence of others, while the plaintiff was under examination as a witness in a trial before a justice of the peace on a complaint in behalf of the commonwealth, where the defendant was the complainant and was examining the plaintiff and managing the case in behalf of the commonwealth. The defendant requested the court to instruct the jury as follows: "That if the jury believe that the words were spoken to a witness in a case on trial before a justice of the peace in the course of the conduct of the case while the witness was under examination, the defendant being complainant and manager of the case in behalf of the commonwealth, and that the words were spoken *bona fide*, without actual malice or intent to defame the witness, with a view to elicit the truth from the witness, or give the justice a comment upon the testimony, or influence him thereby in the decision of the case,— the defense is maintained." The court refused to give such instructions, and the jury found a verdict for the plaintiff. To this opinion and decision of the court the defendant excepted. On the hearing of the exceptions in the supreme judicial court Chief Justice Shaw said: "We take the rule to be well settled by the authorities that words spoken in the course of judicial proceedings, though they are such as impute crime to another, and therefore if spoken elsewhere would import malice and be actionable in themselves, are not actionable if they are applicable and pertinent to the subject of inquiry. The question, therefore, in such cases is not whether the words spoken are true, not whether they are actionable in themselves, but whether they were spoken in the course of judicial proceedings, and whether they were relevant and pertinent to the cause or subject of in-

[1] Hoar v. Wood, 44 Mass., 193; Allen v. Crofoot, 2 Wend., 515; Morrow v. Wheeler et al., 165 Mass., 349; 43 N. E. Rep., 105; Graham v. Cass Circuit Judge (Mich., 1896), 66 N. W. Rep., 318.

quiry. And in determining what is pertinent much latitude must be allowed to the judgment and discretion of those who are intrusted with the conduct of a cause in court, and a much larger allowance made for the ardent and excited feelings with which a party or counsel, who naturally and almost necessarily identifies himself with his client, may become animated by constantly regarding one side only of an interesting and animated controversy in which the dearest rights of such party may become involved. And if these feelings sometimes manifest themselves in strong invectives or exaggerated expressions beyond what the occasion would strictly justify, it is to be recollected that this is said to a judge who hears both sides, in whose mind the exaggerated statements may be at once controlled and met by evidence and arguments of a contrary tendency from the other party, and who, from the impartiality of his position, will naturally give to an exaggerated assertion, not warranted by the occasion, no more weight than it deserves. Still, this privilege must be restrained by some limit; and we consider that limit to be this: That a party or counsel shall not avail himself of his situation to gratify private malice by uttering slanderous expressions, either against a party, witness or third person, which have no relation to the cause or subject-matter of the inquiry. Subject to this restriction, it is on the whole for the public interest, and best calculated to subserve the purposes of justice, to allow counsel full freedom of speech in conducting the causes and advocating and sustaining the rights of their constituents; and this freedom of discussion ought not to be impaired by numerous and refined distinctions. With these views of the law, the court are of opinion that the instructions prayed for by the defendant ought to have been given to the jury." Citing Astley v. Younge, 2 Bur. (Eng.), 807; Hodgson v. Scarlett, 1 B. & A., 232; Padmore v. Lawrence, 11 A. & E., 380; Ring v. Wheeler, 7 Cow. (N. Y.), 725; Hastings v. Lusk, 22 Wend. (N. Y.), 410; Mower v Watson, 11 Vt., 536; Bradley v. Heath, 12 Pick. (Mass.), 163.

2. In a New York Case (*Allen v. Crofoot*, 2 Wend., 515, 1829) tried at the Onondago circuit the defendant had entered a complaint in writing, under oath before a justice, against the plaintiff. The plaintiff was arrested on a warrant and brought before the justice, and, after perusing the complaint, he asked the defendant, who was present, if he was guilty; to which the defendant answered "that his shop had been broken open, his leather stolen and his shoes cut to pieces, and he believed the plaintiff did it, and that he had reason to believe that the plaintiff did it." The plaintiff then asked the defendant whether he considered himself under oath, to which he answered that he did. For the speaking of these words upon this occasion the action was brought. The defendant contended on the trial that the words were spoken in the course of a judicial inquiry, and therefore were not actionable; but his honor the judge charged the jury that the words were actionable because the defendant was not, at the time of the speaking of them, testifying as a witness or complainant, and the jury gave a verdict for the plaintiff for $100 damages, which was now moved to be set aside.

By the Court, Marcy, J.: In this case, as I understand it, the words charged were pertinent to the matter in question, because they were the reiteration of the charge specified in the complaint to which the defendant had made oath. The whole of this case is resolved into the question of fact,

Were the words spoken in the course of a judicial proceeding? The parties were before a magistrate; the plaintiff had been brought there on a warrant issued on the charge against him by the defendant under oath; the justice had furnished him with the written complaint against him, and he was perusing it when the defendant entered and was interrogated by the plaintiff on the subject of the charge made against him. Under these circumstances the defendant might have believed that the magistrate was proceeding on his complaint; and as the plaintiff had been brought in to answer to it, he might have supposed that the plaintiff had a right to question him and that it was his duty to answer. When an appeal was thus made to him as to the truth of the charge in the presence of the justice to whom it had been preferred, and who had the matter before him, silence, he might well suppose, would excite suspicion and subject him to the imputation of shrinking from his charge before the man he had accused. If he did speak, it was natural to expect an asseveration of his belief in the charge he had made under oath and an affirmation that he had reason for preferring it. There was not probably a trial, strictly speaking, going on in the court at the time the words were uttered; nor was that necessary in order to make the defense available. The proceedings on complaint do not appear to have been brought to a close; the matter of the complaint was then pending before the magistrate to abide his further order. In my judgment the question of fact, whether the words were spoken in the course of the proceeding upon the complaint made by the defendant, or under such circumstances that the defendant had reason to believe and did in good faith believe that it was necessary for him then to repeat the charge contained in his complaint, should have been distinctly submitted to the jury. A new trial ought, therefore, to be granted for the misdirection of the judge.

§ 43. **Witnesses.**— A witness on the stand is absolutely privileged in answering all questions asked him by the counsel on either side; and if he volunteers an observation, if it has reference to the matter in issue, or fairly arises out of any question asked him by counsel, though only going to his credit, such observation will also be privileged.[1] But a remark made by a witness while on the stand, wholly irrelevant to the matter of inquiry, uncalled for by any question of counsel, and introduced by him maliciously for his own purposes, and observations made while waiting about the court, before or after he has given his evidence, are not privileged.[2]

[1] Seaman v. Netherclift, 1 C. P. D., 540; 2 C. P. D., 53; 46 L. J., C. P., 128; Crecelious v. Bierman, 59 Mo. App., 513.

[2] Trotman v. Dunn, 4 Camp., 211; Lyman v. Gowing, 6 L. R. (Ir.), 259; Cooley, Const. Lim., 545; 7 Wait's Act. & Def., 438; White v. Carroll, 42 N. Y., 166; 1 Am. Rep., 503; Barnes v. McCrate, 32 Me., 442; Kidder v. Parkhurst, 3 Allen (Mass.), 393; Calkins v. Sumner, 13 Wis., 193; Dunlap v. Glidden, 31 Me., 435; Grove v. Brandenburg, 7 Blackf. (Ind.), 234; Ring v. Wheeler, 7 Cow. (N. Y.), 726.

§ 44. **The Rule in Starkie.**— Witnesses appear in court in obedience to the authority of the law, and therefore may be considered to be acting in the discharge of a public duty; and though convenience requires that they should be liable to a prosecution for perjury committed in the course of their evidence, or for conspiracy in case of a combination of two or more to give false evidence, they are not responsible in a civil action for any reflections thrown out in delivering their testimony.[1]

§ 45. **The American Rule — Folkes, J.**— We recognize fully the importance to a due administration of justice of upholding the privilege accorded parties to write and speak freely in judicial proceedings; but in so doing we must not lose sight of the fact that it concerns the peace of society; that the good name and repute of the citizen shall not be exposed to the malice of individuals who, under the supposed protection of an absolute privilege, make use of the witness box to volunteer defamatory matter in utterances not pertinent. To hold such persons responsible in damages cannot fairly be said to hamper the administration of justice. The privilege of a witness is great and will be protected in all proper cases, but it must not be mistaken for unbridled license.[2]

§ 46. **Illustrations — American Cases.**—

1. A Maryland Case: *Hunkell v. Voneiff* (1888), 59 Md. 179, 6 Atl. Rep., 500.

In a case recently decided in the Maryland court of appeals (June, 1888), it was held by the majority of the court that where a witness is asked to fix a certain date, a reply as follows: "Not knowing that a mistress or woman of Mr. Plitt would step in to claim the lawful wife's property, I did not keep an account of the date that way. If I would have, I would have noticed the date, and all those little particular incidents,"— is not so wholly foreign to the case as to be beyond the privilege of a witness, and therefore not actionable as slander.

In the opinion, which is here given, the law will be found fully discussed:

MILLER, J. This is an action of libel or slander against a witness in an equity cause, whose testimony was written down by the examiner, returned to the court and read at the hearing before the judge. The alleged libelous or slanderous statements are contained in the testimony thus taken. There was a demurrer to each of the two counts in the declaration, which the court sustained, and thereupon gave judgment for the defendants. From that

[1] Starkie on Slander, 242; 2 Inst., 228; 2 Roll. Rep., 198; Pal., 144; 1 Vin. Abr., 387; Cro. Eliz., 230; Terry v. Fellows, 21 La. Ann., 375.

[2] Shadden v. McElwee, 86 Tenn., 146. See, also, Calkins v. Sumner, 13 Wis., 193; Barnes v. McCrate, 32 Me., 442; White v. Carroll, 42 N. Y., 161; 1 Am. Rep., 504; Story v. Wallace, 60 Ill., 51; Smith v. Howard, 28 Iowa, 51; Liles v. Gaster, 42 Ohio St., 631; Hutchinson v. Lewis, 75 Ind., 55; Wyatt v. Buell, 47 Cal., 624.

judgment this appeal is taken. In the able arguments of counsel the whole field of the law on the question of privilege has been explored; and we believe all the decisions, as well as the opinions and *dicta* of eminent judges, have been cited and pressed upon our attention. It would be a tedious task to review them in detail, and a hopeless one to attempt to reconcile them. The question is a new one in this state. No precedent for such an action has been found in our reports or judicial records, and we believe this is the first attempt to bring one since a court of justice was first established in the colony of Maryland — a period of more than two centuries. This fact, while it may not be conclusive against the right to maintain the action, certainly leaves us free to follow and adopt those authorities which state the law in accordance with what, in our judgment, the administration of justice and a sound public policy demand.

The case now before us is not that of an advocate, but of a witness; and in our opinion it is of the greatest importance to the administration of justice that witnesses should go upon the stand with their minds absolutely free from apprehension that they may subject themselves to an action of slander for what they may say while giving their testimony. Mr. Townshend, in his book on Slander and Libel, well says: "The due administration of justice requires that a witness should speak, according to his belief, the truth, the whole truth, and nothing but the truth, without regard to the consequences; and he should be encouraged to do this by the consciousness that, except for any wilfully false statement, which is perjury, no matter that his testimony may in fact be untrue, or that loss to another ensues by reason of his testimony, no action for slander can be maintained against him. It is not simply a matter between individuals; it concerns the administration of justice. The witness speaks in the hearing and under the control of the court; is compelled to speak, with no right to decide what is immaterial; and he should not be subject to the possibility of an action for his words." Townsh. Sland. & Lib., § 233. But there is more substantial authority for the absolute character of the privilege. In the standard work of Starkie on Slander it is laid down as the result of the English decisions that " witnesses, like jurors, appear in court in obedience to the authority of the law, and therefore may be considered, as well as jurors, to be acting in the discharge of a public duty; and, though convenience requires that they should be liable to a prosecution for perjury committed in the course of their evidence, or for conspiracy in case of a combination of two or more to give false evidence, they are not responsible, in a civil action, for any reflections thrown out in delivering their testimony." 1 Starkie, Sland., 262. This statement of the law has been frequently quoted with approval by the English courts, and in some instances by courts and text-writers in this country. Terry v. Fellows, 21 La. Ann., 375. In support of the absolute character of the privilege, a long list of English decisions, ancient and modern, has been cited. Without referring to the earlier ones, we mention some of those decided in more recent times, which have special reference to the case of parties and witnesses: Revis v. Smith, 86 E. C. L., 126; Henderson v. Broomhead, 4 Hurl. & N., 568; Kennedy v. Hilliard, 10 Ir. C. L., 195; Dawkins v. Rokeby, 4 Fost. & F., 806; Dawkins v. Rokeby, L. R., 8 Q. B., 255, on appeal in the house of lords, L. R., 7 H. L., 744.

In these cases, Willes, Coleridge, C. J., Cockburn, C. J., Blackburn, Kelly, C. B., Creswell, Lord Cairns and other eminent jurists have again and again expressed the opinion that the privilege of a witness should be absolute, have pointed out the great benefit of such privilege to the administration of justice, and have deprecated in strong terms the evil consequences they thought would ensue if witnesses were placed under any intimidation, or the fear of being involved in litigation by reason of what they might say when under examination. In Dawkins v. Rokeby the judges were called in and gave unanimously an answer to the question put to them by the house of lords, in which they say: "A long series of decisions has settled that no action will lie against a witness for what he says or writes in giving evidence before a court of justice. This does not proceed on the ground that the occasion rebuts the *prima facie* presumption that words disparaging to another are maliciously spoken or written. If that were all, evidence of express malice would remove this ground. But the principle, we apprehend, is that public policy requires that witnesses should give their testimony free from any fear of being harassed by an action on an allegation, whether true or false, that they acted from malice. The authorities, as regards witnesses in the ordinary courts of justice, are numerous and uniform." After this decision the case of Seaman v. Netherclift arose, which was tried before Chief Justice Coleridge at *nisi prius*, and afterwards decided by him and Brett, J., in 1 C. P. Div., 540, and subsequently by the court of appeals in 2 C. P. Div., 53. The judges who heard the case on appeal were Cockburn, C. J., Bramwell and Amphlett, JJ., and they disposed of it at once. Cockburn, C. J., said: "If there is anything as to which the authority is overwhelming, it is that a witness is privileged to the extent of what he says in course of his examination. Neither is that privilege affected by the relevancy of what he says, for then he would be obliged to judge of what is relevant or irrelevant; and questions might be and are constantly asked which are not strictly relevant to the issue. But that beyond all question this unqualified privilege extends to a witness is established by a long series of cases, the last of which is Dawkins v. Rokeby, after which to contend to the contrary is hopeless. It was there expressly decided that the evidence of a witness with reference to the inquiry [the inquiry referred to being a military court of inquiry instituted to investigate the conduct of an officer] is privileged, notwithstanding it may be malicious; and to ask us to decide otherwise is to ask what is beyond our power.

"But I agree that if, in this case, beyond being spoken maliciously, the words had not been spoken in the character of a witness, or not while he was giving evidence in the case, the result might have been different; for I am very far from desiring to be considered as laying down as law that what a witness states altogether out of the character of a witness, or what he may say *dehors* the matter in hand, is necessarily protected. I quite agree that what he says before he enters or after he has left the witness box is not privileged, which was the case [Trotman v. Dunn, 4 Camp., 211] before Lord Ellenborough. Or if a man, when in the witness box, were to take advantage of his position to utter something having no reference to the cause or matter of inquiry in order to assail the character of another: as if he were asked, 'Were you at York on a certain day?' and he were to

answer, 'Yes; and A. B. picked my pocket there,'— it certainly might well be said, in such a case, that the statement was altogether *dehors* the character of a witness, and not within the privilege." So, in speaking upon the same subject, Bramwell, J., says: "Suppose, while the witness was in the box, a man were to come in at the door, and the witness were to exclaim, 'That man picked my pocket.' I can hardly think that would be privileged. I can scarcely think a witness would be protected for anything he may say in the witness box wantonly, and without reference to the inquiry. I do not say he would not be protected. It might be held that it was better that everything that a witness said should be protected than that witnesses should be under the impression that what they said in the witness box might subject them to an action. I certainly should pause before I affirmed so extreme a proposition; but, without affirming that, I think the words 'having reference to the inquiry' ought to have a very wide and comprehensive application, and ought not to be limited to statements for which, if not true, a witness might be indicted for perjury, or the exclusion of which by the judge would give ground for a new trial, but ought to extend to that which a witness might naturally and reasonably say when giving evidence with reference to the inquiry as to which he had been called as a witness." Amphlett, J., on the same subject, says: "How it would have been if this statement had been volunteered by the defendant, without it being necessary, or in any way arising from questions he had been asked, we need not express any opinion. In such a case it may be that the words would not have been spoken in his office of a witness. I must by no means be taken as expressing an opinion that in such a case the witness would not be protected. I can see many reasons why a witness should be absolutely protected for anything he said in the witness box. If he did voluntarily make a scandalous attack while giving evidence he would be guilty of a gross contempt of court, and might be committed to prison by the presiding judge; or if he were before an inferior tribunal, and he persevered in his scandalous statements, he might be liable to an indictment for obstructing the course of justice."

Much, also, was said as to the privilege of a witness in the still more recent case of Munster v. Lamb, in the court of appeals, in 11 Q. B. Div., 588; and we feel ourselves at liberty to adopt, if we choose, what was said in that case on that subject. The judges (Brett and Fry) there again affirm the absolute character of this privilege in the broadest terms. "Why," said Fry, J., "should a witness be able to avail himself of his position in the box, and to make, without fear of civil consequences, a false statement, which in many cases is perjured, and which is malicious and affects the character of another? The rule of law exists, not because the conduct of such a person ought not of itself to be actionable, but because, if his conduct was actionable, actions would be brought against witnesses in cases in which they had not spoken with malice,— in which they had not spoken with falsehood. It is not a desire to prevent actions from being brought in cases where they ought to be maintained that has led to the adoption of the present rule of law; but it is the fear that, if the rule were otherwise, numerous actions would be brought against persons who were merely discharging their duty. It must always be borne in mind that it is not in-

tended to protect malicious and untruthful persons, but that it is intended to protect persons acting *bona fide*, who, under a different rule, would be liable, not, perhaps, to verdicts and judgments against them, but to the vexation of defending actions." And he refers to the fact that courts of justice have control over all proceedings before them, and have ample powers to check improper conduct on the part of witnesses as well as of solicitors and counsel. Such are the English decisions. As to authority on the same subject in this country, we have Judge Cooley to the effect that "among the cases which are so absolutely privileged, on reasons of public policy, that no inquiry into motives is permitted in an action for slander or libel, is that of a witness giving evidence in the course of judicial proceedings. It is familiar law that no action will lie against him at the suit of a party aggrieved by his false testimony, even though malice be charged." And for this a number of authorities from different states are cited. Cooley, Const. Lim., 545. Again, Mr. Wait seems to adopt the English cases as laying down the true rule. 7 Wait, Act. & Def., 438. A different view, as to the extent of the privilege, has been taken by the courts of many of the states; and it may be conceded that the weight of authority in this country is in favor of a much greater restriction upon the privilege than is sanctioned by the English decisions. But we are not controlled by any decision of our own courts, and are at liberty to settle the law for this state according to our best judgment. After a most careful consideration of the subject, we are convinced that the privilege of a witness should be as absolute as it has been decided to be by the English authorities we have cited, and we accordingly adopt the law on this subject as they have laid it down.

It remains to apply this law to the case before us. The declaration does not state definitely what the controversy or matter of inquiry in the equity case of Manning v. Voneiff actually was. Enough is stated, however, to warrant the inference that the female plaintiff was a party to that suit, or was preferring a claim in some capacity to the estate or some part of it, of a Mr. Plitt, deceased, and that the witness or her husband was resisting that claim. The defendant was examined as a witness in that case; and, so far as her testimony is set out in the declaration, it appears she was first asked if she remembered quite distinctly the day on which her husband told her that he was copying certain deeds at Mr. Plitt's request. To this she replied that she saw her husband copying some papers; that he had a file of papers copying them; and she being inquisitive asked him what he was writing, and he said he was copying some deeds Mr. Plitt asked him to copy. She was then asked: "Was that the same day on which the magistrate came to see Mr. Plitt?" To this she replied: "No; I don't think so." She was then asked: "Well, how many days, about, intervened?" To this she replied: "Not knowing that a mistress or woman of Mr. Plitt would step in to claim the lawful wife's property, I did not keep an account of the date that way. If I would have, I would have noticed the date and all those little particular incidents, to save Mrs. Plitt from much heart-ache and trouble and cause of her death." This is the libel or slander complained of. Now, it is true she could have answered the question by simply saying she "did not remember." It is also true that the imputation thus cast upon the plaintiff was grossly slanderous. She may have made it from malice,

knowing at the same time that it was false; and from the averments of the declaration, which the demurrer admits, we must so take it. Still, it was the excuse she chose to give as to not remembering the date about which she had been pressed by this and two previous questions. It is, as we consider it, nothing more than a reflection cast upon a party to the controversy in answer to a question which could have been answered without making such reflection. The answer might have been expunged from the record and the witness punished for making it; but it is quite impossible to say that she did not make it in her character as witness, or that it is at all like the examples put by the judges in Seaman v. Netherclift as being entirely outside of the privilege. Judgment affirmed.

2. A Tennessee Case: *Shadden v. McElwee*, 86 Tenn., 146; 5 S. W. Rep., 602.

In a recent case (1887) on this question the supreme court of Tennessee held where a witness, under examination, voluntarily and maliciously, and not in response to a question, interjects into his answer defamatory matter, he loses his privilege as a witness and becomes liable in an action for slander. And it is for the jury to determine whether the words were pertinent to the case, and responsive to a question propounded to the witness, or were uttered maliciously and voluntarily, and not in good faith.

The opinion by Folkes, J., is as follows: This is an action for slander. The words as charged in the declaration are, "He [meaning plaintiff] stole my horse;" and "He [meaning plaintiff] came to my house while I was away and stole my horse," and "He [meaning plaintiff] is a rogue, for he stole my horse, and I did not see him back for days." The defendant pleaded the general issue, and in addition thereto pleaded that the words, if spoken, were uttered as a witness under oath, in a cause pending in the circuit court of Roane county, wherein the plaintiff here was plaintiff there, and defendant here was defendant there, and that as such witness, replying to questions propounded to him, his answers were privileged.

While the matters set out in the special plea might have been relied on under the plea of not guilty, the defendant might properly have interposed the special plea in a case where the occasion of the speaking or publishing furnishes a defense to the action. Dunn v. Winters, 2 Humph., 513. To this special plea the plaintiff replied that the words were not spoken in response to questions propounded to him, but were maliciously injected into the testimony voluntarily and falsely, and were not pertinent to the issues in said suit, but were spoken for the purpose of defaming and injuring plaintiff. To this replication there was a demurrer to the effect that "it was immaterial to the validity of the defense set up in the special plea whether the words spoken by the defendant concerning the plaintiff, as a witness under oath in a judicial proceeding were uttered, though not in answer to any question; neither is it material whether or not they were spoken maliciously and voluntarily; in neither event can defendant be held liable therefor," etc. The demurrer was presented under several heads, but the substance and effect of them all is contained in the language above quoted. The circuit court sustained the demurrer, and the plaintiff declining to further reply the suit was dismissed, and plaintiff has appealed in error. The judgment of the circuit court is erroneous and must be reversed.

It is insisted on behalf of the defendant that it is not a matter between individuals, but concerns the due administration of justice, that a witness should be allowed to speak, according to his belief, the truth without regard to consequences, and should be encouraged to do this by the consciousness that his utterances are absolutely privileged, leaving him only liable to indictment for perjury if he speaks other than the truth. That witnesses should not be hampered, while on the stand, with fears of a suit for damages. This is the view in the courts of England and some of the states. While plausible, it is in our opinion unsound. The act of testifying as a witness must be either in the exercise of a right or the performance of a duty, and in either case the act must be performed in good faith. If he avails himself of his position as a witness to maliciously answer, with a knowledge that such answer is not pertinent or relevant, the law withdraws the protection it would otherwise have afforded him.

Where the defendant, a witness, was asked if a certain person was attended by a physician, his answer was, "Not as I know of; I understood he had a quack; I would not call him a physician." In an action brought for these words it was held proper to charge the jury that if they "believed from all the circumstances proved—from the questions put, from the manner of answering and from the answers themselves—that the defendant testified in good faith, or in the belief that his answers were pertinent or relevant, then the law protected him; but if the defendant was actuated by mere malice, and used the words for the mere purpose of defaming the plaintiff, then the law withdrew the protection it would otherwise have afforded him." White v. Carroll, 42 N. Y., 161; Smith v. Howard, 28 Iowa, 51; Barnes v. McCrate, 32 Me., 442. It follows, of course, that the witness is not liable if the answers are pertinent and responsive; or, as it is expressed in some of the cases, the relevancy of the words complained of to the matter at issue is the test of the privilege. In Odgers, Slander and Libel, 191, it is said: "A witness in the box is absolutely privileged in answering all questions asked him by counsel on either side, and even if he volunteers an observation, a practice much to be discouraged, still, if it has reference to the matter in issue, or fairly arises out of any question asked him by counsel, though only going to his credit, such observation will also be privileged. But a remark made by a witness in the box, wholly irrelevant to the matter of inquiry, uncalled for by any question of counsel, and introduced by the witness maliciously for his own purposes, would not be privileged, and would also probably be a contempt of court."

Such seems to be the rule also in Wisconsin and Massachusetts. Calkins v. Sumner, 13 Wis., 193; McLaughlin v. Cowley, 127 Mass., 316. While we have no reported cases in our state with reference to the privilege of a witness, there are adjudications concerning judicial proceedings and the privilege afforded thereunder which are in harmony with the conclusions here reached. In Lea v. White, 4 Sneed, 111, the words complained of were used in a return to a *habeas corpus* imputing insolvency and inability to support two free colored children under covenant of indenture; that said children were cruelly neglected and maltreated, and that there was reason to believe that the petitioner would sell them into slavery. This court said: "There are many occasions upon which the legal presumption of malice from the fact that the words are defamatory does not arise; the

communications are on account of the occasion on which they are made *prima facie*, or, as the books have it, 'conditionally privileged; that is, they do not amount to defamation until it appears that the communication had its origin in actual malice in fact.' In such cases it will be incumbent on the plaintiff to show, in addition to the injurious publication, a malice in fact, and that the occasion was seized upon as a mere pretext." It is perhaps needless to add that where the matter alleged is pertinent to the issue, or fairly supposed to be so, although not in the strictest sense relevant, the pleader is absolutely privileged, although he may have also entertained sentiments of malice to the adverse party. The point in this case further held that "the question whether there be or be not reasonable or probable cause may be for the jury or not according to the particular circumstances of the case."

The pertinency of the matter to the occasion is that which is meant by probable cause. In that case it was held that whether the matter there complained of could reasonably have been thought by the defendant necessary to his defense was properly a question for the court, and that it was within the class of absolutely privileged communications, and therefore not actionable. In Buohs v. Backer, 6 Heisk., 404–407, the doctrine of Lea v. White is re-affirmed. It was a case where Buohs was sued in libel by a young girl, of whom he had written in a petition to the county court as next friend for certain minors, for the removal of their guardian, that "said guardian has had in his family a girl, who is now probably over sixteen years of age, who came to live with him at about the age of thirteen and has remained in his family ever since; her reputation is ruined and she is now an example of shame and prostitution."

The plea was that the words had been used in judicial proceedings in good faith and without malice. The trial judge had charged the jury that as the plaintiff was no party to the suit the communication could not be privileged, and there was verdict and judgment for $5,000. The cause was reversed in this court for error in said charge, and in not charging as requested that express or actual malice must be shown on the part of the petitioner in that cause. The well-known distinction between absolutely privileged communications and those only conditionally so is well stated in the case just referred to. Again, in Davis v. McNees, 8 Humph., 40, Judge Green, delivering the opinion of the court in reversing the judgment of the court below, said: "Whether the words that were spoken were used in the legitimate defense of himself, or were employed maliciously as a means of abuse and slander of McNees, should have been left to the jury." This was a case where the prosecutor was told by the magistrates, who had just adjudged the proof insufficient to convict the defendant of perjury, that they would have to tax him with the costs; the prosecutor replied that he did not see how they could do that, "as the defendant had sworn falsely and he had proved it." It was for the use of this language under these circumstances that the suit was brought, with the result above stated.

We recognize fully the importance to a due administration of justice of upholding the privilege accorded parties to write and speak freely in judicial proceedings; but, in so doing, we must not lose sight of the fact that it concerns the peace of society that the good name and repute of the citi-

zen shall not be exposed to the malice of individuals who, under the supposed protection of an absolute privilege, make use of the witness box to volunteer defamatory matter in utterances not pertinent. To hold such persons responsible in damages cannot fairly be said to hamper the administration of justice. The privilege of a witness is great and will be protected in all proper cases, but it must not be mistaken for unbridled license.

It follows that the truth or falsity of the matters alleged in the replications in this case, involving the good faith of the defendant in using the words imputed to him in the defense of himself, or whether they were employed as a means of abuse and slander of the plaintiff, should have been submitted to the jury with proper instructions. That this may be done the judgment is reversed and cause remanded.

§ 47. Digest of American Cases.—

1. In a case regarding disputed property where a witness is asked to fix a certain date, a reply as follows: "Not knowing that a mistress or woman of Mr. Plitt would step in to claim the lawful wife's property, I did not keep an account of the date that way. If I would have, I would have noticed the date and all those little particular incidents,"—is not so wholly foreign to the case as to be beyond the privilege of a witness, and is therefore not actionable as slander. Hunckel v. Voneiff, 69 Md., 179, 6 Atl. Rep., 500. But where a witness under examination voluntarily and maliciously, and not in response to a question, interjects into his answer defamatory matter, he loses his privilege as a witness and becomes liable in an action for slander. Shadden v. McElwee, 2 Pick. (86 Tenn.), 146, 5 S. W. Rep., 602.

2. Where a witness testifies in the regular course of legal proceedings and under the direction of the court, he is not liable in an action of slander for the answers he may make to questions put to him by the court or counsel, provided such answers are pertinent and responsive to the questions. Barnes v. McCrate, 32 Me., 442; Calkins v. Sumner, 13 Wis., 193.

3. The immunity of a witness in a judicial proceeding from liability to an action for slander is not affected by the Code of Mississippi, 1880, section 1004, which provides that "all words which from their usual construction and common acceptation are considered as insults and lead to violence and breaches of the peace, shall hereafter be actionable," and that no plea shall be sustained so as to preclude a jury from passing on the question. Verner v. Verner, 64 Miss., 184, 1 So. Rep., 479.

4. If a witness, while testifying in court, goes out of his way to utter a slander, his privilege does not protect him. Shadden v. McElwee, 86 Tenn., 146.

5. A defendant was cross-examined concerning a certain newspaper publication which the plaintiff's counsel afterwards incorporated into his printed brief. The publication on final hearing was declared incompetent as evidence, and the plaintiff and his counsel were sued for libel, the publication containing libelous matter concerning the defendant. There was nothing to show bad faith. *Held*, that the publication was privileged, and that the action could not be maintained. Stewart v. Hall, 83 Ky., 375.

6. In an action for words spoken upon the witness stand, the question is whether the words were spoken by the witness under the supposition that they were relevant to the case. Sleinecke v. Marx, 10 Mo. App., 580.

7. Where nothing is shown except that an alleged slanderous statement was made by the defendant as a witness in a judicial proceeding, the same must be regarded as absolutely privileged. Hutchinson v. Lewis, 75 Ind., 55.

8. In an action for slander for words spoken by a witness in answer to questions put to him as witness, *held*, that in the absence of an averment to the contrary, the court would presume that the answers were pertinent to the issue, believed to be true, and so privileged. Liles v. Gastor, 42 Ohio St., 631.

9. The immunity of a witness in a judicial proceeding from liability to an action for slander is not affected by the Mississippi Code, section 1004. Verner v. Verner, 64 Miss., 321, 1 So. Rep., 479.

§ 48. **Digest of English Cases.**—

1. Defendant, an expert in handwriting, gave evidence in the probate court in the trial of Davies v. May, that, in his opinion, the signature to the will in question was a forgery. The jury found in favor of the will, and the presiding judge made some very disparaging remarks on defendant's evidence. Soon afterwards defendant was called as a witness in favor of the genuineness of another document, on a charge of forgery before a magistrate. In cross-examination he was asked whether he had given evidence in the suit of Davies v. May, and whether he had read the judge's remarks on his evidence. He answered, "Yes." Counsel asked no more questions, and defendant insisted on adding, though told by the magistrate not to make any further statement as to Davies v. May: "I believe that will to be a rank forgery, and shall believe so to the day of my death." An action of slander for these words having been brought by one of the attesting witnesses to the will, *held*, that the words were spoken by defendant as a witness, and had reference to the inquiry before the magistrate, as they intended to justify the defendant, whose credit as a witness had been impugned; and the defendant was therefore absolutely privileged. Seaman v. Netherclift, 1 C. P. D., 540; 45 L. J., C. P., 798; 24 W. R., 884; 34 L. T., 878; (C. A.) 2 C. P. D., 53; 46 L. J., C. P., 128; 25 W. R., 159; 35 L. T., 784.

2. The plaintiff brought an action against L., and the defendant being produced as a witness at the trial, testified that the plaintiff was a common liar, by reason whereof the jury gave the plaintiff but small damages. After verdict for the plaintiff, in an action for slander, it was moved in arrest of judgment that the action did not lie; for if it did, every witness might be charged upon such a suggestion, and judgment was given for the defendant. Harding v. Bullman, 2 Hutt., 11.

§ 49. **Jurors.**— Whatever may be said by one juror to one of his fellows in the jury-room while considering their verdict concerning one of the parties to the suit, who has been a witness therein, cannot be the subject of an action for slander.[1]

[1] Cooley, Const. Lim., 545; Dunham v. Powers, 42 Vt., 1; Rector v. Smith, 11 Ia., 302.

§ 50. **Affidavits, Pleadings, etc.—The English Rule.**—Every affidavit sworn in the course of a judicial proceeding before a court of competent jurisdiction is absolutely privileged, and no action lies therefor, however false and malicious may be the statements made therein.[1] So is any indorsement on a writ.[2] So are all pleadings and instructions to counsel.[3] So are articles of the peace exhibited against the plaintiff.[4] The only exception is where an affidavit is sworn recklessly and maliciously before a court that has no jurisdiction in the matter, and no power to entertain the proceeding.[5] The court will, however, sometimes order scandalous matter in such an affidavit to be expunged.[6] But even for matter thus expunged no action can be brought.[7]

§ 51. **The American Rule** does not seem to be quite so broad. False accusations contained in affidavits or other judicial proceedings by which prosecutions for supposed crimes are commenced, or in any other papers in the course of judicial proceedings, are not so absolutely protected, and the party making them is liable to an action if actual malice be averred and proved. The law requires that they shall be made in good faith to courts or tribunals having jurisdiction of the subject and power to hear and determine the matter of complaint, and not resorted to as a cloak for private malice.[8]

§ 52. **Illustrations — American Cases.—**

THE PRIVILEGE ALLOWED.

1. An Indiana Case: *Hartsock v. Reddick*, 6 Blackf., 255.

Hartsock sued Reddick for a libel for charging him in writing with obtaining property by false pretenses. Among the pleas filed was a special plea alleging that the supposed libel was an affidavit made by the defend-

[1] Revis v. Smith, 18 C. B., 126; 25 L. J., C. P., 195; Henderson v. Broomhead, 4 H. & N., 569; 28 L. J., Ex., 360; 5 Jur. (N. S.), 1175.

[2] Lord Beauchamps v. Sir H. Croft, Dyer, 285*a*.

[3] See Bank of British North America v. Strong, 1 App. Cas., 307; 34 L. T., 627.

[4] Cutler v. Dixon, 4 Rep., 14.

[5] Buckley v. Wood, 4 Rep., 14; Cro. Eliz., 230; R. v. Salisbury, 1 Ld. Raym., 341; Lewis v. Levy, E., B. & E., 554; 27 L. J., Q. B., 282; 4 Jur. (N. S.), 970.

[6] Christie v. Christie, L. R., 8 Ch., 499; 42 L. J., Ch., 544; 21 W. R., 493; 28 L. T., 607.

[7] Kennedy v. Hilliard, 10 Ir. C. L. R., 195; 1 L. T., 578.

[8] Hoar v. Wood, 44 Mass., 193; McLaughlin v. Cowley, 127 Mass., 316; Hart v. Baxter, 47 Mich., 198; 10 N. W. Rep., 198; Hibbard et al. v. Ryan, 46 Ill. App., 313.

ant before a justice of the peace for the purpose of procuring a warrant for the arrest of the plaintiff on the charge of having obtained the property named in the affidavit by false pretenses. Upon this plea issue was joined, and there was a verdict and judgment for the defendant. The court instructed the jury, "If the paper in evidence called the libel is an affidavit made and sworn to and regularly presented to Justice W., of the county, for the purpose of obtaining from him a state warrant on which to arrest and try the plaintiff for obtaining goods by false pretenses, the action for a libel cannot be sustained." The propriety of the instruction being the only question, it was held that "a complaint made to a justice of the peace or other qualified magistrate for the purpose of enforcing justice against an individual accused of crime does not subject the person making the accusation to an action for libel. The foundation of this principle is the necessity of preserving the due administration of public justice. Few would be found to accuse if the institution of an unsuccessful prosecution subjected the prosecutor to an action for words spoken or written; and it makes no difference whether the charge be true or false, or whether it be sufficient to effect its object or not, if it be made in the due course of a legal or judicial proceeding it is privileged, and cannot be made the foundation of an action for defamation." Citing Cutler v. Dixon, 4 Rep., 14; Lake v. King, 1 Saund., 131; Johnson v. Evans, 3 Esp. R., 32; Buckley v. Wood, 4 Rep., 14.

2. **A Nebraska Case:** *Pierce v. Oard*, 23 Neb., 828; 37 N. W. Rep., 677.

The plaintiff, who was a merchant, procured to be written and by him signed an affidavit in the words and figures following: "State of Nebraska, Buffalo County — ss. Before me, William L. Beatty, justice of the peace in and for said county, personally came J. W. P——, who, being duly sworn according to law, deposes and says that on or about the 26th day of November, 1884, at and within the county of Buffalo, in the state of Nebraska, one M—— O—— [the plaintiff], then and there being, did unlawfully steal, take and carry away three pairs of rubbers of the value of $3.45, said rubbers being then and there the property of said affiant, and further deponent saith not. J. W. P—— [the defendant]. Subscribed in my presence and sworn to before me this —— day of ——, 18—." Which complaint he presented to the justice and desired him to swear him, the defendant, to it, and issue a warrant for the arrest of the plaintiff as required by law. The justice assured him that he was acquainted with the plaintiff, and that she would not commit such an act; that there was some mistake about it. He offered to pay for the shoes himself, and refused to issue the warrant. In a few hours the defendant again applied to the justice for the warrant, saying in substance that she had stolen three pairs of shoes from his store, and he could prove it. The justice again refused to issue the warrant, saying to him he was mistaken. On the next day the defendant went with a constable to the plaintiff's residence, having no warrant, and in the presence of her husband and children charged the plaintiff with the larceny of the shoes. On the trial it was claimed that the words complained of were privileged, but defendant failing to show that he had any reasonable or probable cause to believe that plaintiff had committed the larceny, the court ruled otherwise, and there was a verdict against him for $325, upon

which judgment was rendered. From this he appealed, but the supreme court sustained the judgment, holding that any person having reasonable and probable cause to believe that a crime has been committed has the right to communicate his suspicion to a justice of the peace or other magistrate having jurisdiction of the case; but the existence of reasonable and probable cause for the suspicion is essential to make the communication privileged.

3. An Iowa Case: *Rainbow v. Benson*, 71 Iowa, 301; 32 N. W. Rep., 352.

Plaintiff brought an action for damages for an alleged libelous publication contained in an affidavit filed by the defendants in a criminal action pending before a justice of the peace, and is as follows: "I, F. E. Benson, and John Reed, on oath state, I [John Reed] am the party filing the information herein, and that G. S. Rainbow, the deputy-sheriff, the officer to whom it is proposed to issue the venire and have to summon the jury in said case and act as constable or officer therein, is prejudiced in favor of the defendant in said cause, and is colluding with said defendant and men in the saloon business for the purpose of preventing their conviction; and to that end he, in exercising the duty of selecting and impaneling a jury to try said cause, wherein a party is accused of the crime of selling intoxicating liquors, takes particular pains to select men who are opposed to the enforcement of the prohibitory law, so called, and in hopes thereof to secure the acquittal of the defendant then to be tried; and that, if he should be allowed to select a jury in that case, affiant believes and alleges that he would, in the manner aforesaid, select a jury in the interest of the defense and with an object of securing the defendant's release. All this I verily believe." The answer alleged that the defendants at the time they signed and filed the paper were citizens of Shelby county; that the defendant John Reed had filed an information before the justice of the peace accusing one Al Wicks of the crime of selling intoxicating liquors contrary to law; that when said Wicks was brought before a justice of the peace for trial on said charge, he demanded a trial by jury, and thereupon the justice was about to direct the plaintiff to prepare a list of names of which such jury would be drawn, and to issue to him a venire to summon said jurors, when the defendant Reed made a motion orally asking the justice to designate some other peace officer to perform said duties, on the ground that plaintiff was prejudiced against the interests of the state in cases of that character; that he was directed by the justice to reduce the motion to writing and support the same by affidavits, and that he thereupon made and filed a written motion to that effect, and filed the affidavit in question in support thereof; that said motion and affidavit were made and filed in good faith and without malice, and in the performance of a public duty; and that defendants had good ground for believing, and did believe, that the allegations in the affidavit were true, and that they made the same for the sole purpose of imparting to the jury the matters contained therein. The plaintiff demurred that the justice did not have jurisdiction of the subject to which the publication referred, and that, upon the facts alleged in the answer, it was not privileged. The district court sustained the demurrer, and an appeal was taken. In the opinion the court say: "As to the power of the justice to entertain the motion and make the inquiry the statute provides that, 'If a

trial by jury be demanded, the justice shall direct any peace officer of the county to make a list in writing of the names of eighteen inhabitants of the county having the qualification of jurors in the district court, from which list the prosecutor and defendant may each strike out three names.' And we think the informant has the same right to enter an objection to the designation of a particular officer. He is not a party to the record, it is true, but the law allows him to institute the prosecution, for the reason that, as a citizen of the state, he has an interest in the faithful execution of its laws. Indeed, the duty of private individuals to institute criminal prosecutions is often the highest duties of citizenship, and having instituted such a prosecution he has a right to have the cause fairly and impartially tried. The right to make the objection in question results necessarily from his relation to the case. The investigation, while it does not relate to the matters involved in the main cause, takes place in the progress of the case and is incident to it. It is a judicial investigation in the same sense that the trial by a court of record of a challenge to a juror for cause is a judicial investigation. The matters alleged in the affidavit were clearly pertinent and material to the subject of the investigation. They tended to show that the officer was the partisan of the defendant, and that he would, if intrusted with the duty of selecting the jury, exercise the power of his position with the view of securing the acquittal of the defendant, regardless of the merits of the case. If the statement of the affidavit were true he was not a fit person to be intrusted with the power proposed to be conferred upon him. If the statements were made in good faith and in the honest belief that they were true, they are privileged. The judgment of the district court is reversed."

4. A Maryland Case: *Bartlett v. Christhilf*, 69 Md. 219.

In the Maryland court of appeals a case was recently (June 13, 1888) decided holding that an action for libel will not lie for statements contained in a petition by a receiver against his co-receiver, that such co-receiver was unlawfully withholding a portion of the assets, and was obstructing their collection, and that he was acting in contempt of court, and had embezzled some of the trust money, even though they are malicious and false; such statements being made in the course of judicial proceedings.

The opinion, which gives a fair exposition of the law, is as follows:

McSHERRY, J. In a proceeding instituted in the circuit court of Baltimore city by John D. Muir, plaintiff, against William P. Whiting and J. Kemp Bartlett, Jr., defendants, the said Bartlett and one Christhilf, the appellee, were appointed receivers. Some weeks thereafter Christhilf filed a petition in that case, alleging, in substance, that Bartlett was unlawfully and wrongfully withholding a portion of the assets from the receivers; that he was obstructing the collection of the assets of the firm; acting in contempt of the authority of the circuit court; and that he had embezzled some of the money belonging to the trust. Upon this petition an order was passed requiring Bartlett to show cause why he should not be attached for contempt, and removed from his office of receiver. Bartlett answered the petition, but, before any hearing was had upon it, the case of Muir against Whiting & Co. was settled, and dismissed by order of Muir, the plaintiff, and Whiting and Bartlett, the defendants. Thereupon Bartlett

instituted suit against Christhilf in the superior court of Baltimore city for an alleged libel and a malicious abuse of the process of the court. The declaration contains two counts. The first avers that the statements of the petition filed by Christhilf were libelous because they falsely and maliciously imputed to Bartlett a neglect of his duty as receiver, alleging that he was guilty of a contempt of the court which had appointed him to his position, and charged that he (Bartlett) had committed the crime of embezzlement in regard to moneys intrusted into his hands through the order of the court. The second count, for an alleged malicious abuse of the process of the court, will be stated later on in this opinion.

It is insisted that the appellee is not liable to be sued, in an action for libel, on account of anything stated by him in the petition alluded to, because it is claimed that the statements alleged to be libelous are privileged. We have had before us this term cases involving the privilege of counsel and of witnesses, and in the opinions delivered in those cases the authorities upon the subject of privilege have been fully reviewed. The case now before us, as far as the first count of the declaration is concerned, is of a kindred character, and must therefore be governed by the view of the law adopted by a majority of this court in those cases. It is stated in a work of high authority that "an action for defamation will not lie for anything sworn or stated in the course of a judicial proceeding before a court of competent jurisdiction, such as defamatory bills or proceedings filed in chancery or in the ecclesiastical courts, or affidavits containing false and scandalous assertions against others. Therefore, if a man goes before a justice of the peace and exhibits articles against the plaintiff containing divers false and scandalous charges concerning him, the plaintiff cannot have an action for a libel in respect of any matter contained in such articles; for the party preferring them has pursued the ordinary course of justice in such a case; and, if actions should be permitted in such cases, those who have just cause for complaint would not dare to complain for fear of infinite vexation. There is a large collection of cases where parties have from time to time attempted to get damages for slanderous and malicious charges contained in affidavits made in the course of a judicial proceeding, but in no one instance has the action been held to be maintainable; but the libeler may be punished, and the abuse repressed by a prosecution for perjury, the result of which is to make the libeler infamous if he is convicted." 2 Add. Torts (Wood's ed.), § 1092. In Odgers, Sland. & Lib., side page 193, it is stated that every affidavit sworn in the course of a judicial proceeding before a court of competent jurisdiction is absolutely privileged, and no action lies therefor, however false and malicious may be the statement therein. The only exception is where an affidavit is sworn recklessly and maliciously before a court that has no jurisdiction in the matter, and no power to entertain the proceedings. The court will order scandalous matter to be expunged, but even for such matter no action will lie.

Kidder v. Parkhurst, 3 Allen, 396, was an action for a libel on the plaintiff in a complaint made by the defendant against her for perjury. The complaint was made to the grand jury. The court says: "It [the complaint] therefore appears to have been made in the regular course of justice, and the decisions, ancient and modern, are uniform that no proceeding in a regular

course of justice is to be deemed an actionable libel." In Seaman v. Netherclift, 1 C. P. Div., 540, Lord Coleridge, C. J., said: "Now, a long course of authorities, of which, perhaps, the best known, as the most remarkable, is the case of Astley v. Younge [2 Burrows, 807], has decided that no action of slander can be brought for any statement made by the parties either in the pleadings or during the conduct of the case. The law is so stated very clearly by Lord Eldon in Johnson v. Evans [3 Esp., 32]. It is so stated, also, not indeed with absolute certainty, in a note to the well-known case of Hodgson v. Scarlett [1 Barn. & Ald., 232], the author of which note we learn from Baron Alderson, in Gibbs v. Pike [9 Mees. & W., 358], to have been Mr. Justice Holroyd himself. But I conceive the law on this point to be now quite certain, although most men of any experience in the profession must have seen many instances in which judicial proceedings have been made by parties to them to serve the ends of private malignity." In Henderson v. Broomhead, 4 Hurl. & N., 577, Crompton, J., laid it down that "no action will lie for words spoken or written in the course of any judicial proceeding." And again: "The rule is inflexible that no action will lie for words spoken or written in the course of giving evidence." Where the cause of action against a defendant was that he falsely and maliciously, and without any reasonable cause, went before a commissioner for taking oaths in the court of chancery, and swore out an affidavit stating of the plaintiff, in his character of an auctioneer, that he conducted his business fraudulently and improperly, and that he was not, in the deponent's opinion, a fit and proper person to be intrusted with the sale of certain property then the subject of a suit in the court of chancery, and the court, upon the evidence before it, decided that the plaintiff was not a fit and proper person to conduct the sale, it was held that the affidavit, being made in the course of a judicial proceeding, could form no ground of action. Revis v. Smith, 18 C. B., 126; 25 Law J., C. P., 195. See, also, Astley v. Younge, 2 Burrows, 807. These authorities, and others which might be cited, hold that statements made in any of the pleadings or proceedings in a cause before a court having jurisdiction of the subject are absolutely privileged, even though made maliciously and falsely. This privilege, protecting against a suit for libel or slander, is founded upon what would seem to be a sound public policy, which looks to the free and unfettered administration of justice, though, as an incidental result, it may, in some instances, afford an immunity to the evil-disposed and malignant slanderer.

While the appellee was not, in the literal sense of the term, a party to the case of Muir v. Whiting & Co., he is none the less within the reason, the spirit and the policy of the rule laid down and enforced by the decisions referred to. In this case it is not material whether the privilege invoked be considered an absolute or a qualified one, because the ruling of the court below upon the first count of the *narr.* is correct in either event. If the privilege be an absolute one, no action can be maintained at all for the alleged libelous words; and if, on the other hand, it be only a qualified privilege — that is, a privilege protecting the party using the words provided the thing written has relation to the subject-matter undergoing judicial investigation — the action cannot be sustained, in this case, for the reason that every averment of the petition did have a most direct relation to the

subject-matter brought before the court under that petition. The concession made by the demurrer, that these statements were false and maliciously made, does not render them actionable if the privilege be absolute, or if they be within the scope of a qualified privilege such as has been described. Now both the appellant and appellee were receivers in the case of Muir v. Whiting & Co. It was their duty to collect the assets of the firm, and to preserve them for the benefit of the trust. If either of them became derelict in his duty, it was plainly incumbent upon the other to bring that fact to the knowledge of the court, whose officers they both were. The proper and the only mode to do this was by petition filed in the case, and addressed to the court. This the appellee did. His act was therefore in the due, ordinary and regular course of justice. It was strictly within the line of a proper proceeding before a tribunal having jurisdiction of the subject, and having control of its own officers. Even though the words used in the petition are libelous, we think with Mr. Addison that, under such circumstances, no case can be found where a recovery has been allowed in a suit for libel founded upon statements contained in such a proceeding. And the reason is obvious. To allow such suits to prevail would most effectually deter every one from presenting a well-founded complaint for fear of being pursued with "infinite vexation." It is better, therefore, where the statements are false, and knowingly false, to leave the party injured to the redress which the criminal courts may apply, than to open the door for the institution of civil suits which may be successfully used as an efficient means to obstruct the full and fearless pursuit and administration of justice. In our judgment there is nothing disclosed by the first count of the *narr.* to warrant a recovery against the appellee.

The Privilege Not Allowed.

A Massachusetts Case: *McLaughlin v. Cowley*, 127 Mass., 316; 131 id., 70.

In an action of tort for a libel the declaration contained a count as follows: "And the plaintiff further says that the said defendant made, published and filed in the office of the clerk of the supreme judicial court, etc., and made a matter of public record in said court, a false and malicious libel concerning the plaintiff, a copy of which is hereto annexed, and therein falsely and maliciously charged the plaintiff with the crime of murder, in the words following, to wit, 'and well knew that the said McLaughlin' [meaning the plaintiff] 'caused to be put to death immediately after its birth an illegitimate child born to him' [meaning the plaintiff] 'by one S. C.,' etc.; and by the same words falsely and maliciously accused the plaintiff of the crime of adultery by thus charging that an illegitimate child was born to the plaintiff by one S. C., the plaintiff being a married man and having a lawful wife alive other than the said S. C.; and the defendant in said libelous paper falsely and maliciously accused the plaintiff of said crimes of murder and adultery, etc.; and the plaintiff avers that the said libelous paper was made and published and filed as aforesaid by the defendant of his express malice and without color for making said imputations, and with a design to defame and slander the plaintiff." Annexed to the count was a copy of the declaration in case of Nancy D. Leggate against Elbridge Moulton, signed by the defendant in the case at bar, as attorney for the plaintiff

in that case, and which alleged that the plaintiff was seized in fee of a lot of land in Newton worth $10,000, and desired to sell the same; that Lawrence McLaughlin requested the plaintiff to employ him as her agent and sell the land and to execute to him in form of law a conveyance thereof to enable him to dispose of it for her; that the defendant falsely and fraudulently represented to the plaintiff that McLaughlin was a trustworthy person; that the defendant well knew that the representations were false, "and well knew that McLaughlin had caused to be put to death immediately after its birth an illegitimate child born to him by one S. C.," etc.; that in consequence of the representations so made to her by the defendant, she, not knowing to the contrary, but believing therefrom that the said McLaughlin was a responsible and trustworthy man, was induced to employ him to sell said estate, and, for the better enabling him to dispose thereof, to execute to him a conveyance in form of law of her estate; that McLaughlin, contrary to his duty, made away with and converted to his own use the sum of $7,000, which he received as the proceeds of the sale by him of said estate, and that as a consequence of employing McLaughlin as her agent she had lost the possession, use and income of her estate and all the proceeds accruing from the sale thereof. To the declaration in the case at bar the defendant filed a general denial of each and every allegation therein contained, with an averment that should the plaintiff prove that he filed or published or caused to be published said paper, then the same was and is true and not libelous. The trial resulted in a verdict for the plaintiff, to which the defendant alleged exceptions. In considering the exceptions Lord, J., said: "A careful examination of the declaration in the case of Leggate against Moulton shows that the action was brought to recover damages for losses sustained by Leggate in consequence of employing the plaintiff in the case at bar as her agent, and that he was also employed because Leggate believed certain false representations made by Moulton as to McLaughlin's trustworthiness and fitness for the agency. The declaration sets forth the representations made, and alleges that they were false and that Moulton knew it, and then proceeds with the statements which are here charged to be libelous. These statements relate to matters not mentioned in the representations made by Moulton. They do not directly negative the truth of any of his representations, and were not necessary or material to a full and complete presentation of the case on which Leggate asked for damages. The ground of action was not strengthened by adding them, nor did they furnish any basis for enhancing the damages which might be recovered. They were not pertinent to the action, and were struck out of the declaration by the court on motion of Moulton. They contained charges against the present plaintiff of criminal conduct of the grossest character. To hold that such statements, thus uncalled for and irrelevant, are privileged, as a part of the pleadings in a cause, would be to disregard the salutary modification of the English rule which has been made by the American courts. The defendant therefore stands as to liability to an action on account of these statements precisely the same as if he had published them in a newspaper, and cannot justify by showing his belief that they were true, the sources of his information or his instructions from his client. It is only when words are published on an occasion which makes them privileged that the belief of the publisher may be shown."

§ 53. Digest of American Cases.—

1. Statements in an affidavit made in support of an answer to be used in opposition to an application for an injunction are privileged, provided they are not irrelevant and impertinent. Hart v. Baxter, 47 Mich., 198; 10 N. W. Rep., 198.

2. When a party files a bill in chancery against another, and in it alleges that the defendant's general character for honesty is bad and other similar statements, *held*, that such charges made in the due course of the administration of justice are privileged and that slander or libel will not lie on them. Strauss v. Meyer, 48 Ill., 385.

3. An affidavit filed by an informant in a prosecution before a justice of the peace for selling intoxicating liquors contrary to law in support of an application requesting the justice to designate some peace officer other than the one proposed by the justice to summon the jury, and which alleges that said constable is prejudiced in favor of the defendant and is colluding with the defendant and men in the saloon business for the purpose of preventing their conviction, and is in the habit of selecting men for the jury who are opposed to the enforcement of the prohibitory law, is a privileged communication if made in good faith and the matters therein are pertinent. Rainbow v. Benson, 71 Iowa, 301; 32 N. W. Rep., 352.

4. Stockholders of a corporation filed a petition in a court having jurisdiction of the cause against the corporation, alleging that the president, with the approval of the directors, had been fraudulently conducting the management of the company, detailing the acts alleged to show a concerted scheme to reduce the value of the company's stock, and buy it in and control the company's affairs, and thus destroy the plaintiff's interests, and asked for the appointment of a receiver. *Held* that, as proceedings in courts are absolutely privileged, a director of the company, though not a party to the suit, could not maintain an action for alleged defamatory matter contained in the petition, though it was false and malicious and made under color and pretense of a suit without right. The plaintiff also alleged that, after he had filed an affidavit denying the charges, the defendants caused the same to be published in a newspaper, "repeating through [its] columns the said libelous matter," and attached the newspaper article as an exhibit to its petition. The article contained a report of the suit, its object, the charges made, some of which were not declared on. The libelous matter relied on was not pointed out, except by declaring it to be a repetition of the matter contained in the petition, but the article contained much more matter and the language was different. *Held* that, if an independent cause of action can be set up by borrowing from former allegations, the language relied on as libelous must be set out *in hæc verba*, and the damages alleged to result therefrom be specified. Runge v. Franklin, 72 Tex., 585, 10 S. W. Rep., 721.

5. Where the court has jurisdiction to grant injunctions, the allegations in a bill applying for one are privileged though the grounds set forth in the bill are not sufficient to obtain one. A plea justifying the words as true to the best of defendant's knowledge and belief is no waiver of the privilege that they were used in judicial proceedings, and does not render words libelous which were not so when the action was brought. Where the alleged libelous matter is contained in a bill praying for an injunction,

and is relevant and material, it is absolutely privileged. Wilson v. Sullivan, 81 Ga., 238, 7 S. E. Rep., 274.

6. The publication by newspapers of pleadings or other proceedings in civil cases, before trial, is not privileged. Park v. The Detroit Free Press Co., 72 Mich., 560, 40 N. W. Rep., 731.

7. An affidavit made before a magistrate charging perjury, and made for the purpose of causing an arrest, will not support an action for libel, though falsely and maliciously made. Francis v. Wood. 75 Ga., 648.

8. One who, in an affidavit in a judicial proceeding, charges a woman with being a common prostitute, is not guilty of slander. Lindsey v. State, 18 Tex. App., 280.

9. Averments in an affidavit in support of a motion for a new trial of a criminal case in a court of competent jurisdiction, if material, are privileged, and, even if shown to be false and malicious, will not subject the affiant to an action in damages. Burke v. Ryan, 36 La. Ann., 951.

10. A. was on trial before a Masonic lodge. B. testified, and C. made affidavit that B. could not be believed under oath. Neither B. nor C. were Masons. *Held*, that C.'s communication was not privileged. Nix v. Caldwell, 81 Ky., 293; 50 Am. Rep., 163.

11. A defamatory statement contained in the declaration, in an action signed by counsel, if not pertinent or material to the issue, is not privileged, and in an action for libel against the counsel he cannot justify by showing his belief that it was true, the sources of his information or his instructions from his client. McLaughlin v. Cowley, 127 Mass., 316.

12. An attorney sued his client for professional services, who gave notice, under the general issue, that he would prove that the plaintiff conducted the prosecution and defense of the several suits, and attended to the other professional business in the declaration mentioned in so careless, unskilful and improper a manner as to render such service of no value; and the attorney moved to strike out the notice as false, and the client resisted upon his affidavit, stating that the attorney had revealed confidential communications of the client relative to a portion of the business to a third person, to the client's prejudice. In the attorney's action for libel, upon his declaration reciting these facts, and charging that the affidavit was malicious and impertinent, *held*, that the affidavit was pertinent to the motion, and that the law would not allow its truth or falsity to be drawn in question in the action. Garr v. Selden, 4 Coms., 91; rev'g 6 Barb., 416.

13. In an action for a libel the defendant may plead that the matter was part of an affidavit used in opposing an application to mitigate bail in an action by him against the plaintiff, and that he had reasonable and probable cause for believing, and did at the time believe, that it was true. Suydam v. Moffat, 1 Sand., 459.

14. Where the plaintiff in a suit demands a bill of particulars he cannot maintain an action for libel upon any statements therein made. Perzel v. Tausey, 52 N. Y. Sup. Ct., 79.

15. The presumption is that a complaint drawn and signed by an attorney is privileged, and an action for libel cannot therefore be maintained upon it, neither malice nor bad faith being shown. Dada v. Piper, 41 Hun (N. Y.), 254.

16. Whatever is said or written in a legal proceeding pertinent and material to the matter in controversy is privileged, and no action can be maintained upon it. So in an action on the case for wrongfully suing out an attachment, a count in the declaration which was merely a count in slander, based upon an alleged libelous affidavit filed for the procurement of the writ, was *held* bad on demurrer. Spaids v. Barrett, 57 Ill., 289; Hill. on Torts, 344; Warner v. Payne, 2 Sandf. (N. Y.), 195; Garr v. Selden, 4 Comst. (N. Y.), 91.

17. A party cannot be held in damages for allegations set up by him in his pleadings in a suit which assail the character of the other party where it appears that the circumstances were such that he might reasonably believe that the allegations were true. Wallis v. New Orleans Times Co., 29 La. Ann., 66.

18. In an answer statements relevant believed by the defendant to be true, and made without malice, upon probable cause and by the advice of counsel, are not ground for a recovery in a suit for libel. So held as to an answer charging a woman with perjury in obtaining certain notes in settlement of a bastardy case. Lanning v. Christy, 30 Ohio St., 115.

19. Where a bill was filed by a mortgagor to reform the mortgage, and an agent of the mortgagee was charged therein with fraud in connection with the drafting of the mortgage, and said agent made affidavit in support of the answer, averring therein that the charge of fraud was wilfully and maliciously false, *held*, that an action counting on these words as a libel would not lie. Hart v. Baxter, 47 Mich., 198.

20. A party may allege fraud in his pleadings in a suit for the purposes of his case without thereby rendering him liable in damages for a libel when the charge is made in good faith, without malice, and is based upon facts affording a reasonable inference of fraud. Vinas v. Merchants' Mut. Ins. Co., 33 La. Ann., 1265.

21. An action may be maintained for aspersions contained in an affidavit filed in a suit; there is no rule that matters alleged in an affidavit in judicial proceedings are absolutely privileged. Kelly v. Lafitte, 28 La. Ann., 435.

§ 54. Digest of English Cases.—

1. No action will lie for defamatory expressions against a third party contained in an affidavit made and used in the proceedings in a cause, though such statements be false, to the knowledge of the party making them, and introduced out of malice. Henderson v. Broomhead, 28 L. J., Ex., 360; 4 H. & N., 569; 5 Jur. (N. S.), 1175; Astley v. Younge, 2 Burr., 807; 2 Ld. Kenyon, 536; Revis v. Smith, 18 C. B., 126; 25 L. J., C. P., 195; 2 Jur. (N. S.), 614.

2. If application be *bona fide* made to a court which the defendant by a pardonable error honestly believes to have a jurisdiction which it has not, the privilege will not be lost merely by reason of this error. Buckley v. Wood, 4 Rep., 14; Cro. Eliz., 230; M'Gregor v. Thwaite, 3 B. & C., 24; 4 D. & R., 695. But in other cases an affidavit made voluntarily when no cause is pending, or made *coram non judice*, is not privileged as a judicial proceeding. Maloney v. Bartley, 3 Camp., 210; Odgers on S. & L., 194.

3. An attorney's bill of costs is in no sense a judicial proceeding, though

delivered under a judge's order, and can claim no privilege. Bruton v. Downes, 1 F. & F., 668.

4. A charge of felony made by the defendant when applying in due course to a justice of the peace for a warrant to apprehend the plaintiff on that charge is absolutely privileged. Ram v. Lamley, Hutt., 113. See Johnson v. Evans, 3 Esp., 32; Weston v. Dobniet, Cro. Jac., 432; Dancaster v. Hewson, 2 Man. & R., 176.

5. Defamatory communications made by witnesses or officials to a court-martial, or to a court of inquiry instituted under articles of war, are absolutely privileged. Keighley v. Bell, 4 F. & F., 763; Dawkins v. Lord Rokeby, L. R., 8 Q. B., 255; 42 L. J., Q. B., 653; 21 W. R., 544; 4 F. & F., 806; 28 L. T., 134; L. R., 7 H. L., 744; 45 L. J., Q. B., 8; 23 W. R., 931; 33 L. T., 196.

6. No action lay for defamatory expressions contained in a bill in chancery. Hare v. Mellers, 3 Leon., 138; as explained by Pollock, B., 16 Q. B. D., at p. 113.

§ 55. **Publication of Pleadings in Civil Cases Before Trial Not Privileged.**— There is no rule of law which authorizes any but the parties interested to handle the files or publish the contents of their matters in litigation. The parties, and none but the parties, control them. One of the reasons why parties are privileged from suit for accusations made in their pleadings is that the pleadings are addressed to courts where the facts can be fairly tried, and to no other readers. If pleadings and other documents can be published to the world by any one who gets access to them, no more effectual way of doing mischief with impunity can be devised than filing papers containing false and scurrilous charges, and getting them printed as news. The public have no rights to any information on private suits till they come for public hearing or action in open court; and when any publication is made involving such matter they possess no privilege, and the publication must rest on either non-libelous character or truth to defend it. A suit thus brought with scandalous accusations may be discontinued without any attempt to try it, or on trial the case may easily fail of proof or probability. The law has never authorized any such mischief. It has been uniformly held that the public press occupies no better ground than private persons publishing the same libelous matter, and, so far as actual circulation is concerned, there can be no question which is more likely to spread them.[1]

[1] Park v. Detroit Free Press Co., 72 Mich., 530; 40 N. W. Rep., 731.

§ 56. **Illustrations — American Cases.—**

1. **A Michigan Case:** *Park v. Detroit Free Press Co.*, 72 Mich., 560; 40 N. W. Rep., 731.

Park, the plaintiff, sued the Detroit Free Press Company for a libel against him published in the paper, to the effect that he had been the day before (June 23, 1888) arrested and brought before a justice of the peace in Detroit on the charge of bastardy, and on his plea of not guilty was released on his personal recognizance to appear the next day for his preliminary examination. The defendant pleaded the general issue, with notice of a special defense to the effect that one of its reporters, who was a prudent and skilful person, obtained the information in good faith from the clerk of the court, and that it was published without malice or negligence, and claimed to be privileged; that on the next day a correction was published as conspicuously as the libel, to the effect that the plaintiff was the attorney for the prosecution, and not the defendant in the bastardy proceeding; and that the mistake occurred through the justice's clerk, who gave the plaintiff's name as the defendant in the bastardy case; that on the file-wrapper the plaintiff's name was so placed, and that everything was done in good faith, the falsehood being due to mistake. On the trial there was a finding and judgment for the defendant under a statute providing that in suits brought for the publication of libels in any newspaper only such actual damages as may be proved can be recovered if it appear that the publication was made in good faith and did not involve a criminal charge, and was due to a mistake, and that a retraction was published, etc. But on appeal the supreme court held the act unconstitutional, and the publication by newspapers of pleadings or other proceedings in civil cases before trial not privileged.

§ 57. **Third Class — Communications Relating to Military and Naval Affairs.—** A similar privilege, resting also on obvious grounds of public policy, is accorded to all reports made by a military officer to his military superiors in the course of his duty, and to evidence given by any military man to a court-martial or other military court of inquiry, it being essential to the welfare and safety of the state that military discipline should be maintained without any interference by civil tribunals. In short, "all acts done in the honest exercise of military authority are privileged." The law is of course the same as to the navy. Naval and military matters are for naval and military tribunals to determine, and not the ordinary civil courts.[1]

[1] Hart v. Gumpach, L. R., 4 P. C., 336; 21 L. T., 584; Dawkins v. Lord 439; 9 Moore, P. C. C. (N. S.), 241; Rokeby, L. R., 7 H. L., 744; 45 L. J., 42 L. J., P. C., 25; 21 W. R., 365; Q. B., 8; 23 W. R., 931; 33 L. T., 196; Dawkins v. Lord Paulet, L. R., 5 Q. 4 F. & F., 806; Odgers on L. & S., B., 94; 39 L. J., Q. B., 53; 18 W. R., 194.

§ 58. **Extent of the Rule in America.**— All confidential archives and "secrets of state" pertaining to the administration of the government, the disclosure of which would be prejudicial to public interests; the archives of the executive departments at Washington, including such papers and documents as official communications and correspondence between the president or members of the cabinet and public officials and agents, civil and military; reports of investigations and other official communications made in the line of duty by officers of the army or navy to their military or naval superiors; records of advisory boards, etc.,— are privileged communications.[1]

§ 59. **Heads of Departments Keepers of the Archives.**— The heads of departments in whose legal custody these matters are cannot in general be required to furnish the same or copies to be produced in court, if the fact is determined by them that it is not for the public interest to make such contents public; and if furnished, the court will, in general, refuse to admit them in evidence if objection is made. There seems to be but one exception to the rule, and that is where the official communication is first shown to have been made maliciously and without just cause.[2]

§ 60. **Illustrations — Digest of American Cases.**—

1. M. was a teacher in the United States Naval Academy, and placed his resignation in the hands of W., the superintendent of the academy, to be forwarded to the secretary of the navy for his decision. W. was required by law to indorse his opinion thereon. The resignation was forwarded by W. with his indorsement thereon of reasons why it should be accepted. In a suit for libel, based on such indorsement, it was *held* that the indorsement did not fall within the class of communications which are absolutely privileged, but that it was privileged, however, to the extent that the occasion of making it rebutted the presumption of malice, and threw upon the plaintiff the *onus* of proving that it was not made from duty, but from actual malice, and without reasonable and probable cause. Maurice v. Worden, 54 Md., 233; 39 Am. Rep., 384.

§ 61. **Digest of English Cases.**—

1. The defendant, being the plaintiff's superior officer, in the course of his military duty, forwarded to the adjutant-general certain letters written by the plaintiff, and at the same time, also in accordance with his military duty, reported to the commander-in-chief on the contents of such letters, using words defamatory of the plaintiff. It was alleged that the defend-

[1] 2 Winthrop's Military Law, 467. Wharton's Crim. Ev., § 513; 1
[2] Maurice v. Worden, 54 Md., 233; Greenleaf's Ev., § 251; Gardner v. 2 Winthrop's Military Law, 468; Anderson, 22 Int. Rev. Rec., 41.

ant did so maliciously, and without any reasonable, probable or justifiable cause, and not in the *bona fide* discharge of his duty as the plaintiff's superior officer. *Held*, on demurrer, by the majority of the court of queen's bench (Mellor and Lush, JJ.), that such reports being made in the course of military duty were absolutely privileged, and that the civil courts had no jurisdiction over such purely military matters. Cockburn, C. J., dissented on the grounds that it never could be the duty of a military officer falsely, maliciously and without reasonable and probable cause to libel his fellow-officer; that the courts of common law have jurisdiction over all wilful and unjust abuse of military authority, and that it would not in any way be destructive of military discipline or of the efficiency of the army to submit questions of malicious oppression to the opinion of a jury. Dawkins v. Lord Paulet, L. R., 5 Q. B., 94; 39 L. J., Q. B., 53; 18 W. R., 336; 21 L. T., 584. There was no appeal in this case. The arguments of Cockburn, C. J., deserve the most careful attention. In Dawkins v. Lord Rokeby, *supra*, the decision of the house of lords turned entirely on the fact that the defendant was a witness. Neither Kelly, C. B., nor any of the law lords (except perhaps Lord Penzance), rest their judgment on the incompetency of a court of common law to inquire into purely military matters. The court of exchequer chamber no doubt express an opinion that "questions of military discipline and military duty alone are cognizable only by a military court, and not by a court of law." L. R., 8 Q. B., 271. But after referring to "the eloquent and powerful reasoning of L. C. J. Cockburn in Dawkins v. Lord F. Paulet." the court goes on to express its satisfaction that the question "is yet open to final consideration before a court of the last resort." However, in a court of first instance, at all events, it must now be taken to be the law that the civil courts of common law can take no cognizance of purely military or purely naval matters. (Sutton v. Johnstone, 1 T. R., 493; Grant v. Gould, 2 Hen. Bl., 69; Barwis v. Keppel, 2 Wils., 314); but wherever the civil rights of a person in the military or naval service are affected by any alleged oppression or injustice at the hands of his superior officers or any illegal action on the part of a military or naval tribunal, there the civil courts may interfere. Re Mansergh, 1 B. & S., 400; 30 L. J., Q. B., 296; Warden v. Bailey, 4 Taunt., 67; Odgers on L. & S., 195. But private letters written by the commanding officer of the regiment to his immediate superior on military matters, as distinct from his official reports, are not absolutely privileged; but the question of malice should be left to the jury. Dickson v. Earl of Wilton, 1 F. & F., 419; Dickson v. Cambermere, 3 F. & F., 527. If this be not the distinction, these cases must be taken to be overruled by the cases cited above. L. R., 8 Q. B., 272-3.

2. By a general order it was declared that all unemployed Indian officers ineligible for public employment, by reason of misconduct or physical or mental inefficiency, should be removed to the pension list. Under this order the plaintiff was removed to the pension list and a notification of such removal was published in the "Indian Gazette." *Held*, on demurrer, that no action lay either for the removal of the plaintiff or for the official publication of the fact, although special damage was alleged. Grant v. Secretary of State for India, 2 C. P. D., 445; 25 W. R., 848; 37 L. T., 188; Doss v.

Secretary of State for India in Council, L. R., 19 Eq., 509; 23 W. R., 773; 32 L. T., 294; Oliver v. Lord Wm. Bentinck, 3 Taunt., 456.

3. A military court of inquiry may not be strictly a judicial tribunal, but where such court has been assembled under the orders of the general commanding in chief, in conformity with the queen's regulations for the government of the army, a witness who gives evidence thereat stands in the same situation as a witness giving evidence before a judicial tribunal, and all statements made by him thereat, whether orally or in writing, having reference to the subject of the inquiry, are absolutely privileged. Dawkins v. Lord Rokeby, L. R., 7 H. L., 744; 45 L. J., Q. B., 8; 23 W. R., 931; 33 L. T., 196; Exch. Ch., L. R., 8 Q. B., 255; Goffin v. Donnelly, 6 Q. B. D., 307; 50 L. J., Q. B., 303; 29 W. R., 440; 44 L. T., 141; 45 J. P., 439; Keighley v. Bell, 4 F. & F., 763; Home v. Bentinck, 2 B. & B., 130; 4 Moore, 563.

§ 62. **Second, the Qualified Privilege — The Subject Classified.**— In the less important matters, however, the interests and welfare of the public do not demand that the speaker should be freed from all responsibility, but merely require that he should be protected so far as he is speaking honestly for the common good. In these cases the privilege is said not to be absolute but qualified; and a party defamed may recover damages notwithstanding the privilege if he can prove that the words were not used in good faith, but that the party availed himself of the occasion wilfully and knowingly for the purpose of defaming the plaintiff. In this class of cases it will be convenient to divide the occasions into three classes:

(1) Where the circumstances of the occasion cast upon the defendant the duty of making a communication to a certain other person to whom he makes such communication in the *bona fide* performance of such duty.

(2) Where the defendant has an interest in the subject-matter of the communication, and the person to whom he communicates it has a corresponding interest.

(3) Reports of the proceedings of courts of justice and legislative bodies.

First Class — Qualified Privilege.

§ 63. **Where the Circumstances Cast upon the Party the Duty of Making the Communication.**— In those cases where the circumstances of the occasion cast upon a party the duty of making a communication, the duty may be either one which

the party owes to society or one which he owes to himself or his family.

Communications made in pursuance of the duty owed to society are: (1) characters of servants; (2) confidential communications of a private nature; (3) information as to the misconduct of others and crimes; and (4) charges against public officers.

Communications made in pursuance of the duty owed to his family or to himself are: (1) statements necessary to protect his private interests, and (2) statements provoked by other parties.

§ 64. **Character of the Duty Cast upon the Party Communicating.**— The duty referred to need not be one binding at law: any moral or social duty of imperfect obligation will be sufficient.[1] And it is sufficient if the defendant honestly believes that he has a duty to perform in the matter, although it may turn out that the circumstances were not such as he reasonably concluded them to be.[2] It is a question of good faith, in determining which the law looks at the circumstances of each case as they presented themselves to the mind of the defendant at the time; the presumption being that he has been guilty of no laches, and did not wilfully shut his eyes to any source of information. If there were means at hand for ascertaining the truth of the matter, of which the defendant neglected to avail himself, and chose rather to remain in ignorance when he might have obtained full information, there can be in law no pretense for any claim of privilege.

The defendant must, at the date of the communication, implicitly believe in its truth. If a man knowingly makes a false charge against his neighbor he cannot claim privilege. It never can be his duty to circulate lies.[3]

Cockburn, C. J.: "For to entitle matter, otherwise libelous, to the protection which attaches to communications made in the fulfillment of a duty, *bona fides*, or, to use our own equivalent, honesty of purpose, is essential; and to this again two things are necessary: (1) that the communication be made not merely in the course of duty — that is, on an occasion which

[1] Harrison v. Bush, 5 E. & B., 344; 25 L. J., Q. B., 25; Rainbow v. Benson, 71 Iowa, 301; Smith v. Higgins, 16 Gray, 251; Lewis v. Chapman, 16 N. Y., 369; Palmer v. Concord, 48 N. H., 211; Knowles v. Peck, 42 Conn., 386; Easley v. Moss, 9 Ala., 266.

[2] Whiteley v. Adams, 15 C. B. (N. S.), 392; 33 L. J., C. P., 89; 12 W. R., 153; 9 L. T., 483; 10 Jur. (N. S.), 470.

[3] Briggs v. Garrett, 111 Pa. St., 404.

would justify the making it — but also from a sense of duty; (2) that it be made with a belief of its truth."[1]

§ 65. **The Party Must Guard Against Exaggerated Expressions.**— Where a person, acting under a sense of duty, makes a communication which he reasonably believes to be true, he must be careful not to be led away by his honest indignation into exaggerated or unwarrantable expressions. The privilege extends to nothing which is not justified by the occasion.[2]

§ 66. **The Subject-matter — Manner of Communication.**— Where the expressions employed are allowable in all respects, the manner of publication may take them out of the privilege. Confidential communications must not be shouted across the street for all passers-by to hear. Nor should they be transmitted by post-card or telegram, which others may read. They should be sent in a letter properly sealed and fastened. If the words be spoken, the defendant should choose a time when no one else is by except those to whom it is his duty to make the statement. It is true that the accidental presence of some third person, unsought by the defendant, will not take the case out of the privilege; but it would be otherwise if the defendant purposely sought an opportunity of making a communication *prima facie* privileged in the presence of the very persons who were most likely to act upon it to the prejudice of the plaintiff.[3]

§ 67. **When the Communication Exceeds the Privilege.**—If the communication has been made in good faith, fairly, impartially, without exaggeration or the introduction of irrelevant defamatory matter, the communication is privileged. But it must be remembered that although the occasion may be privileged, it is not every communication made on such occasion that is privileged. It is not enough to have an interest or duty in making a communication; the interest or duty must be shown to exist in making the communication complained of.[4] A communication which goes beyond the occasion exceeds the privilege.

[1] Dawkins v. Lord Paulet, L. R., 5 Q. B., p. 102.

[2] Warren v. Warren, 1 C., M. & R., 251; 4 Tyr., 850; Huntley v. Ward, 6 C. B. (N. S.), 514; 1 F. & F., 552; 6 Jur. (N. S.), 18; Simmonds v. Dunne, Ir. R., 5 C. L., 358; Lewis v. Chapman, 16 N. Y., 369; Smith v. Higgins, 16 Gray, 251; Edwards v. Chandler, 14 Mich., 471; Quinn v. Scott, 23 Minn., 456.

[3] Harris v. Zanone, 93 Cal., 59; 28 Pac. Rep., 845; Vallery v. State, 42 Neb., 123; 60 N. W. Rep., 347.

[4] Dowse, B., 6 L. R., Ir., p. 269; King v. Patterson, 49 N. J. L., 417; Byam v. Collins, 111 N. Y., 143; Dunsee v. Norden, 36 La. Ann., 78; Clemmons v. Danforth, 67 Vt., 617; 32 Atl. Rep., 626.

The first two classes are sometimes stated as one, and cases frequently occur which seem to come under either or both of them. But the distinction made by an English writer between them is this:

"In the first class of cases the defendant makes the communication, perhaps to an entire stranger, generally to one with whom he has had no previous concern; and he does so because he feels it to be his duty so to do. The person to whom he makes the communication is under no corresponding obligation, and generally has no common interest with the defendant in the matter. The defendant's duty would be the same to whomsoever the communication had to be made."

"In the second class of cases, however, there must have been an intimate relation or connection already established between the defendant and the person to whom he makes the communication, and it is because of this relationship that the communication is privileged. The same words, if uttered to another person with whom the defendant had no such connection, would not be privileged." [1]

The question whether the communication is or is not privileged by reason of the occasion is for the court, especially where there is no dispute as to the circumstances under which it was made.[2]

§ 68. **Province of the Court and the Jury — Practice.**— If there exist any doubts as to these circumstances, the court may direct the jury to find a special verdict as to what the circumstances in fact were, or what the defendant honestly believed them to be, if that be the point to be determined; and on their findings the court may determine whether the occasion was privileged or not. If the occasion is not privileged, and the words are defamatory and false, the court will instruct the jury, if they so find, to return a verdict for the plaintiff. If the occasion is absolutely privileged, judgment will be given for the defendant. If, however, the occasion is one of qualified privilege only, the burden is cast upon the plaintiff of proving actual malice on the part of the defendant; and if he gives no such evidence, it is the duty of the court to nonsuit him, or to direct a verdict for the defendant. If, however, he does

[1] Odgers on L. & S., 198.

[2] State v. Griffith, L. R., 2 P. C., L. T., 197.

420; 6 Moore, P. C. C. (N. S.), 18; 20

give any evidence of malice sufficient to go to the jury, then it is a question for the jury whether or not the defendant was actuated by malicious motives in the publication of the defamatory words.

The laws of the different states, however, in relation to the practice in courts having jurisdiction in actions for defamation, especially in relation to general and special verdicts and instructions to juries, are somewhat at variance, and it is impossible to give any more than a rule founded upon general principles.

Communications Volunteered in the Discharge of a Duty.

§ 69. **(1) A Confidential Relation Existing between the Parties.**— It is often a difficult question to determine in what cases a party is privileged in going of his own accord to the person concerned and giving him information which is not asked for. In one class of cases it is clear that it is not only excusable but it is imperative on a person to do so; and that is where there exists between the parties such a confidential relation as to throw on the party the duty of protecting the interests of the persons concerned.

Such a relationship exists between husband and wife, father and son, brother and sister, guardian and ward, master and servant, principal and agent, solicitor and client, partners or intimate friends, wherever any trust or confidence is reposed by the one in the other. It will be the duty of the one to volunteer information to the other, whenever he could justly reproach him for his silence if he did not volunteer such information.[1]

§ 70. **The Rule Stated by Chief Justice Shaw.**— Where words imputing misconduct to another are spoken by one having a duty to perform, and the words are spoken in good faith and in the belief that it comes within the discharge of that duty, or where they are spoken in good faith to those who have an interest in the communication and a right to know and act upon the fact stated, no presumption of malice arises from the speaking of the words, and therefore an action can be maintained in such cases without proof of express

[1] Streety v. Wood, 15 Barb., 105; Van Wyck v. Aspinwall, 17 N. Y., 190; Byam v. Collins, 111 N. Y., 143. King v. Patterson, 49 N. J. L., 417;

malice. If the occasion is used merely as a means of enabling the party uttering the slander to indulge his malice, and not in good faith to perform a duty or make a communication useful and beneficial to others, the occasion will furnish no excuse.[1]

§ 71. **Manner of Conveying the Communication.**— Merely labeling a letter "private and confidential," or merely stating "I speak in confidence," will not make a communication confidential in the legal sense of that term if there be in fact no relationship between the parties which the law deems confidential.[2]

§ 72. **The Law Illustrated — Examples and Applications.**— "It is clearly the duty of my steward, bailiff, foreman or housekeeper, to whom I have intrusted the management of my lands, business or house, to come and tell me if they think anything is going wrong, and not to wait till my own suspicions are aroused and I myself begin asking questions. So my family solicitor may voluntarily write and inform me of anything which he thinks it is to my advantage to know without waiting for me to come down to his office to inquire. But it would be dangerous for another solicitor, whom I had never employed, to volunteer the same information; for till I retain him in the matter there is no confidential relation existing between us. So a father, guardian or an intimate friend may warn a young man against associating with a particular individual, or may warn a lady not to marry a particular suitor; though in the same circumstances it might be considered officious and meddlesome if a mere stranger gave such a warning. So if the defendant is in the army or in a government office it would be his duty to inform his official superiors of any serious misconduct on the part of his subordinates, for the defendant is in some degree answerable for the faults of those immediately under his control."[3]

§ 73. **Illustrations — Digest of American Cases.—**

1. Statements contained in an affidavit presented to a superintendent of schools for the purpose of preventing a teacher's license being granted to a

[1] Bradly v. Heath, 12 Pick. (Mass.), 163; Skeekell v. Jackson, 10 Cush. (Mass.), 26.

[2] Krebs v. Oliver, 78 Mass., 242; Picton v. Jackman, 4 C. & P., 257.

[3] Odgers on L. & S., 211; Belle v. Parke, 10 Ir. C. L. R., 284; 11 Ir. C. L. R., 413.

particular person, charging such person with improper conduct, are privileged and not actionable unless untrue and maliciously made. Weiman v. Maybie et al., 45 Mich., 484; 8 N. W. Rep., 465. But statements that a man had been imprisoned for larceny, made to the family of a woman he is about to marry, by one who is no relation of either, and not in answer to inquiries, are not privileged. Krebs v. Oliver, 78 Mass., 239. And so a letter by a mere volunteer, containing defamatory statements as to a man's character, not known to be true, written for the purpose of breaking off relations which may lead to his marriage with a friend, but not a near relative of the writer, is not privileged. Defamatory words do not become privileged merely because uttered in the strictest confidence by one friend to another, or because uttered upon the most urgent solicitation, where the person uttering them is under no duty to utter them, and has no interest to subserve by uttering them, and the person to whom they are addressed has no interest or duty to hear and no right to demand that he may hear them. Byam v. Collins, 111 N. Y. 143, 19 N. E. Rep., 75.

2. The defendant was one of the selectmen of Brookline town. At a public town meeting he was requested to see that none voted improperly. While he was at the meeting and acting in his official capacity as selectman he observed that in the manner of the plaintiff's voting which led him in good faith to believe that the plaintiff had actually put in the ballot-box more votes than one at the same time, and he uttered the words complained of: "Bradley has put in two votes." It was held that an action for slander could not be maintained. Bradley v. Heath, 29 Mass., 163.

§ 74. Digest of English Cases.—

1. The defendant and Tinmouth were joint owners of The Robinson, and engaged the plaintiff as master; in April, 1843, defendant purchased Tinmouth's share; in August, 1843, defendant wrote a business letter to Tinmouth, claiming a return of £150, and incidentally libeled the plaintiff. *Held* a privileged communication, as the defendant and Tinmouth were still in confidential relationship. Wilson v. Robinson, 7 Q. B., 68; 14 L. J., Q. B., 196; 9 Jur., 726.

2. The defendant, a linen-draper, dismissed his apprentice without sufficient legal excuse; he wrote a letter to her parents, informing them that the girl would be sent home, and giving his reasons for her dismissal. Cockburn, C. J., held this letter privileged, as there was clearly a confidential relationship between the girl's master and her parents. James v. Jolly, Bristol Summer Assizes, 1879; Fowler and wife v. Homer, 3 Camp., 294. So, of course, a letter to the girl herself, stating in detail the faults her late employer found with her. R. v. Perry, 15 Cox, C. C., 169. But a complaint of a man's conduct is not privileged if addressed by the employer to the man's wife. Jones v. Williams, 1 Times L. R., 572.

3. My regular solicitor may unasked give me any information concerning third persons of which he thinks it to my interest that I should be informed, even although he is not at the moment conducting any legal proceedings for me. Davis v. Reeves, 5 Ir. C. L. R., 79.

4. A solicitor who is conducting a case for a minor may inform his next friend of the minor's misconduct. Wright v. Woodgate, 2 C., M. & R., 573; 1 Tyr. & G., 12; 1 Gale, 329 (approved in L. R., 4 P. C., 495).

5. Rumors being in circulation prejudicial to the character of the plaintiff, a dissenting minister, he courted inquiry and appointed A. to sift the matter thoroughly. It was agreed that the defendant should represent the malcontent portion of the congregation and state the case against the plaintiff to A. A confidential relationship being thus established between the defendant and A., all that took place between them, whether by word of mouth or in writing, so long as the inquiry lasted and relative thereto, was held to be privileged. Hopwood v. Thorn, 8 C. B., 293; 19 L. J., C. P., 94; 14 Jur., 87.

6. A report by the comptroller of the navy to the board of admiralty upon the plans and proposals of a naval architect is clearly privileged. Per Grove, J., in Henwood v. Harrison, L. R., 7 C. P., 606; 41 L. J., C. P., 206; 20 W. R., 1000; 26 L. T., 938.

7. A time-keeper employed on public works on behalf of a public department wrote a letter to the secretary of the department imputing fraud to the contractor. Blackburn, J., directed the jury that if they thought the letter was written in good faith and in the discharge of the defendant's duty to his employers it was privileged, although written to the wrong person. Scarll v. Dixon, 4 F. & F., 250.

8. A relation or intimate friend may confidentially advise a lady not to marry a particular suitor and assign reasons, provided he really believes in the truth of the statements he makes. Todd v. Hawkins, 2 M. & Rob., 20; 8 C. & P., 88; Erskine, *amicus curiæ*, 3 Smith, 4; Adams v. Coleridge, 1 Times L. R., 84.

9. The officers and men of the garrison of St. Helena gave an entertainment at the theater at which considerable noise and disturbance took place. The commanding officer was informed that this was caused by the plaintiff, who was said to have been drunk. The plaintiff was an assistant master in the government school. The commanding officer reported the circumstances to the colonial secretary of the island, and the plaintiff was in consequence suspended from his appointment. Verdict for the plaintiff disapproved and set aside, and judgment arrested. Stace v. Griffith, L. R., 2 P. C., 426; Moore, P. C. C. (N. S.), 18; 20 L. T., 197; Sutton v. Plumridge, 16 L. T., 741.

10. It is the duty of an under-master in a college school to inform the head-master that reports have been for some time in circulation imputing habits of drunkenness to the second-master. Hume v. Marshall (Cockburn, C. J.), 42 J. P., 136. But where, after an election, the agent of the defeated candidate wrote a letter to the agent of the successful candidate, asserting that the plaintiff and another (both members of the successful candidate's committee) had bribed a particular voter, the latter was held not to be privileged, as there was no confidential relation existing between the two agents. Dickeson v. Hilliard and another, L. R., 9 Ex., 79; 43 L. J., Ex., 37; 22 W. R., 372; 30 L. T., 196.

11. A circular letter, sent by the secretary to the members of a society for the protection of trade against sharpers and swindlers is not a privileged communication. Getting v. Foss, 3 C. & P., 160; Goldstein v. Foss, 2 C. & P., 252; 6 B. & C., 154; 4 Bing., 489; 2 Y. & J., 146; 4 D. & R., 197; 1 M. & P., 402; Humphreys v. Miller, 4 C. & P., 7. But see Waller v. Loch

(C. A.), 7 Q. B. D., 619; 51 L. J., Q. B., 274; 30 W. R., 18; 45 L. T., 243; 46 J. P., 484; Clover v. Royden, L. R., 17 Eq., 190; 43 L. J., Ch., 665; 22 W. R., 254; 29 L. T., 639.

§ 75. **No Confidential Relation Existing between the Parties.**— Where the party does not stand in any confidential relation to the person interested, it is difficult to define what circumstances will be sufficient to impose on him the duty of volunteering the information. The rule of law applicable to such cases cannot be better expressed than in the following passage: Blackburn, J. "Where a person is so situated that it becomes right in the interests of society that he should tell to a third person certain facts, then if he *bona fide* and without malice does tell them it is a privileged communication."[1] But the difficulty is in any given case to determine whether it had or had not become right in the interests of society that the party should act as he did. And this is a question rather of social morality than of law.[2]

§ 76. **The Doctrine of Voluntary Communications Discussed.**— I learn that one of my tradesmen is about to supply goods on credit to a man whom I know to be practically insolvent; may I warn him not to do so? Is it right, in the interests of society, that I should tell him what I know, or am I to stand by and see him lose his money? In England, in the days of Elizabeth, it was considered clear law that no action would lie for such a caution given as "good counsel."[3] So it was in the days of George III.[4] But in 1838 Lord Abinger, C. B., held that no such communication should be volunteered; the party must wait till the tradesman applies to him for advice: "If the defendant had been asked as to the plaintiff, and had said what he did without malice, no action would have been maintainable; but as he made the communication without being asked in any way to do so, he is liable if the words reflect on the character of the plaintiff as a tradesman."[5] In 1846[6] the court of common pleas was equally divided on this question.

[1] Davies v. Snead, L. R., 5 Q. B., 611; 39 L. J., Q. B., 202; 23 L. T., 609; Waller v. Loch (C. A.), 7 Q. B. D., 621, 622; 51 L. J., Q. B., 274; 30 W. R., 18; 45 L. T., 242; 46 J. P., 484.

[2] Odgers on L. & S., 214.

[3] Vanspike v. Cleyson, Cro. Eliz., 541; 1 Roll. Abr., 67.

[4] Herber v. Dowson, B. N. P., 8.

[5] King v. Watts, 8 C. & P., p. 615.

[6] Bennett v. Deacon, 2 C. B., 628; 15 L. J., C. P., 289.

In the same year this court was equally divided on the question whether a man may inform the owner of a ship that his captain has been guilty of gross misconduct at sea.[1] Later it was admitted that a letter sent to an absent vicar, informing him of the misconduct of the curate whom he had left in charge of the parish, was privileged. And generally a person is always justified in informing a master or employer of any misconduct on the part of his servant or workman which has come to his knowledge. It is submitted that such a communication is privileged, although volunteered, if made honestly from a sense of duty, and not officiously or from a love of gossip.[2]

Coltman, J.: "If a neighbor makes inquiry of another respecting his own servants, that other may state what he believes to be true; but the case is different when the statement is a voluntary act; yet, even in this case, the jury is to consider whether the words were dictated by a sense of the duty which one neighbor owes to another."[3]

§ 77. **Danger of Voluntary Statements.**— It appears to be clear that if a party reasonably supposes that human life would be seriously imperiled by his remaining silent he may volunteer information to those thus endangered, or to their master, though he be not himself personally concerned.[4] So if the money or goods of the person to whom he speaks would be in great and obvious danger of being stolen or destroyed. So, too, it appears that a person may, without being applied to for the information, acquaint a master with the misconduct of his servants, if instances have come under the especial notice of the party and which have been concealed from the master's eye. But in most other cases a person runs a great risk in volunteering statements which afterwards turn out to be inaccurate, unless indeed he is himself personally interested in the matter, or compelled to interfere by the fiduciary relationship in which he stands to some person concerned. Although a person may feel sure that if he were in his neighbor's place he should be most grateful for the information conveyed,

[1] Coxhead v. Richards, 2 C. B., 569; 14 L. J., C. P., 278; 10 Jur., 984.

[2] Clark v. Molyneux, 3 Q. B. D., 237; 47 L. J., Q. B., 230; 26 W. R., 104; 36 L. T., 466; 37 L. T., 694; 14 Cox, C. C., 10; Odgers on L. & S., 215.

[3] Rumsey v. Webb et ux. (1842). Car. & M., p. 105; 11 L. J., C. P., 129.

[4] Cresswell, J., 2 C. B., 605.

still he must recollect that it may eventually turn out that in endeavoring to avert a fancied injury to that neighbor he has really inflicted an undoubted and undeserved injury on another.[1]

§ 78. **Parties Making Statements Must Believe Them.**— The party volunteering the statement must at the time sincerely believe in its truth. But this alone will afford him no defense.[2] It is necessary that circumstances should be present to his mind which reasonably impose on him the duty to make the statement. If such circumstances exist the statement is privileged although it may prove to be untrue. It is not necessary that before making such statement he should have thoroughly investigated the reports which had reached him. Hearsay is sufficient reasonable and probable cause in the absence of malice, unless he ought for any reason to have known that his informant was unreliable and his story undeserving of belief. And he must make the statement under an honest sense of duty, desiring to serve the person most concerned, and not from any malicious or self-seeking motive.[3]

§ 79. **Illustrations — Digest of American Cases.**—

1. The directors of a charity were informed that the plaintiff, their former collector, continued to solicit and receive subscriptions on behalf of the charity, although dismissed as untrustworthy. They therefore printed at the end of their annual report a "Caution to the Public," warning them against such imposture. *Held*, that such a caution was privileged, if published *bona fide* in the belief that the statements contained in it were true, and with the honest desire of protecting the interests of the charity and guarding the public against imposture, and not with any malicious desire of defaming the plaintiff, with whom they had quarreled; and that it was for the jury to decide with which intent it was in fact published. Gassett v. Gilbert, 6 Gray (72 Mass.), 94.

2. In an action for the words, "Dr. Krebs was imprisoned many years in a penitentiary in Germany for larceny," the plaintiff introduced evidence tending to show the speaking of the words to the father, brother and brother-in-law of a woman he was about to marry, and to a fourth person who was not related to the family, but whose brother-in-law had married

[1] The Count Joannes v. Bennett, 87 Mass., 169; Odgers on L. & S., 216; Krebs v. Oliver, 78 Mass., 239; Gassett v. Gilbert, 72 Mass., 94.

[2] Byam v. Collins, 111 N. Y., 143; 19 N. E. Rep., 75. See § 94, *post;* Gassett v. Gilbert, 72 Mass., 94; The Count Joannes v. Bennett, 87 Mass., 169; Botterill v. Whytehead, 41 L. T., 588.

[3] Maitland v. Bramwell, 5 F. & F., 623; Coxhead v. Richards, 2 C. B., 569; 15 L. J., C. P., 278; Lister v. Perryman, L. R., 4 H. L., 521; 39 L. J., Ex., 177; 23 L. T., 269; Briggs v. Garrett, 111 Pa. St., 404.

her sister. The defendant had been on intimate terms with the members of the family to whom the charges against the plaintiff's character had been communicated; that he had always repeated them as reports which he had heard, and communicated them in good faith and without malice, in pursuance of what he considered a duty. He asked the court to rule as a matter of law that the words did not amount to an imputation of larceny. The court, however, declined to so rule, but left it to the jury to say whether on the whole evidence they were satisfied the defendant by these words meant to impute the commission of the crime of larceny. The court instructed the jury "that the fact that the plaintiff was about to be married could not justify the defendant in reporting to the members of the intended wife's family the charges alleged if false, no inquiry having been made of the defendant or information having been requested of him; that he sustained no relation to her family which would make the communication privileged in law, and that the defense could not be maintained." The jury found for the plaintiff and the finding was sustained. Krebs v. Oliver, 78 Mass., 239.

8. It appeared that the defendant had formerly for several years held the relation of pastor to the parents of the intended wife, as members of his church, and to the daughter, as a member of his choir. He was on the most intimate terms of friendship with the parents. On the 18th day of May, 1860, being upon a visit in Boston, he called upon the father at his place of business and was urged by him to accompany him to his residence, the father stating that both he and his wife were in great distress of mind and anxiety about their daughter, whom they feared would engage herself in marriage to the plaintiff. On their way to his residence the father stated to the defendant what he and his wife had heard about the plaintiff, and their views with regard to his being an unsuitable match for their daughter, who, with a young child by a former husband, was living with them. On reaching the house it was found the daughter had gone out. It was arranged that the defendant should write a letter, and materials for that purpose were furnished, and the letter complained of was written, addressed to the daughter, and left unsealed and open with the mother, after the principal portion of it had been read aloud at the tea table in the presence of the parents and a confidential friend of the family. The letter was read by the daughter, but it did not have the desired effect of breaking up the engagement with the "Count," and the day before her marriage to him she gave it into his keeping. In a suit for a libel which followed, founded upon it, the court held the writing of it could not be justified on the ground that the writer was the friend and former pastor of the intended wife, and that the letter was written at the request of her parents, who assented to all its contents. The Count Joannes v. Bennett. 87 Mass., 169.

§ 80. Digest of English Cases.—

1. The defendant said to one Dudley, "Doth Vanspike [the plaintiff, a merchant] owe you any money?" Dudley replied that he did. Defendant then said, "You had best call for it; take heed how you trust him." And it was adjudged for the defendant; for it is not slander to the plaintiff, but good counsel to Dudley. Vanspike v. Cleyson, Cro. Eliz., 541; 1 Roll. Abr.,

67. So where defendant said of the plaintiff, who was a tradesman, "He cannot stand it long; he will be a bankrupt soon," and it was laid as special damage in the declaration that one Lane had, in consequence, refused to trust the plaintiff for a horse. Lane was the only witness called for the plaintiff; and it appearing on his evidence that the words were not spoken maliciously, but in confidence and friendship to Lane and by way of warning to him, and that in consequence of that advice he did not trust the plaintiff with the horse, Pratt, C. J., directed the jury that though the words were otherwise actionable, yet if they should be of opinion that the words were not spoken out of malice, but in the manner before mentioned, they ought to find the defendant not guilty, and they did so accordingly. Herver v. Dowson, B. N. P., 8.

2. The plaintiff was a malster and had bought a quantity of barley of Butler. The defendant said to Butler, "Don't trust that damned rogue, he will never pay you a farthing. Have you sold King some barley? You mind and have the money for it before it goes out of the wagon, or you will never have it." Butler, in consequence, refused to deliver the barley till he was paid for it. Lord Abinger, C. B., directed the jury that the defendant's words were unprivileged, because they were volunteered. Verdict for the plaintiff accordingly. Damages one farthing. King v. Watts, 8 C. & P., 614.

3. Defendant met Clark in the road, and asked him if he had sold his timber yet. Clark replied that Bennett (plaintiff) was going to have it. Defendant asked if he was going to pay ready money for it, and, being answered in the negative, said: "Then you'll lose your timber; for Bennett owes me about £25, and I am going to arrest him next week for my money, and your timber will help to pay my debt." Clark consequently declined to sell the timber to the plaintiff. Plaintiff really did owe defendant about £23. Coltman, J., directed the jury that the caution was altogether unprivileged because volunteered; and they therefore found a verdict for the plaintiff. Damages 40*s*. The court of common pleas were equally divided on the question whether the judge was right in his direction, and therefore the verdict for the plaintiff stood. Bennett v. Deacon, 2 C. B., 628; 15 L. J., C. P., 289.

4. A former friend of the plaintiff, who knew all about plaintiff's past wild life, hearing plaintiff was about to be married, wrote, after consulting the clergyman of his parish, to the lady, to whom he was apparently a stranger, disclosing plaintiff's antecedents. Hill, J., said that if the jury thought the defendant reasonably believed that it was his duty to write the letter he should hold it to be privileged; but the jury found a verdict for the plaintiff. Ex relatione Coleridge, Q. C., 15 C. B. (N. S.), 410, 411.

5. A. and B. were shareholders in the same railway company. B. was also a river commissioner. The plaintiff, who had been engineer to the railway company, sought to be elected engineer to the river commissioners, but was unsuccessful. Shortly after the election A. wrote to B. that the plaintiff's mismanagement or ignorance had cost the railway company several thousand pounds. *Held* not a privileged communication. Brooks v. Blanshard, 1 Cr. & Mees., 779; 3 Tyrw., 844.

7. The plaintiff, an architect, had been employed by a certain committee

to superintend and carry out the restoration of Skirlaugh church; thereupon the defendant, who was a clergyman residing in the county, but who had no manner of interest in the question of the employment of the plaintiff to execute the work, wrote a letter to a member of the committee saying: "I see that the restoration of Skirlaugh church has fallen into the hands of an architect who is a Wesleyan and can have no experience in church work. Can you not do something to avert the irreparable loss which must be caused if any of the masonry of this ancient gem of art be ignorantly tampered with?" The letter was clearly a libel on the plaintiff in the way of his profession or calling. Bramwell, L. J., thought it was privileged, because the restoration was a matter of public interest, and one in which a neighboring clergyman would be especially interested; but a special jury found that there was evidence of malice in the unfair expressions employed, and gave the plaintiff £50 damages. But Kelly, C. B., on a motion for a new trial, declared that he was "at a loss to see what privilege the defendant possessed, under the circumstances of the case, to interfere between the committee and the plaintiff in respect of the contract between them; the defendant being neither the patron, nor the minister of the church, nor a member of the committee appointed to effect its restoration, nor even a parishioner." Botterill v. Whytehead, 41 L. T., 588.

8. Two ladies, A. and B., were interested in the plaintiff, a lady who "had seen better days." A. applied to the Charity Organization Society for information concerning the plaintiff. Defendant, the secretary of that society, drew up and sent A. a report unfavorable to the plaintiff, and gave A. permission to show it to B. *Held*, that the publication of this report both to A. and to B. was privileged, although B. had made no inquiries of the defendant, and was not a member of the society or in any way connected with it. Waller v. Loch (C. A.), 7 Q. B. D., 619; 51 L. J., Q. B., 274; 30 W. R., 18; 45 L. T., 242; 46 J. P., 484; Clover v. Royden, L. R., 17 Eq., 190; 43 L. J., Ch., 665.

9. A. and B. are tenants to the same landlord with similar clauses in their respective leases. A. has reason to believe that B. is breaking his covenants, committing waste, violating the rotation of crops, etc. The landlord is away abroad. It is submitted on the authority of Cockayne v. Hodgkisson, 5 C. & P., 543, that it is not the duty of A. to write and inform the landlord of his suspicions, and that therefore such a letter would not be privileged, unless the landlord had in some way set A. in authority over B.

10. A housemaid thinks the cook is robbing their master. It is not her duty to speak at once on bare suspicion merely; but as soon as she sees something which reasonably appears to her inconsistent with the cook's innocence, she will be justified, it is submitted, in telling her master all she knows. "If a man write to a father scandalous matter concerning his children, of which he gives notice to the father and adviseth the father to have better regard to his children, this is only reformatory, without any respect of profit to him which wrote it; it shall not be intended to be a libel." Peacock v. Reynal, 2 Brownlow & Goldesborough, 151; approved by Erle, C. J.; 15 C. B. (N. S.), 418; 33 L. J., C. P., 95.

11. Communications confidentially made to a master as to the conduct of his servants, by one who has had an opportunity of noticing certain mal-

practices on their part, are privileged. Cleaver v. Sarraude, 1 Camp., 268; Kine v. Sewell, 3 M. & W., 297; Amann v. Damm, 8 C. B. (N. S.), 597; 29 L. J., C. P., 313; 7 Jur. (N. S.), 47; 8 W. R., 470; Masters v. Burgess, 3 Times L. R., 96.

12. The occupier of a house may complain to the landlord of the workmen he has sent to repair the house. Toogood v. Spyring, 1 C., M. & R., 181; 4 Tyrw., 582.

13. The defendant was a director of two companies, of one of which the plaintiff was secretary, of the other auditor. The plaintiff was dismissed from his post as secretary of the first company for alleged misconduct. Thereupon the defendant, at the next meeting of the board of the second company, informed his co-directors of this fact, and proposed that he should also be dismissed from his post of auditor of the second company. *Held* a privileged communication. Harris v. Thompson, 13 C. B., 333.

14. Dawes told the defendant that he intended to employ the plaintiff as surgeon and accoucheur at his wife's approaching confinement; the defendant thereupon advised him not to do so, on account of the plaintiff's alleged immorality. Martin, B., thought this was a privileged communication, though it was volunteered. Dixon v. Smith, 29 L. J., Ex., 125; 5 H. & N., 450.

15. The defendant, a parishioner, mentioned to her rector a report, widely current in the parish, that the rector and his solicitor were grossly mismanaging a trust estate, and defrauding the widow and orphans, etc. The solicitor brought an action for the slander. The jury found that she did so in the honest belief that it was a benefit to the rector to inform him of the report in order that he might clear his character. The court held that the statement was clearly privileged so far as the rector was concerned, and that as the statement was not divisible it must also be privileged with regard to the plaintiff. Davies v. Sneed, L. R., 5 Q. B., 611; 39 L. J., Q. B., 202; 23 L. T., 609.

16. Information given to a vicar absent on the continent as to rumors affecting the moral character of the curate he has left in charge is privileged. So is similar information given verbally to the absent vicar's solicitor, with a view to his informing the vicar, should he think it right to do so. So is similar information given to a neighboring vicar who has asked the curate in charge to preach for him. Clark v. Molyneux, 3 Q. B. D., 237; 47 L. J., Q. B., 230; 26 W. R., 104; 36 L. T., 466; 37 L. T., 694; 14 Cox, C. C., 10.

17. If a report be current in a parish as to the disgraceful conduct of the incumbent, bringing scandal on the church, a good churchman may inform the bishop of the diocese thereof, although he does not reside in the district and is not personally interested. James v. Boston, 2 C. & K., 4.

18. A letter written by a private individual to the chief secretary of the postmaster-general complaining of the misconduct of an official under the authority of the postmaster-general is privileged if made *bona fide* and without malice, even though some of the charges made in the letter may not be true, and though the defendant stood in no relation, past or present, either to the plaintiff or to the postoffice authorities. Blake v. Pilfold, 1 Moo. & Rob., 198; Woodward v. Lander, 6 C. & P., 548.

19. The first mate of a merchant ship wrote a letter to the defendant, an old and intimate friend, stating that he was placed in a very awkward position owing to the drunken habits, etc., of the captain, and saying: "How shall I act? It is my duty to write to Mr. Ward [the owner of the ship], but by doing so would ruin" the captain and his wife and family. The defendant, after much deliberation and consultation with other nautical friends, thought it his duty to show the letter to Ward, who thereupon dismissed the captain. The defendant knew nothing of the matter except from the mate's letter. Tindal, C. J., told the jury that the publication was *prima facie* privileged, and they negatived malice. The court of common pleas was equally divided on the question whether so showing the letter was privileged, and therefore the verdict for the defendant stood. Coxhead v. Richards, 2 C. B., 569; 15 L. J., C. P., 278; 10 Jur., 984.

20. A lieutenant in the navy was appointed by the government agent or superintendent on board a transport ship, the Jupiter. He wrote a letter to the secretary of Lloyd's coffee-house imputing misconduct and incapacity to the plaintiff, the master of the Jupiter. This was held altogether unprivileged; the information should have been given to the government alone, by whom the defendant was employed. Harwood v. Green, 3 C. & P., 141.

§ 81. **(1) Communications Relating to the Character of Servants or Employees.**— One of the most ordinary occasions of every-day life which brings into existence the question of privilege in regard to communications is when one person, either voluntarily or in answer to an inquiry, states his own views to another concerning the character of some individual who has left his service and seeks to obtain employment elsewhere. A duty is thereby cast upon the former master to state fully and honestly all that he knows either for or against the servant; and any communication made in the performance of this duty is clearly privileged for the sake of the common convenience of society, even though it should turn out that the former master was mistaken in some of his statements. But if the master, knowing that the servant deserves a good character, yet, having some grudge against him, or from some other malicious motive, deliberately states what he knows to be false and gives his late servant a bad character, then such a communication is not a performance of the duty, and therefore is not privileged. There is in fact, in such a case, evidence of malice, which "takes the case out of the privilege."[1]

§ 82. **Character of Servants.**— It is a common but erroneous notion, entertained both by employers and the employed, that

[1] Flood on L. & S., 208; Odgers on L. & S., 202; Fresh v. Cutter, 73 Md., 87; 20 Atl. Rep., 744; Missouri Pac. Ry. Co. v. Behee, 2 Tex. Civ. App., 107.

a master is required by law to give a "character" to or of a servant who leaves him; but such is not really the case.[1] If, however, the master does give the character, it must be given under all circumstances without malice. It may be true or it may be otherwise; but if untrue, it is important to see whether the master acts only voluntarily — that is, without being asked anything about the servant — or whether he furnishes the statement concerning such person in reply to questions addressed to him as to his or her character. For if an employer voluntarily gives a defamatory account of a former servant which is really false, such a proceeding on his part would raise a presumption of actual malice having prompted him to take the course in question, and so render him liable to an action for slander or libel, malice being, as before stated, the gist of such an action in either case. If, on the other hand, a voluntary statement is made respecting a servant by his former employer, absolutely true in all respects, though on its face defamatory, then, if made *bona fide*, not with a view to injure the servant, but in order, say, to prevent an unworthy person from intruding himself into a respectable house, such communication would be privileged.[2] Again, if in answer to inquiries addressed to him concerning a former servant of his, he states that which happens to be incorrect, he will not be liable to an action, unless, of course, the statement be flagrantly untrue and defamatory, to his knowledge and belief. And where the reply to questions is true and honest, no amount of ill-will would make the master liable to an action for libel or slander.[3] His statement would be in all respects a privileged communication. It is therefore important in considering these cases to see whether the master volunteers his statement or simply answers questions put to him; for a statement which may be privileged when given in answer to a proper question may not be so when merely volunteered, especially if made with an oblique or sinister motive.[4]

§ 83. **A Favorable Character May be Retracted.**— If, after a favorable character has been given, facts come to the knowledge of the former master which induce him to alter his opin-

[1] Carrol v. Bird, 3 Esp., 201; Flood on L. & S., 208; Smith's Master and Servant, 347.

[2] Somerville v. Hawkins, 10 C. B., 583; 20 L. J., C. P., 131.

[3] Stevens v. Sampson, L. R., 5 Ex. Div., 53; 49 L. J. (O. S.), 120.

[4] Flood on L. & S., 208.

ion, it is his duty to inform the person to whom he gave the character of his altered opinion. Hence, a letter written to retract a favorable character previously given will also be privileged.[1]

So, again, if a person take a servant with a character given her by another and is disappointed in her, he may write and inform such person that she does not deserve the character he gave her, so that he may refrain from recommending her to others; and such a letter would be privileged.[2] A master may also warn his present servants against associating with a former servant whom he has discharged, and state his reasons for dismissing him.[3]

§ 84. **Eagerness to Prevent a Former Servant from Obtaining Employment Evidence of Malice.**— If a person happen to hear that a discharged servant of his is about to enter the service of another, it may be questioned whether it is his duty to write at once and inform the person of the servant's misconduct. It is certainly safer to wait till he applies for the servant's character. Eagerness to prevent a former servant obtaining another place has the appearance of malice, and if it were found that a person had written systematically to every one to whom the servant applied for work the jury would probably give damages. On the other hand, if the person about to employ the servant was an intimate friend or relation, and there was no other evidence of malice except that the information was volunteered, the occasion would still be privileged. In short, when a master volunteers to give the character, stronger evidence will be required that he acted in good faith than in the case where he has given the character after being required so to do.[4]

§ 85. **Illustrations — Digest of American Cases.**—

1. After a mercantile firm has given to one of its clerks a general recommendation by means of which he obtains a situation, if a partner subsequently discovers facts which alter his opinion of that clerk's character, it

[1] Fowles v. Bowen, 30 N. Y., 20; Gardner v. Slade, 13 Q. B., 796; 18 L. J., Q. B., 334; 13 Jur., 826; Child v. Affleck and wife, 9 B. & C., 403; 4 M. & R., 338.

[2] Dixon v. Parsons, 1 F. & F., 24. But see Fryer v. Kinnersley, 15 C. B. (N. S.), 429; 33 L. J., C. P., 96; 10 Jur. (N. S.), 441.

[3] Somerville v. Hawkins, 10 C. B., 590; 20 L. J., C. P., 131; 15 Jur., 450.

[4] Pattison v. Jones, 8 B. & Cr., 586; 3 C. & P., 387; Odgers on L. & S., 203.

is his duty to communicate the new facts and his change of opinion to the new employer of the clerk in order to guard against his being misled by the previous recommendation of the firm. Fowles v. Bowen, 3 Tiffany (30 N. Y. 20.

§ 86. **Digest of English Cases.—**

1. The defendant, on being applied to for the character of the plaintiff, who had been his saleswoman, charged her with theft. He had never made such a charge against her till then; he told her that he would say nothing about it if she resumed her employment at his house; subsequently he said that if she would acknowledge the theft he would give her a character. *Held*, that there was abundant evidence that the charge of theft was made *mala fide* with the intention of compelling plaintiff to return to defendant's service. Damages £60. Jackson v. Hopperton, 16 C. B. (N. S.), 829; 12 W. R., 913; 10 L. T., 529.

2. If a master about to dismiss his servant for dishonesty calls in a friend to hear what passes, the presence of such third person does not take away privilege from words which the master then uses imputing dishonesty. Taylor v. Hawkins, 16 Q. B., 308; 20 L. J., Q. B., 313; 15 Jur., 746; Jones v. Thomas, 34 W. R., 104; 53 L. T., 678; 50 J. P., 149.

3. Sir Gervas Clifton never made any complaint of his butler's conduct while he was with him; but he suddenly dismissed him without notice and without a month's wages. The butler naturally, but illegally, refused to leave the house without a month's wages; a violent altercation took place, and eventually a policeman was sent for, who forcibly ejected the butler. Sir Gervas subsequently gave the butler a very bad character in too strong terms, and making some charges against him which were wholly unfounded. Verdict for the plaintiff. Damages £20. New trial refused. Rogers v. Clifton, 3 B. & P., 587; Murdoch v. Funduklian, 2 Times L. R., 215, 614.

4. Where a master discharged his footman and cook and they asked him his reason for doing so, and he told the footman in the absence of the cook that "he and the cook had been robbing him," and told the cook in the absence of the footman that he had discharged her "because she and the footman had been robbing him," *held*, that these were privileged communications as respected the absent parties, as well as those to whom they were respectively made. Manby v. Witt, Eastmead v. Witt, 18 C. B., 544; 25 L. J., C. P., 294; 2 Jur. (N. S.), 1004.

5. A letter written by an employer dismissing a shop-woman, and stating the reasons why in very forcible language, is a privileged communication, and the court will not closely scrutinize the language to find evidence of malice. R. v. Perry, 15 Cox, C. C., 160.

§ 87. **(2) Confidential Communications in Answer to Inquiries.**— The rules of law which apply to characters given to servants govern all other answers to private and confidential inquiries.

If the owner of a vacant farm ask his neighbor as to the character of a person applying to become his tenant the answer would be privileged. So if a person comes into the

neighborhood to live, and asks advice of his neighbors as to the tradesman or doctor he shall employ, they may tell him their opinions of the various tradesmen or doctors in the locality without fear of an action for slander. Brett, L. J.: "If a person who is thinking of dealing with another in any matter of business asks a question about his character from some one who has means of knowledge, it is for the interests of society that the question should be answered; and if answered in good faith and without malice the answer is a privileged communication." [1]

§ 88. **The General Rule.**—It is a duty every person owes to society to assist in the discovery of any crime, dishonesty or misconduct, and to afford all information which will lead to the detection of the culprit. It is a perfectly privileged communication if a party who is interested in discovering a wrong-doer comes and makes inquiries, and a person in answer makes a discovery or a *bona fide* communication which he knows or believes to be true, although it may possibly affect the character of a third person.[2]

In short, whenever in answering an inquiry the defendant is acting *bona fide* in the discharge of any legal, moral or social duty, his answer will be privileged. "Every one owes it as a duty to his fellow-men to state what he knows about a person when inquiry is made." [3]

And when once such a confidential inquiry is set on foot, all subsequent interviews between the parties will be privileged, so long as what takes place thereat is still relevant to the original inquiry.[4]

The person must honestly believe in the truth of the charge he makes at the time he makes it. And this implies that he must have some ground for the assertion; it need not be a conclusive or convincing ground; but no charge should ever be made recklessly and wantonly, even in confidence. The in-

[1] Waller v. Loch (C. A.), 7 Q. B. D., 622; 51 L. J., Q. B., 274; 30 W. R., 18; 45 L. T., 242; State v. Lonsdale, 48 Wis., 348; Broughton v. McGrew, 39 Fed. Rep., 672; Long v. Peters, 47 Iowa, 239; Lewis v. Chapman, 16 N. Y., 369.

[2] Billings v. Fairbanks, 139 Mass., 36; Kine v. Sewell, 3 M. & W., 302; Klinck v. Colby, 46 N. Y., 427.

[3] Robshaw v. Smith, 38 L. T., 423; Lentner v. Merfield (C. A.), Times for May 6, 1880.

[4] Beatson v. Skene, 5 H. & N., 838; 29 L. J., Ex., 430; 6 Jur. (N. S.), 780; 2 L. T., 378; Hopwood v. Thorn, 8 C. B., 293; 19 L. J., C. P., 94; 14 Jur., 87; Wallace v. Carroll, 11 Ir. C. L. R., 485.

quirer should be put in possession of all known means of knowledge; if the only means of knowledge is hearsay, he should be told so. A rumor should never be stated as a fact; and in repeating a rumor care should be taken not to heighten its color or exaggerate its extent. If the only information possessed is contained in a letter, he should be given the letter and left to draw his own conclusions.[1] A person should not speak with the air of knowing of his own knowledge that every word is a fact when he is merely repeating gossip or hazarding a series of reckless assertions. If time allows, and means of inquiry exist, he should make some attempt to sift the charge before spreading it. In short, confidential advice should be given seriously and conscientiously; it should be manifest that the person does not take a pleasure in maligning the party, but is compelled to do so in the honest discharge of a painful duty.

§ 89. **Pertinency of the Answers.**— The answer must be pertinent to the inquiry. If, where one is asked the party's name or address, he must not commence to disparage his credit, conduct, family or wares. The reply must be an answer to the question, or reasonably induced thereby, and not irrelevant information gratuitously volunteered.[2] It is for the jury in each case to determine whether what passed was or was not relevant to the inquiry, and whether or no the information was given confidentially.

§ 90. **Illustrations — Digest of American Cases.—**

1. The defendant had suspected, and declared his suspicions, that a person's wife had committed larceny, but upon being inquired of by that person whether his suspicions continued replied that he was "now satisfied that A. B. [a hired girl] stole it." It was held that, if the communication was privileged at all, the defamatory matter, going further than to satisfy the inquirer that there was reason for the suspicion to cease, went beyond the exigency of the occasion. The answer was not pertinent. Robinett v. Ruby, 13 Md., 95.

2. A. had a forged check passed to him by a stranger, and afterwards a relative of B., having heard that A. had charged B. with the forgery, of his own accord applied to A.— saying, however, that he came at B.'s re-

[1] White v. Nichols, 3 How. (U. S.), 266; Coxhead v. Richards, 2 C. B., 569; 15 L. J., C. P., 278; 10 Jur., 984; Robshaw v. Smith, 38 L. T., 423; Odgers on L. & S., 206.

[2] Robinett v. Ruby, 13 Md., 95; Thorn v. Moser, 1 Den. (N. Y.), 488; Southam v. Allen, Sir T. Raym., 231; Huntley v. Ward, 6 C. B. (N. S.), 514; Byam v. Collins, 111 N. Y., 143; Park v. Detroit Free Press, 72 Mich., 560; 40 N. W. Rep., 731; Erber v. Dun, 12 Fed. Rep., 526; Lock v. Bradstreet Co., 22 Fed. Rep., 771; Bradstreet Co. v. Gill, 72 Tex., 115.

quest — for information respecting the charge and to convince A. that he was mistaken. A. thereupon told him that B. was unquestionably guilty, and proposed to arrange the matter by receiving the amount obtained on the check, and on that occasion persisted in the charge after being warned not to do so. In an action of slander by B. against A., it was held that the conversation was not privileged, and that the plaintiff was entitled to recover without proof of express malice. Thorn v. Moser, 1 Den. (N. Y.), 488.

8. In an action for libel it appeared that the defendant was employed by the father of the plaintiff's wife to accompany her home on a visit to her parents, and that the defendant was directed to make inquiries concerning the general standing of the plaintiff. On the return of the defendant he reported the result of his inquiries to the father, and wrote the letter alleged to contain the libel, and to the same effect, to the mother of the plaintiff's wife. It was held that the trust which the defendant had assumed and the relation in which he stood to the parents of the plaintiff's wife created an occasion which made the communication privileged if fairly made. And it was for the jury to decide on the question of express malice, whether the defendant had made an honest report, justified by the relations in which he was placed, or whether it was made with a purpose wrongfully to defame the plaintiff. Atwill v. Mackintosh, 120 Mass., 177.

4. The defendant, a member of a church, was appointed with the plaintiff and other members of the church on a committee to prepare a Christmas festival for the Sunday school. He declined to serve, and being asked his reason by a member of the committee said that a third member of the committee, a married man, had the venereal disease; and being asked where he got it, said he did not know, but that "he had been with the plaintiff," who was a woman. It was held that this was not a privileged communication. York v. Johnson, 116 Mass., 482.

§ 91. Digest of English Cases.—

1. The plaintiff was a London merchant who had had business relations with the London and Yorkshire Bank (Limited). The defendant, the manager of that bank, on being applied to by one Hudson for information about the plaintiff, showed Hudson an anonymous letter which the bank had received about the plaintiff and which contained the libel in question. *Held*, that handing Hudson the letter in confidence was a privileged communication. Grove, J., in refusing a rule for a new trial made the following remarks: "The defendant did not act as a volunteer, but was applied to for information. When applied to he did give such information as he possessed. He might have refused to give that information. He had no legal duty cast upon him to give any opinion. But he was entitled to give his opinion when asked, and *a fortiori*, as it seems to me, to show any letters he had received bearing on the subject. If one man shows another a letter, he leaves him to estimate what value attaches to it; whereas any opinion he gives might be based on very insufficient grounds. It is better to state facts than to give an opinion. Every one owes it as a duty to his fellow-men to state what he knows about a person when inquiry is made; otherwise no one would be able to discern honest men from dishonest men.

It is highly desirable, therefore, that a privilege of this sort should be maintained. An anonymous letter is usually a very despicable thing. But anonymous letters may be very important, not by reason of what they say, but because they lead to inquiry which may substantiate what they have said. It seems to me, therefore, that he was fully entitled to show this anonymous letter for what it was worth." Robshaw v. Smith, 28 L. T., 423. So where an attorney employed defendant to translate some German into English, no action lies for the publication of such translation to the attorney. Kerr v. Shedden, 4 C. & P., 528; Du Barre v. Livette, Peake, 76. (See Zuckerman v. Sonnenschein, 62 Ill., 117.)

2. Plaintiff had been tenant to the defendant; a wine-broker went to defendant to ask him plaintiff's present address. Defendant commenced to abuse the plaintiff. The broker said. "I don't come to inquire about his character, but only for his address; I have done business with him before." But the defendant continued to denounce the plaintiff as a swindler, adding, however, "I speak in confidence." The broker thanked defendant for his remarks, and declined in future to trust the plaintiff. *Held*, that it was rightly left to the jury to say if defendant spoke *bona fide* or maliciously. Picton v. Jackman, 4 C. & P., 257· Southam v. Allen, Sir T. Raymond, 231.

3. Watkins met the defendant in Brecon, and addressing him said: "I hear that you say the bank of Bromage and Snead, at Monmouth, has stopped. Is it true?" Defendant answered, "Yes, it is. I was told so. It was so reported at Cricklewell, and nobody would take their bills, and I came to town in consequence of it myself." *Held*, that if the defendant understood Watkins to be asking for information by which to regulate his conduct, and spoke the words merely by way of honest advice, they were *prima facie* privileged. Bromage v. Prosser, 4 B. & Cr., 247; 1 C. & P., 475; 6 D. & R., 296.

4. The defendant was asked to sign a memorial, the object of which was to retain the plaintiff as trustee of a charity, from which office he was about to be removed. The defendant refused to sign, and on being pressed for his reasons stated them explicitly. *Held*, a privileged communication. Cowles v. Potts, 34 L. J., Q. B., 247; 11 Jur. (N. S.), 946; 13 W. R., 858.

5. The plaintiff had been a major-general commanding a corps of irregular troops during the war in the Crimea. Complaint having been made of the insubordination of the troops, the corps commanded by the plaintiff was placed under the superior command of General Vivian. The plaintiff then resigned his command, and General Vivian directed General Shirley to inquire and report on the state of the corps, and particularly referred him for information on the matter to the defendant, who was General Vivian's private secretary and civil commissioner. All communications made by the defendant to General Shirley touching the corps and the plaintiff's management of it are privileged, if the jury find that the defendant at the time honestly believed that he was acting within the scope of his duty in making them. Beatson v. Skene, 5 H. & N., 838; 29 L. J., Ex., 430; 6 Jur. (N. S.), 780; 2 L. T., 378; Hopwood v. Thorn, 8 C. B., 293; 19 L. J., C. P., 94; 14 Jur., 87.

§ 92. **Confidential Communications — Not in Answer to Inquiries.**— In the previous cases stress is laid on the fact that the defendant did not volunteer the information, but was expressly applied to for it. This is always, no doubt, a very material fact in the defendant's favor, but it is never alone decisive. It is not necessary in all cases that the information should be given in answer to an inquiry.[1] Many occasions are privileged in which no application is made to the defendant, but he himself takes the initiative; while, on the other hand, many answers to inquiries will not necessarily be privileged even if given confidentially. The question in every case is this: Were the circumstances such that an honest man might reasonably suppose it is his duty to act as the defendant has done in this case? And the circumstances may be such that it is clearly the duty of a good citizen to go at once to the person most concerned and tell him everything, without waiting for him to come and inquire. It may well be that he has no suspicions, and never would inquire into the matter unless warned.[2]

§ 93. **The Cases Distinguished.**— In cases where neither life nor property is in imminent and obvious peril, there the circumstance that the defendant was applied to for the information and did not volunteer it will materially affect the issue. Where the matter is not of great or immediate importance, interference may be considered officious and meddlesome; although, had the party been applied to, it would clearly have been his duty to give all the information in his power. An answer to a confidential inquiry may be privileged where the same information if volunteered would be actionable.

In cases, then, in which there can be a doubt as to the party's duty to speak, the fact that he was applied to for the information will tell strongly in his favor. In cases where his duty to speak was clear without that, the fact that he was applied to is immaterial.[3]

§ 94. **Illustrations — Digest of American Cases.**—

W. J. B., the plaintiff, a lawyer, resided in New York, where also resided Miss D. McN., to whom he was paying his addresses with a view to matri-

[1] Swan v. Tappan, 5 Cush. (Mass.), 104, 110; Gassett v. Gilbert, 6 Gray, 94; Waller v. Loch (C. A.), 7 Q. B. D., 621; 51 L. J., Q. B., 274; 45 L. T., 242; White v. Nichols, 3 How. (U. S.), 266; Ormsby v. Douglass, 37 N. Y., 477; Easly v. Moss, 9 Ala., 266.

[2] Crane v. Waters, 10 Fed. Rep., 619; Alvin v. Morton, 21 Ohio St., 536; Perkins v. Mitchell, 31 Barb., 461; Mott v. Dawson, 46 Iowa, 533; Hubbard v. Rutledge, 57 Miss., 7; Parker v. McQueen, 8 B. Mon. (Ky.), 16; Beals v. Thompson, 149 Mass., 405.

[3] Odgers on L. & S., 209, and cases cited under note 2.

mony. The defendant also resided at the same place, and she and Miss D. had been very intimate friends. During this friendship Miss D., before she had made the acquaintance of B., frequently requested of the defendant if she knew anything about any young man she went with, or in fact any young man in the place, to tell her. Afterwards they became somewhat estranged and their intimacy ceased. Some four years afterwards the defendant wrote a letter to Miss D., stating that she had heard B. talked about a good deal, but no one spoke well of him, and she did not wish him to marry Miss D. The letter was delivered to Miss D. in the presence of B. She read it and delivered it to him. He also read it and took it to Miss D.'s father. B. sued the defendant and her husband for libel. There was a judgment for defendants, which was, however, reversed on appeal; the court of appeals holding that the communication was libelous, and not privileged by reason of the previous friendship, nor by reason of the request made four years before. Byam v. Collins, 46 N. Y., 204, 111 N. Y., 143, 19 N. E. Rep., 75.

§ 95. Digest of English Cases.—

1. Nash selected plaintiff to be his attorney in an action. Defendant, apparently a total stranger, wrote to Nash to deprecate his so employing the plaintiff. This was held to be clearly not a confidential communication. Damages 1*s*. Godson v. Home, 1 B. & B., 7; 3 Moore, 223.

2. A husband asked a medical man to see his wife and ascertain her mental condition. He reported to the husband that she was insane. *Held*, a privileged communication. Weldon v. Winslow, Times for March 14 to 19, 1884.

3. I am not justified in standing at the door of a tradesman's shop and voluntarily defaming his character to his intending customers. But if an intending customer comes to me and inquires as to the respectability or credit of that tradesman, it is my duty to tell him all I know. Storey v. Challands, 8 C. & P., 234.

4. At the hearing of a county court case (Nettlefold v. Fulcher), Fulcher's solicitor commented severely on the conduct of the plaintiff, Nettlefold's debt collector. Not content with that, Fulcher's solicitor sent a full report of the case to the Marylebone "Gazette," including his remarks on the plaintiff. The jury found that this report was substantially fair and accurate, but that it was sent to the newspaper "with a certain amount of malice." The court upheld this finding, laying especial stress upon the fact that the defendant was a volunteer, and not an ordinary reporter for that paper. Stevens v. Sampson, 5 Ex. D., 53; 49 L. J., Q. B., 120; 28 W. R., 87; 41 L. T., 782.

5. Both the Marquis of Anglesey and his agent told the defendant, the tenant of Haywood Park farm, to inform them if he saw or heard anything wrong respecting the game. The defendant heard that the gamekeeper was selling the game, and, believing the fact to be so, wrote and informed the marquis. *Held*, that the letter was privileged; but Parke, J., intimated that if the defendant had not been previously directed to communicate anything he thought going wrong, the letter would have been unauthorized and libelous. Cockayne v. Hodgkisson, 5 C. & P., 543. See King v. Watts, 8 C. & P., 615.

6. If a master, hearing that a discharged servant is seeking to enter M.'s service, writes to M. of his own accord to give the servant a bad character, and thus forestalls any inquiry by M., it will at all events require stronger evidence to prove that he acted *bona fide* than it would had he waited for M. to write and inquire. Pattison v. Jones, 8 B. & C., 578; 3 M. & R., 101.

7. Horsford was about to deal with the plaintiff, when he met the defendant, who said at once, without his opinion being asked at all, "If you have anything to do with Storey, you will live to repent it; he is a most unprincipled man," etc. Lord Denman directed a verdict for the plaintiff, because the defendant began by making the statement, without waiting to be asked. Storey v. Challands, 8 C. & P., 234.

§ 96. **(3) Communications Relating to Misconduct of Others and Crimes — A Duty Owed to the Public.** — It is a duty which every one owes to society and to the state in which he lives to assist in the investigation of any alleged misconduct and to promote the detection of crime. All information given in good faith in response to any inquiries made with this object is clearly privileged. But this duty does not arise merely when confidential inquiries are made. If facts come under any person's knowledge which lead him reasonably to conclude that a crime has been or is about to be committed, it is his duty at once to give information to the public authorities or to the persons interested.[1]

§ 97. **The Rule Stated by Inglis, Lord President.** — "When it comes to the knowledge of any one that a crime has been committed a duty is laid on that person, as a citizen of the country, to state to the authorities what he knows respecting the commission of the crime; and if he states only what he knows and honestly believes he cannot be subjected to an action of damages merely because it turns out that the person as to whom he has given the information is after all not guilty of the crime."[2]

§ 98. **Communications in the Prosecution of Inquiries Regarding Crimes.** — Upon grounds of public policy communications which would otherwise be slanderous are protected as privileged if they are made in good faith in the prosecution of an inquiry regarding a crime which has been committed and for the purpose of detecting and bringing to punishment

[1] Eames v. Whittaker, 123 Mass., 342; Dale v. Harris, 109 Mass., 193; Brow v. Hathaway, 13 Allen (Mass.), 239; Pierce v. Oard, 23 Neb., 828; Sands v. Robison, 12 S. & M. (Miss.), 704; 51 Am. Dec., 133; Mayo v. Sample, 18 Iowa, 306.

[2] Lightbody v. Gordon, 9 Scotch Sessions Cases (4th Series), 937, 938.

the criminal.[1] All material statements made by the persons interested in the detection of the crime during their investigations and relevant thereto are privileged. For the sake of public justice charges and communications which would otherwise be slanderous are protected if made in good faith in the prosecution of an inquiry into a suspected crime.[2] The law requires such charges to be made in the honest desire to promote the ends of justice and not with spiteful or malicious feelings against the person accused, nor with the purpose of obtaining any indirect advantage to the accuser. Nor should serious accusations be made recklessly or wantonly; they must always be warranted by some circumstances reasonably arousing suspicion. And they should not be made unnecessarily to persons unconcerned, nor before more persons nor in stronger language than necessary.[3]

§ 99. **Illustrations — Digest of American Cases.—**

1. Certain merchants in New York believing on reasonable grounds that they had been defrauded by plaintiff and others drew up an agreement reciting that they had "been robbed and swindled" by plaintiff and others named, whom they were determined to prosecute, and promising that each person signing would pay his fair share towards the expenses of the prosecution, etc. This agreement was left with A.'s manager in order that he might procure A.'s signature thereto. *Held*, a privileged publication. Klinck v. Colby, 46 N. Y., 427

2. One who honestly suspects another of stealing may make a communication which will be privileged to the same extent as if the fact was known. Billings v. Fairbanks, 139 Mass., 66.

3. The owner of a building which had been set on fire may caution the persons employed by him therein against a particular person suspected of being an incendiary, and his statements to them, if made in good faith for this purpose, are privileged communications, although they contain an unfounded criminal charge against the suspected person. Lawler v. Earle, 5 Allen (Mass.), 22.

4. Plaintiff sued defendants for libel in publishing of him that he was a man of bad moral character and wholly unfit to teach and have the care of a district school. The charge was in an affidavit made by some of the defendants and a petition of others directed to the superintendent of schools of the township of Lenox. The papers were intended to prevent the licensing of the defendant as a teacher in the district where the signers lived. The defendants pleaded the privileged character of the publication, and averred by way of justification that the plaintiff was an habitual blasphemer

[1] Eames v. Whittaker, 123 Mass., 344.

[2] Padmore v. Lawrence, 11 A. & E., 382; Johnson v. Evans, 3 Esp., 33; Fowler et ux. v. Homer, 3 Camp., 295.

[3] Roberts v. Richards, 3 F. & F., 507.

and profane person; an open violator of the Sabbath by hunting, sports and in other ways. *Held*, that it was a privileged communication, and abundantly justified by proof that he was an habitual blasphemer and profane person and open violator of the Sabbath. Wieman v. Mabee, 45 Mich., 484; 40 Am. Rep., 426.

5. If one who has lost goods by theft goes to the house of the person whom he suspects to have stolen them, and then, in reply, accuses that person of the theft, and states the grounds of his accusation, the communication is privileged if made in good faith with the belief that it is true and without express malice, although made in the presence of others and although it may have been intemperate and excessive from excitement. Brow v. Hathaway, 13 Allen (Mass.), 239.

6. In an action by a servant against his master for accusing him of theft, in which the defendant set up that the accusation was privileged, the judge ruled that statements concerning the alleged theft made in good faith to the plaintiff or to a police officer, or to a neighbor who had spoken to the defendant about hiring the plaintiff, were not actionable if made to such persons alone, the defendant taking reasonable care that he should not be heard by others. On appeal the ruling was held to be correct. Dale v. Harris, 109 Mass., 193.

§ 100. Digest of English Cases.—

1. Defendant charged the plaintiff, his porter, with stealing his bed-ticks, and with plaintiff's permission subsequently searched his house, but found no stolen property. The jury found that defendant *bona fide* believed that a robbery had been committed by the plaintiff, and made the charge with a view to investigation, but added: "The defendant ought not to have said what he could not prove." *Held*, that this finding was immaterial, that the occasion was privileged, and that there was no evidence of malice. Judgment for the defendant. Howe v. Jones, 1 Times L. R., 19, 461; Fowler et ux. v. Homer, 3 Camp., 294.

2. Farquharson forged the name "J. Smith" on a check and sent a boy to present it and get the money. The defendant was cashier of the bank. He looked hard at the boy, and satisfied himself, as he thought, that it was Smith's boy, the plaintiff, and gave him the money. When inquiries were made, defendant told Smith it was his boy who presented the check, and described him accurately. He told the detective so too. Plaintiff was according tried along with Farquharson, who pleaded guilty. The sheriff found the charge not proven against the plaintiff. Then plaintiff sued defendant and recovered damages £50, by a verdict of eight jurymen to four. The court set the verdict aside on the ground that there was no evidence whatever of malice. Lightbody v. Gordon, 9 Scotch Sessions Cases (4th Series), 934.

3. Barton, a friend of the defendant, employed a builder, the plaintiff's master, to build a house for him; the defendant informed Barton that the plaintiff while at work on his house had removed some quarterings. Barton complained to the master-builder, who came down to the defendant's and said: "I am told you say that you saw my man Kine take away some of the quarterings from Mr. Barton's premises." A repetition of the charge made then to the plaintiff's master without malice was held privileged, and

as the plaintiff had not called Barton to prove the original remark, the jury found for the defendant, and a new trial was refused. Parke, B., said: "Is a man's mouth to be closed when I ask him if he has seen another man take away my timber?" Kine v. Sewell, 3 M. & W., 297.

4. Defendant discharged his servant, the plaintiff, and sent for a constable, intending to give her in charge. All that he said to the constable in the course of his charge and complaint against the plaintiff is privileged, although ultimately he did not give her into charge. Johnson v. Evans. Clerk, 3 Esp., 32.

5. Defendant was a haberdasher. On a Saturday evening while he was absent Mrs. Fowler came into his shop and bought some goods. Soon after she was gone his shopman missed a roll of ribbon and mistakenly supposed that she had stolen it, but did not then pursue her. On the following Monday as she was again passing the shop the shopman pointed her out to the defendant as the person who had stolen the ribbon. The defendant brought her into the shop and accused her of the robbery, which she positively denied. He then took her into an adjoining room and sent for her father, to whom he repeated the accusation. After a good deal of altercation she was allowed to go home, and there the matter rested. Lord Ellenborough decided that no action lay. Fowler et ux. v. Homer, 3 Camp., 294.

6. Mensel sent his servant, the plaintiff, to the defendant's shop on business; while there the plaintiff had occasion to go into an inner room. Shortly after he left a box was missed from that inner room. No one else had been in the room except the plaintiff. The defendant thereupon went round to Mr. Mensel's, and, calling him aside into a private room, told him what had happened, adding that the plaintiff must have taken the box. Later on the plaintiff came to the defendant's house, and the defendant repeated the accusation to him; but, an English girl being present, defendant was careful to speak in German. Both communications were held privileged, if made without actual malice and in the *bona fide* belief of their truth. Aman v. Damm, 8 C. B. (N. S.), 597; 29 L. J., C. P., 313; 7 Jur. (N. S.), 47; 8 W. R., 470.

7. Defendant accused the plaintiff, in the presence of a third person, of stealing his wife's brooch; plaintiff wished to be searched; defendant repeated the accusation to two women, who searched the plaintiff and found nothing. Subsequently it was discovered that defendant's wife had left the brooch at a friend's house. *Held*, that the mere publication to the two women did not destroy the privilege attaching to charges, if made *bona fide*, but that all the circumstances should have been left to the jury, who should determine whether or not the charge was made recklessly and unwarrantably, and repeated before more persons than necessary. Padmore v. Lawrence, 11 A. & E., 380; 4 Jur., 458; 3 P. & D., 209; Jones v. Thomas, 34 W. R., 104; 53 L. T., 678; 2 Times L. R. 95.

8. A discharged servant of the defendant charged plaintiff, her former manager, with embezzlement. Defendant went to plaintiff's house, and, finding him out, said to his wife, "He has robbed me." This was held not to be privileged, though the jury found that defendant spoke in the performance, as she believed, of a duty, and in the *bona fide* belief that what she said was true, and without malice. Judgment for the plaintiff. Jones v. Williams, 1 Times L. R., 572.

9. Plaintiff assaulted the defendant on the highway. Defendant meeting a constable requested him to take charge of the plaintiff, and the constable refusing to arrest the plaintiff unless the defendant would charge him with felony, the defendant did so. *Held*, on demurrer to the defendant's plea setting up these circumstances, that they did not render the charge of felony a privileged publication. Smith v. Hodgeskins, Cro. Car., 276.

10. Plaintiff was defendant's shopman in Plymouth till November 5, 1834, when he left and went to London, receiving from the plaintiff a good character for steadiness, honesty and industry. Early in December defendant found one of his female servants in possession of some of his goods. When charged with stealing them she said that the plaintiff gave them to her. Thereupon the defendant, though he knew the girl was of bad character, went to the plaintiff's relations in Plymouth and charged him with felony, and eventually induced them to give him £50 to say no more about the matter. *Held*, that the charge of felony was not made *bona fide* with any intention to promote investigation or prosecution, and was altogether unprivileged; and that no question as to malice in fact should have been left to the jury. Hooper v. Truscott, 2 Bing. N. C., 457; 2 Scott, 672.

11. Plaintiff and defendant were neighbors and both drapers. Defendant, from facts which came to his knowledge and which were sufficient to arouse suspicion, concluded that he was being robbed by one of his assistants with the collusion of the plaintiff. He went to A., in whose employ plaintiff had formerly been, and inquired as to the plaintiff's honesty. A. asked, "What do you want to know for?" Defendant replied, "Oh, the man has robbed me; I mean to get him imprisoned." Defendant then made inquiries of B., one of his own assistants, who said she knew nothing at all of the matter, whereupon defendant repeated what he had said to A. Damages £5. Lindley, J., on further consideration, held both statements unprivileged, as neither A. nor B. was concerned in or connected with the matter. Harrison v. Fraser, 29 W. R., 652.

§ 101. **(4) Communications Containing Charges against Public Officers.**— It is the duty of all who witness any misconduct on the part of a magistrate or any public officer to bring such misconduct to the notice of those whose duty it is to inquire into and punish it; and, therefore, all petitions and memorials complaining of such misconduct, if prepared in good faith and forwarded to the proper authorities, are privileged. And it is not necessary that the informant or memorialist should be in any way personally aggrieved or injured; for all persons have an interest in the pure administration of justice and the efficiency of our public offices in all departments of the state. So with ecclesiastical matters; all good churchmen are concerned to prevent any scandal attaching to the church. If, however, the informant be the person immediately affected by the misconduct complained of, he can claim privilege also on the ground that he is acting in self-defense. Every communication is privileged which is made in good faith with a view to obtain redress for some injury received or to prevent

or punish some public abuse. The privilege should not be abused. If such communication be made maliciously and without probable cause, the pretense under which it is made, instead of furnishing a defense, will aggravate the case of the defendant.[1] And a party will be taken to have acted maliciously if he eagerly seizes on some slight and frivolous matter, and without any inquiry into the merits, without even satisfying himself that the account of the matter that has reached him is correct, hastily concludes that a great public scandal has been brought to light which calls for the immediate intervention of the people.[2]

§ 102. **Caution to be Observed in Making the Statements.** The party complaining must be careful to apply to some person who has jurisdiction to entertain the complaint, or power to redress the grievance, or some duty or interest in connection with it. Statements made to some stranger who has nothing to do with the matter cannot be privileged. If a party applies to the wrong person, through some natural and honest mistake as to the respective functions of various state officials, such slight and unintentional error will not take the case out of the privilege.[3] But if he recklessly makes statements to some one who is, as he ought to have known, altogether unconcerned with the matter, the privilege is lost.[4]

And where the informant is himself the person aggrieved, he should be very careful not to be led away by his just indignation into misstating facts, or employing language which is clearly too violent for the occasion.[5]

§ 103. **Illustrations — American Cases.—**

1. **A Wisconsin Case:** *Ellsworth v. Hayes*, 71 Wis., 427.

At the general election held in the town of Oregon, Dane county, Wisconsin, on the 2d day of November, 1886, H. G. Ellsworth, being duly qualified, was acting as chairman of the board of election inspectors at such

[1] Ellsworth v. Hayes, 71 Wis., 427; 37 N. W. Rep., 249; Smith v. Higgins, 16 Gray (Mass.), 251; Fairman v. Ives, 5 B. & Ald., 647, 648; Odgers on L. & S., 226; Harris v. Huntington, 2 Tyler, 129; Van Wyck v. Aspinwall, 17 N. Y., 190; Larkin v. Noonan, 19 Wis., 93; Bradley v. Heath, 12 Pick., 163; 22 Am. Dec., 418; Howard v. Thompson, 21 Wend., 319; 34 Am. Dec., 238; Young v. Richardson, 4 Ill. App., 364; Wright v. Lothrop, 149 Mass., 385.

[2] Robinson v. May, 2 Smith, 3.

[3] Smith v. Kerr, 1 Edm. (N. Y.) Sel. Cas., 190; Scarll v. Dixon, 4 F. & F., 250; Allen v. Crofoot, 2 Wend. (N. Y.), 515.

[4] Negley v. Farrow, 60 Md., 158; Lansing v. Carpenter, 9 Wis., 540; Hamilton v. Eno, 81 N. Y., 116; Curtis v. Mussey, 6 Gray, 261.

[5] Brow v. Hathaway, 13 Allen (Mass.), 239.

election. One John M. Estes was the republican candidate for sheriff, and Philip Barry was the candidate for the same office on the democratic ticket. On canvassing the votes Hayes charged that Ellsworth had counted four of the votes which were cast for Estes, the republican candidate, for Barry, the candidate on the democratic ticket; and, upon several persons who heard the charge remarking that they did not believe Ellsworth was that kind of a man, Hayes replied: "It is true; there is no doubt of it." "There was a man standing looking right over Mr. Ellsworth's shoulder and saw him do it. It's a swindle." Ellsworth brought an action for slander. On the trial it was claimed by the defendant that the words set out in the declaration did not constitute a cause of action, because they did not charge the plaintiff with any unlawful or wilful miscounting of the votes cast at such election. And that he, as one of the electors and tax-payers of the precinct, in good faith and without malice, in answer to a question propounded by another elector and tax-payer of said precinct, spoke the words in the exercise of his right as such elector and tax-payer of such precinct to discuss questions of mistakes by the board of inspectors in canvassing the votes cast at said precinct, and for the purpose of promoting the public welfare by insisting that the ballot shall always be counted as cast. The trial resulted in a judgment in favor of the plaintiff, from which the defendant appealed. It was held that, as the language might be construed as charging the plaintiff with a fraudulent count, evidence was properly admitted to prove the meaning intended; and that the defendant could not in law protect himself on the ground that his statements were privileged under the laws of Wisconsin relating to the recounting of votes, where the evidence fails to show that the statements were made for the purpose of procuring a recount.

§ 104. **Digest of American Cases.**—

1. Words charging a party with theft, spoken in good faith under a belief of their truth and with probable cause, to a police officer employed to detect the robber, are in the nature of a privileged communication and are not actionable. Smith v. Kerr, 1 Edm. (N. Y.) Sel. Cas., 190.

2. Words spoken by a person who has preferred a criminal complaint, in the presence of the magistrate, averring the truth of his complaint, are not actionable. Allen v. Crofoot, 2 Wend. (N. Y.), 515.

3. At a town meeting having under consideration an application from the assessors of the town for reimbursement for expenses incurred in defending a suit, on the ground that it was brought against them for acts done in their official capacity, which is opposed because that suit was brought against them for making false answers under oath to interrogatories propounded to them in another suit, a statement of a voter and tax-payer in the town that they had therein perjured themselves is privileged if made in good faith with a belief of the speaker in its truth, and without actual malice towards the assessors. Smith v. Higgins, 16 Gray (Mass.), 251.

4. A letter written in good faith by an inhabitant of a school district to the school committee accusing a school-mistress of a want of chastity and remonstrating against her appointment as a teacher is a privileged communication. Bodwell v. Osgood, 3 Pick. (Mass.), 379.

§ 105. **Digest of English Cases.—**

1. A letter written to the postmaster-general or to the secretary of the general postoffice, complaining of misconduct in a postmaster, is not a libel, if it was written as a *bona fide* complaint to obtain redress for a grievance that the party really believed he had suffered; and particular expressions are not to be too strictly scrutinized if the intention of the defendant was good. Woodward v. Lander, 6 C. & P., 548; Blake v. Pilford, 1 Moo. & Rob., 198.

2. The defendant drafted a memorial to the home secretary on a matter within his jurisdiction, and read it to M. in the presence of M.'s wife, and asked M. to sign it. M. signed it, and the defendant then sent it to the home secretary. Grove, J., held that both the petition and the conversation with M. were *prima facie* privileged. Spackman v. Gibney, Bristol Spring Assizes, 1878.

3. The plaintiff was a sanitary inspector under the statute 41 and 42 Vict., ch. 74, sec. 42, appointed by the local authority, but removable by the privy council; the defendant addressed a letter to the privy council, charging the plaintiff with corruption and misconduct in his office. *Held*, that no action lay without proof of malice. Proctor v. Webster, 16 Q. B. D., 112; 55 L. J., Q. B., 150; 53 L. T., 765.

4. A memorial to the home secretary or to the lord chancellor, complaining of misconduct on the part of a country magistrate, and praying for his removal from the commission of the peace, is privileged. Harrison v. Bush, 5 E. & B., 344; 25 L. J., Q. B., 25, 99; 1 Jur. (N. S.), 846; 2 Jur. (N. S.), 90. So is a petition to the house of commons charging the plaintiff with oppression and extortion in his office of vicar-general to the bishop of Lincoln, although the petition was printed and copies distributed among the members. Lake v. King, 1 Lev., 240; 1 Saund., 131; Sid., 414; 1 Mod., 58.

5. The defendant deemed it his duty as a churchman to write to the bishop of London informing him that a report was current in the parish of Bethnal Green that a stand-up fight had occurred in the school-room of St. James the Great between the plaintiff, the incumbent, and the school-master during school hours. The letter was held privileged under the Church Discipline Act, 3 and 4 Vict, ch. 86, sec. 3, although the defendant did not live in the district of which the plaintiff was incumbent, but in an adjoining district of the same parish. James v. Boston, 2 B. & K., 4.

§ 106. **The Rule Stated by Baron Fitzgerald.**—"If, without express malice, I make a defamatory charge which I *bona fide* believe to be true against one whose conduct in the respect defamed has caused me injury, to one whose duty it is, or whose duty I reasonably believe it to be, to inquire into and redress such injury, the occasion is privileged; because I have an interest in the subject-matter of my charge, and the person to whom I make the communication has on hearing the communication a duty to discharge in respect of it."[1]

[1] Waring v. M'Caldin, 7 Ir. Rep., C. L., 288.

§ 107. Illustrations — Digest of English Cases.—

1. A time-keeper employed on public works on behalf of the board of works wrote a letter to the secretary of the board imputing fraud to the contractor. Blackburn, J., directed the jury that, if they thought the letter was written in good faith and in the discharge of what the defendant considered his duty to his employers, it was privileged, although such a complaint should have been addressed to Mr. Harris, the resident engineer. Scarll v. Dixon, 4 F. & F., 250; Tompson v. Dashwood, 11 Q. B. D., 43; 52 L. J., Q. B., 425; 48 L. T., 943; 48 J. P., 55.

2. The plaintiff was a teacher in a district school. The inhabitants of the district prepared a memorial charging the plaintiff with drunkenness and immorality, which they sent to the local superintendent of schools. It ought strictly to have been sent to the trustees of that particular school in the first instance, and such trustees would then, if they thought fit, in due course forward it to the local superintendent for him to take action upon it. *Held*, that the publication was still *prima facie* privileged, although by a mistake easily made it had been sent to the wrong quarter in the first instance. McIntyre v. McBean, 13 Up. Canada, Q. B. Rep., 534. But where the defendant wrote a letter to the home secretary complaining of the conduct of the plaintiff, a solicitor, as clerk to the borough magistrates, this was held not to be privileged, because Sir James Graham had no power or jurisdiction whatever over the plaintiff. There was moreover evidence of malice. Blagg v. Sturt, 10 Q. B., 899; 16 L. J., Q. B., 39; 8 L. T. (O. S.), 135; 11 Jur., 101.

3. An Irish coroner sent to the chief secretary of Ireland a report of an inquest he had held on the body of an out-door pauper, and at which the plaintiff, who was the relieving officer, had given evidence. He mentioned in this report that the parish priest, who happened to be in court, stated publicly at the conclusion of the plaintiff's evidence, "This is nothing short of perjury." *Held*, that this portion of the report at all events was not privileged, as the chief secretary could have no interest in hearing Father Callary's opinion of the plaintiff's evidence. Lynam v. Gowing, 6 L. R., Ir., 259.

4. An elector of Frome petitioned the home secretary stating that the plaintiff, a magistrate of the borough, had made speeches inciting to a breach of the peace, and praying for an inquiry and that the home secretary should advise her majesty to remove the plaintiff from the commission of the peace. Such petition was held to be privileged although it should more properly have been addressed to the lord chancellor. Harrison v. Bush, 5 E. & B., 344; 25 L. J., Q. B., 23, 59; 1 Jur. (N. S.), 846; 2 Jur. (N. S.), 90; Scarll v. Dixon, 4 F. & F., 250.

5. The plaintiff was about to be sworn in as a paid constable by the justices when the defendant, a parishioner, made a statement against the plaintiff's character in the hearing of several by-standers. *Held*, that even if such statement ought rather to have been made to the vestry who drew up the list of constables whom the justices were to swear in, still it was privileged if made *bona fide* in furtherance of the ends of justice. Kershaw v. Bailey, 1 Ex., 743; 17 L. J., Ex., 129.

6. A letter to the secretary of war with the intent to prevail on him to

exert his authority to compel the plaintiff, an officer of the army, to pay a debt due from him to defendant was held privileged, although the secretary of war had no direct power or authority to order the plaintiff to pay his debt. "It was an application," says Best, J., "for the redress of a grievance made to one of the king's ministers, who, as the defendant honestly thought, had authority to afford him redress." Fairman v. Ives, 5 B. & Ald., 642; 1 Chit., 85; 1 D. & R., 252.

§ 108. **(1) Communications to Protect Private Interests.**— A communication made by a person is privileged which a due regard to his own interest renders necessary. He is entitled to protect himself. In such cases, however, it must appear that he was compelled to employ the words complained of. If he could have done all that his duty or interest demanded without libeling or slandering the plaintiff, the words are not privileged. It is very seldom necessary in self-defense to impute evil motives to others or to charge your adversary with dishonesty or fraud.[1]

§ 109. **The Extent of the Publication — Must Not be Excessive.**— In cases where a communication is necessary and proper in the protection of the party's interests, the privilege may be lost if the extent of its publication be excessive. I am not entitled to write to the "Times" because some one has cast a slur on me at a private meeting of the board of guardians; in fact by so doing I take the surest method of disseminating the charge against myself. So with an advertisement inserted in a newspaper, defamatory of a person; if such advertisement be necessary to protect the party's interest, or if advertising was the only way of effecting the object, and such object is a lawful one, then the circumstances excuse the extensive publication. But if it was not necessary to advertise at all, or if the object could have been equally well effected by an advertisement which did not contain the words defamatory, then the extent given to the announcement is evidence of malice to go to the jury.[2]

[1] Easley v. Moss, 9 Ala., 266; Gassett v. Gilbert, 72 Mass., 94; Brown v. Croome, 2 Stark., 297; Lay v. Lawson, 4 A. & E., 795, overruling Delany v. Jones, 4 Esp., 191; Stockley v. Clement, 4 Bing., 162; 12 Moore, 376; Head v. Briscoe et ux., 5 C. & P., 485; R. v. Enes, Andr., 229; 4 Bacon's Abr., Libel, A. (2), p. 452.

[2] Smith v. Smith, 73 Mich., 445; Brown v. Croome, 2 Stark., 297; Lay v. Lawson, 4 A. & E., 795, explaining Delany v. Jones, 4 Esp., 191; Stockley v. Clement, 4 Bing., 162; 12 Moore, 376; Head v. Briscoe et ux., 5 C. & P., 485; R. v. Enes, Andr., 229; 4 Bacon's Abr., Libel, A. (2), p. 452; Gassett v. Gil-

§ 110. **The Privilege, when Not Defeated — Intemperate Statements.** — A communication by a person immediately concerned in interest in the subject-matter to which it relates, for the purpose of protecting his own interest, in the full belief that the communication is true and without any malicious motive, is held to be excused from responsibility in an action for a libel; and this privilege is not defeated by the mere fact that the statements were made in the presence of others than the parties immediately interested; nor that they were intemperate or excessive from over-excitement.[1]

§ 111. **Illustrations — American Cases.**—

1. **In a recent Michigan case** (*Smith v. Smith*, 41 N. W. Rep., 499, 1889), the plaintiff brought an action for libel against her father-in-law, alleging that he composed and published, or caused to be composed and published, in a certain newspaper, a notice signed by H. O. S., as follows: "Notice — My wife, Mrs. H. O. S., deserted me in my sickness, and has informed me I could get another woman, for she had quit. I forbid all persons from harboring or trusting her on my account. H. O. S. Eaton Rapids, Dec. 27, 1883." It appeared on the trial that her husband composed the obnoxious article, and that his father, the defendant, caused it to be published and paid for its publication. The declaration contains two counts: one alleging that the defendant composed and published, and the other that he caused to be composed and published, the libel set out. The plea was the general issue. Champlin, J., in delivering the opinion of the court, says: "The first question raised is whether this notice contains libelous matter *per se*. We think it does. It charges her with deserting her husband in his sickness. If this charge be true, Mrs. S. was guilty of the basest ingratitude, and of conduct deserving the contempt of all right-minded people. The words which follow show that the charge made was intended to be understood in a sense derogatory to the plaintiff.

The next question to be considered is, Was the publication of the notice privileged? A qualified privilege exists in cases where some communication is necessary and proper in the protection of a person's interest, but this privilege may be lost if the extent of its publication be excessive. The rule is thus stated in a late English work. Odgers, Sland. & Lib., 225. "So with an advertisement inserted in a newspaper defamatory of the plaintiff; if such advertisement be necessary to protect the defendant's interest, or if advertising was the only way of effecting defendant's object, and such object is a lawful one, then the circumstances excuse the extensive publication. But if it was not necessary to advertise at all, or if the defendant's object could have been equally well effected by an advertisement which did not contain the words defamatory of the plaintiff, then the extent given to the announcement is evidence of malice to go to the jury." If a wife leave her husband's home without cause or provocation, and he is willing

bert, 6 Gray (72 Mass.), 94; Odgers on L. & S., 230.

Twogood v. Spyring, 4 Tyrw., 582; Dunman v. Bigg, 1 Camp., 269.

[1] Brow v. Hathaway, 95 Mass., 242;

to suitably supply her with necessaries, or with money to purchase them, he cannot be held liable on the basis of a presumption of authority, or of an implied agency, for goods purchased by her on his credit. Notice to the public would not be necessary in such a case. It is only when he has permitted her to trade upon his credit that notice to tradesmen is necessary to protect the husband's interests. In such cases a notice to the public not to give her credit upon his account would be justifiable, and would be to that extent privileged. But he would not be justified in inserting in such notice words which were defamatory of the wife; and, if he does so, such defamatory words are evidence of malice. There is another rule which applies to communications or publications which are upon proper occasions qualifiedly privileged; and that rule is that, if the matter charged as libelous be false, and the publication malicious, it is not privileged. In this case the facts were submitted to the jury, and they have found that defendant did not have reasonable and probable cause to believe that said notice signed by his son was substantially true, and that in what he did in relation to the publication of the notice he was actuated by malice towards the plaintiff. The court also instructed the jury that the burden of proof was upon the part of the plaintiff to prove by a preponderance of evidence that the defendant caused this notice to be published knowing it to be false. The jury having returned a general verdict of guilty under this charge, as well as the special verdict above that he was actuated by malice, does away entirely with the defense of privilege.

It is also urged by counsel in behalf of defendant that, as the testimony shows the notice was written by the husband of the plaintiff and sent by him to be published in the paper, the plaintiff is not entitled to recover, for the reason that a married woman could not bring an action of slander or libel against her husband at the common law; and the statutes of this state that give a married woman the same right to sue and be sued in relation to her own property have not gone so far as to allow a married woman to sue her husband in an action of tort for libel. In a suit brought against her husband she would not be allowed to testify, and that the defendant stands in privity with the husband, who is now deceased. That the husband's defense would be his defense. We are not prepared to decide that a married woman in this state may not maintain an action of libel against her husband. This, however, is not such a case; nor is it any excuse or defense for this defendant to show that his son, who was plaintiff's husband, indited the libel and directed defendant to publish it. The testimony is uncontradicted that defendant caused it to be published and paid for its publication. The special verdict, which was given in response to questions submitted to the jury, appears to have been supported by testimony introduced in the cause, and is consistent with the general verdict rendered, and we discover no error in the record which warrants us in setting it aside. The judgment is affirmed. The other judges concurred.

2. A New York Case: *Klinck v. Colby*, 46 N. Y., 427.

In an action for a libel where the defendants and others, who were merchants of New York, having been defrauded out of a large amount of goods by reason of false representations, and having probable cause to believe that the plaintiff was a party to the fraud, signed the following agree-

ment: "We, the undersigned merchants of New York, who have been robbed and swindled by Ellery C. Folger, Percy W. Tibbs, William C. Williams, James G. Goggin, L. G. Klink and S. H. Klink, realizing that justice demands that said parties should be punished for the offenses which they have committed, do hereby pledge and agree with each other, mutually, that we will bear equally all expenses and charges which may be incurred in prosecuting criminally said Folger, Tibbs, Williams, Goggin, L. G. Klink and S. H. Klink; and it is further mutually agreed that we will contribute equally toward the payment of any judgment or judgments which may be recovered against any of the subscribers hereto arising by reason of any criminal complaint which may be or has been made by any of the subscribers herein against the said Folger, Tibbs, Williams, Goggin, L. G. Klink and S. H. Klink, or either of them. The agreement was kept by one of the defendants and shown to no one but one Anderson, for the purpose of procuring his signature to it, as agent of one William Kirk. On appeal in the court of appeals it was held that the preparation and signing of the agreement was a lawful transaction and a privileged communication; that the terms used, though strong and plain, were not irrelevant, and in the absence of actual malice did not take away the privileged character of the communication.)

§ 112. Digest of American Cases.—

1. Defendant published a statement in a newspaper that plaintiff had attempted to decoy away his clients and customers. The plaintiff, in a denial in the same newspaper, characterized the defendant's statement as "a contemptible, cowardly and malicious lie." Defendant replied by publishing a card in which he referred to the plaintiff's "known character as a liar," and that any person who was "scoundrel enough" to have acted as plaintiff had "would be unprincipled enough to deny it when charged with it." *Held*, that the occasion of defendant's reply was privileged, and it ought to have been left to the jury to say whether he abused his privilege, and had acted with malice or honestly and in the protection of his own interest. In an action for a libel under the Virginia statute, it is error to refuse an instruction that the publication was privileged, if the defendant made it in good faith, for the purpose of protecting his business, and in answer to an attack in a newspaper, and to instruct the jury to consider these matters only in connection with the measure of damages. Chaffin v. Lynch 83 Va. 106. 1 S. E. Rep., 803.

2. In an action by B., editor of one newspaper, against V., editor of another, for publishing a card (headed by B.'s name): "The above-named scoundrel, editor of the 'City Item,' has been in the habit of publishing, in the columns of his paper, lying statements with reference to business matters, and coarse, impertinent allusions to individuals; intended as wit. When called to account he resorts to the indecent method of representing those alluded to as bulldozers and swaggerers. . . . It becomes necessary to brand him thus publicly that his infamous character may be known to all." V. alleged and proved that B., before this publication, on being requested to make a certain correction, had published that V. was "an irate swaggerer, trying his hand at bulldozing this paper." *Held*, that B. could not recover. Bigney v. Van Benthuysen, 36 La. Ann., 38.

3. If one who has lost goods by theft goes to the house of the person whom he suspects to have stolen them, and there, in reply to questions put as to the object of his visit, accused that person of the theft and states the grounds of his accusation, the communication is privileged, if made in good faith, with the belief that it is true and without express malice, although made in the presence of others, and although it may have been intemperate and excessive from excitement. Brow v. Hathaway, 95 Mass., 239.

§ 113. Digest of English Cases.—

1. The defendant had dismissed the plaintiff from his service on suspicion of theft, and, upon the plaintiff coming to his counting-house for his wages, called in two other of his servants, and addressing them in the presence of the plaintiff, said: "I have dismissed that man for robbing me; do not speak to him any more, in public or in private, or I shall think you as bad as him." *Held*, a privileged communication, on the ground that it was the duty, and also the interest, of the defendant to prevent his servants from associating with such a person. Somerville v. Hawkins, 10 C. B., 583; 20 L. J., C. P., 131; 16 L. T. (O. S.), 283; 5 Jur., 450; Manby v. Witt and Eastmead v. Witt, 18 C. B., 544; 25 L. J., C. P., 294; 2 Jur. (N. S.), 1004.

2. The occupier of a house may complain to the landlord or his agent of the workmen he has sent to repair the house. Toogood v. Spyring, 1 C., M. & R., 181; 4 Tyrw., 582; Kine v. Sewell, 3 M. & W., 297.

3. A customer may call and complain to a tradesman of the goods he supplies and the manner in which he conducts his business; but he should be careful to make the complaint in the hearing of as few persons as possible, and in moderate language. Oddy v. Ld. Geo. Paulet, 4 F. & F., 1009; Crisp v. Gill, 29 L. T. (O. S.), 82.

4. An insurance company may inform a ship-owner that they must refuse to insure his vessel any longer if he put a particular master in command of her. Hamon v. Falle, 4 App. Cas., 247; 48 L. J., P. C., 45.

5. Defendant claimed rent of plaintiff; plaintiff's agent told defendant that plaintiff denied his liability; defendant thereupon wrote to the agent, alleging facts in support of his claim, and adding, "This attempt to defraud me of the produce of the land is as mean as it is dishonest." *Held*, that the publication, in these terms, was not privileged, for one can claim a debt without imputing fraud, and that the judge was justified in directing the jury that it was libel. Lord Denman, in delivering the judgment of the court, said: "Some remark from the defendant on the refusal to pay the rent was perfectly justifiable, because his entire silence might have been construed into an acquiescence in that refusal, and so might have prejudiced his case upon any future claim, and the defendant would therefore have been privileged in denying the truth of the plaintiff's statement. But, upon consideration, we are of opinion that the learned judge was quite right in considering the language actually used as not justified by the occasion. Any one in the transaction of business with another has a right to use language *bona fide* which is relevant to that business, and which a due regard to his own interest makes necessary, even if it should directly or by its consequences be injurious or painful to another; and this is the principle on which privileged communication rests; but defamatory comments on the motives or conduct of the party with whom he is dealing do not fall within that rule.

It was enough for the defendant's interest, in the present case, to deny the truth of the plaintiff's assertion; to characterize that assertion as an attempt to defraud and as mean and dishonest was wholly unnecessary." Tuson v. Evans, 12 A. & E., 733. And see Robertson v. M'Dougall, 4 Bing., 670; 1 M. & P., 692; 3 C. & P., 259; Hancock v. Case, 2 F. & F., 711; Jacob v. Lawrence, 4 L. R., Ir., 579; 14 Cox, C. C., 321.

6. The defendant owed the plaintiff £6 10s.; the plaintiff told his attorney to write and demand the money, and threaten proceedings. The defendant in reply wrote to the attorney denouncing the proceeding as a "miserable attempt at imposition," and proceeded to discuss the plaintiff's "transactions in matters generally," asserting that "his disgusting tricks are looked upon by all respectable men with scorn." Williams, J., ruled that the letter was not privileged, and the court of common pleas upheld this ruling. Damages one farthing. The jury expressly found that there was no malice, but the judge certified for costs on the express ground that there was. Huntley v. Ward, 1 F. & F., 552; 6 C. B. (N. S.), 514; 6 Jur. (N. S.), 18.

7. The plaintiff, a trader, employed an auctioneer to sell off his goods, and otherwise conducted himself in such a way that his creditors reasonably concluded that he had committed an act of bankruptcy. One of them, the defendant, thereupon sent the auctioneer a notice not to pay over the proceeds of the sale to the plaintiff, "he having committed an act of bankruptcy." It was held by the majority of the court of common pleas that this notice was privileged, as being made in the honest defense of defendant's own interests. Blackham v. Pugh, 2 C. B., 611; 15 L. J., C. P., 290. So where an agent in temperate language claims a right for his principal, or a solicitor for his client. Hargrave v. Le Breton, 4 Burr., 2422; Steward v. Young, L. R., 5 C. P., 122; 39 L. J., C. P., 85; 18 W. R., 492; 22 L. T., 168. Even without express authority. Watson v. Reynolds, Moo. & Mal., 1.

8. Delivery to a third person for service on the plaintiff of a statutory notice under the insolvent act of 1869 (Nova Scotia) is *prima facie* privileged, if it be made *bona fide* with the object of protecting defendant's rights. Bank of British North America v. Strong, 1 App. Cas., 307; 34 L. T., 627.

9. The defendant was clerk of the peace of the county of Kent, and as such it was his duty to have the register of county voters printed, the expense of such printing being allowed by the justices in quarter sessions. In 1854 the defendant employed a new printer, who charged less for the job. The defendant wrote a letter to the finance committee of the justices stating his reasons for the change, and added that to continue to pay the charges made by his former printer, the plaintiff, would be "to submit to what appears to have been an attempt to extort money by misrepresentation." *Held*, that the rest of the letter was privileged, as it was proper and necessary for the defendant to explain to the finance committee what he had done; but that the words imputing improper motives to the plaintiff were uncalled for and malicious. Damages £50. Cooke v. Wildes, 5 E. & B., 328; 24 L. J., Q. B., 367; 1 Jur. (N. S.), 610; 3 C. L. R., 1090.

10. Defendant, having lost certain bills of exchange, published a handbill offering a reward for their recovery, and adding that he believed they

had been embezzled by his clerk. His clerk at that time still attended regularly at his office. *Held*, that the concluding words of the handbill were quite unnecessary to defendant's object, and were a gratuitous libel on the plaintiff. Damages £200. Finden v. Westlake, Moo. & Malk., 461.

§ 114. **Communications Provoked by the Plaintiff's Request or Contrivance.**— Closely allied to retorts provoked by the plaintiff's own attack are communications procured by his own contrivance or request. If the only publication that can be proved is one made by the defendant in answer to an application from the plaintiff, or some agent of the plaintiff, demanding explanation, such answer, if fair and relevant, will be held privileged; for the plaintiff brought it on himself. But this rule does not apply where there has been a previous unprivileged publication by the defendant of the same libel or slander which causes the plaintiff's inquiry; for in that case it is the defendant who brings it on himself. A person is not to be allowed to entrap people into making statements to him on which he can take proceedings. And again, if rumors are afloat prejudicial to the plaintiff which he is anxious to sift and trace to their source, all statements made *bona fide* to him or any agent of his in the course of the investigation are rightly protected. But it makes a great difference if the rumors originated with the defendant, so that what he has himself previously said produces the plaintiff's inquiry.[1] If in answer to such an inquiry the defendant does no more than acknowledge having uttered the words, no action can be brought for the acknowledgment; the party injured must sue for the words previously, and use the acknowledgment as proof that those words had been spoken. But if besides saying "Yes" to the question asked he repeats the words in the presence of a third person, asserting his belief in the accusation and that he can prove it, such a statement is slanderous and is not privileged, although elicited by the plaintiff's question.[2]

§ 115. **The Rule Stated by Lord Denman.**— "Injurious words having been uttered by the defendant respecting the plaintiff, the plaintiff was bound to make inquiry on the subject. When she did so, instead of any satisfaction from the defendant, she gets only a repetition of the slander. The real

[1] Lord Lyndhurst, in Smith v. Mathews, 1 Moo. & Rob., 151; Remington v. Condon, 2 Pick., 310; Kirkpatrick v. Eagle Lodge, 26 Kan., 384; Fonville v. Nease, Dudley (S. C.), 303; Wright v. Lothrop, 149 Mass., 385; Klinck v. Colby, 46 N. Y., 427.

[2] Griffiths v. Lewis, 7 Q. B., 61; 14 L. J., Q. B., 199.

question comes to this: Does the utterance of slander once give the privilege to the slanderer to utter it again whenever he is asked for an explanation? It is the constant course, when a person hears that he has been calumniated, to go with a witness to the party who he is informed has uttered the injurious words, and to say, 'Do you mean in the presence of witnesses to persist in the charge you have made?' And it is never wise to bring an action for slander unless some such course has been taken. But it never has been supposed that the persisting in and repeating the calumny, in answer to such a question, which is an aggravation of the slander, can be a privileged communication; and in none of the cases cited has it ever been so decided."[1]

§ 116. **The Second Occasion Discussed.**— If, however, the second occasion on which the words were spoken is clearly privileged and justifiable, the mere fact that defendant had previously spoken them will not of itself destroy the privilege; the plaintiff must rely on the first utterance: that may be privileged as well or may be barred by the statute. This rule is sometimes cited as an instance of the maxim "*Volenti non fit injuria*," and is then not classed as a ground of privilege, but would rather be stated thus: That if the only publication proved at the trial be one brought about by the plaintiff's own contrivance, this is no sufficient evidence of publication; it is as though the only publication were to the plaintiff himself, and therefore he must be nonsuited;[2] but it was afterwards held that a communication purposely procured by the plaintiff was privileged.[3]

§ 117. **Illustrations — American Cases.—**

1. **A Massachusetts Case:** *Bradley v. Heath*, 29 Mass., 163 (1831).

In an action of slander the declaration charged the defendant with having uttered at a public town meeting the words, "Bradley has put in two votes." At the trial the words were proved to have been spoken as alleged. The defendant showed that at the time of uttering them he was one of the selectmen of the town, and was requested to see that no one voted improperly. It was also shown that the manner of the plaintiff's voting at the time when the words were spoken was such as to excite suspicion, and to in-

[1] Richards v. Richards, 2 Moo. & Rob., 557; Force v. Warren, 15 C. B. (N. S.), 806.

[2] Smith v. Wood, 3 Camp., 323.

[3] Duke of Brunswick v. Harmer, 14 Q. B., 185; Warr v. Jolly, 6 Car. & P., 497; Odgers on L. & S., 235; Heller v. Howard, 11 Brad. (Ill.), 554.

duce others to believe that he actually did put into the ballot-box more than one vote at the same time. The court instructed the jury that if, from the evidence, they believed that the conduct of the plaintiff was such as induced the defendant to believe that the plaintiff did what the defendant said he did, and that the defendant did not speak the words maliciously, they should find a verdict for the defendant. A verdict having been returned for the defendant, the plaintiff moved for a new trial. Shaw, C. J., in delivering the opinion of the court said: "As to the instruction to the jury, we think it was sufficiently favorable to the plaintiff, and that the position might have been a little broader in terms, namely: That if they found that the defendant was induced by any cause to believe that the plaintiff did what the defendant said he did, and that the defendant did not speak the words maliciously, they should find for him. But the instruction was precisely adapted to the proof, because the case finds that it was the conduct of the defendant which tended to induce this belief."

§ 118. Digest of American Cases.—

1. Remington, the plaintiff, was a member of a Baptist church. Verbal accusations having been made against him to some members of the same church, he intimated a desire or willingness that an inquiry should be made by the church upon a written complaint. Thereupon Congdon, one of the defendants, who was not a member of the church, made a complaint in writing charging him with having sworn falsely when under oath. The church meeting, after receiving the complaint and partially acting upon it, dissolved, and a new meeting was called, at which a decision was made. An action for libel having been brought it was held that, the plaintiff having invited the investigation, the action could not be sustained without showing express malice. Remington v. Congdon, 2 Pick. (Mass.), 310.

2. The repetition of words first spoken in the presence of a third person does not prove that they were originally spoken in the presence of another. And the repetition being made at the special request of the plaintiff does not of itself constitute such a legal injury as will give rise to an action. Heller v. Howard, 11 Brad. (Ill. App.), 554.

§ 119. Digest of English Cases.—

1. A friend of the plaintiff's asked defendant to act as arbitrator between the plaintiff and A. in a dispute about a horse. Defendant declined. The friend wrote again strongly urging defendant to use his influence with A. not to bring the case into court. Defendant again declined, and stated his reasons; and on this letter plaintiff brought an action. Subsequently another friend of the plaintiff's, with his knowledge and consent, wrote to defendant that she was confident he was misinformed about the plaintiff. Defendant replied that he believed A. and his servant, and not the plaintiff. On this plaintiff brought a second action of libel. *Held*, that both letters were privileged. Whiteley v. Adams, 15 C. B. (N. S.), 392; 32 L. J., C. P., 89; 10 Jur. (N. S.), 470; 12 W. R., 153; 9 L. T., 483; Odgers on L. & S., 237.

2. A witness (whom we must presume to have been an agent of the plaintiff's, though it is not so stated in the report) heard that the defendant had a copy of a libelous print, went to defendant's house and asked to see it; the defendant thereupon produced it, and pointed out the figure of

the plaintiff and the other persons caricatured. Lord Ellenborough nonsuited the plaintiff, as there was no other publication proved. Smith v. Wood, 3 Camp., 323; Odgers on L. & S., 237.

3. The plaintiff had been in partnership with his brother-in-law, Pinhorn, as a linen-draper at Southampton, but gave up business and became a dissenting minister. Rumors reached his congregation that he had cheated his brother-in-law in the settlement of the accounts on his retirement from the partnership. The plaintiff challenged inquiry, and invited the malcontents in the congregation to appoint some one to thoroughly sift the matter. The malcontents appointed the defendant, and the plaintiff appointed the Rev. Robert Ainslie. *Held*, that all communications between the defendant and Ainslie relative to the matter were privileged, as being made with the sanction and concurrence of the plaintiff. Hopwood v. Thorn, 8 C. B., 293; 19 L. J., C. P., 94; 14 Jur., 87. And see Sayer v. Begg, 15 Ir. C. L. R., 458.

4. If a servant, knowing the character which his master will give of him, procures a letter to be written, not with a fair view of inquiring the character, but to procure an answer upon which to ground an action for a libel, no action can be maintained. King v. Waring et ux., 5 Esp., 15.

5. The defendant discharged the plaintiff, his servant, and when applied to by another gentleman gave him a bad character. The plaintiff's brother-in-law, Collier, thereupon repeatedly called on the defendant to inquire why he had dismissed the plaintiff; and at last the defendant wrote to Collier stating his reasons specifically. The plaintiff sued out a writ the same day the letter was written. *Held*, no action lay on such letter, as the defendant was evidently entrapped into writing it. Weatherston v. Hawkins, 1 T. R., 110; Taylor v. Hawkins, 16 Q. B., 308; 20 L. J., Q. B., 313; R. v. Hart, 1 Wm. Black., 386; and the remarks of Lord Alvanley, C. J., in Rogers v. Clifton, 3 B. & P., 592.

6. A builder employed two men, the plaintiff and Fosdyke, to repair Barton's house. Defendant on a privileged occasion had stated to the builder, "I saw the man employed by you take from Mr. Barton's house and carry away two long pieces of quartering. I hallooed to the man." Plaintiff thereupon brought Fosdyke to the defendant and said, "Is this the man?" Defendant replied, "No, you are the man." *Held* no action lay. Kine v. Sewell, 3 M. & W., 297; Amann v. Damm, 8 C. B. (N. S.), 597; 29 L. J., C. P., 313; 7 Jur. (N. S.), 47; 8 W. R., 470.

7. The defendant was asked by a friend of the plaintiff's to sign a memorial in favor of the plaintiff. He declined. The plaintiff's friend pressed him to sign and asked his reasons for declining. Thereupon defendant stated his reasons, and this statement was held a privileged communication. Cowles v. Potts, 34 L. J., Q. B., 247; 11 Jur. (N. S.), 946; 13 W. R., 858; Murdoch v. Funduklian, 2 Times L. R., 215, 614.

8. In answer to plaintiff's inquiry as to a rumor against himself, defendant told him, in the presence of a third party, what some one had said to his (defendant's) wife. There was no proof that the defendant had ever uttered a word on the subject till he was applied to by the plaintiff. *Held*, that the answer was privileged. Warr v. Jolly, 6 Car. & P., 497; Griffiths v. Lewis, 7 Q. B., 67; 14 L. J., Q. B., 199; 9 Jur., 370; Richards v. Richards, 2 Moo. & Rob., 557.

9. The plaintiff called at the "Trevor Arms" and asked the landlord, in the presence of witnesses: "What do you mean by saying that I have taken sovereigns over your counter from your barmaid?" *Held*, defendant's answer privileged. Palmer v. Hummerston (1883), 1 Cababe & Ellis, 36.

10. The plaintiff was a builder, and contracted to build certain school-rooms at Bermondsey. The defendant started a false report that in the building the plaintiff had used inferior timber; the report reached the plaintiff, who thereupon suspended the work and demanded an inquiry; and the committee of the school employed defendant to survey the work and report. He reported falsely that inferior timber was used. Lord Lyndhurst directed the jury that if they believed that the reports which produced the inquiry originated with the defendant, the defendant's report to the committee was not privileged. Verdict for the plaintiff. Smith v. Mathews, 2 Moo. & Rob., 151.

11. The "Weekly Dispatch" libeled the Duke of Brunswick in 1830. In 1848 the duke sent to the office of that newspaper for a copy of the number containing the old libel, and obtained one. *Held*, that he could sue on this publication to his own agent, though all proceedings on the former publication were barred by the statute of limitations. Duke of Brunswick v. Harmer, 14 Q. B., 185; 19 L. J., Q. B., 20; 14 Jur., 110; 3 C. & K., 10; Odgers on L. & S., 238.

§ 120. (2) **Communications Provoked by the Plaintiff's Misconduct — The Right to Defend One's Character.** — Every man has a right to defend his character against false aspersion. It is one of the duties which he owes to himself and to his family. Therefore, communications made in fair self-defense are privileged. If a person is attacked in a newspaper, he may write to the paper to rebut the charges, and may at the same time retort upon his assailant, where such retort is a necessary part of his defense or fairly arises out of the charges he has made.[1] A man who commences a newspaper war cannot subsequently come to the court as plaintiff to complain that he has had the worst of the fray. But in rebutting an accusation the party should not state what he knows at the time to be untrue, or intrude unnecessarily into the private life or character of his assailant. The privilege extends only to such retorts as are fairly an answer to the attacks.[2]

As a ground of provocation for an attack either upon the person or the character of an individual, whatever took place at the time may be given in evidence by the defendant in mitigation of damages; for the law makes allowances for the

[1] O'Donoghue v. Hussey, Ir. R., 5 C. L., 124.

[2] Quinn v. Hession, 40 L. T., 70; 4 L. R., Ir., 35; Odgers on L. & S., 233; Chaffin v. Lynch, 83 Va., 106; Gasset v. Gilbert, 72 Mass., 94; Easley v. Moss, 9 Ala., 266; Smith v. Smith, 73 Mich., 445; 41 N. W. Rep., 499.

infirmities of human nature and for what is done in the heat of passion, produced by the improper conduct of the adverse party. The principle upon which this evidence of provocation is received is the same, whether the suit is for an injury done to the character or the person of the plaintiff.[1]

§ 121. **Limitation of the Rule.**— The law does not allow independent wrongs, of the nature treated of in this work, to be set off against each other and a balance found in favor of the less culpable party. The principle which allows proof of provocation in mitigation of damages is the same as that which is applicable in the case of a provoked assault; and if there has been time and opportunity for hot blood to cool and calm reason to resume its ordinary control, a mere provocation not connected with the wrong cannot be shown. If in this respect there is any distinction between the cases of personal encounter and assault and written defamation, it would seem that the rule should be applied with at least as great strictness in the latter class as in the former, since the composition and publication of a libel in general involves necessarily some degree of deliberation and opportunity for reflection. There are plain reasons of public policy for this limitation of the right to reply in extenuation of such wrongs, upon remote provoking inducements not connected with the matter in issue. If the law were less strict there would be less self-restraint from acts of violence and wrong calculated to disturb the peace of society. Men would be too ready to take it upon themselves to avenge their personal grievances; and again, in the trial of causes for alleged wrongs, the principal issue would be embarrassed and confused, if not overwhelmed, by numerous collateral issues.[2]

§ 122. **Illustrations — American Cases.—**

1. A Minnesota Case: ***Quimby v. Minn. Tribune Co.*****, 38 Minn., 528; 38 N. W. Rep., 623.**

Quimby, the plaintiff, in his complaint included as a cause of action an

[1] Maynard v. Beardsley, 7 Wend. (N. Y.), 560.

[2] Quinby v. Minn. Tribune Co., 38 Minn., 528; Gronan v. Kukkuck, 59 Iowa, 18, 12 N. W. Rep., 748; Keiser v. Smith, 71 Ala., 481; 1 Suth. Dam., 228, 231; Lee v. Woolsey, 19 Johns., 319; Maynard v. Beardsley, 7 Wend., 560; Goodbread v. Ledbetter, 1 Dev. & Bat., 12; Bourland v. Eidson, 8 Grat., 27; Wakely v. Johnson, Ry. & Mood., 423; Child v. Homer, 13 Pick., 505; 2 Greenl. Ev., § 275; Sheffill and wife v. Van Dusen and wife, 15 Gray, 485.

allegation of the publishing by the Minnesota Tribune Co., the defendant, in its newspaper on the 18th day of April, of an alleged libelous article imputing to the plaintiff, a physician and surgeon, malpractice in the setting of a broken arm. The article is as follows, the latter part constituting the libel complained of: "The 'Sunday Globe' was very much wrought up over a brutal jest which had thrown an alleged prominent physician into a fit of hysterics. If the alleged prominent physician was so very much shocked, and so fully realized the enormity of the offense, why did he go so far out of his way to spread 'the cold-blooded brutality?' It may not be out of place to suggest to the alleged prominent physician that he mind his own business. Then, perhaps, people would not be shocked by such cold-blooded brutality as setting a man's broken arm in such a manner as to necessitate breaking it over again in order to do it right." In its answer the defendant alleged that the publication was made in a moment of heat and passion, induced by the previous publication, at the instance of the plaintiff, in another newspaper — the "Globe" — on the 17th day of April, of an article commenting upon a paragraph which had been published in the defendant's newspaper on the 16th day of April, and which in the "Globe" publication was designated as a "brutal jest," and was further characterized by the terms "cold-blooded brutality and heartlessness." This part of the answer was stricken out upon motion, and the defendant appealed. It was held that the fact that the publication was induced by passion caused by a previous provoking publication of the plaintiff (irrelevant to the subject of the libel) could not be considered in mitigation of damages where there has been time for hot blood to cool.

2. A Massachusetts Case: *Sheffill v. Van Dusen*, 81 Mass., 485.

Hiram Sheffill and his wife sued George J. Van Dusen and wife for slander in charging her with keeping a house of ill-fame. On the trial it appeared from the evidence that Sheffill's wife on the evening before the slanderous words complained of were spoken had addressed provoking and violent words to the wife of Van Dusen. This evidence, however, the trial court excluded, and Van Dusen and wife excepted. But on the appeal it was held to have been rightfully excluded, because a defendant is not allowed to introduce evidence in mitigation of damages of a provocation given by the plaintiff at another time, and not connected with the injury for which the action is brought. Citing Maynard v. Beardsley, 7 Wend. (N. Y.), 560; Goodbread v. Ledbetter, 1 Dev. & Bat., 12; Bourland v. Eidson, 8 Grat. (Penn.), 27; Wakely v. Johnson, Ry. & Mood., 423; Child v. Homer, 13 Pick. (Mass.), 503; 2 Greenl. Ev., §§ 223, 275.

3. A New York Case: *Beardsley v. Maynard*, 7 Wend., 560.

Beardsley sued Maynard for a libel published in a newspaper June 20, 1828, charging him with official misconduct as district attorney. The libel was proved, and that the defendant was the author. The defendant offered in evidence three several publications in another newspaper printed in the same town March 11 and 18, and June 17, 1828, and offered to prove that such publications were generally understood to apply to him, and that the plaintiff was the author of the publication of June 17, and that it was also generally understood that the article complained of by the plaintiff as libelous was caused by and written in consequence of and in answer to

such publication. The circuit judge decided that the articles had no relation to the subject-matter of the publication complained of as libelous, and refused to receive them in evidence. The case being taken to the court of errors, it was held correct, for the reason that evidence of previous publications will not be received in mitigation of damages on the ground of provocation unless not only the connection between the publications be manifest, but also that the provocation be so recent as to induce a fair presumption that the injury complained of was inflicted during the continuance of the feelings and passions excited by the provocation. Under other circumstances libelous publications by the plaintiff affecting the defendant are inadmissible in mitigation, the only remedy of the party being by cross-action.

§ 123. Digest of English Cases.—

1. The defendant, manager of a private lunatic asylum, unsuccessfully attempted to seize and carry off a lady, the plaintiff, whom he *bona fide* believed to be insane. He did so at the request of her husband, proper certificates having been obtained and all the requirements of the Lunacy Act complied with. The plaintiff, who was perfectly sane, constantly afterwards attacked him in the newspapers, challenging him to justify his conduct. Defendant at last wrote a letter in answer to these attacks and sent it to the "British Medical Journal." Huddleston, B., held this letter privileged. Weldon v. Winslow, Times for March 14 to 19, 1884; Coward v. Wellington, 7 C. & P., 531.

2. At a vestry meeting called to elect fresh overseers the plaintiff accused the defendant, one of the outgoing overseers, of neglecting the interests of the vestry and not collecting the rates; the defendant retorted that the plaintiff had been bribed by a railway company. *Held*, that the retort was a mere *tu quoque*, in no way connected with the charge made against him by the plaintiff, and was therefore not privileged; for it was not made in self-defense, but in counter-attack. Senior v. Medland, 4 Jur. (N. S.), 1039. And see Huntley v. Ward, 6 C. & B. (N. S.), 514; 6 Jur. (N. S.), 18; 1 F. & F., 552; Murphy v. Halpin, Ir. R., 8 C. L., 127.

3. The defendant was a candidate for the county of Waterford. Shortly before the election the Kilkenny Tenant Farmers' Association published in "Freeman's Journal" an address to the constituency describing the defendant as "a true type of a bad Irish landlord — the scourge of the country," and charging him with various acts of tyranny and oppression towards his tenants, and especially towards the plaintiff, one of his former tenants. The defendant thereupon published also in 'Freeman's Journal' an address, to the constituency answering the charges thus brought against him, and in so doing necessarily libeled the plaintiff. *Held*, that such an address being an answer to an attack, was *prima facie* privileged. Dwyer v. Esmonde, 2 L. R. (Ir.), 243, reversing the decision of the court below, Ir. R., 11 C. L., 542; O'Donoghue v. Hussey, Ir. R., 5 C. L., 124.

4. The plaintiff was a policy-holder in an insurance company and published a pamphlet accusing the directors of that company of fraud. The directors published a pamphlet in reply declaring the charges contained in the plaintiff's pamphlet to be false and calumnious, and also asserting that in a suit he had instituted he had sworn in support of these charges in op-

position to his own handwriting. Cockburn, C. J., held the directors' pamphlet *prima facie* privileged, and directed the jury in the following words: "If you are of opinion that it was published *bona fide* for the purpose of the defense of the company, and in order to prevent these charges from operating to their prejudice, and with a view to vindicate the character of the directors and not with a view to injure or lower the character of the plaintiff,— if you are of that opinion and think that the publication did not go beyond the occasion, then you ought to find for the defendants on the general issue." Verdict for the defendants. Kœnig v. Ritchie, 3 F. & F., 413; R. v. Veley, 4 F. & F., 1117.

5. The plaintiff, a barrister, attacked the bishop of Sodor and Man before the house of keys in an argument against a private bill imputing to the bishop improper motives in his exercise of church patronage. The bishop wrote a charge to his clergy refuting these insinuations, and sent it to the newspapers for publication. *Held*, that under the circumstances the bishop was justified in sending the charge to the newspapers, for an attack made in public required a public answer. Laughton v. Bishop of Sodor and Man, L. R., 4 P. C., 495; 42 L. J., P. C., 11; 9 Moore, P. C. C. (N. S.), 318; 21 W. R., 204; 28 L. T., 377; Hibbs v. Wilkinson, 1 F. & F., 608; Hemmings v. Gasson, E., B. & E., 346; 27 L. J., Q. B., 252; 4 Jur. (N. S.), 834.

Second Class — Qualified Privilege.

§ 124. **Parties Having a Common Interest.**— In those cases where one person has an interest in the subject-matter of the communication, and the person to whom the communication is made has a corresponding interest, every communication honestly made in order to protect such common interest is privileged by reason of the occasion. The interest is generally a pecuniary one; for example, that of two customers of the same bank, two directors of the same company, two creditors of the same debtor. But it may also be a professional interest, as in the case of two officers in the same corps, or masters in the same school, anxious to preserve the dignity and reputation of the body to which they both belong. It may be any interest arising from the joint exercise of any legal right or privilege, or from the joint performance of any duty imposed or recognized by the law. Two executors of the same will, two trustees of the same settlement, have a common interest, though not a pecuniary one, in the management of the trust estate. So the tax-payers of a town or city have a common interest in the selection of fit and proper officers, their salaries being paid out of the taxes. Relations by blood or marriage have a common interest in their family concerns. But beyond

this there is no privilege. The common interest must be one which the law recognizes and appreciates. No privilege attaches to gossip, however interesting it may be to both speaker and hearers.[1] The law never sanctions mere vulgar curiosity or officious intermeddling in the concerns of others. To be within the privilege the statement must be such as the occasion warrants, and must be made in good faith to protect the private interests both of the speaker and of the person addressed. For if the defendant has no other interest in the matter beyond that which any other person would naturally feel, interference on his part will be officious and unprivileged.[2]

§ 125. **Illustrations — American Cases.—**

1. A Michigan Case: *Bacon v. Mich. R. R. Co.*, 33 N. W. Rep., 181.

The plaintiff was a carpenter in the employ of the defendant and resided at a station on its line of road. He had been at work at Michigan City and returned home on the defendant's road. On leaving the train he picked up, by mistake, as he claimed, a coat that was not his, and carried it off, leaving his own in its place. The owner of the coat reported his loss to the conductor, and the matter was placed in the hands of a special agent, who recovered the coat. The special reported to the superintendent of the road stating, "There was a big mistake after seeing both coats — so much so that I could not believe the man honest who had taken it, and told him we had enough to do to watch professional thieves without watching our own men." A day or two later the plaintiff was discharged, for which no cause was assigned at the time. The division road-master, whose duty it was to employ men, received a discharge list a month later. The plaintiff requested to be shown the list. It was done. It contained, among other names and entries, the following:

NAME.	OCCUPATION.	WHY DISCHARGED.
Bacon, John.	Carpenter.	Stealing.

Thereupon the plaintiff brought his action against the company for a libel. Upon the trial the court charged the jury that the communication was privileged, and that the plaintiff could not recover without proving affirmatively, not only the falsity of its contents, but also that it was published with express malice. On appeal it was held that the communication was clearly privileged.

[1] Rumsey v. Webb et ux., Car. & M., 104; 11 L. J., C. P., 129: Bacon v. Mich. C. R. Co., 33 N. W. Rep., 181; Shurtleff v. Stevens, 51 Vt., 501; Kirkpatrick v. Eagle Lodge, 26 Kan., 384; Dial v. Holton, 6 Ohio St., 228; Wright v. Lothrop, 149 Mass., 385; Klinck v. Colby, 46 N. Y., 427; Metzler v. Romine, 9 Pa. Co. Ct. R., 171.

[2] Botterill and another v. Whyte-head, 41 L. T., 588; Odgers on L. & S., 239.

2. A Vermont Case: *Shurtleff v. Stevens*, 51 Vt., 501.

In an action for a libel the plaintiff and defendant were both members of the Windham Congregational Association, an association of Congregational ministers organized in accordance with Congregational usage, and having an association covenant and by-laws, to which any Congregational minister residing in the county and of good standing might, by vote of the association, be admitted, and from which on removal from the county he might be dismissed with a letter commending him to other like associations in other counties. Such associations were recognized by Congregational churches, and membership thereof was considered among the churches as evidence of good ministerial standing. At one of its regular meetings the association, being actively incited thereto by the defendant, adopted by a unanimous vote the following preamble and resolutions: "*Whereas*, charges of untruthfulness, deception and creating disturbances among the churches have been made against the Rev. David Shurtleff, a member of this body, *therefore resolved*, that we hereby withdraw fellowship from him until the 7th day of August next, at which time he is invited to appear before our body at Wilmington and show reason why he should not be finally dismissed without papers. *Resolved*, that the scribe be instructed to send a copy of this minute to the brother, and also to the 'Congregationalist' and the Vermont 'Chronicle.'" Agreeably to the vote the scribe sent copies thereof, showing the votes, including the defendant's, to the newspapers referred to, and they were therein published. It appeared that the former of those newspapers was a denominational paper published at Boston, Mass., and circulated among Congregationalists throughout New England; and that the latter was a like paper published at Montpelier, Vt., and circulated among Congregationalists in Vermont, and that both were at the time of the publication, organs of Congregational churches and of organizations and institutions connected therewith. For several years prior to the publication complained of, reports of difficulties between the plaintiff and his parishioners were in circulation, and defendant had received letters in relation thereto from time to time from ministers and parish committees in various places where plaintiff was preaching, giving unfavorable accounts of his career, and some of them speaking of him as unfit for the office and work of the ministry, and then asking defendant to do what he could to restrain him. It was held that the action of the defendant before and as a member of the association, and the publication of the preamble and resolutions which were the result of that action, were privileged, and that the burden of proof as to whether the defendant was actuated by malice was on the plaintiff.

3. A Kansas Case: *Kirkpatrick v. Eagle Lodge*, 26 Kan., 384.

Kirkpatrick sued Eagle Lodge No. 42 of the Independent Order of Odd Fellows, and one hundred and nine others, to recover damages for a libel. The alleged libel was contained in a report of a special committee on the memorial of the plaintiff, and which was unanimously adopted by the lodge. The report was as follows:

"*To the R. W. Grand Lodge, Kansas, I. O. O. F.:*

"Your committee to which was referred the petition of William Kirkpatrick to have set aside a certain action of Eagle Lodge No. 32 have had the same under consideration; and having visited Eagle Lodge No. 32 by your

orders to examine into the grievances of the said Kirkpatrick, I am prepared to say that his expulsion on the charge of perjury, from which he appealed, was well merited. On the occasion of that visit I carefully examined the brethren present, including the noble grand at the time of Kirkpatrick's first trial, the chairman of the committee charged with the registry of evidence, the sitting past grand who appeared on behalf of the lodge, and the brother who appeared on behalf of the accused. They were unanimous in the expression that the statements concerning said trial, sworn to by Kilpatrick and presented at your last session, are all infamously untrue; hence the expulsion for perjury. . . . GEO. W. MARTIN."

Held, the publication was conditionally privileged, and that no recovery could be had thereon without proof of express malice on the part of the defendants, though the charge imputed in the publication be without foundation. Citing Shurtleff v. Stevens, 51 Vt., 501; How v. Bodman, 1 Disney (Ohio), 115; Dial v. Holter, 6 Ohio St., 228.

§ 126. Digest of American Cases.—

1. Where the officers of any town claim to be reimbursed moneys expended by them, any statements made at a town meeting by a rate-payer are privileged, if made with the *bona fide* intention of showing that the expenses were not properly incurred by them in their official capacity, and so ought not to be charged on the rates (Smith v. Higgins, 16 Gray (82 Mass.), 251); and words spoken at a church meeting in the regular course of church discipline, with the honest intention of examining whether the plaintiff is or is not fit to be a member of the church, are held privileged (Jarvis v. Hathaway, 3 Johns. (N. Y.), 178; Remington v. Congdon and others, 2 Pick. (19 Mass.), 310; York v. Pease, 2 Gray (68 Mass.), 282; Kirkpatrick v. Eagle Lodge, 26 Kans., 384; 40 Am. Rep., 316); unless such words are also defamatory of some third person who is not a member of the church, when such outsider may sue. Coombs v. Rose, 8 Blackf. (Ind.), 155. So where the plaintiff was a member of a provincial assembly of Congregational ministers, a resolution proposed at a meeting of that assembly severely censuring the plaintiff, and all speeches made thereon, are privileged; but a letter written to the assembly by a person not a member of it is not privileged. Shurtleff v. Stevens, 51 Vt. 501; 31 Am. Rep., 698; Shurtleff v. Parker, 130 Mass., 293; 39 Am. Rep., 454.

2. A caution sent by the committee of a charity to all the subscribers, warning them not to pay their subscriptions in future to the plaintiff, the former collector, who "was found unworthy of confidence and dismissed," is *prima facie* privileged. Gassett v. Gilbert and others, 6 Gray (72 Mass.), 94.

3. A communication made by a citizen to a school commissioner in good faith is privileged although detrimental to the moral character of the teacher. And the burden of proving a want of good faith is on the teacher who denies it. Decker v. Gaylord, 35 Hun (N. Y.), 584.

§ 127. Digest of English Cases.—

1. A parish meeting was called to investigate the accounts of the parish constable; one rate-payer was unable to attend, so he wrote a letter to be read to the meeting concerning the constable and his accounts. This letter

was held *prima facie* privileged. For had he attended the meeting and made the same charge orally, such speech would have been privileged. Spencer v. Amerton, 1 Moo. & Rob., 470.

2. A member of parliament gave notice that he would ask in the house of commons why the plaintiff, a colonel in the army, had been dismissed; thereupon the defendant, the plaintiff's superior officer, who had been instrumental in procuring his discharge, called on the member, whom he knew well, to explain the true facts of the case. Lord Campbell considered the occasion *prima facie* privileged; but the jury found it was done maliciously, and awarded the plaintiff £200 damages. Dickson v. Earl of Wilton, 1 F. & F., 419.

3. A *bona fide* communication between a member of parliament and his constituents on a matter of political or local interest is privileged; such as a report of any speech of his circulated privately among his constituents for their information. Davison v. Duncan, 7 E. & B., 233; 26 L. J., Q. B., 107; Wason v. Walter, L. R., 4 Q. B., 95; 8 B. & S., 730; 38 L. J., Q. B., 42; 17 W. R., 169; 19 L. T., 416. But it would be otherwise if a member of parliament published his speech to all the world, with the malicous intention of injuring the plaintiff. R. v. Lord Abingdon, 1 Esp., 226; R. v. Creevey, 1 M. & S., 273. But a judge of the bankruptcy court and an opposing creditor have no such common interest in the case of an insolvent debtor as to render privileged a letter written by the creditor to the judge previously to the hearing of the case. Writing such a letter is indeed a contempt of court. Gould v. Hulme, 3 C. & P., 625. So the agents of the rival candidates at an election have no common interests, at all events after the election is over. Dickeson v. Hilliard and another, L. R., 9 Ex., 79; 43 L. J., Ex., 37; 22 W. R., 372; 30 L. T., 196.

4. A confidential consultation between a vicar and his curate as to the course which the vicar ought to adopt in an ecclesiastical matter was held privileged. Clark v. Molyneux, 3 Q. B. D., 237; 47 L. J., Q. B., 230; 26 W. R., 104; 36 L. T., 466; 37 L. T., 694; 14 Cox, C. C., 10; Bell v. Parke, 10 Ir. C. L. R., 284. But where a rector sent to his parishioners a circular letter warning them not to send their children to a school which plaintiff had opened in the parish against the rector's wishes and in opposition to the rector's parish school, it was held that no privilege attached. Gilpin v. Fowler, 9 Ex., 615; 23 L. J., Ex., 152; 18 Jur., 293.

5. If a clergyman or parish priest, in the course of a sermon, "make an example" of a member of his flock by commenting on his misconduct, and either naming him or alluding to him in unmistakable terms, his words will not be privileged, although they were uttered *bona fide* in the honest desire to reform the culprit and to warn the rest of his hearers, and although the congregation would probably be more interested in this part of the discourse than in any other. If the words be actionable the clergyman must justify. Magrath v. Finn, Ir. R., 11 C. L., 152; Kinnahan v. McCullagh, id., 1; R. v. Knight, Bacon's Abr., A., 2 (Libel).

6. A creditor was appointed trustee in liquidation of the debtor's estate, the debtor continuing to manage his former business for the benefit of the estate. A letter written by the trustee to another creditor, commenting in very severe terms on the debtor's conduct, is privileged. Spill v. Maule, L. R., 4 Ex., 232; 38 L. J., Ex., 138; 17 W. R., 805; 20 L. T., 675.

7. A person interested in the proceeds of a sale may give notice to the auctioneer not to part with them to the plaintiff who ordered the sale, on the ground that he has committed an act of bankruptcy. Blackham v. Pugh, 2 C. B., 611; 15 L. J., C. P., 290. So the son-in-law of a lady has sufficient interest in whom she marries to justify him in warning her not to marry the plaintiff, if he honestly believes him, however erroneously, to be of bad character. Todd v. Hawkins, 8 C. & P., 88; 2 M. & Rob., 20; Adams v. Coleridge, 1 Times L. R., 84. So the reports of the directors and auditors of a company printed and circulated among the shareholders are privileged. Lawless v. Anglo-Egyptian Cotton Co., L. R., 4 Q. B., 262; 10 B. & S., 226; 38 L. J., Q. B., 129; 17 W. R., 498.

8. A solicitor, acting for some shareholders in a company, printed and sent to the shareholders, but to no one else, a circular reflecting on the promoters and directors, and inviting the shareholders to meet and discuss their position and take measures to protect their common interests. *Held*, that such publication was *prima facie* privileged. Quartz Hill Gold Mining Co. v. Beall (C. A.), 20 Ch. D., 509; 51 L. J., Ch., 874; 30 W. R., 583; 46 L. T., 746.

9. The defendant and Messrs. Wright & Co., his bankers, were both interested in a concern, the management of which the bankers had intrusted to the plaintiff, their solicitor. A confidential letter written by the defendant to Messrs. Wright & Co., charging the plaintiff with professional misconduct in the management of such concern, was held privileged by Lord Ellenborough. M'Dougall v. Claridge, 1 Camp., 267.

10. A creditor of the plaintiff may comment on the plaintiff's mode of conducting his business to the man who is surety to that creditor for the plaintiff's trade debts. Dunman v. Bigg, 1 Camp., 269, n.

11. Where A. and B. have a joint interest in a matter, a letter written by A. to induce B. to become a party to a suit relating thereto is privileged though it may refer to the plaintiff in angry terms. Shipley v. Todhunter, 7 C. & P., 680.

12. A communication from a firm of brewers to the tenants of their public-houses, refusing to accept any longer in payment checks drawn on a particular bank, is *prima facie* privileged. Capital and Co. Bank v. Henty (C. A.), 5 C. P. D., 514; 49 L. J., C. P., 870; 28 W. R., 851; 43 L. T., 651; (H. L.), 7 App. Cas., 741; 52 L. J., Q. B., 232; 31 W. R., 157; 47 L. T., 662; 47 J. P., 214.

13. Defendant was a life governor of a public school to which the plaintiff supplied butcher's meat; defendant told the steward of the school, whose duty it was to examine the meat, that plaintiff had been known to sell bad meat. *Held*, a privileged communication. Humphreys v. Stillwell, 2 F. & F., 590; Crisp v. Gill, 29 L. T. (O. S.), 82.

14. Several fictitious orders for goods had been sent in the defendant's name to a tradesman, who thereupon delivered the goods to the defendant. The defendant returned the goods, and, being shown the letters ordering them, wrote to the tradesman that in his opinion the letters were in the plaintiff's handwriting. *Held*, that this expression of opinion was privileged, as both defendant and the tradesman were interested in discovering the culprit. Croft v. Stevens, 7 H. & N., 570; 31 L. J., Ex., 143; 10 W. R., 272; 5 L. T., 683.

15. A prominent member of the church of St. Barnabas, Pimlico, went to stay in the vacation at Stockcross, in Berkshire, and so conducted himself

there as to gravely offend the parishioners. Letters passing between the curate of St. Barnabas and the incumbent of Stockcross relative to the charges of misconduct brought against the plaintiff were held privileged, as both were interested in getting at the truth of the matter. Whiteley v. Adams, 15 C. B. (N. S.), 392; 33 L. J., C. P., 89; 10 Jur. (N. S.), 470; 12 W. R., 153; 9 L. T., 483.

16. The defendant had a dispute with the Newry Mineral Water Company, which they agreed to refer to "some respectable printer, who should be indifferent between the parties," as arbitrator. The manager of the company nominated the plaintiff, a printer's commercial traveler. The defendant declined to accept him as an arbitrator, and, when pressed for his reason, wrote a letter to the manager stating that the plaintiff had formerly been in the defendant's employment, and had been dismissed for drunkenness. The plaintiff thereupon brought an action on the letter as a libel concerning him in the way of his trade. *Held*, that the letter was privileged, as both parties were interested in the selection of a proper arbitrator. Hobbs v. Bryers, 2 L. R., Ir., 496.

17. If a parish officer seeks re-election, charges made against him at the parish meeting for the nomination of officers as to his previous conduct in the office are privileged, if made *bona fide*. George v. Goddard, 2 F. & F., 689; Kershaw v. Bailey, 1 Ex., 743; 17 L. J., Ex., 129. See Senior v. Medland, 4 Jur. (N. S.), 1039; Pierce v. Ellis, 6 Ir. C. L. R., 55; Bennett v. Barry, 8 L. T., 857; Harle v. Catherall, 14 L. T., 801. Even though made to the wife of a voter, not to the voter himself. Wisdom v. Brown, 1 Times L. R., 412.

§ 128. **Where there is a Community of Interest.**— Where a large number of persons have an interest more or less remote in the matter, a person will not be privileged in informing them all, by circular or otherwise, unless there is no other way of effecting his object. Thus, in the case of most societies there is a council, or a managing committee, or a manager or a body of trustees or directors; and communications made confidentially to them will be privileged which would not be privileged if addressed in the first instance to the whole body of subscribers or shareholders. Such communications ought to be confined in the first instance to those whose duty it is to investigate them.[1] For such a communication can scarcely be called confidential which is addressed to some two or three hundred people at once.

§ 129. **Illustrations — Digest of American Cases.**—

1. A defendant who is on trial before a *quasi* judicial tribunal of this description, for alleged offenses against good morals and conduct inconsist-

[1] York v. Pease, 2 Gray (Mass.), 282; Purcell v. Sowler, 2 C. P. D., 221; Burt v. Advertiser Co., 154 Mass., 238; 28 N. E. Rep., 1; Carpenter v. Willey, 65 Vt., 168; Boehmer v. Detroit Free Press, 94 Mich., 7; 53 N. W. Rep., 822; Etchison v. Pergerson, 88 Ga., 620; 15 S. E. Rep., 680.

ent with his religious profession, is entitled to make a full defense, and is allowed great latitude so long as he acts in good faith and within the fair scope of repelling and refuting the charges brought against him. A party making such proceedings the vehicle of scandal is not protected by law. But so long as he confines himself to the subject-matter of his defense, and uses no language which is not pertinent thereto, then, although he may incidentally disparage private character, he is not answerable therefor in an action for damages. York v. Pease, 2 Gray, 282.

2. An anathema and sentence of excommunication pronounced by a Roman Catholic priest upon one of his parishioners, whether pronounced with or without authority, is not in this country — at least in the absence of an intent to injure the parishioner in his temporal affairs — a cause for a civil action. Fitzgerald v. Robinson, 112 Mass., 371.

3. When a vote of excommunication from a church has been passed, and the offender thereby declared to be no longer a member, the sentence may nevertheless be promulgated by being read in the presence of the congregation by the pastor. Farnsworth v. Storrs, 5 Cush., 412.

4. Where a member of a church submitted to an investigation by the church of charges preferred against him in a written complaint by persons not members, and the church decided that the complaint was substantiated by the evidence, it was held that, in an action for a libel against the person making the complaint on account of the matter contained in it, the decision of the church was evidence of probable cause for making the charges, and sufficient to rebut the presumption of malice, and that the action could not be maintained without proving express malice on the part of the defendants. Remington v. Congdon, 2 Pick. (Mass.), 310.

5. Churches have authority to deal with their members for immoral and scandalous conduct, and for that purpose to hear complaints, to take evidence and to decide; and, upon conviction, to administer proper punishment by way of rebuke, censure, suspension and excommunication. To this jurisdiction every member, by entering into the church covenant, submits, and is bound by his consent. Farnsworth v. Storrs, 5 Cush. (Mass.), 412; 7 Gray (Mass.), 314; Remington v. Congdon, 2 Pick. (Mass.), 310.

6. The proceedings of the church are *quasi* judicial, and those who complain, or give testimony, or act and vote, or pronounce the result orally or in writing, acting in good faith and within the scope of the authority conferred by this limited jurisdiction, and not falsely or colorably, making such proceedings a pretense for covering an intended scandal, are protected by law. Remington v. Congdon, 2 Pick. (Mass.), 310; Farnsworth v. Storrs, 5 Cush. (Mass.), 412; 7 Gray (Mass.), 314; Fairchilds v. Adams, 11 Cush., 549.

7. A discourse delivered pending the canvass for an election of a member of congress upon the opinion and decision of a commissioner of the circuit court of the United States, remanding a fugitive from service under the fugitive slave law, and upon the expediency and constitutionality of such a law, and containing passages accusing the commissioner of "legal Jesuitism," of prejudice and want of feeling, of "a partisan and ignoble act," and comparing him to Pilate and Judas, is not a privileged communication. Curtis v. Mussey, 6 Gray, 261 (1856).

§ 130. **Digest of English Cases.**—

1. The defendant, who was a sergeant in a volunteer corps, of which plaintiff also was a member, represented to the committee by whom the general business of the corps was conducted, that plaintiff was an unfit person to be permitted to continue a member of the corps; that he was the executioner of the French king, etc. Lord Ellenborough held the communication privileged. Farbaud v. Hookham, 5 Esp., 109. See Bell v. Parke, 10 Ir. C. L. R., 284; 11 Ir. C. L. R., 413. But for one member of a charitable institution to send round to all the subscribers a circular calling on them "to reject the unworthy claims of Miss Hoare," and stating that "she squandered away the money which she did obtain from the benevolent in printing circulars abusive of Commander Dickson," the secretary of the institution, is libelous and not privileged. Hoare v. Silverlock (No. 1, 1848), 12 Q. B., 624; 17 L. J., Q. B., 306: 12 Jur., 695. "There may be a thousand subscribers to a charity," observes Lord Denman in Martin v. Strong, 5 Ad. & E., 538. "Such a claim of privilege is too large."

2. A letter written by a subscriber to a charity to the committee of management of the charity concerning the conduct of their secretary in the management of the funds of the charity is *prima facie* privileged. Maitland v. Bramwell, 2 F. & F., 623; Hartwell v. Vesey, 3 L. T., 275.

3. Any statement made by a director of a company to his fellow-directors as to the conduct and character of their auditor is privileged, though it relates to his conduct with reference to another company of which he was secretary and not auditor. Harris v. Thompson, 13 C. B., 333. But a statement made by one private shareholder in a company to another about a man who was formerly engineer to the company, and sadly mismanaged its affairs, is not privileged. Brooks v. Blanshard, 1 Cr. & Mees., 779; 3 Tyrw., 844.

§ 131. **Unnecessary Publicity Must be Avoided.**—If the words are spoken in the presence of strangers wholly uninterested in the matter, the communication loses all privilege. The party must be careful that his words reach only those who are concerned to hear them. Words of admonition or of confidential advice should be given privately, not shouted across the street, or written on post-cards, or published in the newspapers.[1] The accidental presence of a third person will not alone, however, take the case out of the privilege, if it was unavoidable or happened in the usual course of business affairs. But if a party purposely contrives that a stranger should be present who has no right to be present, and who in the natural course of things would not be present, all privilege is lost.[2] And whenever a person deliberately adopts a method of com-

[1] Wilson v. Collins, 5 C. & P., 373; 17 L. J., Ex., 129; Scarll v. Dixon, 4 Robinson v. Jones, 4 L. R., Ir., 391. F. & F., 250.

[2] Kershaw v. Bailey, 1 Ex., 743;

munication which gives unnecessary publicity to statements defamatory of another, the jury will be justified in finding malice.

So, too, in making a communication which is only privileged by reason of its being made to a person interested in the subject-matter thereof, a person must be careful not to branch out into extraneous matter with which he is unconcerned. The privilege only extends to that portion of the communication in respect of which the parties have a common interest or duty.[1]

§ 132. **Exaggerated Expressions Not Privileged.**— He must also be careful to avoid the use of exaggerated expressions; for the privilege may be lost by the use of violent language when it is clearly uncalled for.[2] And especially in cases where a rumor reaches him of which he feels it his duty to inform the others who are equally interested with himself in its subject-matter, he should be very careful to report it precisely as he heard it, without any addition or exaggeration.[3]

§ 133. **Illustrations — Digest of American Cases.**—

1. The directors of a charity were informed that the plaintiff, their former collector, continued to solicit and receive subscriptions on behalf of the charity, although dismissed as untrustworthy. They therefore printed at the end of their annual report a "Caution to the Public," warning them against such imposture. *Held*, that such a caution was privileged, if published *bona fide* in the belief that the statements contained in it were true, and with the honest desire of protecting the interests of the charity, and guarding the public against imposture, and not with any malicious desire of defaming the plaintiff, with whom they had quarreled; and that it was for the jury to decide with which intent it was in fact published. Gassett v. Gilbert, 6 Gray (72 Mass.), 94.

2. Where the members of a provincial assembly of Congregationalist ministers passed a resolution condemning the conduct of the plaintiff, one of their body, towards his congregation, and also a resolution directing that a copy of the first resolution be sent to the Congregational organs for publication, it was held that such publication was not too widespread, and that no action lay. Shurtleff v. Stevens, 51 Vermont, 501; 31 Am. Rep., 698. So where the committee of a lodge of Freemasons expelled the plaintiff from the lodge, and the plaintiff appealed to the grand lodge, the committee was held justified in printing and circulating among the members of the grand lodge a pamphlet justifying their conduct, it being usual for

[1] Odgers on L. & S., 245.

[2] Fryer v. Kinnersly, 15 C. B. (N. S.), 422; 33 L. J., C. P., 96; 10 Jur. (N. S.), 442; 12 W. R., 155; 9 L. T., 415; Senior v. Medland, 4 H. & N., 843; 4 Jur. (N. S.), 1039.

[3] Bromage v. Prosser, 4 B. & C., 247; 6 Dowl. & R., 296.

them to report the transactions of their lodge to the grand lodge in that form. Kirkpatrick v. Eagle Lodge, 26 Kansas, 384; 40 Am. Rep., 316.

3. The manager and the directors of a joint-stock company have a common interest in discussing the affairs of the company; but that does not justify the manager in making personal charges of fraud against the directors in a public news-room. Sewall v. Catlin, 3 Wend. (N. Y.), 292.

§ 134. **Communications Relating to Candidates for Office.**— While it cannot be said that the law of privileged communications relating to candidates for public office is perfectly settled in the states, it has been generally held that the correct doctrine is announced by Chief Justice Parsons upon this subject, wherein he says, speaking for the court, "When any man shall consent to be a candidate for a public office conferred by the election of the people, he must be considered as putting his character in issue so far as it may respect his fitness and qualifications for the office, and publications of the truth on this subject with the honest intention of informing the people are not a libel; for it would be unreasonable to conclude that the publication of truths which it is the interest of the people to know should be an offense against their laws. For the same reason the publication of falsehood and calumny against public officers or candidates for public offices is an offense most dangerous to the people and deserves punishment, because the people may be deceived and reject the best citizens to their great injury, and it may be to the loss of their liberties."[1] One may in good faith publish the truth concerning a public officer, but if he states that which is false and aspersive, he is liable therefor however good his motives may be;[2] and the same is true whether the party defamed be an officer or a candidate for an office, elective or appointive.[3]

§ 135. **Freedom of Discussion.**— Freedom of the press and freedom of speech are equally sacred and equally protected by the constitution. Section 3 of the bill of rights provided that the liberty of the press shall forever remain inviolate; and all persons may freely speak, write and publish their

[1] Com. v. Clap, 4 Mass., 163; Wheaton v. Beecher, 66 Mich., 307; Lewis v. Few, 5 Johns. (N. Y.), 1; Root v. King, 7 Cow. (N. Y.), 613; Seeley v. Blair, Wright (Penn.), 358, 683; Brewer v. Weakly, 2 Overt. (Tenn.), 99; Barr v. Moore, 87 Penn. St., 385; Sweeny v. Baker, 13 W. Va., 158.

[2] Hamilton v. Eno, 81 N. Y., 116; Bailey v. Kal. Pub. Co., 40 Mich., 257.

[3] Wheaton v. Beecher, 66 Mich., 307, 33 N. W. Rep., 504.

sentiments on all subjects, being responsible only for the abuse of the right. In the United States nearly all the offices are elective. The press possesses no immunities not shared by every individual in the land. In every election the same freedom in discussing the merits and demerits of candidates for office is allowed equally to the press and the people, and every citizen can claim to be interested in the election of his rulers. But, under the doctrine of freedom of the press and freedom of speech, it will not do to hold that every household visitation made by itinerant politicians, poisoning the minds of the electors with defamatory charges against candidates, or every public harangue filled with similar matter, or every club-room discussion in which such charges are bandied about with licentious freedom and exaggeration, are privileged communications, and impose upon the party the burden of proving express malice. The freedom of speech cannot, even in this country, be carried to any such extent. If such were the law as to an article published in a public journal, there can be no good reason shown why it does not extend to all channels of communication between man and man during the pendency of an election. The law undoubtedly is that, where a public journal or an individual indulges in defamatory assertions against candidates for office, they are equally liable for their acts with those guilty of like offenses against private individuals.[1]

§ 136. **Qualification and Fitness May be Discussed, but Not Private Character.**— *Craig, J.:* "While the qualifications and fitness of a candidate for office might properly be discussed with freedom by the press of the country, we are aware of no case that goes so far as to hold that the private character of a person who is a candidate for office can be destroyed by the publication of a libelous article in a newspaper, notwithstanding the election may be attended with that excitement and feeling that not unfrequently enters into an election."[2]

§ 137. **The Rule in Pennsylvania.**— In a recent Pennsylvania case it is held that if a respectable citizen honestly believes and states that a candidate for a public office is guilty of

[1] Aldrich v. Press Printing Co., 9 Minn., 138.

[2] Rearick v. Wilcox, 81 Ill., 77.

official misconduct, or is a person of evil repute in the sense that it affects his fitness for the office which he seeks, such statement is privileged, and may be repeated by another in a meeting assembled to inquire into the merits of the candidates, though it be absolutely false and upon inquiry its falsity might have been ascertained, without being liable in an action for libel; for the voter has the right to canvass and discuss the qualifications of the candidates who seek his suffrage, openly and freely.[1]

§ 138. **Defamation Concerning Candidates for Office — A General Rule.**— Defamatory language spoken in relation to candidates for office, to come within the rules of law concerning privileged communications, must be (1) spoken without malice and with probable cause; (2) relevant to the fitness of the person for the office for which he is a candidate, and (3) spoken to the persons interested in the subject and having authority or power as to his election or appointment.[2]

§ 139. **Illustrations — American Cases.—**

1. In a Michigan Case (*Wheaton v. Beecher*, 30 N. W. Rep., 503), the libel originated in an interview between the defendant and one May, a reporter of the Detroit "Evening News" at the time and in its employ. The declaration avers that the defendant, "to revenge himself and to inflict his spite upon the plaintiff; to harass, annoy, wound and injure the plaintiff in respect of his feelings, honor, self-respect and dignity; to prevent the plaintiff from obtaining said office; and to cause it to be suspected and believed by all his neighbors and other good and worthy citizens of said city, county and state that the plaintiff was wanting in honesty and integrity; that he was a dishonest and corrupt man; that he had been and would be a dishonest and corrupt officer; that such good repute and honest character as the plaintiff might seem to have, or was supposed to have, by the people aforesaid were but pretense and sham, and that the plaintiff, though seemingly just and honest, was really morally corrupt and rotten; and to

[1] Briggs v. Garrett, 111 Penn. St., 404.

[2] Lewis v. Few, 5 Johns. (N. Y.), 1; L. C. P. Co., book 3, 929, note; Hunt v. Bennett, 19 N. Y., 173; Law v. Scott, 5 Har. & J., 438; Duncombe v. Daniel, 8 C. & P., 213; Harwood v. Astley, 4 Bos. & Pul., 47; Root v. King, 7 Cow., 613; 4 Wend., 113; Com. v. Clap, 4 Mass., 163; Curtis v. Mussey, 6 Gray (Mass.), 251; Aldrich v. Press Printing Co., 9 Minn., 133; Smith v. Higgins, 16 Gray, 251; Viele v. Gray, 10 Abb. Pr., 1; Spenser v. Amerton, 1 Moo. & Rob., 470; George v. Goddard, 2 F. & F., 689; How v. Prin, Holt, 652; 7 Mod., 107; Prin v. How, 1 Browne's P. C., 64; Wilson v. Noonan, 35 Wis., 331; Barr v. Moore, 87 Penn. St., 385; Sweeny v. Baker, 13 W. Va., 158; Kimball v. Fernanda, 41 Wis., 329; Marks v. Baker, 28 Minn., 162; Field v. Colson, 93 Ky., 347; Rea v. Wood, 105 Cal., 314; 38 Pac. Rep., 899.

otherwise cause the plaintiff to incur and be exposed to the hatred, scorn and contempt of his neighbors and other good and worthy citizens of said city, county and state,— did heretofore, to wit, on the 17th day of March, A. D. 1886, at, to wit, the said city of Detroit, compose, and did cause and procure to be published in the "Evening News," a newspaper published and circulating in said city, county and state, and in other places and countries, a certain false, malicious, scandalous and defamatory libel of and concerning the plaintiff, in words and figures following; that is to say: "I [the interlocutor meaning] see your [the defendant meaning] old friend, W. W. Wheaton [the plaintiff meaning], is going to be comptroller [the city comptroller of the city of Detroit meaning]. Yes, and I [the defendant meaning] shouldn't wonder if the city [the city of Detroit meaning] has [thereby meaning that the city of Detroit would have] the same experience with him [the plaintiff meaning] that England [the kingdom of Great Britain, Ireland, etc., meaning] did [had meaning] with Cyprus [meaning the island of Cyprus in the Mediterranean sea, provisionally acquired by Great Britain about June 4, 1878]. What was that? Why, England thought it had secured a great bargain in Cyprus [meaning thereby that the people of Great Britain, and those having the charge and management of their political affairs, believed that the island of Cyprus was a valuable and desirable acquisition and addition to the jurisdiction of Great Britain], but it turned out [meaning that it was subsequently learned and discovered] that the island [Cyprus meaning] was a huge grave-yard. The whole surface was covered with dead bodies and bones to the depth of sixteen feet. They couldn't plow or dig anywhere without turning up this mass of carrion. And so the island [Cyprus meaning] did not prove such a very fine bargain after all [meaning that it was a bad bargain, and that Cyprus was not a valuable or desirable acquisition or addition to British jurisdiction]," meaning thereby that the plaintiff might seem to be a man of honesty and integrity, and a fit and desirable person for city comptroller, but that, in fact and reality, such was not the case. On the contrary, that the plaintiff's supposed honesty and integrity were but pretense and sham; that he was a hypocrite; that his real character was bad; that he was dishonest; that he was morally corrupt and rotten; and that business and official contact or relation with him would actually disclose these imputed evil characteristics of the plaintiff. Defendant pleaded the general issue and gave the following notice thereunder: "Please take notice that the defendants, under the general issue above pleaded, will give evidence and insist upon as a defense to said action, (1) that the words set forth in the plaintiff's declaration, as alleged to have been composed and published by said defendants, were privileged communications; defendant at the time of the alleged publication being a citizen of the city of Detroit, Michigan, and a large property owner and tax-payer in said city of Detroit, and interested in the appointment of the public officers of said city as affecting his private interests as well as public good; (2) that the said alleged libel was a privileged communication." No justification of the libel was pleaded by the defendant. The cause was tried before a jury, and before the parties closed their testimony the case was taken from the jury. On appeal in the supreme court, Sherwood, J., in delivering the opinion, says: "I do not think

the action of the learned judge in this case can be sustained. At the time of the publication of the matters alleged to be libelous, Mr. Wheaton was a very prominent candidate for the appointment of comptroller of the city, and had been favorably known to the people of the city and state for more than twenty years, having held during that period high political and officials positions, among which was that of mayor of Detroit, and had been prominent as a business man of that city and in other parts of the state, and was then being very strongly supported by all classes in Detroit for the position he desired. There can be no question, I apprehend, but that the language imputed to Mr. Beecher, used with the intent and purpose charged in the declaration, was libelous, and must be regarded so upon its face." Citing Evening News v. Tryon, 42 Mich., 549.

§ 140. **Digest of American Cases.**—

1. The law on this point varies greatly in the different states. In New York no attack is allowed even on the public character of any public officer; and that the defendant honestly believed in the truth of the charge is no defense. No distinction is made between a public man and a private citizen. Hamilton v. Eno, 81 N. Y., 116; Lewis v. Few, 5 Johns., 1; Root v. King, 7 Cowen, 613; 4 Wend., 113. So in West Virginia. Sweeney v. Baker, 13 West Virginia R., 158. And in Massachusetts. Commonwealth v. Clap, 4 Mass., 103; Curtis v. Mussey, 6 Gray (72 Mass.), 261.

2. In Michigan the supreme court decided that "the public are interested in knowing the character of candidates for congress; and while no one can lawfully destroy the reputation of a candidate by falsehood, yet, if an honest mistake is made in an honest attempt to enlighten the public, it must reduce the damages to a minimum if the fault itself is not serious." Bailey v. Kalamazoo Publishing Co., 40 Mich., 251; Scripps v. Foster, 39 Mich., 376; 41 Mich., 742.

3. In New Hampshire a newspaper may state in good faith and on reasonable grounds that any public officer has been guilty of official misconduct. Palmer v. Concord, 48 N. H., 211. And in Iowa charges affecting the moral character of any public man are protected if made in good faith and on reasonable grounds. Mott v. Dawson, 46 Iowa, 533.

4. A newspaper article set out the procuring of a pension by a congressman in a case of fraudulent enlistment, and afterwards used the following language, which was alleged to be aimed at the complaining witness, a candidate for public office, viz.: "Up to date President Cleveland has not seen fit . . . to tie hungry spoils-hunters to the crib, who . . . have aimed to very doubtful pension grants and anti-convict labor bills to catch votes." *Held*, that this language was capable of being construed as charging that a public representative, for the purpose of obtaining votes, had intentionally pressed for the payment of public money on very questionable claims; that such a meaning was defamatory. State v. Schmidt, 49 N. J. L., 579, 9 Atl. Rep., 774.

5. The rule as laid down by the Minnesota supreme court is that a communication made in good faith upon any subject-matter in which the person communicating has an interest, or in reference to which he has a duty, public or private, either legal or moral or social, if made to a person having a corresponding interest or duty, is privileged; that in such case the

inference of malice which the law draws from defamatory words is rebutted, and the burden of proving actual malice is cast upon the person claiming to have been defamed. Where the subject of the communication is of public interest to the community of which the parties are members, it is said to be sufficient to make the communication privileged. Marks v. Baker, 28 Minn., 162; 9 N. W. Rep., 678.

6. Public writers and speakers may discuss men and measures in speaking of matters of public interest, provided only they do so in good faith and without malice. The public has a right to discuss in good faith the public conduct and qualifications of a public man — such as a judge, an embassador, etc., with more freedom than they can take with a private matter or with the private conduct of any one. Crane v. Waters, 10 Fed. Rep., 619.

7. An abusive article in a newspaper, touching a candidate for an appointment to office, is not privileged, though such a remonstrance addressed to the appointing power would be. Hunt v. Bennett. 5 Smith, 173.

8. The plaintiff was the treasurer of the city of Mankato and a candidate for re-election. The defendants, being residents and tax-payers of said city, published a communication in a newspaper published in said city, of which they were editors and proprietors, charging or insinuating that the plaintiff had, as appeared by certain official reports, failed to account for city funds which had come into his hands as such treasurer, and that (as plaintiff claimed) he had embezzled a portion of such funds, and the court held that such publication, if made in good faith, was privileged. Marks v. Baker, 28 Minn., 162; 9 N. W. Rep., 678.

9. A newspaper article falsely charging a candidate for congress with being a forger, thief and cheat, though published without malice and in an honest belief of the truth of the charges, is not privileged. Bronson v. Bruce, 59 Mich., 467; 26 N. W. Rep., 671.

10. The publication of a communication charging or insinuating that a candidate for the office of treasurer had failed to account for city funds, if made in good faith, is privileged. Marks v. Baker, 28 Minn., 162; 9 N. W. Rep., 678.

11. An accusation of larceny made in good faith to electors against a candidate for office, for the sole purpose of advising them of the real character and qualifications of the candidate, does not render the accuser liable for slander. Bays v. Hunt, 60 Iowa, 251; 14 N. W. Rep., 785.

12. The fact that defendant, as the proprietor of a newspaper, in publishing a libelous article against the plaintiff while a candidate for office, was actuated by what he believed to be for the public good, cannot be taken and considered in mitigation of damages. An intention to serve the public good does not authorize a defamation of private character. Rearick v. Wilcox, 81 Ill., 77.

13. A publication of and concerning a candidate for an elective office is libelous which charged that he had bartered away a public improvement, *e. g.*, a railroad, in which the constituency for whose suffrages he is a candidate had a deep interest, for the charter of a bank to himself and associates; and that, if elected, he would be an unfaithful representative and act counter to the interests of his constituents; that he would by criminal in-

difference or treachery retard or totally prevent the construction of such railroad, and he would do all this from motives of personal political aggrandizement, or to accomplish some sinister and dishonest purpose, or to gratify his personal malice. Powers v. Dubois, 17 Wend. (N. Y.), 63.

14. In a criminal prosecution for libel, evidence was introduced tending to show that the defendant, who was an elector of Chase county, Kansas, circulated an article among the voters of such county containing some things which were untrue and derogatory of the character of the prosecuting witness, who was then a candidate for the office of county attorney in said county. The court says: "If the supposed libelous article was circulated only among the voters of Chase county, and only for the purpose of giving what the defendant believed to be truthful information, and only for the purpose of enabling such voters to cast their ballots more intelligently, and the whole thing was done in good faith, we think the article was privileged and the defendant should have been acquitted, although the principal matter contained in the article was untrue in fact and derogatory to the character of the prosecuting witness." State v. Balch, 31 Kan., 465, 2 Pac. Rep., 609, citing Com. v. Clap, 4 Mass., 163; Sweeney v. Baker, 13 W. Va., 160, 183; White v. Nichols, 3 How., 266; Brown v. Hathaway, 95 Mass., 239; Lewis v. Chapman, 16 N. Y., 369; Klinck v. Colby, 46 N. Y., 427; Munster v. Lamb, 23 Amer. Law Reg. (N. S.), 22 and note: Briggs v. Garrett, 18 Cent. Law J., 109 and note; 2 Whart. Crim. Law (8th ed.), 1636, and Russ. Crim. Law. 244. 245.

15. In a recent case in Pennsylvania it is said that upon probable cause a candidate for a public office may be charged with an act which, if true, would render him unfit for the suffrage of the people. In this case the plaintiff was a candidate for re-election as judge of one of the common pleas courts of Philadelphia, and the defendant was chairman of the "Committee of One Hundred." A letter was addressed to the defendant as chairman of such committee, in which the plaintiff was savagely attacked and maligned. The letter was turned over at one of the meetings of the committee to the secretary, with directions to read it to the committee as a letter addressed to them through the chairman, and concerning a matter in which they were interested. The court say:

"Was this letter a privileged communication? We are here met with the inquiry, Is falsehood privileged? I answer no. A lie is never privileged. It always has malice coiled up within it. When a man coins and utters a lie, or when he repeats it knowing it to be false, the law implies malice, and he cannot shelter himself behind the doctrine of privileged communications. I may illustrate this by a familiar instance of an inquiry into the character of a servant. If I say I believe him to be a thief upon information derived from others, or from facts and circumstances within my own knowlege — in other words, if my statement *is based upon probable cause* — the communication is privileged, and I am not responsible, even though it should appear I was entirely mistaken. If, on the contrary, I knowingly and falsely accuse him of dishonesty, such charge is not privileged, and I am liable in damages for the consequences of such a statement. We have no concern with the knowledge or motive of the writer of the letter. Conceding, for the purposes of this case, that every word con-

tained therein is false, and was known to be so by the writer; that it was sent out of pure malice to injure and defame Judge Briggs (the plaintiff), no such knowledge was brought home to Mr. Garrett (the defendant); nor is there anything in the case from which it would be justly imputed to him. So far as he is concerned it was a mistake — nothing more. The difference between an honest mistake made in the pursuit of a proper object, and a wilful falsehood coined for the purpose of deception, is so palpable that we may well be excused from dwelling upon it at length. It is mistakes, not lies, that are protected under the doctrine of privilege. A communication to be privileged must be made upon a proper occasion, from a proper motive, and must be based upon a reasonable or probable cause. When so made in good faith, the law does not imply malice from the communication itself as in the ordinary case of libel; actual malice must be proved before there can be a recovery; and whether communication be privileged or not is a question for the court, not the jury." Briggs v. Garrett, 111 Pen. St., 404, 2 Atl. Rep., 513

16. Certain citizens of a town prayed for the removal of a constable from office on the grounds of want of principle, of ignorance and of misconduct. *Held*, in the constable's action for libel, that he must show express malice as well as that the statements were false before he could recover. Kent v. Bougratz, 15 R. I., 72.

17. The fact that a person is a candidate for office in the gift of the people affords in many instances a legal excuse for publishing language concerning him as such candidate, for which publication there would be no legal excuse if he did not occupy the position of such candidate, whether the publication is made by the proprietor of a newspaper or by a voter or other person having an interest in the election. The conduct and actions of such candidate may be freely commented upon; his acts may be canvassed and his conduct boldly censured. Nor is it material that such criticism of conduct should in the estimate of the jury be just. The right to criticise the conduct or actions of a candidate is a right on the part of the party making the publication to judge himself of the justness of the criticism. If he was liable to an action for libel for a publication criticising the conduct or actions of such a candidate, if a jury should hold his criticism unjust his right of criticism would be a delusion. The only limitation to the right of criticism of the acts or conduct of a candidate for an office in the gift of the people is that the criticism be made in good faith. As this right of criticism is confined to the acts or conduct of such candidate, whenever the acts or conduct criticised are not admitted they must of course be proven. The candidate's talents and qualifications, mentally and physically, for the office he asks at the hands of the people may be fully commented on in newspaper publications; and though such comments be harsh and unjust, no malice will be implied; for these are matters of opinion, of which the voters are the only judges. But no one has a right by a publication to impute to such candidate falsely crimes, or publish allegations affecting his character falsely. Sweeney v. Baker, 13 W. Va., 183.

18. *Campbell, J.:* "The law favors the freedom of the press so long as it does not interfere with private reputation or other rights entitled to protection. And inasmuch as the newspaper press is one of the necessities of

civilization, the conditions under which it is required to be conducted should not be unreasonable or vexatious. Where the wrong done consists in a libel, which can never be accidental, the publishing is therefore always imputed to a wrong motive, and that motive is called malice." Detroit Daily Post v. McArthur, 16 Mich., 447.

19. The public are interested in knowing the character of candidates for congress; and while no man can lawfully destroy the reputation of a candidate by falsehood, yet if an honest mistake is made in an honest attempt to enlighten the public, it must reduce the damage to the mininum, if the fault itself is not serious; and there should be no unreasonable responsibility where there is no malice. Bailey v. Kalamazoo Pub. Co., 40 Mich., 251.

§ 141. Digest of English Cases.—

1. Defendant made a speech at a public meeting called to petition parliament, and subsequently handed a copy of what he had said to the reporters for publication in the newspapers. Such publication was held to be in excess of the privilege. Pierce v. Ellis, 6 Ir. C. L. R., 55.

2. A letter sent to the newspaper by members of the town council, and published therein, charging certain contractors for the erection of the borough gaol with "scamping" their work, is not privileged; although preferring the same charge at a meeting of the town council probably would have been. Simpson v. Downs, 16 L. T., 391. *Contra*, Harle v. Catherall, 14 L. T., 801.

3. A personal attack on the private life and character of a candidate at a parliamentary election, published by a voter in the newspapers, is not privileged. "However large the privilege of electors may be," said Lord Denman, C. J., "it is extravagant to suppose that it can justify the publication to all the world of facts injurious to a person who happens to stand in the situation of a candidate." Duncombe v. Daniell, 8 C. & P., 222; 2 Jur., 32; 1 W., W. & H., 101.

4. A shareholder in a railway company summoned a meeting of shareholders, and also invited reporters for the press to attend. Charges which he made at such meeting against one of the directors for his conduct of the affairs of the company held not privileged, because persons not shareholders were present. Parsons v. Surgey, 4 F. & F., 247.

5. If a parish officer seeks re-election, charges made against him at the parish meeting for the nomination of officers as to his previous conduct in the office are privileged if made *bona fide*. George v. Goddard, 2 F. & F., 689; Kershaw v. Bailey, 1 Ex., 743; 17 L. J., Ex., 129. See Senior v. Medland, 4 Jur. (N. S.), 1039; Pierce v. Ellis, 6 Ir. C. L. R., 55; Bennett v. Barry, 8 L. T., 857; Harle v. Catherall, 14 L. T., 801. Even though made to the wife of a voter, not to the voter himself. Wisdom v. Brown, 1 Times L. R., 412. But a personal attack on the private character of a candidate at a parliamentary election is not privileged. Duncombe v. Daniell, 8 C. & P., 222; 2 Jur., 32; 1 W., W. & H., 101; Sir Thomas Clarges v. Rowe, 3 Lev., 30; How v. Prin, Holt, 652; 7 Mod., 107; 2 Salk., 694; 2 Ld. Raym., 812; 1 Brown's Parl. Cas., 64; Onslow v. Horne, 3 Wils., 177; 2 W. Bl., 750; Harwood v. Sir J. Astley, 1 B. & P. N. R., 47; Pankhurst v. Hamilton, 3 Times L. R., 500.

§ 142. **Petition for the Removal of Officers — How Far Privileged.**— *Best, J.:* "Every communication is privileged which is made in good faith with a view to obtain redress for some injury received, or to prevent or punish some public abuse. This privilege, however, must not be abused; for if such communication be made maliciously and without probable cause, the pretense under which it is made instead of furnishing a defense will aggravate the case of the defendant." [1]

Third Class — Qualified Privilege.

§ 143. **Publications of the Proceedings of Legislative Bodies and Courts of Justice.**— This class of cases might be included in either of the two preceding, for it is the duty of the publisher of a newspaper to present to the public fair and impartial reports of such proceedings, while on the other hand, as one of the public, he has a common interest with the public in insuring that such proceedings should be reported with accuracy and uniformity.

§ 144. **First, Legislative Proceedings.**— Every fair and accurate report of any proceeding in either house of congress, or in any committee thereof, is privileged, even though it contain matter defamatory of an individual.

The analogy between such reports and those of legal proceedings is complete. Whatever would deprive a report of a trial of immunity will equally deprive a report of parliamentary proceedings of all privilege. Reports of the proceedings and transactions of the state legislatures and their committees, of town councils, etc., are privileged in the same manner as reports of judicial proceedings. A speech made by a member of congress or parliament in open session is absolutely privileged. If he subsequently causes his speech to be printed, and circulates it privately among his constituents in good

[1] Fireman v. Ives, 5 B. & A., 647; 250; Blagg v. Sturt, 10 Q. B., 899; Odgers on Libel and Slander, 222; McIntyre v. McBean, 13 U. C., Q. B., Harrison v. Bush, 5 E. & B., 344; 534; Cook v. Hill, 3 Sandf., 341; Lake v. King, 1 Lev., 240; 1 Saund., Vanderzee v. McGregor, 12 Wend., 131; Woodward v. Lander, 6 C. & 545; Gray v. Pentland, 2 S. & R., 23; P., 548; Blake v. Pilford, 1 Moo. & Howard v. Thompson, 21 Wend., Rob., 198; Scarll v. Dixon, 4 F. & F., 319; Bodwell v. Osgood, 3 Pick., 379.

faith for their information on any matter of general or local interest, a qualified privilege would attach to such report.[1] But if he publishes his speech to all the world, with the malicious intention of injuring the plaintiff, he will be liable both civilly and criminally.[2] The privilege, however, does not attach to reports of legislative proceedings if the sessions are held with closed doors.[3]

§ 145. **Illustrations — Digest of American Cases.—**

1. A newspaper may report the proceedings of a public meeting of a town council, and remarks made by the members of the council concerning public matters, and may comment thereupon without being chargeable with libeling the mayor, whose public action is unfavorably criticised. Wallace v. Bazet, 34 La. Ann., 131.

2. The publication of proceedings before a joint committee appointed by the legislature to sit after its adjournment to obtain evidence, consisting in part of statements by witnesses under oath, to guide the state's counsel in instituting criminal prosecutions against the perpetrators of land frauds and forgeries, was held not privileged. Belo v. Wren, 63 Tex., 686.

3. Libel complained of: "J. Randall Terry took part in the late rebellion against the United States, and in March, 1862, when General Lovell was reviewing the rebel forces in this city, to show their strength, he did carry the black flag whereon was a skull and cross-bones, which meant no quarter to the enemy in the fight." The matter was published in the New Orleans "Times" as a report of testimony taken before an investigating committee of congress, and was held to be privileged. Terry v. Fellows, 21 La. Ann., 375.

§ 146. **Digest of English Cases.—**

1. The defendant published the report of a select committee of the house of commons, which contained a paragraph charging an individual with holding views hostile to the government. But the court refused to grant a criminal information, on the express ground that the publication was a true copy of a proceeding in parliament. R. v. Wright, 8 T. R., 293.

2. The plaintiff induced Earl Russell to present a petition to the house of lords charging a high judicial officer with having suppressed evidence before an election committee some thirty years previously. The charge was shown to be wholly unfounded, and the conduct of the plaintiff in presenting such a petition was severely commented on by the earl of Derby and others in the debate which followed. The plaintiff sued the proprietor of the "Times" for reporting this debate. Cockburn, C. J., directed the jury that if they were satisfied that the report was faithful and correct, it was

[1] Cooley's Constitutional Lim., 419; Terry v. Fellows, 21 La. Ann., 375; Wallace v. Bazet, 34 La. Ann., 131; Davison v. Duncan, 7 E. & B., 233; 26 L. J., Q. B., 107; Wason v. Walter, L. R., 4 Q. B., 95; 38 L. J., Q. B., 42; 19 L. T., 416.

[2] R. v. Lord Abingdon, 1 Esp., 226; R. v. Creevey, 1 M. & S., 273; Odgers on L. & S., 265.

[3] Wren v. Belo et al., 63 Tex., 686.

in point of law a privileged communication; and the court of queen's bench subsequently discharged a rule *nisi* which had been obtained for a new trial on the ground of misdirection. Wason v. Walter, L. R., 4 Q. B., 73; 8 B. & S., 671; 38 L. J., Q. B., 34; 17 W. R., 169; 19 L. T., 409.

3. The proceedings of any committee of the house of lords may be reported and commented on. Kane v. Mulvany, Ir. L. R., 2 C. L., 402.

§ 147. **Second, Judicial Proceedings — Requisites of the Report.**— Every impartial and accurate report of any proceeding in a public law court is privileged, unless the court has itself prohibited the publication, or the subject-matter of the trial be unfit for publication.

This rule applies to all proceedings in any court of justice, superior or inferior, of record or not of record.[1] It appears to be immaterial whether the matter be one over which the court has jurisdiction or not, and whether it disposes of the case finally or sends it for trial to a higher tribunal.

Lawrence, J.: "The reason for the privilege is this: The general advantage to the country in having these proceedings made public more than counterbalances the inconvenience to private persons whose conduct may be the subject of such proceedings."[2]

§ 148. **Illustrations — Digest of American Cases.—**

1. The publication of judicial proceedings is not protected to the extent of protecting statements made in connection therewith, but drawn from other sources, without stating the judicial conclusion. Bathrick v. Detroit Post & Tribune Pub. Co., 50 Mich., 659; 16 N. W. Rep., 172.

2. A statement upon the authority of a newspaper, and not purporting to be a report of proceedings of a court, is not privileged, and the responsibility therefor cannot be evaded by offer of proof that the libel was in fact matter of evidence. Storey v. Wallace, 60 Ill., 51.

3. By New York act of 1854, chapter 150, which is declaratory of the common law, no action will lie against editors, etc., for the publication of a fair and true report of a judicial proceeding, except on proof of malice in the making it, which is not to be implied from the fact of the publication; and the fact that he who claims to be libeled by the report was not a party to the judicial proceedings does not affect the privilege. Ackerman v. Jones, 37 N. Y. Superior Ct., 42.

4. The editor of a newspaper has a right to publish the fact that an individual has been arrested, and upon what charge; but he has no right, while the charge is in the course of investigation before the magistrate, to as-

[1] Stanley v. Webb, 4 Sand. (N. Y.), 21; Salisbury v. Union & Ad. Co., 45 Hun (N. Y.), 120; Lewis v. Levy, E., B. & E., 537; 27 L. J., Q. B., 287; 4 Jur. (N. S.), 970; Lecroy v. State, 89 Ga., 335; Hart v. Printing Co., 79 Hun, 358; Johns v. Press Pub. Co., 19 N. Y. S., 3; 61 N. Y. Super. Ct., 207.

[2] R. v. Wright, 8 T. R., 293; Wason v. Walter, L. R., 4 Q. B., 87; 8 B. & S., 730; 38 L. J., Q. B., 34; 17 W. R., 169; 19 L. T., 418.

sume that the person accused is guilty, or to hold him out to the world as such. Usher v. Severence, 20 Me., 9.

5. The publication in a newspaper of the contents of a petition for the disbarment of an attorney, filed in vacation and not presented or docketed, is not privileged. Cowley v. Pulsifer, 137 Mass., 392; 50 Am. Rep., 318.

6. As a general rule, a full, fair and correct account of a trial in a court of justice is a privileged publication; but the privilege is confined strictly to a report of the actual proceedings in court, and must contain nothing in addition to what forms strictly and properly the legal proceedings. Stanley v. Webb, 4 Sandf. (N. Y.), 21; Edsall v. Brooks, 17 Abb. (N. Y.) Pr., 221; 26 How. Pr., 426.

7. While the publication, without malice, of a fair and true report of judicial proceedings is privileged, the publication must not be garbled so as to misrepresent. It need not, however, be reported verbatim, or embrace the entire proceeding. Salisbury v. Union & Advertiser Co., 45 Hun (N. Y.), 120.

8. Publication of the contents of a petition for divorce is not privileged because the paper has been filed in court. Barber v. St. L. Dispatch Co., 3 Mo. App., 377.

9. A justice of the peace, in reference to an order of the county court in an appealed case, made an amended return, and stated therein that the plaintiff had slipped a bogus answer among the papers in the case. Upon a suit for a libel the communication was held material and pertinent and therefore privileged, irrespective of the motive. Aylesworth v. St. John, 25 Hun (N. Y.), 156.

NOTE.— It seems that it would have been privileged if the justice in good faith believed it to have been pertinent and material although he was mistaken in his belief.

10. The publication of a statement made by a justice of what had been said by persons applying to him for a warrant, which statements not appearing in any affidavit, nor made as a part of a hearing, are not privileged. McDermott v. Evening Journal Asso., 43 N. J. L., 488.

11. Under the Maryland constitution, making justices of the peace a part of the judiciary, proceedings before them are those of a public court of justice, and reports thereof entitled to the qualified privilege under the law of libel. The reports must be substantially correct, and, together with the comments thereon, must be made in good faith and without malice. McBee v. Fulton, 47 Md., 403.

12. The publication of judicial proceedings is not privileged to the extent of protecting statements made in connection therewith, but drawn from other sources, and without stating the judicial conclusion. Bathrick v. Detroit Post & Tribune Pub. Co., 50 Mich., 629.

13. The publication of a report of judicial proceedings is not privileged if it contains intrinsic evidence that it was not published with good motives or for justifiable ends. Saunders v. Baxter, 6 Heisk. (Tenn.), 369.

14. Statements made in the course of judicial proceedings with regard to third persons are conditionally privileged, and are not actionable if made without malice, with probable cause, and under such circumstances as would reasonably create a belief in the speaker's mind that they were true.

A next friend is entitled to the protection of his principal. Rouhs v. Backer, 6 Heisk. (Tenn.), 395.

15. An *ex parte* affidavit presented to a police magistrate to obtain a search-warrant is a judicial proceeding within the statute; and where an affidavit stated that affiant had probable cause to suspect, and did suspect, that letters written and addressed to him and being his property, and also a check for $30 indorsed to his order and being his property, had been feloniously taken, stolen and carried away from his safe by one A., at the instigation and by the direction of B., and then set forth the reasons for the suspicion, a report stating that the affiant appeared before a police magistrate and stated that several important letters and a check for $30 were taken from his safe by a private detective named A., at the instance of B., a banker; that B. was arrested and taken to the station-house, where the letters were found in his possession, and then he was discharged from custody, and the police magistrate retained the letters in his possession for the present (there being no evidence that the letters were found in the possession of B. or that the magistrate retained them), is a fair and true report, privileged under the statute, and an action by A. for libel founded thereon cannot be sustained. Ackerman v. Jones, 37 N. Y. Sup. Ct., 42.

16. A publication which charges attorneys at law in their conduct touching the defense of a client against a criminal prosecution with "betraying and selling innocence in a court of justice," and with doing acts in their profession which should cause them "to be held up to the world as derelict in their sense of honor and obligations" and "unworthy of trust and confidence," is libelous; and such a publication in a newspaper is not in the nature of a report of a proceeding in a court of justice and is not privileged. Ludwig et al. v. Cramer, 53 Wis., 193; 10 N. W. Rep., 81.

§ 149. Digest of English Cases.—

1. A fair and accurate report in a newspaper of proceedings before a magistrate on a preliminary investigation of a charge of treason-felony is privileged, although the prisoners were ultimately committed for trial and are awaiting trial at the moment of publication. So held in Ireland by Lefroy, C. J., and Fitzgerald and O'Brien, JJ.; *dissentiente*, Hays, J. Reg. v. Gray, 10 Cox, C. C., 184, overruling Duncan v. Thwaites, 2 B. & C., 556; 5 D. & R., 447.

2. A report of proceedings before a judge at chambers on an application under 5 and 6 Vict., ch. 122, sec. 42, to discharge a bankrupt out of custody, is privileged. Smith v. Scott, 2 C. & K., 580.

3. The defendants presented a petition in the Croyden county court to adjudicate the plaintiff a bankrupt and to set aside a bill of sale which they alleged to be fraudulent. The county court judge did not hear the case in open court, but in his own room; the public, however, could walk in and out of the room at their pleasure during the hearing. *Held*, by Cockburn, C. J., at *nisi prius*, that a fair report of what took place before the county court judge in his room was *prima facie* privileged. Myers v. Defries, Times, July 23, 1877.

4. Proceedings held in goal before a registrar in bankruptcy, under the bankruptcy act, 1861, secs. 101, 102, upon the examination of a debtor in custody, are judicial and in a public court. A fair report, therefore, of those

proceedings is protected. Ryalls v. Leader, L. R., 1 Ex., 296; 12 Jur. (N. S.), 503; 4 H. & C., 555; 35 L. J., Ex., 185; 14 W. R., 838; 14 L. T., 563.

5. A fair and accurate report of proceedings before the examiners appointed under 9 Geo. 4, ch. 22, sec. 7, to inquire into the sufficiency of the sureties offered on the trial of an election petition, was held privileged. Cooper v. Lawson, 8 A. & E., 746; 1 W., W. & H., 601; 2 Jur., 919; 1 P. & D., 15. But Patteson, J., held that a report of what had occurred at the town hall at Ludlow on the occasion of one of his majesty's commissioners of inquiry going to Ludlow to inquire into the state of that corporation was not privileged. Charlton v. Watton, 6 C. & P., 385.

6. A conversation took place between a coroner, his officer and the widow of the deceased in the room in which the inquest was about to be held, after reporters and the coroner had entered and taken their seats there, but before the jury had been sworn. The officer complained that the body had been improperly removed from the hospital; the widow complained of the manner in which she had been served with the summons to the inquest. *Held*, per Bowen, J., that a fair report of such conversation was privileged. Sheppard v. Lloyd, Daily Chronicle for March 11, 1882. But no privilege attaches to the report of unsworn statements made by a mere by-stander at an inquest. Lynam v. Gowing, 6 L. R., Ir., 259.

7. The following passage appeared in the "Daily News," the "Standard," and the "Morning Advertiser," on the same morning: "Three gentlemen, civil engineers, were among the applicants to the magistrate yesterday, and they applied for criminal process against Mr. Usill, a civil engineer of Great Queen street, Westminster. The spokesman stated that they had been engaged in the survey of an Irish railway by Mr. Usill, and had not been paid what they had earned in their various capacities, although from time to time they had received small sums on account; and, as the person complained of had been paid, they considered that he had been guilty of a criminal offense in withholding their money. Mr. Woolrych said it was a matter of contract between the parties; and although on the face of the application they had been badly treated, he must refer them to the county court." Mr. Usill thereupon brought an action against the proprietor of each newspaper. The three actions were tried together before Cockburn, C. J., at Westminster, on November 15, 1877. The learned judge told the jury that the only question for their consideration was whether or not the publication complained of was a fair and impartial report of what took place before the magistrate; and that, if they found that it was so, the publication was privileged. The jury found that it was a fair report of what occurred, and accordingly returned a verdict for the defendant in each case. *Held*, that the report was privileged, although the proceedings were *ex parte*, and although the magistrate decided that he had no jurisdiction over the matter. Usill v. Hales, Usill v. Brearley and Usill v. Clarke, 3 C. P. D., 319; 47 L. J., C. P., 323; 26 W. R., 371; 38 L. T., 65. See M'Gregor v. Thwaites, 3 B. & C., 24.

8. Richard Carlile on his trial read over to the jury the whole of Paine's "Age of Reason," for selling which he was indicted. After his conviction his wife published a full, true and accurate account of his trial, entitled "The Mock Trial of Mr. Carlile," and in so doing republished the whole of

the "Age of Reason," as a part of the proceedings at the trial. *Held*, that the privilege usually attached to fair reports of judicial proceedings did not extend to such a colorable reproduction of a book adjudged to be blasphemous, and that it is unlawful to publish even a correct account of the proceedings in a court of justice, if such an account contain matter of a scandalous, blasphemous or indecent nature. R. v. Mary Carlile, 3 B. & Ald., 167; Steele v. Brannan, L. R., 7 C. P., 261; 41 L. J., M. C., 85; 20 W. R., 607; 26 L. T., 509.

§ 150. **Exceptions to the Rule.**—There appear to be two cases in which reports of judicial proceedings, although fair and accurate, are not privileged, and are really illegal.[1]

(1) The first is where the court has itself prohibited the publication, as it frequently did in former days. "Every court has the power of preventing the publication of its proceedings pending litigation."[2] But such a prohibition now is rare.[3]

(2) The second is where the subject-matter of the trial is an obscene or blasphemous libel, or where for any other reason the proceedings are unfit for publication. It is not justifiable to publish even a fair and accurate report of such proceedings; such a report will be indictable as a criminal libel.[4]

§ 151. **Illustrations—Digest of English Cases.**—

1. The Protestant Electoral Union published a book called "The Confessional Unmasked," intended to show the pernicious influence exercised by Roman Catholic priests in the confessional over the minds and consciences of the laity. This was condemned as obscene in R. v. Hicklin, L. R., 3 Q. B., 360; 37 L. J., M. C., 89; 16 W. R., 801; 18 L. T., 395; 11 Cox, C. C., 19. The Union thereupon issued an expurgated edition, for selling which one George Mackey was tried at the Winchester quarter sessions on October 19, 1870, when the jury, being unable to agree as to the obscenity of the book, were discharged without giving any verdict. The Union thereupon published "A Report of the Trial of George Mackey," in which they set out the full text of the second edition of "The Confessional Unmasked," although it had not been read in open court, but only taken as read and certain passages in it referred to. A police magistrate thereupon ordered all copies of this "Report of the Trial of George Mackey" to be seized and destroyed as obscene books. *Held*, that this decision was correct. Steele v. Brannan, L. R., 7 C. P., 261; 41 L. J., M. C., 85; 20 W. R., 607; 26 L. T., 509.

2. On the trial of Thistlewood and others for treason in 1820 Abbott, C. J., announced in open court that he prohibited the publication of any of the

[1] Odgers on L. & S., 253.

[2] Turner, L. J., in Brook v. Evans, 29 L. J., Ch., 616; 6 Jur. (N. S.), 1025; 8 W. R., 688.

[3] Levy v. Lawson, E., B. & E., 560; 27 L. J., Q. B., 282.

[4] Re Evening News, 3 Times L. R., 255.

proceedings until the trial of all the prisoners should be concluded. In spite of this prohibition, the "Observer" published a report of the trial of the first two prisoners tried. The proprietor of the "Observer" was summoned for the contempt, and, failing to appear, was fined £500. R. v. Clement, 4 B. & Ald., 218.

3. Richard Carlile on his trial read over to the jury the whole of Paine's "Age of Reason," for selling which he was indicted. After his conviction his wife published a full, true and accurate account of his trial, entitled "The Mock Trial of Mr. Carlile," and in so doing republished the whole of the "Age of Reason" as a part of the proceedings at the trial. *Held*, that the privilege usually attaching to fair reports of judicial proceedings did not extend to such a colorable reproduction of a blasphemous book; and that it is unlawful to publish even a correct account of the proceedings in a court of justice, if such an account contains matter of a scandalous, blasphemous or indecent nature. R. v. Mary Carlile, 3 B. & Ald., 167; Bayley, J., in R. v. Creevey, 1 M. & S., 281.

§ 152. **Reports of Ex Parte Proceedings and Preliminary Examinations, etc.**— The right to publish reports of *ex parte* proceedings and preliminary examinations and the like does not seem to be fully conceded by the law. The weight of authority is in favor of extending the privilege to reports of arrests on information gained from papers on file, so long as such reports do not assume the guilt of the accused person and are not otherwise defamatory.[1]

§ 153. **Illustrations — Digest of American Cases.**—

1. **Libel complained of:** "*A Ruffian Caged.*— For several weeks past the police of the northwestern district have been endeavoring to make the arrest of a man named William McBee, who has occasioned considerable trouble in various neighborhoods. It appears he is a low character, who habitually frequents the streets, and always seeks to throw himself in the way of school girls, often insulting them with indecent remarks and actions. The police were notified and succeeded in arresting him. He was given a hearing in the afternoon, when a number of young ladies who had been approached testified as to the facts as above narrated. Justice McCaffray committed him for the action of the grand jury." The article was published in the Baltimore "American" upon information furnished by the justice. McBee, having been acquitted upon his trial, sued the proprietors of the paper for libel. In the trial court it was held that the publication was privileged if it was a correct account of the charges prepared in the course of an official inquiry before the justice. The court of appeals approved the holding. McBee v. Fulton et al., 47 Md., 403. But where a newspaper, the Cincinnati "Gazette," published the following article: "*Swindling.*— Amongst the arrests at the Ninth street station-house yes-

[1] Tesca v. Maddox, 11 La. Ann., 206; 20 Me., 9; Usill v. Hales, 3 C. P. D., Timberlake v. Cin. Gazette Co., 10 319.
Ohio St., 548; Usher v. Severence,

terday appeared the name of C. L. Timberlake, who is charged with petit larceny, he having, according to the statement made, bought a land warrant of a lady for $95, and when the lady had signed the document making the warrant over to him, he gave her $76 and would give her no more." The information having been obtained from the affidavit filed to procure the arrest the matter was held not to be privileged. The plaintiff received a verdict of $500, which was sustained. Timberlake v. Cincinnati Gazette Co., 10 Ohio St., 548; Merrill's Newspaper Libel, 184. And see Stanley v. Webb, 4 Sand. (N. Y.), 21.

2. A Louisiana newspaper published an account of the plaintiff's arrest for piracy. The report was embellished with a description of his person. "A land and water rat was this skipper of the schooner and a pet of criminal justice during many a day. . . . A brawny, thick-set, low-browed bandit, and, to all appearances,

'As mild a mannered man
As ever scuttled ship or cut a throat.'"

It was held the report exceeded the privilege. Tesca v. Maddox, 11 La. Ann., 206; Merrill's Newspaper Libel, 188.

3. The Kennebec, Me., "Journal" published the following paragraph: "*Postoffice Reform.*— We understand that Samuel Usher, Esq., postmaster of Kingfield in Somerset county, has been arrested for being a little too eager for the spoils of victory. . . . Mr. Usher found the proceeds of his office but an insufficient reward for his party services until at last a prize came in a letter with a five-hundred dollar bill in it from General Crehore, of Boston, to Daniel Pike, Esq., of Kingfield. The honest and patriotic postmaster, who had perhaps been peeping into letters for some time, discovered the five-hundred dollar bill and removed the deposit to his own pocket." In a suit for a libel founded upon this article it was held that the publication went beyond the mere fact of the arrest and assumed the plaintiff guilty of the offense with which he was charged, and was for that reason a libel. Usher v. Severence, 20 Me., 9.

4. On the 14th day of March, 1884, the Chicago "Tribune" published a libelous statement that one J. Appleton Wilson, a reputable real estate agent of Chicago, had been indicted by the grand jury of Cook county, Illinois, for the murder of an aged couple, his uncle and aunt, at Winetka, a suburb of Chicago. The publication was made in good faith in the belief it was true and without malice. The information came from the state's attorney's office. That official having nothing for his clerk to do directed him to draw up an indictment for the murder against Mr. Wilson. The clerk, supposing he had been indicted by the grand jury then in session, allowed one of the "Tribune" reporters access to the papers, where he gained the information upon which the article was based. The managing editor sent the reporter back for further information, and the report was confirmed. He was also sent to see Mr. Wilson, but it seems he did not succeed in finding him. Upon discovering its mistake the "Tribune" publicly and promptly made a full retraction and apology. Nevertheless a suit was brought which resulted, after a six days' trial, in a verdict for $250. Judge Collins instructed the jury that "it was no defense to an action for

libel in any case that the alleged libel is a faithful report of the proceedings of a grand jury, or that the defendant believed the same so to be the indictment, not having been returned into court." Chicago Tribune, April 19, 1885; Merrill's Newspaper Libel, 190.

5. In 1854 Warren Wood was adjudged to execution in New York for murder. On the scaffold he falsely charged Mr. Sandford, his counsel, with mismanagement in his defense. The "Herald" published a report of the execution, and gave the speech of the condemned man in full, which it seems to have copied from a local paper published at the place of execution. The report was held not to come within the privilege, and a verdict for $250 damages was sustained. Sandford v. Bennett, 24 N. Y., 20.

§ 154. **Digest of English Cases.**—

1. A London paper published the following article: "Three gentlemen, civil engineers, were among the applicants to the magistrate yesterday, and applied for criminal process against Mr. Usill, a civil engineer, of Great Queen street, Westminster. The spokesman stated that they had been engaged in the survey of an Irish railway by Mr. Usill, and had not been paid what they had earned in their various capacities, although from time to time they had received small sums on account; and, as the person complained of had been paid, they considered that he had been guilty of a criminal offense in withholding their money. Mr. Woolrych said it was a matter of contract between the parties; and although on the face of the application they had been badly treated, he must refer them to the county court." Mr. Usill claimed that the publication was a report of an *ex parte* application to a magistrate who had no jurisdiction in the matter, and therefore not entitled to the privilege; but in an action for libel founded upon the article in question the court held otherwise and he was defeated in his suit. Usill v. Hales et al., 3 Com. Pleas Div., 319.

§ 155. **Essentials of the Report.**—The report must be an impartial and accurate account of what really occurred at the trial; otherwise no privilege will attach. It is the duty of the judge to exclude irrelevant evidence; if, therefore, such evidence be given and appear in the report, it is not the fault of the reporter.[1] The evidence of the witnesses should be relied on, rather than the speeches of advocates. Care should be taken to report accurately the charge of the judge, especially if the case be of more than transitory interest. In many cases a report has escaped the charge of partiality on the ground that it contained an accurate report of the judge's charge to the jury.[2] A report is not privileged which gives the speeches of counsel wherein reflections are cast upon indi-

[1] 2 Wharton's Crim. Law, § 1639; Ryalls v. Leader, L. R., 1 Ex., 300; 35 L. J., Ex., 185; 14 W. R., 838; 12 Jur. (N. S.), 503; 14 L. T., 563.

[2] Milissich v. Lloyds, 46 L. J., C. P., 404; 36 L. T., 424; Chalmers v. Payne, 2 C., M. & R., 156; 5 Tyrw., 766; 1 Gale, 69.

viduals, but which does not state the evidence or explain in any way the defamatory remarks of the attorney.[1]

§ 156. **Not Essential that the Report Should be Verbatim.** The report need not be *verbatim;* it may be abridged or condensed, but it must not be partial or garbled. It need not state all that occurred *in extenso;* but if it omit any fact which would have told in a person's favor, it will be a question for the jury whether the omission is material. The entire suppression of the evidence of one witness may render the report unfair.[2] But a report will be privileged if it is "substantially a fair account of what took place" in court.[3] "It is sufficient to publish a fair abstract."[4]

§ 157. **Extent of the Privilege.**— The privilege is not confined to reports in a newspaper or law magazine. It attaches equally to fair and accurate reports issued for any lawful purpose in pamphlet or in any other form. Though if there be any other evidence of malice, the mode and extent of publication will be taken into consideration with such other evidence on that issue.[5]

§ 158. **The Press Has No Exclusive Privilege.**— It does not matter by whom the report is published; the privilege is the same as a matter of law for a private individual as for a newspaper.[6] "I do not think the public press has any peculiar privilege."[7] "A newspaper has no greater privilege in such a matter than any ordinary person. Any person is privileged publishing such a report if he does so merely to inform the public."[8]

§ 159. **Illustrations — Digest of American Cases.—**

1. The Bethlehem "Times" published a part of the argument of counsel in a civil action, as follows: "The plaintiff in this case, Mr. Aaron

[1] Com. v. Godshalk, 13 Phil. (Penn.), 575; Kent v. Bongartz, 15 R. I., 72; 22 Atl. Rep., 1023.

[2] Duncan v. Thwaites, 3 B. & C., 580; Odgers on L. & S., 256; Salisbury v. Union & Advertiser Co., 45 Hun (N. Y.), 120.

[3] Andrews v. Chapman, 3 C. & K., 289.

[4] Milissich v. Lloyds, 46 L. J., C. P., 405; Turner v. Sullivan, 6 L. T., 180.

[5] Milissich v. Lloyds, 46 L. J., C. P., 404; Salmon v. Isaac, 20 L. T., 885; Riddell v. Clydesdale Horse Society, 12 Ct. of Session Cases (4th Series), 976; Forbes v. Johnson, 11 B. Mon., 48; Saunders v. Baxter, 6 Heisk., 369; Salisbury v. Union & Advertiser Co., 45 Hun, 120; McBee v. Fulton, 47 Md., 403; Com. v. Blanding, 3 Pick., 304; Treska v. Maddox, 11 La. Ann., 206; Cowley v. Pulsifer, 137 Mass., 392; 50 Am. Rep., 319.

[6] Brett, L. J., 46 L. J., C. P., 407.

[7] Bramwell, L. J., 5 Ex. D., 56.

[8] Salmon v. Isaac, 20 L. T., 885; 3 Times L. R., 245.

Lynn, is a man so notoriously known in this community that the presumption that he brought this suit in good faith against Mr. Crist, to recover money justly due him, is entirely against him. He is known to be a man who, hidden behind the impregnable barrier of his wife's dress, has swindled creditor after creditor, and avoided paying his honest bills in this town for years. . . . I do not believe you can find one out of every ten men in Bethlehem who would believe this man Lynn under oath." An indictment having been found against the publishers, in affirming a verdict of guilty the court said: "The speech of counsel in a judicial proceeding does not afford matter for a privileged publication, and if it contains scandalous and defamatory matter, a prosecution for libel will be maintained. Commonwealth v. Godshalk, 13 Phil. (Penn.), 575.

§ 160. Digest of English Cases.—

1. Where the report of a criminal trial gave the speech for the prosecution, a brief *resumé* of the speech of the prisoner's counsel, who called no witnesses, and the whole of the lord chief baron's summing up *in extenso*, but it did not give the evidence except in so far as it was detailed in the judge's summing up, lord Coleridge, C. J., held the report necessarily unfair because incomplete, and refused to leave the question of fairness to the jury. But the court of appeal held that he was wrong in so doing; that it is sufficient to publish a fair abstract of the trial, and that the judge's summing up was presumably such an abstract; that the question of fairness must be left to the jury, and that therefore there must be a new trial. Milissich v. Lloyds (C. A.), 46 L. J., C. P., 404; 36 L. T., 432; 13 Cox, C. C., 575.

2. In a former action for libel brought by the plaintiff, the then defendant had justified. The report of this trial set out the libel in full, and gave the evidence for the defendant on the justification, concluding, however, by stating that the plaintiff had a verdict for £30. The jury, under the direction of Lord Abinger, took the "bane" and the "antidote" together, and found a verdict for the defendant, on the ground that the report when taken altogether was not injurious to the plaintiff. And the court refused a rule for a new trial. Chalmers v. Payne, 5 Tyrw., 766; 1 Gale, 69; 2 C., M. & R., 156; Dicas v. Lawson, id.

3. Where the report of a trial gave none of the evidence, but only an abridgment of the speeches of counsel, and the defendant pleaded that it was still in substance a true report of the trial, such plea was held bad on demurrer. Flint v. Pike, 4 B. & Cr., 473; 6 D. & R., 528; Kane v. Mulvany, Ir. R., 2 C. L., 402.

4. A report is not privileged which does not give the evidence, but merely sets out the circumstances "as stated by the counsel" for one party. Saunders v. Mills, 6 Bing., 213; 3 M. & P., 520; Woodgate v. Ridout, 4 F. & F., 202. Still less will it be privileged, if after so stating the case the only account given of the evidence is that the witnesses "proved all that had been stated by the counsel for the prosecution." Lewis v. Walter, 4 B. & Ald., 605.

5. The "Morning Post," in reporting proceedings taken against the plaintiff in the Westminster police court, stated that certain facts "appeared from the evidence." No evidence had in fact been given of them; but they had been stated in the opening of the solicitor for the prosecution. On these facts, Lord Coleridge, C. J., directed the jury to find for the defend-

ant. But the divisional court granted a new trial on the ground that there was a substantial discrepancy between the report and what really occurred, and that the question should therefore have been left to the jury whether the report was a fair one; and this decision was affirmed on appeal. Ashmore v. Borthwick, 49 J. P., 792; 2 Times L. R., 113, 209.

6. Where a report in the "Times" of a preliminary investigation before a magistrate set out at length the opening of the counsel for the prosecution, but entirely omitted the examination and cross-examination of the prosecutor, the only witness, merely saying that "his testimony supported the statement of his counsel," the jury found a verdict for the plaintiff. Pinero v. Goodlake, 15 L. T., 676.

7. The mother of a lady who was dead and buried applied to the coroner on affidavits for an order that the body might be exhumed; the affidavits imputed that she had been murdered by her husband. Thereupon the coroner issued his warrant for exhumation. A newspaper reported this fact, and proceeded to state the contents of these affidavits in a sensational paragraph, commencing, "From inquiries made by our reporter it appears that the deceased," etc. The reporter had made no inquiries; he had merely copied the affidavits. He was convicted and fined £50. R. v. Gray, 26 J. P., 663.

§ 161. **Partial Reports.**— An accurate report of a portion of a judicial proceeding will still be privileged if it does not purport to be a report of the whole. Thus, where a trial lasts more than one day, reports published in the newspapers each morning are protected. Where a man publishes a portion only, when it is in his power to publish the whole, this fragmentary publication will be evidence of malice if the part selected and published tell more against the plaintiff than a report of the whole trial would have done; for example, if the opening speech of one counsel or the evidence on one side only were published after the trial was over. But the judgment or charge of the judge may be separately published, for it is considered a distinct part of the proceedings, not affected by any other — complete in itself and fairly severable from the rest. It is also presumably a fair summary of the whole proceedings.[1]

A condensed report might be published, if prepared faithfully and truthfully; but the suppression of parts of the testimony which would tend to qualify defamatory matter contained in the report would be evidence of malice, and would destroy the privilege.[2]

[1] Milissich v. Lloyds (C. A.), 46 L. J., C. P., 404; 36 L. T., 423; 13 Cox, C. C., 575; Odgers on L. & S., 258.

[2] Salisbury v. Roch. U. & A. Co., 45 Hun (N. Y.), 120.

§ 162. Illustrations — Digest of English Cases.—

1. A weekly paper stated on December 21, 1884, that plaintiff had been brought up at the Nottingham police court on the preceding Monday (15th) and charged with obtaining money on false pretenses, and that "a number of other charges will be brought against him." It omitted all mention of the fact that plaintiff had been brought up again on remand on the preceding Thursday (18th) and triumphantly discharged. The jury awarded the plaintiff £45 in addition to the £5 which defendant had paid into court under Lord Campbell's act. Grimwade v. Dicks and others, 2 Times L. R., 627.

2. Where the plaintiff in a trade-mark case failed on all points but one, and afterwards published a "caution" to the trade which stated the effect of the judgment accurately so far as it was in his favor, but omitted all allusion to the parts of the subject in defendant's favor, North, J., held the report unfair, and granted an injunction restraining its circulation. Hayward & Co. v. Hayward & Sons, 34 Ch. D., 198; 56 L. J., Ch., 287; 35 W. R., 392; 55 L. T., 729.

3. Where judicial proceedings last more than one day and their publication is not expressly forbidden by the court, a report published in a newspaper every morning of the proceedings of the preceding day is privileged if fair and accurate; but all comment on the case must be suspended till the proceedings terminate. Lewis v. Levy, E., B. & E., 537; 27 J. L., Q. B., 282; 4 Jur. (N. S.), 970.

4. The sentence of a court martial may be read at the head of every regiment. Per Heath, J., in Oliver v. Bentinck, 3 Taunt., p. 459.

5. The plaintiff had sued defendants in the chancery division, and the action was dismissed with costs. Defendants thereupon published, in the form of a pamphlet, a verbatim report of the whole judgment taken from the short-hand writer's notes, but omitting all the evidence and speeches on either side. The jury having negatived malice, the court of appeal held the pamphlet privileged. MacDougall v. Knight & Son (C. A.), 17 Q. B. D., 636; 55 L. J., Q. B., 464; 34 W. R., 727; 55 L. T., 274.

6. The defendants presented a petition in the Croydon county court to adjudicate the plaintiff a bankrupt, and to set aside a bill of sale which they alleged to be fraudulent. The county court judge heard the case in his own room, where no reporters were present, and decided that the bill of sale was fraudulent. After the case was over the defendants sent for a reporter to the Greyhound Hotel, and gave him an account of the proceedings before the county court judge, from which he drew up a report, which appeared in several papers. The jury found that the report was "fair as far as it went;" but it did not state the fact that the plaintiff had announced his intention to appeal. *Held*, that neither this omission, nor the fact that the report was furnished by one of the parties, instead of being taken by the reporter in the usual way, was by itself sufficient to destroy the privilege attaching to all fair reports of legal proceedings. (Per Cockburn, C. J., at *nisi prius*, Myers v. Defries, Times, July 23, 1877.) But the jury being satisfied from the whole circumstances that the defendants furnished the report with the express intention of injuring the plaintiff gave the plaintiff £250 damages on the first trial, and one farthing damages on the second.

Meyers v. Defries, 4 Ex. D., 176; 5 Ex. D., 15, 180; 48 L. J., Ex., 446; 28 W. R., 406; 40 L. T., 795; 41 L. T., 659; Saxby v. Easterbrook, 3 C. P. D., 339; 27 W. R., 188.

7. In a county court action (Nettlefold v. Fulcher), the defendant, a solicitor, appeared for Nettlefold, and commented severely on the conduct of the plaintiff, who was Fulcher's agent and debt collector. The defendant sent to the local newspapers a report of the case, which the jury found "was in substance a fair report;" but they also found that "it was sent with a certain amount of malice." Verdict for the plaintiff. Damages 40*s*. On appeal it was argued that the defendant was entitled to judgment on the first finding of the jury, and that the motive which the defendant had in sending the report was immaterial. But the court of appeal held that Cockburn, C. J., was right in directing judgment to be entered for the plaintiff. Stevens v. Sampson, 5 Ex. D., 53; 49 L. J., Q. B., 120; 28 W. R., 87; 41 L. T., 782.

8. Plaintiff brought an action against defendant, and applied for an injunction. Defendant applied at the same time for a receiver, which was refused. Thereupon defendant said that he would "make it d—d hot for Dodson," and inserted in a newspaper he owned a report of the application, setting out all his own counsel had said against the plaintiff's solvency, etc., but omitting all mention of plaintiff's affidavit. *Held*, ample evidence of malice. Damages £250. Dodson v. Owen, 2 Times L. R., 111.

9. A church-warden obtained a writ of prohibition against the bishop of Chichester on an affidavit which falsely stated the facts. He immediately had the writ translated into English, and dispersed two thousand copies of such translation all over the kingdom, with a title-page alleging that by such writ "the illegality of oaths is declared," which was not the case. *Held* "a most seditious libel." Waterfield v. Bishop of Chichester, 2 Mod., 118.

10. Defendant published, in the form of a circular, headed "Take Notice; Important to Farmers," a fairly accurate report of two actions brought by the plaintiff in the Ashford county court to recover the price of manures he had sold. These circulars were extensively distributed on market days in the home and adjoining counties, and plaintiff's business consequently fell off. The jury considered that the defendant published it with a view of injuring the plaintiff. Damages £287. Salmon v. Isaac, 20 L. T., 885.

§ 163. **Reports to be Confined to the Proceedings.**— The publisher must add nothing of his own. He must not state his opinion of the conduct of the parties, or impute motives therefor; he must not insinuate that a particular witness committed perjury. That is not a report of what occurred; it is simply his comment on what occurred, and to this no privilege attaches. Often such comments may be justified on another ground — that they are fair and *bona fide* criticism on a matter of public interest, and are therefore not libelous. But such observations, to which quite different considerations ap-

ply, should not be mixed up with the history of the case. Lord Campbell said: "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."[1] And all sensational headings to reports should be avoided.

§ 164. **Illustrations — Digest of American Cases.—**

1. The New York "Evening Express" published a report stating that the plaintiff had been dismissed from the police force. Preceding the article the publishers added, "Blackmailing by a policeman," as a heading. In an action brought for libel, it was held that this addition destroyed the privilege. Edsall v. Brooks, 17 Abb. Pr. (N. Y.), 221.

2. A person may publish a correct account of the proceedings in a court of justice, yet, if he discolors or garbles the report, or adds comments or insinuations of his own in order to asperse the character of the parties concerned, he exceeds the privilege, and his publication becomes a libel. Thomas v. Crosswell, 7 Johns. (N. Y.), 264.

§ 165. **Digest of English Cases.—**

1. A captain of a vessel was charged before a magistrate with an indecent assault upon a lady on board his own ship. The defendant's newspaper published a report of the case, interspersed with comments which assumed the guilt of the captain, commended the conduct of the lady, and generally tended to inflame the minds of the public violently against the accused. *Held*, that no privilege attached to such comments, and that the report was neither fair nor dispassionate. R. v. Fisher and others, 2 Camp., 563; R. v. Lee, 5 Esp., 123; R. v. Fleet, 1 B. & Ald., 379.

2. It is libelous to publish a highly-colored account of criminal proceedings, mixed with the reporter's own observations and conclusions upon what passed in court, headed "Judicial Delinquency," and containing an insinuation that the plaintiff ("our hero") had committed perjury; and it is no justification to pick out such parts of the libel as contain an account of the trial, and to plead that such parts are true and accurate, leaving the extraneous matter altogether unjustified. Stiles v. Nokes, 7 East, 493; S. C. *sub nomine* Carr v. Jones, 3 Smith, 491.

3. The report of a trial set out the speech for the counsel for the prosecution, and then added, "The first witness was R. P., who proved all that had been stated by the counsel for the prosecution," but, owing to the absence of a piece of formal evidence in no way bearing on the merits of the case, "the jury under the direction of the learned judge were obliged to give a verdict of acquittal, to the great regret of a crowded court, on whom the statement and the evidence, so far as it went, made a strong impression of their guilt." *Held*, that no privilege applied. Lewis v. Walter, 4 B. & Ald., 605; Roberts v. Brown, 10 Bing., 519; 4 Moo. & Sc., 407.

[1] Andrews v. Chapman, 3 C. & K., 288; Edsall v. Brooks, 17 Abb. Pr. (N. Y.), 221; Thomas v. Crosswell, 7 Johns. (N. Y.), 264; Commonwealth v. Blanding, 3 Pick. (20 Mass.), 304; McBee v. Fulton, 47 Md., 403; Pittock v. O'Niell, 63 Pa. St., 253.

4. On an examination into the sufficiency of sureties on an election petition under 9 Geo. IV., ch. 22, sec. 7, affidavits were put in to show that one of them (the plaintiff) was embarrassed in his affairs, and an insufficient surety. A newspaper report of the examination proceeded to ask why the plaintiff, being wholly unconnected with the borough, should take so much trouble about the matter. "There can be but one answer to these very natural and reasonable queries: he is hired for the occasion." *Held*, that this question and answer formed no part of the report, and therefore enjoyed no privilege; and that it was properly left to the jury to say whether they were a fair and *bona fide* comment on a matter of public interest in that borough. Verdict for the plaintiff. Cooper v. Lawson, 8 A. & E., 746; 1 W., W. & H., 601; 2 Jur., 919; 1 P. & D., 15.

5. The "Observer" gave a true and faithful account of some proceedings in the insolvent debtor's court, but headed it with the words "Shameful conduct of an attorney." *Held*, that for those words, as they were not justified, the plaintiff was entitled to recover. Clement v. Lewis (Exch. Ch.), 3 Br. & B., 297; 3 B. & Ald., 702; 7 Moore, 200; Bishop v. Latimer, 4 L. T., 775.

6. A paragraph was headed "An honest lawyer," and stated that the plaintiff had been reprimanded by one of the masters of the queen's bench "for what is called sharp practice in his profession." *Held*, libelous. Boydell v. Jones, 4 M. & W., 446; 1 H. & H., 408; 7 Dowl., 210; Flint v. Pike, 4 B. & C., 473; 6 D. & R., 528.

7. A report of the hearing of a charge of perjury before a magistrate was headed "Wilful and corrupt perjury," and stated that the "evidence before the magistrate entirely negatived the story of the" plaintiff. The jury found a verdict for the defendant on the ground that it was a fair and correct report of what occurred at the hearing. But the court set aside the verdict on this count and entered a verdict for the plaintiff with nominal damages. Lewis v. Levy, E., B. & E., 537; 27 L. J., Q. B., 282; 4 Jur. (N. S.), 970.

§ 166. **Practice Questions for Consideration.**— In these cases there may be two distinct questions for the jury: (1) Is the report fair and accurate? If so, it is *prima facie* privileged; if not, the verdict must be for the plaintiff. (2) Was the report, though fair and accurate, published maliciously? Was it published solely to afford information to the public and for the benefit of society, without any reference to the individuals concerned; or was it published with the malicious intention of injuring the reputation of the plaintiff? The second question of course only arises when the first has been already answered in the affirmative.

And of course there is in each case the previous question for the court, "Is there any evidence to go to the jury of inaccuracy or of malice?" Where there is no suggestion of malice

and no evidence on which a reasonable man could find that the report is not absolutely fair, the judge should direct a verdict for the defendant. Thus, where the report is verbatim or nearly so, or corresponds in all material particulars with a report taken by an impartial short-hand writer.[1] But if anything be omitted in the report which could make any appreciable difference in the plaintiff's favor, or anything erroneously inserted which could conceivably tell against him, then it is a question for the jury whether such deviation from absolute accuracy makes the report unfair; and the trial judge will not direct a verdict for either party.[2]

§ 167. **Duty of the Jury.**— The jury in considering the question are not to dwell too much on isolated passages: they should consider the report as a whole. They should ask themselves what impression would be made on the mind of an unprejudiced reader who reads the report straight through knowing nothing about the case beforehand. Slight errors may easily occur; and if such errors do not substantially alter the impression of the matter which the ordinary reader would receive, the jury will find for the defendant.[3] If, however, there is a substantial misstatement of any material fact, and such misstatement is prejudicial to the reputation of the plaintiff, then the report is unfair and inaccurate, and the jury will find for the plaintiff.[4]

§ 168. **Publication of the Proceedings of Public Meetings.** If a person publishes an account of the proceedings of any meeting of a town council, of the shareholders in any company, of the subscribers to any charity, or of any public meeting, political or otherwise, and such account contains expressions defamatory of the plaintiff, the fact that it is a fair and accurate report of what actually occurred will not avail as a defense, though it may be urged in mitigation of damages, unless the case comes within the preceding sections. By printing and publishing the statement of the speakers he makes

[1] Milissich v. Lloyds, 46 L. J., C. P., 407.

[2] Risk Allah Bey v. Whitehurst and others, 18 L. T., 615; Street v. Licensed Victualers' Society, 22 W. R., 553; Ashmore v. Borthwick, 49 J. P., 792; 2 Times L. R., 118, 209.

[3] Stockdale v. Tarte and others, 4 A. & E., 1016.

[4] Odgers on L. & S., 263.

them his own; and must either justify and prove them strictly true, or rely upon their being fair comments on a matter of public interest made in good faith.[1]

§ 169. **Consequences of the Publication.**— The consequences of reproducing in the papers calumnies uttered at a public meeting are most serious. The original slander may not be actionable in itself, or the communication may be privileged; so that no action lies against the speaker. Moreover, the meeting may have been thinly attended, or the audience may have known that the speaker was not worthy of credit. But it would be a terrible thing for the person defamed if such words could be printed and published to all the world, merely because they were uttered under such circumstances at such a meeting. Charges recklessly made in the excitement of the moment will thus be diffused throughout the country, and will remain recorded in a permanent form against a perfectly innocent person. We cannot tell into whose hands a copy of that newspaper may come. Moreover, additional importance and weight is given to such a calumny by its republication in the columns of a respectable paper. Many people will believe it merely because it is in print. There is in fact an immense difference between the injury done by such a slander and that caused by its extended circulation by the press.[2]

§ 170. **Illustrations — Digest of American Cases.—**

1. The publishers of a newspaper owe certain duties to the public, and have a right to discuss fairly all matters of public interest and to criticise the public acts of officials. But, while they have this right, they are bound to exercise it fairly in good faith and without wantonness or a reckless disregard of private rights. If they make charges without probable cause and from improper motives, they cannot claim any privilege therefor; neither can they attack the character of private citizens, except subject to the peril of being mulcted in damages in case they are not prepared to fully sustain the truth of the charge made. Snyder v. Fulton, 34 Md., 128; Usher v. Severance, 20 Me., 9; Hotchkiss v. Oliphant, 2 Hill (N. Y.), 510; Powers v. Dubois, 17 Wend. (N. Y.), 63; Turrill v. Delaway, 17 id., 426; Cramer v. Riggs, 17 id., 209; Cooper v. Stone, 24 id., 434.

2. In order to constitute a privilege that will excuse a libel, the person

[1] Etchison v. Pergerson, 88 Ga., 620; 15 S. E. Rep., 680; Boehmer v. Detroit Free Press, 94 Mich., 7; 53 N. W. Rep., 822; Bleakeslee v. Carroll, 64 Conn., 223; 29 Atl. Rep., 473; Barrow v. Bell, 7 Gray, 301; Gassett v. Gilbert, 6 Gray, 94.

[2] Davison v. Duncan, 7 E. & B., 231; 26 L. J., Q. B., 106; 3 Jur. (N. S.), 613; 5 W. R., 253; 20 L. T. (O. S.), 265; De Crespigny v. Wellesley, 5 Bing 403; Odgers on L. & S., 267.

charged therewith must be able to establish a legal excuse therefor, either by showing that it was published in pursuance of a duty, public or private, in good faith and under such circumstances as to deprive the publication of any inference or presumption of malice. If the duty is exceeded, if the privilege is abused, liability attaches; and even though otherwise within the privilege, if express malice or *mala fides* can be shown, the privilege will be of no avail. Private character is of too much value in the eye of the law to be made the mere sport of libelers or slanderers, and it holds them up to a rigid accountability if, under the guise of privilege, they step aside to make wanton or unwarranted attacks upon private citizens or public officers. Rector v. Smith, 11 Iowa, 302; McCabe v. Cauldwell, 18 Abb. Pr. (N. Y.), 377; Littlejohn v. Greeley, 13 id., 41; Aldridge v. Printing Co., 9 Minn., 133; Sheckell v. Jackson, 10 Cush. (Mass.), 25; Hunt v. Bennett, 19 N. Y., 173; Taylor v. Church, 1 E. D. S. (N. Y.), 179.

3. In reference to candidates for office it may be said that their character may be canvassed but not calumniated. Seeley v. Blair, Wright (Ohio), 358, 683; Wilson v. Fitch, 41 Cal., 363. So words spoken or written in a legal proceeding pertinent thereto are privileged. Marsh v. Ellsworth, 2 Sweeney (N. Y. Sup. Ct.), 589; Garr v. Selden, 4 N. Y., 91; Lee v. White, 4 Sneed (Tenn.), 111; Reid v. McLendon, 44 Ga., 136. But otherwise if the court did not have jurisdiction over the subject-matter of the action. Millan v. Burnside, 1 Brev. (S. C.), 295.

§ 171. Digest of English Cases.—

1. At a meeting of the West Hartlepool improvement commissioners, one of the commissioners made some defamatory remarks as to the conduct of the former secretary of the bishop of Durham in procuring from the bishop a license for the chaplain of the West Hartlepool cemetery. These remarks were reported in the local newspaper, and the secretary brought an action against the owner of the newspaper for libel. A plea of justification, alleging that such remarks were in fact made at a public meeting of the commissioners, and that the alleged libel was an impartial and accurate report of what took place at such meeting, was held bad on demurrer. Davison v. Duncan, 7 E. & B., 229; 26 L. J., Q. B., 104; 3 Jur. (N. S.), 613; 5 W. R., 253; 28 L. T. (O. S.), 265. So, also, a newspaper proprietor will be held liable for publishing a report made to the vestry by their medical officer of health, even though the vestry are required by act of parliament sooner or later to publish such report themselves. Popham v. Pickburn, 7 H. & N., 891; 31 L. J., Ex., 133; 8 Jur. (N. S.), 179; 10 W. R., 324; 5 L. T., 846. See, also, Charlton v. Watton, 6 C. & P., 385.

2. The defendants, the printers and publishers of the Manchester "Courier," published in their paper a report of the proceedings at a meeting of the board of guardians for the Altrincham Poor Law Union, at which *ex parte* charges were made against the medical officer of the union workhouse at Knutsford of neglecting to attend the pauper patients when sent for. *Held*, that the matter was one of public interest, but that the report was not privileged by the occasion, although it was admitted to be a *bona fide* and a correct account of what passed at the meeting, and the plaintiff

recovered 40s. damages and costs. Purcell v. Sowler (C. A.), 2 C. P. D., 215; 46 L. J. P., 308; 25 W. R., 362; 36 L. T., 416.

8. A public meeting was called for the purpose of petitioning parliament against the grant to the Roman Catholic College at Maynooth. The defendant made a telling speech at such a meeting, commenting severely on penances and other portions of the discipline of the Roman Catholic Church. The court held that the words were not privileged, although the object of the meeting was legal and the defendant's speech was pertinent to the occasion. Hearne v. Stowell, 12 A. & E., 719; 4 P. & D., 696; 6 Jur., 458 See Pierce v. Ellis, 6 Ir. C. L. R., 55.

CHAPTER XX.

CRITICISM AND COMMENT.

§ 1. **Criticism — Fair Comment Made in Good Faith.**— Every person has a right to comment on matters of public interest and general concern, provided he does so fairly and with an honest purpose. Such comments are not libelous, however severe in their terms, unless they are written intemperately and maliciously. Every citizen has full freedom of speech on such subjects, but he must not abuse it. The general rule to be adhered to in criticising or commenting upon matters of public interest is to confine the comments to the matter itself, and not to descend to personal attacks on private character or imputations of unworthy motives. For the public benefit the law confers a privilege upon fair and honest criticism, and this privilege should never be abused in order to gratify personal malice or to advance private interest. The advancement of truth, the triumph of goodness, the destruction of falsehood and ignorance should be the object of the critic, the commentator or the reviewer; and these principles alone should animate him in the performance of his duty. His sole and single purpose should be to promote the public good, to enable the people to discern right from wrong, to encourage merit, and to firmly condemn and expose the charlatan and the cheat.[1]

§ 2. **Of the English Law.**— *Cockburn, C. J.*, said: "Our law of libel has, in many respects, only gradually developed itself into anything like a satisfactory and settled form. The full liberty of public writers to comment on the conduct and motives of public men has only in very recent times been recognized. Comments on government, on ministers and officers of state, on members of both houses of parliament, on judges and other public functionaries, are now made every day, which half a century ago would have been the subject of actions or *ex officio* informations, and would have brought down fine and imprisonment on publishers and authors. Yet, who can doubt that the public are gainers by the change, and that, though injustice may often be done, and though public men may often have to smart under the keen sense of wrong inflicted by hostile criticism, the nation profits by public opinion being thus freely brought to bear on the discharge of public duties?"[2]

[1] Elliot's Newspaper Libel, 30; Dowling v. Livingstone (Mich.), 32 L. R. A., 104; 66 N. W. Rep., 225; Upton v. Hume, 24 Or., 420; 33 Pac. Rep., 810; Mattice v. Wilcox, 147 N. Y., 624.

[2] Wason v. Walter, L. R., 4 Q. B., 93, 94.

Lord Ellenborough said: "Liberty of criticism must be allowed, or we should have neither purity of taste nor of morals. Fair discussion is essentially necessary to the truth of history and the advancement of science. That publication, therefore, I should never consider as a libel which has for its object not to injure the reputation of any individual, but to correct misrepresentations of fact, to refute sophistical reasoning, to expose a vicious taste in literature, or to censure what is hostile to morality."[1]

Sir John Carr published a literary composition entitled "A Tour Through Scotland." Hood published a comic picture of Sir John as author, bowing beneath the weight of his volume, for which an action of libel was brought. In this case Lord Ellenborough said: "One writer, in exposing the follies and errors of another, may make use of ridicule however poignant. Ridicule is often the fittest weapon that can be employed for such a purpose. If the reputation or pecuniary interest of the person ridiculed suffer, it is *damnum absque injuria*. Where is the liberty of the press if an action can be maintained on such principles? Perhaps the plaintiff's "Tour Through Scotland" is now unsalable; but is he to be indemnified by receiving a compensation in damages from the person who may have opened the eyes of the public to the bad taste and inanity of his composition? Who would have bought the works of Sir Robert Filmer after he had been refuted by Mr. Locke? But shall it be said that he might have sustained an action for defamation against that great philosopher who was laboring to enlighten and ameliorate mankind? We really must not cramp observations on authors and their works. They should be liable to criticism, to exposure, and even to ridicule if their compositions be ridiculous; otherwise the first who writes on any subject will maintain a monopoly of sentiment and opinion respecting it. This would tend to the perpetuity of error. Reflection on personal character is another thing. Show me an attack on the moral character of the plaintiff, or any attack upon his character unconnected with his authorship, and I shall be as ready as any judge who ever sat here to protect him; but I cannot hear of malice on account of turning his works into ridicule." And

[1] Tabart v. Tipper, 1 Camp., 351. See, also, Dowling v. Livingstone (Mich.), 32 L. R. A., 104; 66 N. W. Rep., 225.

again: "The critic does a great service to the public who writes down any vapid or useless publication such as ought never to have appeared. He checks the dissemination of bad taste and prevents people wasting both time and money on trash. I speak of fair and candid criticism; and this every one has a right to publish, although the author may suffer a loss from it. Such a loss the law does not consider as an injury, because it is a loss the party ought to sustain. It is, in short, the loss of fame and profits to which he was never entitled."[1]

Lord Kenyon said the editor of a newspaper may fairly and candidly comment on any place or species of public entertainment, but it must be done fairly and without malice or view to injure or prejudice the proprietor in the eyes of the public. That if so done, however severe the censure, the justice of it screens the editor from legal animadversion; but if it can be proved that the comments are unjust, malevolent or exceeding the bounds of fair opinion, that such are a libel and therefore actionable."[2]

§ 3. **Of the American Law.**— *Gray, C. J.*, says: "The editor of a newspaper has the right if not the duty of publishing for the information of the public fair and reasonable comments, however severe in terms, upon anything which is made by its owner a subject of public exhibition, as upon any other matter of public interest; and such a publication falls within the class of privileged communications, for which no action can be maintained without proof of actual malice."[3]

§ 4. **The Privilege.**— The term "privileged," as used by the judges, does not mean privileged by reason of the occasion, in the strict legal sense of that term. The meaning really is that the words are not defamatory — that criticism is no libel.[4] If such criticism was privileged in the strict sense of the word it would in every case be necessary for the plaintiff to prove actual malice, however false and however injurious the strictures

[1] Carr v. Hood, 1 Camp., 354; Straus v. Francis, 4 F. & F., 1114.

[2] Dibdin v. Bostock, 1 Esp., ch. 26; Gathercole v. Miall, 15 M. & W., 319; 15 L. J., Ex., 179; 10 Jur., 337.

[3] Gott v. Pulsifer, 122 Mass., 235. Citing Dibdin v. Swan, 1 Esp., 28; Carr v. Hood, 1 Camp., 355; Henwood v. Harrison, L. R., 7 C. P., 606; Dowling v. Livingstone (Mich., 1896), 32 L. R. A., 104; 66 N. W. Rep., 225.

[4] Henwood v. Harrison, L. R., 7 C. P., 606; 41 L. J., C. P., 206; 20 W. R., 1000; 26 L. T., 938; Campbell v. Spottiswoode, 3 B. & S., 769; 32 L. J., Q. B., 185; 9 Jur. (N. S.), 1069; 11 W. R., 569; 8 L. T., 201.

may have been; while the defendant would only have to prove that he honestly believed the charges himself in order to escape all liability; and this clearly is not the law.[1]

As for example: Condemnation of the foreign policy of the government, however sweeping, is no libel. Animadversions, however severe, on the use made by the vestry of the money of the rate-payers is not libelous, unless corruption or embezzlement be imputed to individual vestrymen. Criticism, however trenchant, on any new poem or novel, or on any picture exhibited in a public gallery, is no libel. But to maliciously pry into the private life of any poet, novelist, artist or statesman is indefensible.[2]

§ 5. **Criticism Distinguished from Defamation.**— Criticism differs from defamation in the following particulars:

1. Criticism deals only with such things as invite public attention or call for public comment. It does not follow a public man into his private life or pry into his domestic concerns.

2. It never attacks the individual, but only his work. Such work may be either the policy of a government, the action of a member of a legislative body, a public entertainment, a book published or a picture exhibited. In every case the attack is on a man's acts, or on some thing, and not upon the man himself. A true critic never indulges in personalities, but confines himself to the merits of the subject-matter.

3. It never imputes or insinuates dishonorable motives unless justice absolutely requires it, and then only on the clearest proofs.

4. The critic never takes advantage of the occasion to gratify private malice or to attain any other object beyond the fair discussion of matters of public interest, and the judicious guidance of the public taste. He carefully examines the matter, and then honestly and fearlessly states his true opinion of it.[3]

[1] Williams v. Spowers and others, Australian Law Times, May 13, 1882, 113; 3 Times L. R., 432; Fry v. Bennett, 5 Sandf., 54; 4 Duer, 247; 8 Bosw., 201; 28 N. Y., 324.

[2] Odgers on L. & S., 33.

[3] Odgers on L. & S., 34; Gott v. Pulsifer, 122 Mass., 235; Dowling v. Livingstone (Mich., 1896). 32 L. R. A., 104; 66 N. W. Rep., 225.

§ 6. **The Right to Publish Fair and Candid Criticism.**— Every person has a right to publish such fair and candid criticism, although the author may suffer loss from it. Such a loss the law does not consider as an injury, because it is a loss which the party ought to sustain. It is, in short, the loss of fame and profits to which he was never entitled. Reflection upon personal character is another thing.[1] Liberty of criticism must be allowed or we should neither have purity of taste nor of morals. Fair discussion is essentially necessary to the truth of history and the advancement of science. A publication, therefore, which has for its object, not to injure the reputation of any individual, but to correct misrepresentations of fact, to refute sophistical reasoning, to expose a vicious taste in literature, or to censure what is hostile to morality, is not a libel. The critic must confine himself to criticism and not make it the veil for personal censure, nor allow himself to run into reckless and unfair attacks merely from the love of exercising his power of denunciation.[2]

§ 7. **Comment upon Admitted Facts.**— Criticism and comment on well-known or admitted facts are very different things from the assertion of unsubstantiated facts. A fair and *bona fide* comment on a matter of public interest is an excuse of what would otherwise be a defamatory publication. The statement of this rule assumes the matters of fact commented upon to be somehow ascertained. It does not mean that a man may invent facts, and comment on the facts so invented in what would be a fair and *bona fide* manner on the supposition that the facts were true. If the facts as a comment upon which the publication is sought to be excused do not exist, the foundation fails.[3] There is no doubt that the public acts of a public man may lawfully be made the subject of fair comment or criticism, not only by the press, but by all members of the public. But the distinction cannot be too clearly borne in mind between comment or criticism and allegations

[1] Sir John Carr v. Hood, 1 Camp., 355, n.; Tabart v. Tipper, 1 Camp., 351.

[2] Gott v. Pulsifer, 122 Mass., 235; Cooper v. Stone, 24 Wend., 214; Odgers on L. & S., 34; Folkard's Starkie, 225; Dowling v. Livingstone (Mich., 1896), 32 L. R. A., 104; 66 N. W. Rep., 225.

[3] Lefroy v. Burnside (No. 2), 4 L. R., Ir., 565, 566.

of fact, such as that disgraceful acts have been committed, or discreditable language used. It is one thing to comment upon or criticise, even with severity, the acknowledged or proved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct.[1] To state matters which are libelous is not comment or criticism.[2]

Slight unintentional errors, however, will be excused. If a writer in the course of temperate and legitimate criticism falls into error as to some detail, or draws an incorrect inference from the facts before him, and thus goes beyond the limits of strict truth, such inaccuracies will not cause judgment to go against him, if the jury are satisfied, after reading the whole publication, that it was written honestly, fairly and with regard to what truth and justice require. "It is not to be expected that a public journalist will always be infallible."[3]

§ 8. **Illustrations — Digest of American Cases.—**

1. J. Fenimore Cooper published a book entitled "The History of the Navy of the United States." The president of Columbia college wrote a criticism upon it which was published in the New York "Commercial Advertiser," a portion of which was as follows: "Little as we owe to the author on the score of personal consideration, and great as has been our disappointment from many of his late publications, the expression of which had, as we found, provoked his resentment, still we cherished the hope that with the elevated theme he had now chosen he would rise above the personal feelings and political prejudices that disfigure those of his preceding works to which we have alluded. We had hoped on this occasion to use a sea phrase as he does in a sense that a seaman never used it in, would go aloft instead of remaining in the cockpit. We even believed it possible that, finding the subject congenial with his early tastes and pursuits, he would, if not animated by it to the noblest efforts, at least avoid the rocks and quicksands which had already well nigh made shipwreck of his reputation as a writer, and regain a footing upon that strand whence he first launched his gallant little bark upon a sea which to young and rash adventurers, especially if they belong by nature as well as by profession to the irritable genius, is apt to prove a sea of troubles. . . . We were certainly not prepared to find that the infatuation of vanity or the madness of passion could lead him to pervert such an opportunity to the low and paltry purpose of bolstering up the character of a political partisan, an official sycophant, and to degrade the name and object of history in a work claiming by its title to be national in its design, by salving the

[1] Davis & Sons v. Shepstone, 11 App. Cas., 190; 55 L. J., C. P., 51; 55 L. T., p. 2; 34 W. R., 722.

[2] Gott v. Pulsifer, 122 Mass., 235; R. v. Flowers, 44 J. P., 377; Odgers on L. & S., 35; Dowling v. Livingstone (Mich., 1896), 32 L. R. A., 104; 66 N. W. Rep., 225.

[3] Strauss v. Francis, 4 F. & F., 1107; 15 L. T., 674; Odgers on L. & S., 36.

wounded reputation of an individual who from the time of the transaction referred to by his apologist has been regarded as one doing at best but doubtful credit to his profession, and who owes his continuance in the service after the events of that day solely to the forbearance and magnanimity of his superior, which he subsequently requited with ingratitude and perfidy." In an action the article was held to be a libel, and could not be claimed as legitimate criticism. Cooper v. Stone, 24 Wend. (N. Y.), 434.

2. Calvin O. Gott, the owner of the Cardiff giant, brought a suit against the publishers of the Boston "Sunday Herald" for publishing the following article on the famous fossil: "The sale of the Cardiff giant, so called, at New Orleans for the small price of $8 recalls the palmy days of that ingenious humbug. The Harvard professors and other learned men traced its pedigree in their knowledge of artistic history, and constructed theories as to its origin, which at once displayed their erudition and helped to advertise the show. Not long afterwards the man who brought the colossal monolith to light confessed it was a fraud, and the learned gentlemen who indorsed its authenticity were left as naked as the statue itself." The jury found for the defendant, but on appeal a new trial was granted, and the article was held to exceed the privilege and to be libelous. Gott v. Pulsifer, 122 Mass., 235.

§ 9. Digest of English Cases.—

1. Defendant wrote "A History of New Zealand," and therein stated that the plaintiff, a lieutenant in the Kai Jwi cavalry, had charged at some women and young children who were harmlessly hunting pigs, "and cut them down gleefully and with ease;" that he had dismissed from the service a subordinate officer who had protested against this cruelty, and that he was ever afterwards known among the Maoris by the nickname "Kohuru" (the murderer). Defendant admitted that these facts did not appear in the official reports or in any other history of New Zealand, but he said he had heard rumors to the effect, and he called a witness who had made a statement to the governor of New Zealand on hearsay evidence containing substantially the same charge, a copy of which statement the governor had forwarded to the defendant. Huddleston, B., directed the jury that it was no defense whatever that the charges were made in the *bona fide* belief that they were true, and without any malice towards the plaintiff. Verdict for the plaintiff. Bryce v. Rusden, 2 Times L. R., 435; Brenon v. Ridgway, 3 Times L. R., 592.

2. The appellants were the owners of a daily newspaper called the "Natal Witness," in which they constantly attacked the official conduct of the respondent, the British resident commissioner in Zululand, asserting that he had himself violently assaulted a Zulu chief; that he had set on his native police to assault and abuse others, etc. They vouched for the truth of these stories, declaring that, though some doubt had been thrown on them, they would prove to be true on investigation. They then proceeded, on the assumption that the charges were true, to comment on the respondent's conduct in most offensive and injurious language. At the trial in Natal on September 4, 1883, it was proved that the charges against the respondent were absolutely without foundation; the appellants made no attempt to

support them by evidence. Verdict for the plaintiff. Damages £500. Motion for a new trial refused by the supreme court of Natal. *Held*, on appeal to the judicial committee of the privy council, that the distinction must be closely drawn between comment or criticism and allegations of fact; that such a publication was in no way privileged, and that the damages were not excessive. Davis & Sons v. Shepstone, 11 App. Cas., 187; 55 L. J., P. C., 51; 34 W. R., 722; 55 L. T., 1; 50 J. P., 709; Walker v. Brogden, 19 C. B. (N. S.), 65; 11 Jur. (N. S.), 671; 13 W. R., 809; 12 L. T., 495; Duplany v. Davis, 3 Times L. R., 184.

3. A newspaper may comment upon the hearing of a charge of felony and the evidences produced thereat, and discuss the conduct of the magistrates in dismissing the charge without hearing the whole of the evidence; but it may not proceed to disclose "evidence which might have been adduced," and thus argue from facts not in evidence before the magistrates that the accused was really guilty of the felony. Verdict for the plaintiff. Damages £25. Hibbins v. Lee, 4 F. & F., 243; 11 L. T., 541. And see Helsham v. Blackwood, 11 C. B., 111; 20 L. J., C. P., 187; 15 Jur., 861; R. v. White and another, 1 Camp., 359.

4. A writer in a newspaper may comment on the fact that corrupt practices extensively prevailed at a parliamentary election; but may not give the names of individuals as guilty of bribery, unless he can prove the truth of the charge to the letter. Wilson v. Reed and others, 2 F. & F., 149; Dickeson v. Hilliard and another, L. R., 9 Ex., 79; 43 L. J., Ex., 37; 22 W. R., 372; 30 L. T., 196.

5. A newspaper reported that the mother of a lady who was dead and buried had applied to the coroner on affidavits for an order that the body might be exhumed, and then proceeded to give a long sensational narrative of shocking acts of cruelty to the deceased committed by her husband, imputing that he had caused her death. This narrative commenced with the words, "From inquiries made by our reporter it appears that the deceased," etc. As a matter of fact the reporter had made no inquiries; he had merely read the affidavits, and accepted the *ex parte* statements contained in them as truth. They were in fact wholly false. He was convicted and fined £50. R. v. Gray, 26 J. P., 663.

6. A Dublin newspaper asserted that the plaintiff, who was the manager of the queen's printing office in Ireland, had corruptly supplied "Freeman's Journal" with official information and surreptitious copies of official documents. A plea of fair comment, stating that "Freeman's Journal" did somehow get official information earlier than other papers, and that the defendant *bona fide* believed that such information could only have been obtained from the queen's printing office, was held bad on demurrer. Lefroy v. Burnside (No. 2), 4 L. R., Ir., 557.

§ 10. **All Comments Must be Fair and Honest.**—Matters of public interest must be discussed temperately. Wicked and corrupt motives should never be wantonly assigned. And it will be no defense that the writer, at the time he wrote, honestly believed in the truth of the charges he was making, if such charges be made recklessly, unreasonably and without

any foundation in fact.[1] Some people are very credulous, especially in politics, and can readily believe any evil of their opponents. There must, therefore, be some foundation in fact for the charges made; the writer must bring to his task some degree of moderation and judgment.

So long as a writer confines himself to discussing the public conduct of public men, the mere fact that motives have been unjustly assigned for such conduct is not of itself sufficient to destroy this defense. A line must be drawn between criticism upon public conduct and the imputation of motives by which that conduct may be supposed to be actuated; one man has no right to impute to another whose conduct may be fairly open to ridicule or disapprobation, base, sordid and wicked motives unless there is so much ground for the imputation that a jury shall find not only that he had an honest belief in the truth of his statements, but that his belief was not without foundation. Cockburn, C. J., said: "I think the fair position in which the law may be settled is this: That where the public conduct of a public man is open to animadversion, and the writer who is commenting upon it makes imputations on his motives which arise fairly and legitimately out of his conduct, so that the jury shall say that the criticism was not only honest but also well founded, an action is not maintainable. But it is not because a public writer fancies that the conduct of a public man is open to the suspicion of dishonesty he is therefore justified in assailing his character as dishonest."[2]

§ 11. **Illustrations — Digest of American Cases.—**

1. In 1873 James D. Sweeney was a candidate for office in West Virginia. The Wheeling "Daily Register" published of him, on the 15th of October, 1873: "The laboring men are taught to believe that a certain candidate, who never did an honest day's work, is their especial champion and

[1] Caper v. Stone, 24 Wend. (N. Y.), 434; Gott v. Pulsifer, 122 Mass., 235; Campbell v. Spottiswoode, 3 F. & F., 421; 3 B. & S., 769; 32 L. J., Q. B., 185; 11 W. R., 569; 9 Jur. (N. S.), 1069; 8 L. T., 201; Reade v. Sweetzer, 6 Abb. Pr. (N. S.), 9: Dowling v. Livingstone (Mich., 1896), 32 L. R. A., 104; 66 N. W. Rep., 225; Wilcox v. Moore (Minn., 1897), 71 N. W. Rep., 917.

[2] Cockburn, in Campbell v. Spottiswoode, 3 B. & S., 776; Cooper v. Lawson, 8 A. & E., 746; 1 P. & D., 15; 1 W., W. & H., 601; 2 Jur., 919; Seymour v. Butterworth, 3 F. & F., 372; Parmiter v. Coupland, 6 M. & W., 105; 9 L. J., Ex., 202; 4 Jur., 701; Harle v. Catherall, 14 L. T., 801; Wason v. Walter, L. R., 4 Q. B., 93; 38 L. J., Q. B., 34; 17 W. R., 169; 19 L. T., 416; 8 B. & S., 730; Purcell v. Sowler (C. A.), 2 C. P. D., 215; 46 L. J., C. P., 308; 25 W. R., 562; 35 L. T., 416.

friend. . . . A professional gambler, he preaches morality; and a confessed ignoramus, he argues that intelligence should control the election." Again on the 16th of the same month was published: "Let the people of Ohio county not select a representative from the prize-ring or gambling den. . . . Club law is what we may expect from the Jimsweeney style of legislation. . . . Would you select a man to make laws whom you would kick out of your house and would not trust in your hen coop? Certainly not. And yet by staying at home to-day you give half a vote to just such a man. It is as much the duty of the citizen to vote against Jimsweeney as it would be to deodorize against the cholera." For this so-called criticism Mr. Sweeney recovered $8,000 in the circuit court and the recovery was sustained on an appeal to the supreme court; the court saying: "His talents and qualifications, mentally and physically for the office for which he asks at the hands of the people, may be freely commented on in publications in a newspaper, and though such comments be harsh and unjust, no malice will be implied, for these are matters of opinion of which the voters are the only judges; but no one has a right by a publication to impute to such a candidate, falsely, crimes, or publish allegations affecting his character falsely." Sweeney v. Baker et al., 13 W. Va., 184.

2. James Hunt was a candidate for the appointment to a police judgeship in New York city. The "Herald" published of him April 11, 1845: *Who shall be special justice of police?* Was not he the man who, in the discharge of his duty, arrested a poor drunken woman, and for some expression of hers, beat her like a noble-hearted Brutus with a whalebone cane? Did he not on the trial of the cause admit that he had struck the poor creature and said that such was his nature; that he believed if he was placed in the same position he would do it again? Did he not tell his honor the recorder in the most positive manner that he was both an attorney and a counselor in the supreme court or the court of common pleas, and was it not proved false? Did he not in the county court solemnly declare that he did not know the result of his own trial, and refer the counsel to the reporters for information, declaring that they knew more of it than he did? Can these things be overlooked?" In a suit for libel the court of appeals held that as the article was published to the world at large, it was a libel, as the power of appointing a justice of the police court was vested in the common council, criticisms upon him or his appointment should be made to that body alone and not to the public. Judgment for $1,000 sustained. Hunt v. Bennett, 4 E. D. Smith, 647; 19 N. Y., 173; Merrill's Newspaper Libel, 221.

3. John Miner was a police justice in the city of Detroit. In an article concerning him the "Post and Tribune" said: "*More of Miner.*—A few days since a complaint was made before Justice Miner against a Chinaman, without the assent of complainant. Miner inserted the name of a second Chinaman against whom no complaint was made, and whom no one charged with being connected with the offense. At the examination afterwards held, Miner admitted that he inserted the second name on his own motion; and though the evidence of the complainant completely exonerated the second man, and it was shown that he was not present at the commission of the alleged offense, Miner bound him over for trial under heavy bonds. Judge Swift, on the facts coming to his knowledge, released the second man.

There is no accounting for Miner's action. In this case it was an inexcusable outrage. If he would enforce the law upon multitudes of offenders brought before him, if he would discharge his duty on the complaints for violating the liquor laws and gambling laws, people would be more lenient of him. But he does not, and apparently will not. Instead of that he turns upon a helpless Chinaman who has no political influence to sustain him, and much prejudice to combat. It was a contemptible act and a cowardly act; and, instead of satisfying the people who are demanding that he shall enforce the laws, it will excite their disgust and invite them to ask why it is that justice Miner prosecutes and oppresses the weak and permits the strong to go unwhipped of justice." Upon the trial of a suit for libel Miner was awarded $250. But upon an appeal to the supreme court the judgment was set aside, the court holding it to be a matter of privilege to call public attention to the acts of judicial officers in ordering persons into confinement without a charge against them, as such acts are violations of the most important guaranties of constitutional freedom and matters of public concern. Miner v. Post & Tribune Co., 49 Mich., 358; 13 N. W. Rep.,.773.

§ 12. Digest of English Cases.—

1. The plaintiff, who was a queen's counselor and a member of parliament, was appointed recorder of Newcastle. The defendant's paper, the "Law Magazine and Review," thereupon discussed the desirability of giving such an appointment to a member of the house of commons, and declared that it was a reward for his having steadily voted with his party. Cockburn, C. J., directed the jury that a public writer was fairly entitled to comment on the distribution of government patronage; but that he was not entitled to assert that there had been a corrupt promise or understanding that the plaintiff would be thus rewarded if he always voted according to order. Verdict for the plaintiff; damages 40s. Seymour v. Butterworth, 3 F. & F., 372.

2. The plaintiff was ex-mayor of Winchester. The "Hampshire Advertiser" imputed to him partiality and corruption and ignorance of his duties as mayor and justice of the peace for the borough. *Held*, that though some words which are clearly libelous of a private person may not amount to a libel when spoken of a person holding a public capacity, still any imputation of unjust or corrupt motives is equally libelous in either case. Parmiter v. Coupland, 6 M. & W., 105; 9 L. J., Ex., 202; 4 Jur., 701. But when an attack is made on the policy of her majesty's government or on the public conduct of any high officer of state, it appears now that wicked, or at least selfish, motives may be imputed, so long as they are not recklessly and maliciously imputed. Harle v. Catherall, 14 L. T., 801; Wason v. Walter, L. R., 4 Q. B., 93; 38 L. J., Q. B., 34; 17 W. R., 169; 19 L. T., 416; 8 B. & S., 730.

3. The defendants, the printers and publishers of the Manchester "Courier," published in their paper a report of the proceedings at a meeting of the board of guardians for the Altrincham poor-law union, at which charges were made against the medical officer of the union workhouse at Knutsford of neglecting to attend the pauper patients when sent for. Such charges proved to be utterly unfounded; they were made in the absence of

the medical officer, without any notice having been given him. *Held*, that the matter was one of public interest; but that the report was not privileged by the occasion, although it was admitted to be a correct account of what passed at the meeting; that it was obviously unfair to the plaintiff that such *ex parte* statements should be published in the local papers; that the editor should therefore have exercised his discretion and excluded the report altogether; and the plaintiff recovered 40*s.* damages and costs. Purcell v. Sowler (C. A.), 2 C. P. D., 215; 46 L. J., C. P., 308; 25 W. R., 362; 36 L. T., 416.

4. An article in the "Saturday Review" imputed to the plaintiff, the editor and part proprietor of the "British Ensign," that in advocating the propagation of Christianity among the Chinese his purpose was merely to increase the circulation of his own paper, and so put money into his own pocket; that he was an impostor, and that he put forth a list of fictitious subscribers in order to delude others into subscribing. The jury found that the writer honestly believed the imputations contained in the article to be well founded, but the court held that the limits of fair criticism had been undoubtedly exceeded. Campbell v. Spottiswoode, 3 F. & F., 421; 32 L. J., Q. B., 185; 3 B. & S., 769; 9 Jur. (N. S.), 1069; 11 W. R., 569; 8 L. T., 201.

5. Two sureties were proposed for the Berwick election petition, neither of whom had any connection with the borough. Affidavits were put in to show that one of them was an insufficient surety, being embarrassed in his affairs. The "Times" set out these affidavits and added the remarks: "But why, it may be asked, does this cockney tailor take all this trouble, and subject himself to all this exposure of his difficulties and embarrassments? It has nothing to do with the borough of Berwick-upon-Tweed or its members. How comes it then that he should take so much interest in the job? There can be but one answer to these very natural and reasonable queries: he is hired for the occasion. The affair is in fact a foul job throughout, and it is only by such aid that it can possibly be supported." In an action brought on the whole article, the defendant pleaded that the publication was a correct report of certain legal proceedings, "together with a fair and *bona fide* commentary thereon." But the jury thought the comment was not fair and gave the plaintiff £100. Cooper v. Lawson, 8 A. & E., 746; 1 P. & D., 15; 1 W., W. & H., 601; 2 Jur., 919.

§ 13. **Matters of Public Interest.**— All political, legal and ecclesiastical matters are matters of public concern. So is the conduct of every vestry, town and city council and the like. For, although these may be matters of local interest principally, still this rule applies so long as they are not private matters. Anything that is a public concern to the inhabitants is a matter of public interest within the meaning of the rule. The public conduct of every public man is a matter of public concern.

Bramwell, B.: "A clergyman with his flock, an admiral with his fleet, a general with his army, and a judge with his

jury, are all subjects of public discussion. Whoever fills a public position renders himself open thereto. He must accept an attack as a necessary though unpleasant appendage to his office."[1]

In an English case *Cockburn, C. J.*, said: "But it seems to me that whatever is matter of public concern when administered in one of the government departments is matter of public concern when administered by the subordinate authorities of a particular district. It is one of the characteristic features of the government of this country, that, instead of being centralized, many important branches of it are committed to the conduct of local authorities. Thus, the business of counties and that of cities and boroughs is to a great extent conducted by local and municipal government. It is not, therefore, because the matter under consideration is one which in its immediate consequences affect only a particular neighborhood that it is not a matter of public concern. The management of the poor and the administration of the poor-law in each local district are matters of public interest. In this management the medical attendance on the poor is matter of infinite moment; and consequently the conduct of a medical officer of the district may be of the greatest importance in that particular district, and so may concern the public in general."[2]

§ 14. **The Subject Classified.**— Matters in which the public have an interest are: (1) Matters concerning the administration of the government. (2) Matters pertaining to the administration of public justice. (3) Matters relating to the management of public institutions and local authorities. (4) Matters relating to appeals for public patronage. (5) Matters concerning literary publications, books and pictures. (6) Matters concerning the character and quality of public entertainments. (7) Matters relating to religious bodies, churches and associations.

§ 15. **Matters Concerning the Administration of the Government.**— The conduct of all public servants, the policy of the government, our relations with foreign countries, all suggestions of reforms in the existing laws, all bills before the

[1] Kelly v. Sherlock, L. R., 1 Q. B., 689; 35 L. J., Q. B., 209; 12 Jur (N. S.), 937.

[2] Purcell v. Sowler, 2 C. P. D., 218.

legislative bodies, the adjustment and collection of taxes, and all other matters which concern the public welfare, are clearly matters of public interest which come within the preceding rule. Every citizen has a right to comment on those acts of public men which concern him as a citizen of the state, if he do not make his commentary a cloak for malice and slander.[1] *Cockburn, C. J.:* Those who fill "a public position must not be too thin-skinned in reference to comments made upon them. It would often happen that observations would be made upon public men which they knew from the bottom of their hearts were undeserved and unjust; yet they must bear with them, and submit to be misunderstood for a time, because all knew that the criticism of the press was the best security for the proper discharge of public duties."[2]

§ 16. **Illustrations — Digest of American Cases.—**

1. In criticising the conduct of a public officer the publishers of a newspaper render themselves liable to an action for false and groundless imputations of wicked motives or of crime. Neeb v. Hope, 111 Penn. St., 145.

2. A newspaper may publish facts or matters which, in good faith and on probable cause, are believed to be facts, and which have a bearing on the question of the personal character and fitness for public office of a candidate. Express Printing Co. v. Copeland, 64 Tex., 354.

3. Neither the public press nor individuals can discuss the conduct and character of officers and candidates for office without incurring liability, civil or criminal, for defamatory utterances published, although without malice and upon probable cause. Banner Pub. Co. v. State, 16 Lea (Tenn.), 176; 57 Am. Rep., 214.

4. An editor is responsible for the truth of what he alleges in his articles to be facts, but his criticism upon or his opinions (expressed in such articles) upon facts admitted or established are privileged. Fry v. Bennett, 3 Bosw. (N. Y.), 200.

5. The following words published in a newspaper: "The editor of the "Chronicle" has been intoxicated on several occasions, and that, too, after he was elected to the legislature as the champion of prohibition," were held to be libelous. State v. Mayberry, 33 Kan., 441.

6. A publication charging that a county school superintendent had, for a money consideration, by the use of his influence induced the board of education to change the school books, was held to be a libel. Hartford v. State, 96 Ind., 461.

8. In our country the law on this point varies greatly in the different states. In New York no attack is allowed even on the public character of any public officer; and that the defendant honestly believed in the truth of

[1] Parmiter v. Coupland, 6 M. & W., 108.

[2] Seymour v. Butterworth, 3 F. & F., 376, 377; R. v. Sir R. Carden, 5 Q. B. D., 1; 49 L. J. (M. C.), 1; 28 W. R., 133; 41 L. T., 504. See, also, Upton v. Hume, 24 Or., 420; Meteye v. Times Democrat, 47 La. Ann., 821; Mattice v. Wilcox, 147 N. Y., 624; Post Pub. Co. v. Hallam, 59 Fed. Rep., 530.

the charge is no defense. No distinction is made between a public man and a private citizen. Hamilton v. Eno, 81 N. Y., 116; Lewis v. Few, 5 Johns., 1; Root v. King, 7 Cowen, 613; 4 Wend., 113; Sweeney v. Baker, 13 W. Va., 158; Commonwealth v. Clap, 4 Mass., 163; Curtis v. Mussey, 6 Gray (72 Mass.), 261. In Michigan the supreme court decided that "the public are interested in knowing the character of candidates for congress; and while no one can lawfully destroy the reputation of a candidate by falsehood, yet, if an honest mistake is made in an honest attempt to enlighten the public, it must reduce the damages to a minimum if the fault itself is not serious." Bailey v. Kalamazoo Publishing Co., 40 Mich., 251; Scripps v. Foster, 39 Mich., 376; 41 Mich., 742. In New Hampshire a newspaper may state in good faith and on reasonable grounds that any public officer has been guilty of official misconduct. Palmer v. Concord, 48 N. H., 211. And in Iowa charges affecting the moral character of any public man are protected if made in good faith and on reasonable grounds. Mott v. Dawson, 46 Iowa, 533.

§ 17. Digest of English Cases.—

1. The presentation of a petition to parliament impugning the character of one of her majesty's judges, and praying for an inquiry and for his removal from office, should the charge prove true, is a matter of high public concern, on which all newspapers may comment, and in severe terms. So is the debate in the house on the subject of such petition. Wason v. Walter, L. R., 4 Q. B., 73; 38 L. J., Q. B., 34; 17 W. R., 169; 19 L. T., 409; 8 B. & S., 730.

2. The presentation of a petition to parliament against quack doctors is matter for public comment. Dunne v. Anderson, 3 Bing., 88; Ry. & Moo., 287; 10 Moore, 407.

3. Evidence given before a royal commission is matter *publici juris*, and everyone has a perfect right to criticise it. Per Wickens, V.-C., in Malkern v. Ward, L. R., 13 Eq., 622; 41 L. J., Ch., 464; 26 L. T., 831. So is evidence taken before a parliamentary committee on a local gas bill. Hedley v. Barlow, 4 F. & F., 224.

4. A report of the board of admiralty upon the plans of a naval architect, submitted to the lords of the admiralty for their consideration, is a matter of national interest. Henwood v. Harrison, L. R., 7 C. P., 606; 41 L. J., C. P., 206; 20 W. R., 1000; 26 L. T., 938.

5. The appointment of a Roman Catholic to be calendarer of state papers is a matter of public concern. Turnbull v. Bird, 2 F. & F., 508; Lefroy v. Burnside (No. 2), 4 L. R., Ir., 556.

6. All appointments by the government to any office are matters of public concern. Seymour v. Butterworth, 3 F. & F., 372.

7. A newspaper is entitled to comment on the fact (if it be one) that corrupt practices extensively prevailed at a recent parliamentary election so long as it does not make charges against individuals. Wilson v. Reed and others, 2 F. & F., 149.

8. A meeting assembled to hear a political address by a candidate at a parliamentary election, and the conduct thereat of all persons who take any part in such meeting, are fair subjects for *bona fide* discussion by a

writer in a public newspaper. Davis v. Duncan, L. R., 9 C. P., 396; 43 L. J., C. P., 185; 22 W. R., 575; 30 L. T., 464.

9. The public career of any member of parliament or of any candidate for parliament is, of course, a matter of public interest in the constituency. But not his private life and history. "However large the privilege of electors may be," said Lord Denman, C. J., "it is extravagant to suppose that it can justify the publication to all the world of facts injurious to a person who happens to stand in the situation of a candidate." Duncombe v. Daniell, 8 C. & P., 222; 2 Jur., 32; 1 W., W. & H., 101.

10. The electors are entitled to investigate and discuss all matters in the past private life of a candidate which, if true, would prove him morally or intellectually unfit to represent them in parliament; but not to circulate unfounded charges against him even *bona fide*. Harwood v. Sir J. Astley, 1 B. & P., N. R., 47; Wisdom v. Brown, 1 Times L. R., 412; Pankhurst v. Hamilton, 3 Times L. R., 500.

§ 18. **Matters Pertaining to the Administration of Public Justice.**— The administration of the law, the verdicts of juries, the conduct of suitors and their witnesses, are all matters of lawful comment as soon as the trial is over. Any comment pending action is a contempt of court, by whomsoever made; it is especially so where the comment is supplied by one of the litigants or his solicitor or counsel.[1]

Formerly in England, where a trial lasted more than one day, newspapers were sometimes forbidden to publish any report from day to day; they were ordered to reserve their whole report till the case was ended. Unless such an order be made, daily reports of the progress of the trial are unobjectionable, if fair and impartial.[2] A report is very different from comment. No observations on the case are permitted during its progress, lest the minds of the jury should be thereby biased.[3] But under the present state of the law comments upon the proceedings in courts of justice are privileged, if fairly made and made in good faith; for such proceedings are matters in which the public have an interest, and may be temperately discussed with impunity.

But as soon as the case is over, every one has, says Fitzgerald, J., "a right to discuss fairly and *bona fide* the administration of justice as evinced at this trial. It is open to him to show that error was committed on the part of the judge and

[1] Daw v. Eley, L. R., 7 Eq., 49; 38 L. J., Ch., 113; 17 W. R., 245; Thompson v. Powning, 15 Nev., 195; Cincinnati, etc., Co. v. Timberlake, 10 Ohio St., 448; Stanley v. Webb, 4 Sandf. (N. Y.), 21; Hawkins v. Globe Printing Co., 10 Mo. App., 174; Forbes v. Johnson, 11 B. Mon., 48.

[2] Lewis v. Levy, E., B. & E., 537; 27 L. J., Q. B., 282; 4 Jur. (N. S.), 970.

[3] Odgers on L. & S., 45; R. v. O'Dogherty, 5 Cox, C. C., 348.

jury; nay, further, for myself I will say that the judges invite discussion of their acts in the administration of the law, and it is a relief to them to see error pointed out, if it is committed; yet, whilst they invite the freest discussion, it is not open to a journalist to impute corruption."[1]

Cockburn, C. J.: "That the administration of justice should be made a subject for the exercise of public discussion is a matter of the most essential importance. But, on the other hand, it behooves those who pass judgment, and call upon the public to pass judgment, on those who are suitors to or witnesses in courts of justice, not to give reckless vent to harsh and uncharitable views of the conduct of others, but to remember that they are bound to exercise a fair and honest and an impartial judgment upon those whom they hold up to public obloquy."[2] "Writers in public papers are of great utility, and do great benefit to the public interests by watching the proceedings of courts of justice and fairly commenting on them if there is anything that calls for observation; but they should be careful, in discharging that function, that they do not wantonly assail the character of others or impute criminality to them and if they do so, and do not bring to the performance of the duty they discharge that due regard for the interests of others which the assumption of so important a censorship necessarily requires, they must take the consequences."[3]

§ 19. **Manner of Publication.**—Comments upon proceedings in courts of justice should not, in general, be published as a part of the news report. Nor should they be incorporated into the heading of such reports; for then the presumption of malice would more easily arise. The place for criticism of this character is in the editorial columns.[4]

§ 20. **Illustrations — Digest of American Cases.—**

1. A publication which states that "never before have we seen the judges of the supreme court, singly or *en masse*, moved from that becoming propriety so indispensable to secure the respect of the people, and, throwing aside the ermine, rush into the mad contest of politics under the excitement of drums and flags, and render themselves unfit to hold the balance of jus-

[1] R. v. Sullivan, 11 Cox, C. C., 57; Commonwealth v. Blanding, 3 Pick., 314; Cowley v. Pulsifer, 137 Mass., 392; 50 Am. Rep., 318; Sandford v. Bennett, 24 N. Y., 20; Miner v. Detroit Tribune, 49 Mich., 358; McBee v. Fulton, 47 Md., 403.

[2] Woodgate v. Ridout, 4 F. & F., 223.

[3] R. v. Tanfield, 42 J. P., 424.

[4] Merrill's Newspaper Libel, 184; McBee v. Fulton, 47 Md., 403; Pittock v. O'Niell, 63 Pa. St., 253; 3 Am. Rep., 544; Thomas v. Crosswell, 7 Johns., 264; 5 Am. Dec., 269; Com. v. Blanding, 3 Pick., 304.

tice." "Whenever an occasion may offer to serve his fellow-partisans, such a judge will yield to temptation and the wavering balance will shake," is libelous. Matter of Moore, 63 N. C., 397.

2. A publication charging an officer authorized to administer oaths with affixing a jurat to an affidavit and certifying that the person who signed it was duly sworn when in fact he was not sworn, if published *mala fides*, and is not justified by the mere proof that the jurat was so affixed without administering an oath, is libelous. Turrill v. Dolloway, 17 Wend. (N. Y.), 426.

3. It is libelous to publish of a person in his capacity as a juror that he agreed with another juror to stake the decision of the amount of damages to be given in a cause then under their consideration upon a game of draughts. Commonwealth v. Wright, 1 Cush. (Mass.), 46.

4. A publication which tends to impeach the honesty and integrity of jurors in their office, and which denounces a verdict as infamous, and declares that "we cannot express the contempt which should be felt for these twelve men who have thus not only offended public opinion, but have done injustice to their own oaths," is directed against the jurors individually and is libelous. Byers v. Martin, 2 Col. T., 605.

5. Any publication which assails the integrity or capacity of a judge is libelous. Robbins v. Treadway, 2 J. J. Marsh. (Ky.), 540.

6. And so is a correct account of judicial proceedings if they are accompanied with comments and insinuations to asperse a man's character. Commonwealth v. Blanding, 2 Pick. (Mass.), 304; Thomas v. Crosswell, 7 Johns. (N. Y.), 264.

§ 21. Digest of English Cases.—

1. The "Morning Post" published an article on a trial which had greatly excited public attention, giving a highly colored account of the conduct of the attorneys on one side, concluding with the sweeping condemnation: "Messrs. Quirk, Gammon & Snap were fairly equaled, if not outdone," alluding to the notorious firm of pettifoggers in "Ten Thousand a Year." This account of plaintiff's conduct was taken almost verbatim from the speech of counsel on the other side, and no allusion was made to the evidence subsequently produced to rebut his statements. Verdict for the plaintiff. Damages £1,000. Woodgate v. Ridout, 4 F. & F., 202.

2. It is not a fair comment on a criminal trial to suggest that the prisoner, though acquitted, was really guilty. Lewis v. Walter, 4 B. & Ald., 605; Risk Allah Bey v. Whitehurst and others, 18 L. T., 615.

3. It is not a fair comment on any legal proceedings to insinuate that a particular witness committed perjury in the course of them. Roberts v. Brown, 10 Bing., 519; 4 Moo. & S., 407; Stiles v. Nokes, S. C., Carr v. Jones, 7 East, 493; 3 Smith, 491; Littler v. Thompson, 2 Beav., 129; Felkin v. Herbert, 33 L. J., Ch., 294; 10 Jur. (N. S.), 62; 12 W. R., 241, 332; 9 L. T., 635.

4. A newspaper may comment on the evidence given by any particular witness in any inquiry on a matter of public interest; but may not go the length of declaring such evidence to be "maliciously or recklessly false." Verdict for the plaintiff. Damages £250. Hedley v. Barlow, 4 F. & F., 224.

5. A newspaper may comment on the conduct of magistrates in dismissing a case without hearing the whole of the evidence, or in committing the prisoner for trial on insufficient evidence; but it must not impute that in

so doing they acted deliberately and consciously from political motives. Hibbins v. Lee, 4 F. & F., 243; 11 L. T., 541.

6. The details of a long-protracted squabble between a professional singer and a great composer do not become matters of public interest merely because the former ultimately applies to a police magistrate for a summons against the latter. Weldon v. Johnson, Times for May 27, 1884.

§ 22. **Matters Relating to the Management of Public Institutions and Local Authorities.**— The management of all public institutions, colleges, hospitals, asylums, homes, is a matter of public interest, especially where such institutions appeal to the public for subscriptions, or are supported by taxation. The management of local affairs by the various local authorities, town councils, school boards, boards of health, and the like, is a matter of public, though it may not be of universal, concern.[1]

"Not only are comments and criticisms upon public affairs privileged, but the privilege also extends to a large class of institutions of a semi-public character which are dependent on public favor or confidence. The management of railway and insurance companies, banks, boards of trade, charitable organizations and public fairs may be criticised, so long as the writer acts in good faith and does not seek to make the law of privilege a cloak for defamation of character."[2]

§ 23. **Illustrations — Digest of American Cases.**—

1. A report of the condition of the town schools, made and published as required by law by the superintending school committee, is not libelous by reason of its charging the prudential committee of one of the districts with employing a teacher and putting her in charge of a public school in violation of law, and with taking possession of the school-house and excluding by force the general school committee and the teachers employed by them, if it does not impute corrupt motives. Shattuck v. Allen, 4 Gray (Mass.), 540.

2. The Hauma, La., "Courier," in October, 1881, published as a part of a report of a town council meeting the following: "The mayor made a verbal contract with Mr. John Foley for $100 for the cleaning of Barrow street ditch, which has not been the custom. . . . Mr. J. W. Board states publicly that it was a put-up job by the mayor, and the reason why the contract was not written was because the mayor's son was interested in the contract. He further states that the work they want $100 for is worth about $30. There is something rotten in Denmark! More whitewash needed." The mayor brought a suit for libel, but the jury found it was

[1] Odgers on L. & S., 46; Harle v. Catherall, 14 L. T., 801; Cox v. Feeney, 4 F. & F., 13; Purcell v. Sowler, 2 C. P. D., 218; 46 L. J., C. P., 308; 25 W. R., 362; 36 L. T., 416.

[2] Merrill's Newspaper Libel, 195; Hay v. Reid, 85 Mich., 296; 48 N. W. Rep., 507; Brown v. Elder, 27 N. B., 465.

a substantially true account of the proceedings, and the court ruled that the privilege was not exceeded. Wallis v. Bazet, 34 La. Ann., 231.

§ 24. **Digest of English Cases.**—

1. The charity commissioners sent an inspector to inquire into the working of a medical college at Birmingham. He made a report containing passages defamatory of the plaintiff, one of the professors. The mismanagement of the college continued and increased. The warden at last filed a bill to administer the funds in chancery. Thereupon the defendant, the proprietor of a local paper, procured an official copy of the report of the inspector, and published it verbatim in his paper. This was nearly three years after the report had been written. The plaintiff contended that this was a wanton revival of stale matter, which could not be required for public information; but Cockburn, C. J., left it to the jury to say whether public interest in the matter had not rather increased than declined in the interval. Verdict for the defendant. Cox v. Feeney, 4 F. & F., 13. But the conduct of a trustee of a private corporation, as such trustee, is not a matter of public interest. Wilson v. Fitch, 41 Cald., 363.

2. "The management of the poor and the administration of the poor-law in each local district are matters of public interest." Per Cockburn, C. J., in Purcell v. Sowler, 2 C. P. D., 218; 46 L. J., C. P., 308; 25 W. R., 362; 36 L. T., 416.

3. The official conduct of a way-warden may be freely criticised in the local press. Harle v. Catherall, 14 L. T., 801.

4. The manner in which a coroner's officer treats the poor relatives of the deceased when serving them with a summons for an inquest, and the behavior of such officer in court, are matters of public concern. Per Bowen, J., in Sheppard v. Lloyd Daily Chronicle for March 11, 1882.

5. The Toronto "Irish Canadian" published concerning the warden of the Central prison: "How long will a just God allow the poor wretches sent to the Central prison to be reformed (not debased and brutalized) to suffer the tortures of the damned at the hands of this fiend? Is it possible that in this enlightened age men are to be driven insane by the tortures of this modern Nero?" In an action for libel brought by the warden it was held that the publication exceeded the privilege. Massie v. Ontario Printing Co.; 11 Ont., 362.

§ 25. **Matters Relating to Appeals for Public Patronage.**—Where an individual or organization invites public attention in any way or appeals for public patronage—a politician who accepts office or becomes a candidate for office; artists, public writers, lecturers, showmen, dealers in patent medicines, advertisers in all business enterprises—it challenges public criticism.[1] Where a person appeals to the public by writing letters to the newspapers, either to expose what he deems abuses or to call

[1] Smith v. Tribune Co., 4 Bissell 51 Vt., 501; Crane v. Waters, 10 Fed. (U. S. C. C.), 477; Maclean v. Scripps, Rep., 619; Press Co. v. Stewart, 119 52 Mich., 214; Shurtleff v. Stevens, Penn. St., 584.

attention to his own particular grievances, he cannot complain if the editor inserts other letters in answer to his own, refuting his charges and denying his facts. A man who has commenced a newspaper warfare cannot complain if he gets the worst of it.[1] But if such answer goes further, and touches on fresh matter in no way connected with the plaintiff's original letter, or unnecessarily assails the plaintiff's private character, then it ceases to be an answer; it becomes a counter-charge, and if defamatory will be deemed a libel.

A medical man brings forward some new method of treatment, and advertises it largely as the best or only cure for some particular disease or for all diseases at once. He may be said to invite public attention. So when a tradesman distributes handbills or circulars he challenges public criticism. A newspaper writer is justified in warning the public against such advertisers, and in exposing the absurdity of their professions, provided he does so fairly and with reasonable moderation and judgment.

When a man comes prominently forward in any way, and acquires for a time a *quasi* public position, he cannot escape the necessary consequence — the free expression of public opinion. Whoever seeks notoriety or invites public attention is said to challenge public criticism; and he cannot resort to the law courts if that criticism be less favorable than he anticipated.[2]

§ 26. **Illustrations — Digest of American Cases.—**

1. In a libel suit it appeared that the plaintiff held himself out as a teacher of stenography, etc., and sought to attract pupils to his place by signs and advertisements. *Held*, that he thus assumed a *quasi* public character, and that a newspaper report of an interview with him concerning his business must be shown to be malicious in fact before it could be deemed libelous. Press Co. v. Stewart, 119 Pa. St., 584.

2. The Boston "Daily Advertiser" published, under the head "History

[1] Bigney v. Van Benthuysen, 36 La. Ann., 38; Goldberg v. Dobbertine, 46 La. Ann., 1303; 28 La. Ann., 721; Southwick v. Stevens, 10 Johns., 443.

[2] Hunter v. Sharpe, 4 F. & F., 983; Crane v. Waters, 10 Fed. Rep., 619; Dibdin v. Bostock, 1 Esp., 28; Greene v. Chapman, 4 Bing. N. C., 92; 5 Scott, 340; Hibbs v. Wilkinson, 1 F. & F., 608; Odgers on L. & S., 51; Macleod v. Wakley, 3 C. & P., 311; Murphy v. Halpin, Ir. R., 8 C. L., 127; Davis v. Duncan, L. R., 9 C. P., 396; 43 L. J., C. P., 185; 22 W. R., 575; 30 L. T., 464; Jenner v. A'Beckett, L. R., 7 Q. B., 11; 41 L. J., Q. B., 14; 20 W. R., 181; 25 L. T., 464; Odger v. Mortimer, 28 L. T., 472; Kœnig v. Ritchie, 3 F. & F., 413; R. v. Veley, 4 F. & F., 1117; O'Donoghue v. Hussey, Ir. R., 5 C. L., 124; Dwyer v. Esmond, 21 L. R. (Ir.), 243.

Repeated," a charge that Edward Crane had brought the Boston, Hartford & Erie Railroad Company to bankruptcy, and was attempting to involve the New York & New England Railroad in a similar fate. On a demurrer to the declaration in the United States circuit court, the publication was held to be within the privilege. Crane v. Waters, 10 Fed. Rep., 619.

3. The "Tribune" published an article concerning Gerrit Smith, stating that he had been an accomplice of John Brown in his raid at Harper's Ferry, and that in order to avoid arrest he had feigned insanity and taken refuge in a lunatic asylum. Smith brought an action against the Tribune Company, and on the trial it was held no defense to show that the plaintiff was a public lecturer, the publication not coming within the privilege. Smith v. The Tribune Co., 4 Bissell, U. S. C. C., 477.

§ 27. Digest of English Cases.—

1. Two clergymen were engaged in a controversy. One, the plaintiff, wrote a pamphlet; subsequently he published a "collection of opinions of the press" on his own pamphlet, including an inaccurate or garbled extract from an article which had appeared in the defendant's newspaper. The defendant thereupon felt it his duty in justice to the other clergyman to publish an article in his newspaper exposing the inaccuracy of the extract as given by the plaintiff, and accusing him of purposely adding some passages and suppressing others, so as to entirely alter the sense. Erle, C. J., pointed out to the jury that the defendant was maintaining the truth, and that although he was led into exaggerated language, the plaintiff had also used exaggerated language himself. Verdict for the defendant. Hibbs v. Wilkinson, 1 F. & F., 608. But where the editor of the "Lancet" attacked the editor of a rival paper, the "London Medical and Physical Journal," by rancorous aspersions on his private character, the plaintiff recovered a verdict. Damages £5. Macleod v. Wakley, 3 C. & P., 311.

2. So wherever a man calls public attention to his own grievances or those of his class, whether by letters in a newspaper, by speeches at public meetings, or by the publication of pamphlets, he must expect to have his assertions challenged, the existence of his grievances denied, and himself ridiculed and denounced. Odger v. Mortimer, 28 L. T., 472; Kœnig v. Ritchie, 3 F. & F., 413; R. v. Veley, 4 F. & F., 1117; O'Donoghue v. Hussey, Ir. R., 5 C. L., 124; Dwyer v. Esmond, 2 L. R. Ir., 243. But where the defendant, in answering a letter which the plaintiff has sent to the paper, does not confine himself to rebutting the plaintiff's assertions, but retorts upon the plaintiff by inquiring into his antecedents and indulging in other uncalled for personalities, the defendant will be held liable; for such imputations are neither a proper answer to nor a fair comment on the plaintiff's speech or letter. Murphy v. Halpin, Ir. R., 8 C. L., 127.

3. Three clergymen of the Church of England, residing near Swansea, being conservatives, chose to attend a meeting of the supporters of the liberal candidate for Swansea; they behaved in an excited manner, hissed and interrupted the speakers, and had eventually to be removed from the room by two policemen. *Held*, that such conduct might fairly be commented on in the local newspapers; and that even a remark that "appearances were certainly consistent with the belief that they had imbibed rather freely of the cup that inebriates," was not, under the circumstances, a libel. Davis

v. Duncan, L. R., 9 C. P., 396; 43 L. J., C. P., 185; 23 W. R., 575; 30 L. T., 464.

4. A medical man who had obtained a diploma and the degree of M. D. from America advertised most extensively a new and infallible cure for consumption. The "Pall Mall Gazette" published a leading article on the subject of such advertisements, in which they called the advertiser a quack and an impostor, and compared him to "scoundrels who pass bad coin." The jury gave the plaintiff one farthing damages. Hunter v. Sharpe, 4 F. & F., 983; 15 L. T., 421; Morrison and another v. Harmer, 3 Bing. N. C., 759; 4 Scott, 524; 3 Hodges, 108.

5. A marine store dealer extensively circulated a handbill setting forth the high prices he was prepared to give for kitchen stuff, rags, bones, oil-cloth, brass, copper, lead, plated metals, horse-hair and old clothes. An alderman sitting as magistrate at Guildhall denounced this handbill as offering great inducements to servants to rob their masters. The alderman's remarks, together with the handbill itself verbatim, were published in the "Daily Telegraph," with a heading, "Encouraging Servants to Rob their Masters," and also a leading article in the same strain. The jury, under the direction of Earle, C. J., found a verdict for the defendant. Paris v. Levy, 9 C. B. (N. S.), 342; 30 L. J., C. P., 11; 3 L. T., 324; 9 W. R., 71; 7 Jur. (N. S.), 289; and at *nisi prius*, 2 F. & F., 71; Eastwood v. Holmes, 1 F. & F., 347; Jenner v. A'Beckett, L. R., 7 Q. B., 11; 41 L. J., Q. B., 14; 20 W. R., 181; 25 L. T., 464.

§ 28. **Matters Concerning Literary Publications, Books, Pictures, etc.**—"A man who publishes a book challenges criticism.[1]" Therefore all fair and honest criticism on any published book is not libelous. But the critic must not go out of his way to attack the private character of the author.[2] So, too, it is not libelous fairly and honestly to criticise a painting publicly exhibited, or the architecture of any public building, however strong the terms of censure used may be.[3]

These matters are of a semi-public nature, and may be criticised by the press with impunity, so long as the criticism is made in good faith.[4] "Liberty of criticism must be allowed or we should have neither purity of taste nor of morals.[5] Fair discussion is essential to the truth of history and the advancement of science." A distinction must be observed, however, between such literary works and works of art for private use or circulation. If the actor confines himself to private

[1] Cooper v. Stone, 24 Wend. (N. Y.), 434; Strauss v. Francis, 4 F. & F., 1114; 15 L. T., 675.

[2] Fraser v. Berkeley, 7 C. & P., 621.

[3] Thompson v. Shackell, Moo. & Mal., 187; Dowling v. Livingstone (Mich., 1896), 32 L. R. A., 104; 66 N. W. Rep., 225.

[4] Merrill's Newspaper Libel, 198.

[5] Lord Ellenborough, Tabert v. Tipper, 1 Camp., 350.

theatricals, or the author's book is designed for private circulation, or the artist retains his painting in the privacy of his studio, the works do not partake of a semi-public nature; and not being dependent on public favor, the public have no such interest in their discussion as will sustain the right of criticism.[1]

§ 29. **Illustrations — Digest of American Cases.—**

1. In 1866 the "Round Table" published a criticism of Charles Reade's novel "Griffith Gaunt." The criticism denounced the work as "one of the worst stories that had been printed since Sterne, Fielding and Smollet defiled the literature of the already foul eighteenth century." Of the book it was stated that it "is not only tainted with this one foul spot; it is replete with impurity; it reeks with allusions that the most prurient scandalmonger would hesitate to make." The article also questioned Mr. Reade's claim to the authorship of the work. In an action for libel it was held, as a matter of law, that the criticism was libelous on its face. Mr. Reade recovered six cents. Reade v. Sweetzer et al., 6 Abb. Pr. (N. S.), 9.

2. A published criticism on a book, where there are mixed up with the criticisms aspersions upon the moral character of the author, charging him with dishonorable or disreputable motives, is libelous. J. Fenimore Cooper wrote a book entitled "A Naval History of the United States." Col. Stone published in the "New York Commercial Advertiser" of June 8, 1839, the following criticism: "We were certainly not prepared to find that the infatuation of vanity or the madness of passion could lead him to pervert such an opportunity to the low and paltry purpose of bolstering up the character of a political partisan, an official sycophant." A judgment for $300 for publishing the article was sustained. Cooper v. Stone, 24 Wend. (N. Y.), 434.

§ 30. **Digest of English Cases.—**

1. The greatest art critic of the day wrote and published in "Fors Clavigera" an article on the pictures in the Grosvenor gallery, in which the following passage occurred: "Lastly, the mannerisms and errors of these pictures [alluding to the pictures of Mr. Burne Jones], whatever may be their extent, are never affected or indolent. The work is natural to the painter, however strange to us, and is wrought with the utmost conscience of care, however far to his own or our desire the result may yet be incomplete. Scarcely as much can be said for any other pictures of the modern school; their eccentricities are almost always in some degree forced, and their imperfections gratuitously if not impertinently indulged. For Mr. Whistler's own sake, no less than for the protection of the purchaser, Sir Coutts Lindsay ought not to have admitted works into the gallery in which the ill-educated conceit of the artist so nearly approached the aspect of wilful imposture. I have seen and heard much of cockney impudence before now, but never expected to hear a coxcomb ask two hundred guineas for

[1] Merrill's Newspaper Libel, 198.

flinging a pot of paint in the public's face." The jury considered the words "wilful imposture" as just overstepping the line of fair criticism, and found a verdict for the plaintiff. Damages one farthing. Each party had to pay his own costs. Odgers on L. & S., 48; Whistler v. Ruskin, Times for Nov. 26 and 27, 1878; Thompson v. Shackell, Moo. & Mal., 187.

2. The plaintiff was a professor of architecture in the Royal Academy. The defendant published an account of a new order of architecture, called "the Bœotian," said to be invented by the plaintiff, whom he termed "the Bœotian professor." He set forth several absurd principles as the rules of this new order, illustrating them by examples of buildings, all of which were the works of the plaintiff. The jury, under the direction of Lord Tenterden, C. J., found a verdict for the defendant. Soane v. Knight, Moo. & Mal., 74.

3. The "Athenæum" published a critique on a novel written by the plaintiff, describing it as "the very worst attempt at a novel that has ever been perpetrated," and commenting severely on "its insanity, self-complacency and vulgarity, its profanity, its indelicacy (to use no stronger word), its display of bad Latin, bad French, bad German and bad English," and its abuse of persons living and dead. After Erle, C. J., had summed up the case, the plaintiff withdrew a juror. Strauss v. Francis (No. 1), 4 F. & F., 939; Sir John Carr v. Hood, 1 Camp., 355, n.

The "Athenæum" thereupon published another article stating their reason for consenting to the withdrawal of a juror, which was in fact that they considered the plaintiff would have been unable to have paid them their costs had they gained a verdict. The plaintiff thereupon brought another action, which was tried before Cockburn, C. J., and the jury found a verdict for the defendants. Strauss v. Francis (No. 2), 4 F. & F., 1107; 15 L. T., 674.

4. It is doubtful how far a book printed for private circulation only may be criticised. Gathercole v. Miall, 15 M. & W., 334; 15 L. J., Ex., 179; 10 Jur., 337.

5. A comic picture of the author of a book, as author, bowing beneath the weight of his volume, is no libel, though a personal caricature of him as he appeared in private life would be. Sir John Carr v. Hood, 1 Camp., 355, n.

6. The articles which appear in a newspaper and its general tone and style may be the subject of adverse criticism as well as any other literary production, but no attack should be made on the private character of any writer on its staff. Heriot v. Stuart, 1 Esp., 437; Stuart v. Lovell, 2 Stark., 93; Campbell v. Spottiswoode, 3 F. & F., 421; 32 L. J., Q. B., 185; 3 B. & S., 769; 9 Jur. (N. S.), 1069; 11 W. R., 569; 8 L. T., 201.

§ 31. **Matters Concerning the Character and Quality of Public Entertainments.**— All theatrical and musical performances, flower-shows, etc., may be freely criticised, provided that the comments be not malevolent or flagrantly unjust. The exhibitor as well as the author and artist, by his appearance as such in public, invites criticism, and he cannot

complain if the criticism is hostile so long as it is in good faith.[1]

§ 32. **Criticism on Subjects of Public Exhibition.**— The editor of a newspaper has the right, if not the duty, of publishing for the information of the public fair and reasonable comments, however severe in terms, upon anything which is made by its owner a subject of public exhibition as upon any other matter of public interest; and such publications fall within the class of privileged communications, for which no action can be maintained without proof of actual malice.[2]

Clarke, J.: "The critic can say of the player, 'he mouthes his speech as many players do,' or that 'he saws the air too much with his hand,' or that he 'tears a passion to tatters, to very rags, to split the ears of the groundlings;' but he cannot abuse him as a robustus, periwig-pated fellow, and recommend that he be 'whipped for o'erdoing Termagant.'"[3]

§ 33. **Illustrations — Digest of American Cases.**—

1. Edward P. Fry, the manager of an Italian opera, sued James G. Bennett, the proprietor of the New York "Herald," for a libel. The "Herald" published a series of articles from November 3, 1848, to February 11, 1849, in which the conduct of Mr. Fry was severely criticised. It was charged that he had employed critics to defame the female members of his company; that one Madam Pico was insulted and discharged from the company, and had sued the manager; that Fry had packed the opera house with loafers and hirelings to hiss Miss Benedetti off the stage; that the manager appeared before the audience and sustained his favorite character of an ape, and was a half-starved musical adventurer; that the opera season was a history of ridiculous blunders, disgraceful brawlings and broken promises, and but for the patronage of public gamblers the manager could not sustain himself for a week. It was maintained in defense that the articles were true; that they were believed to be true and published without malice, and therefore privileged; but after fourteen years of litigation it was held that the bounds of privilege had been exceeded, and a verdict for $6,000 was sustained. Fry v. Bennett, 5 Sandford, 54; 4 Duer, 247; 3 Bosw., 201; 28 N. Y., 324; Merrill's Newspaper Libel, 199.

[1] Reade v. Sweetzer, 6 Abb. Pr. (N. S.). 9; Fry v. Bennett, 28 N. Y., 324; Greene v. Chapman, 4 Bing. N. C., 92; 5 Scott, 340; Odgers on L. & S., 49; Morrissey v. Belcher, 3 F. & F., 614; Duplaney v. Davis, 3 Times L. R., 184; Merrivale v. Carson, 3 Times L. R., 431.

[2] Gott v. Pulsifer, 122 Mass., 235; Dibdin v. Swan, 1 Esp., 28; Carr v. Hood, 1 Camp., 355; Henwood v. Harrison, L. R., 7 C. P., 606.

[3] Reade v. Sweetzer, 6 Abb. Pr. (N. S.), 9.

§ 34. **Digest of English Cases.**—

1. A newspaper, commenting on a flower-show, denounced one exhibitor by name as "a beggarly soul," "famous in all sorts of dirty work," and spoke of "the tricks by which he and a few like him used to secure prizes" as being now "broken in upon by some judges more honest than usual." Such remarks are clearly not fair criticism on the flower-show. Green v. Chapman, 4 Bing. N. C., 92; 5 Scott, 340.

2. The plaintiff, the proprietor of Zadkiel's Almanac, had a ball of crystal, by means of which he pretended to tell what was going on in the other world. The "Daily Telegraph" published a letter which stated that the plaintiff had "gulled" many of the nobility with this crystal ball; that he took money for "these profane acts, and made a good thing of it." Cockburn, C. J., directed the jury that a newspaper might expose what it deemed an imposition on the public; but that this letter amounted to a charge that the plaintiff had made money by wilful and fraudulent misrepresentations — a charge which should not be made without fair grounds. Verdict for the plaintiff. Damages one farthing. Morrison v. Belcher, 3 F. & F., 614; Duplany v. Davis, 3 Times L. R., 184; Merrivale v. Carson, 3 Times L. R., 431.

3. A gentleman wholly unconnected with the stage got up what he called "a dramatic ball." The company was disorderly and far from select. No actor or actress of any reputation was present at the ball, or took any share in the arrangements. The "Era," the special organ of the theatrical profession, published an indignant article commenting severely on the conduct of the prosecutor in starting such a ball for his own profit, and particularly in calling such an assembly "a dramatic ball." Criminal proceedings were taken against the editor of the "Era." The jury found him not guilty. R. v. Ledger, Times for Jan. 14, 1880; Dibdin v. Swan and Bostock, 1 Esp., 28.

§ 35. **Matters Relating to Religious Bodies — Churches and Associations.**— In England a bishop's government of his diocese, a rector's management of his parish or of the parochial school are matters of public interest. So is the manner in which "public worship" is celebrated in the Established church. But an unobtrusive charitable organization, privately established by the rector in the parish, is not a fit subject for public comment.[1]

§ 36. **Digest of English Cases.**—

1. The press may comment on the fact that the incumbent of a parish has, contrary to the wishes of the church-warden, allowed books to be sold

[1] Odgers on L. & S., 47; Gathercole v. Miall, 15 M. & W., 319; 15 L. J., Ex., 179; 10 Jur., 337; Walker v. Brogden, 19 C. B. (N. S.), 65; 11 Jur. (N. S.), 671; 13 W. R., 809; 12 L. T., 495; Booth v. Briscoe (C. A.), 2 Q. B. D., 496; 25 W. R., 838; Kelly v. Tingling, L. R., 1 Q. B., 699; 35 L. J., Q. B., 231; 14 W. R., 51; 13 L. T., 255; 12 Jur. (N. S.), 940.

in the church during service, and cooked a chop in the vestry after the service was over. Kelly v. Tingling, L. R., 1 Q. B., 699; 35 L. J., Q. B., 231; 14 W. R., 51; 13 L. T., 255; 12 Jur. (N. S.), 940.

2. But where a vicar started a clothing society in his parish, expressly excluding all dissenters from its benefits, it was held that this was essentially a private society, the members of which might manage it as they pleased, without being called to account by any one outside; and that therefore a dissenting organ was not justified in commenting on the limits which the vicar had imposed on the desire of his parishioners to clothe the poor. Gathercole v. Maill, 15 M. & W., 319; 15 L. J., Ex., 179; 10 Jur., 337. And see Walker v. Brogden, 19 C. B. (N. S.), 65; 11 Jur. (N. S.), 671; 13 W. R., 809; 12 L. T., 495; Booth v. Briscoe (C. A.), 2 Q. B. D., 496; 25 W. R., 838.

§ 37. **The Extent of the Right to Publish the News.**—The right to publish through the newspaper press such matters of interest as may be properly laid before the public does not go to the extent of allowing the publication concerning a person of false and defamatory matter, there being no other reason or justification for so doing than the mere publication of the news.[1]

There can be no question at this late day but that the public newspaper has a right—whether it shall be regarded as its duty or not—to discuss those matters which relate to life, habits, comfort, happiness and welfare of the people. In doing so it may state facts, draw its own inferences and give its own views upon the facts. It may err in its deductions, and if they are false they are not actionable unless special damages can be shown. But false assertions, when they impute the commission of crime, are actionable; and when not based upon any facts legally tending to prove the crime imputed the publication cannot be said to be privileged. It will not do to say that such a publication was made with reasonable care, however good the motive may have been. The public welfare never requires any such reckless disregard of the sacred right of enjoyment of a pure and spotless reputation, which no amount of property can command, and which it often takes its possessor a life-time to procure.[2]

§ 38. **Publications Made for Sensation and Increase of Circulation.**— A privileged publication must be shown to be

[1] Mallory v. The Pioneer Press Co., 32 Minn., 521; Foster v. Scripps, 36 Mich., 376; Usher v. Severance, 20 Me., 9; Smart v. Blanchard, 42 N. H., 137; Cooley on Torts, 219; Sheckell v. Jackson, 10 Cush., 25; Detroit Daily Post v. McArthur, 16 Mich., 447; Perret v. New Orleans Times, 25 La. Ann., 170.

[2] Peoples v. Detroit P. & T. Co., 54 Mich., 457; 20 N. W. Rep., 528.

not only false and injurious, but malicious, to entitle the aggrieved party to damages. A false, injurious publication in a public journal, "for sensation and increase of circulation," is, in a legal sense, malicious.[1]

§ 39. **Who is the Proprietor.**— As it is clear that the proprietor of a newspaper is both civilly and criminally responsible for whatever appears in its columns, although the publication may have been made without his knowledge and in his absence, it may be well in this connection to make some inquiry as to who is in law held as such proprietor. The same rules of law by which the question as to whether a party is a member of a partnership, a joint-stock company and the like, where the liability exists, apply equally as well to the law of defamation. In an action on the case for libel published in the "Troy Gazette," printed by John C. Wright, who was also the editor, Wright and two others were owners of the press and establishment, and assigned the same to the defendant and one Thomas Hillhouse as security for their indorsement on certain notes; but they did not receive the profits of the paper, nor had they any agency in its publication. They were not consulted about the articles inserted — the same being left exclusively to the management of Wright. By agreement between Wright and the defendant and Hillhouse, if the notes were not paid, the press and establishment were to be the absolute property of the defendant and Hillhouse. Wright with their assent afterwards sold the press, etc., to one Lewis and discharged the defendant and Hillhouse from their responsibility on the notes. During the time they held the assignment as security they did not take possession of the press nor advance any money to pay the workmen, but the same was conducted solely at the expense of Wright and the original owners. It was held that the defendant was not to be considered the absolute proprietor, but rather as a mortgagee, the mortgagor being left in possession. Such a lien is not that kind of ownership which is requisite to render a person liable as proprietor in an action for libel.[2]

[1] Judge Cooley in Maclean v. Scripps, 52 Mich., 214; 18 N. W. Rep., 260.

[2] Andres v. Wells, 7 Johns. (N. Y.), 209.

CHAPTER XXI.

PLEADINGS IN CIVIL ACTIONS.

THE SUBJECT ILLUSTRATED.

STATEMENT OF THE CLAIM IN ACTIONS FOR SLANDER OF TITLE.

STATEMENT OF THE DEFENSE.

§ 1. **The Pleadings in Actions for Defamation.**— It is common in the course of every system of judicature to require, on behalf of each of the litigating parties before proceeding with the cause, a statement of his case. In the forensic language of the courts these statements are called "the pleadings."

The term defined. A pleading is the statement in a logical and legal form of the facts which constitute the plaintiff's cause of action or the defendant's ground of defense.[1]

Regular pleadings: (1) The declaration or complaint. (2) The pleas or answer. (3) The replication.

§ 2. **Pleading under Codes.**— It would appear from an examination of the earlier cases for libel and slander in the state of New York that the contest was, almost without an exception, a contest of pleaders. The real matters in litigation appear to have become insignificant in comparison to the manner of stating them in the pleadings. As a result of this condition of things the legislature in 1848 attempted to sweep away the whole system of common-law pleading by a statutory enactment providing that "All the forms of pleading heretofore existing are abolished, and hereafter the forms of pleading in civil actions in courts of records, and the rules by

[1] 2 Bouvier's Law Dictionary, 343.

which the sufficiency of the pleadings is to be determined, are those prescribed by this act."[1] The act commonly called the "code of procedure" provided that the first pleading on the part of the plaintiff should be "the complaint," and should contain — "1. The title of the cause, specifying the name of the court in which the action is brought, the name of the county in which the plaintiff desires the trial to be had, and the names of the parties to the action, plaintiff and defendant. 2. A plain and concise statement of the facts constituting a cause of action, without unnecessary repetition. 3. A demand of the relief to which the plaintiff supposes himself entitled. If the recovery of money be demanded, the amount thereof shall be stated."[2]

The pleading on the part of the defendant. The answer must contain —"1. A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief. 2. A statement of any new matter constituting a defense or counter-claim, in ordinary and concise language, without repetition."

In actions for libel and slander. It is provided that "it shall not be necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose; but it shall be sufficient to state, generally, that the same was published or spoken concerning the plaintiff; and if such allegation be controverted, the plaintiff shall be bound to establish, on trial, that it was so published or spoken."

In his answer "the defendant may allege both the truth of the matter charged as defamatory, and any mitigating circumstances, to reduce the amount of damages; and whether he prove the justification or not, he may give in evidence the mitigating circumstances."[3]

§ 3. **Illustrations — Digest of New York Cases under the Code.—**

1. The rule formerly was that when the words required a knowledge of extrinsic facts, either to show their meaning or their applicability to the plaintiff, all such facts must be both averred and proved. The only change

[1] N. Y. Code of Procedure.
[2] Howard's N. Y. Code, 195.
[3] Howard's N. Y. Code, 296.

made by the code in this respect is to dispense with such averments of extrinsic facts showing the applicability of the slander to the plaintiff. It is still necessary, as it formerly was, to aver and prove any facts necessary to explain the meaning of the words used. It is also necessary, of course, to allege that the words were spoken of and concerning the plaintiff. Where the objection taken at the trial is for the want of a material averment which the plaintiff must prove in order to sustain his action, unless the judge permits an amendment on the spot, the objection is as fatal as it would be on demurrer. But where the objection first taken on the trial is for the want of an innuendo stating the meaning of the words, and this question is fairly left to the jury and they find them slanderous, the court ought not after the verdict to interfere. The verdict aids the defect, even if the want of such an averment would have been good cause of demurrer. And it is well settled that the meaning of the words used by the defendant cannot be proved by the opinions of witnesses, or their statement as to how they understood them. In this case the plaintiff was charged to have been a "receiver of stolen goods," which words were considered actionable *per se*. But a charge that "he had received stolen goods" would not have been considered actionable *per se* without the additional allegation that he knew they had been stolen. Per S. B. Strong, J. Dias v. Short, 16 How., 322.

2. The office of an innuendo, in an action of libel or slander, is to connect the words published or spoken with the persons or facts and extrinsic circumstances previously named and set forth in the inducement, and to explain their application thereto; and, being merely explanatory, cannot enlarge the sense of words, or supply or alter them when they are deficient. Defects in innuendoes are usually apparent upon the face of the pleading, and formerly would be taken advantage of by special demurrer; but under the code the remedy is by motion to strike out. It is the province of the jury to determine the meaning of a libel; and where there are allegations in the complaint in the form of innuendoes, but in fact are asseverations of the import of the publication itself, and present the precise points upon which the jury must pass, they are not innuendoes in the proper sense of that term, but are allegations of issuable facts founded upon the matter contained in the published article and are required to be answered. Blaisdell v. Raymond, 14 How., 265.

3. The code merely dispenses with the allegation of extrinsic facts, showing the application of the words to the plaintiff, in order to obviate the difficulty which was supposed to have been occasioned by the decision of the supreme court in Miller v. Maxwell, 16 Wend., 9. It does not dispense with the necessity of an averment or innuendo when they become essential to show the meaning of the words themselves. In these respects the rules of pleading remain unaltered. Per Willard, J., Pike v. Van Wormer, 6 How., 175; Culver v. Van Anden, 4 Abb., 375; Fry v. Bennett, 5 Sand., 54.

4. Where words used convey a clear and direct imputation of a slanderous character they are actionable in themselves and need no colloquium or other averment to aid them in support of the action. But such averments are necessary to sustain the action where the words are ambiguous and uncertain in their meaning. The code has changed the common-law rule of

pleading in actions of slander in one particular; that is, although it may be uncertain to whom the words were intended to apply, it is no longer necessary to insert in the complaint any averments showing they were intended to apply to the plaintiff. Pike v. Van Wormer, 6 How., 99.

5. If the facts alleged are inadmissible as evidence, the pleading itself is, of course, irrelevant. Van Benschoten v. Yaple, 14 How., 97.

6. It was held in Wesley v. Bennett, 6 Abb., 498, that although the words alleged in the complaint for libel may be interpreted so as to be innocent, yet, if they are fairly susceptible of a construction which would render them libelous, the complaint on demurrer will be sustained. An innuendo is not an averment of facts, but an inference of reasoning. Fry v. Bennett, 5 Sand., 54.

7. A statement of the tenor and effect of the words complained of in an action of slander is bad pleading. The words spoken should be alleged. Forsyth v. Edmiston, 5 Duer, 653. And see Viele v. Gray, 18 How., 550.

§ 4. **Modifications of the Common-law System.**—The common-law system has been abolished in many of the states and modified in others. In Massachusetts no averment need be made which the law does not require to be proved. The substantive facts necessary to constitute the cause of action are required to be stated only with substantial certainty and without unnecessary verbiage. In a schedule of forms prescribed by the legislature for general use in the several courts appear the following suggestions with precedents for declaration in libel and slander:[1]

§ 5. **Forms Prescribed in Massachusetts.**—

Libel declaration: "And the plaintiff says that the defendant caused to be published in a newspaper [*describing it*] a false and malicious libel concerning the plaintiff, a copy whereof is hereto annexed [*or if it is a picture it may be described*]."

Slander declaration: "And the plaintiff says that the defendant publicly, falsely and maliciously accused the plaintiff of the crime of perjury by words spoken of the plaintiff substantially as follows: [*Here set out the words. No innuendoes are necessary*]."

("If the natural import of the words is not intelligible without further explanation, or reference to facts understood but not mentioned, or parts of the conversation not stated, in either of those cases, after setting forth the words, the declaration should contain a concise and clear statement of such things as are necessary to make the words relied on intelligible to the court and jury in the same sense in which they were spoken. This rule is applicable to actions for written and printed as well as oral slander.") Mass. Pub. Statutes 1882, 979.

§ 6. **Forms Prescribed in Alabama.**—

Declaration for slander: A. B. plaintiff, v. C. D. defendant. The plaintiff claims of the defendant —— dollars damages for falsely and maliciously charging the plaintiff with perjury [*larceny, or as the case may be*] by

[1] Mass. Public Statutes 1882, 964.

speaking of and concerning him in the presence of divers persons in substance, as follows: [*Here set out the defamatory language*], viz., on the —— day of ——. E. F., Attorney for Plaintiff.

Same for libel: A. B. v. C. D. The plaintiff claims of the defendant —— dollars damages for falsely and maliciously publishing of and concerning him in a newspaper published at ——, called —— [*or book or writing, as the case may be*] the following matter with intent to defame the plaintiff, viz.: [*Here set out the language charged as libelous*] on the —— day of ——. Alabama Civil Code 1886, p. 793.

§ 7. **In Florida.**— "In an action for libel or slander it shall not be necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose; but it shall be sufficient to state generally that the same was published or spoken concerning the plaintiff, and if such allegation be controverted the plaintiff shall be bound to establish on trial that it was so published or spoken."

In the answer the defendant may allege the truth of the matter charged as defamatory, and any mitigating circumstances to reduce the amount of damages; and whether he prove the justification or not he may give in evidence the mitigating circumstances.[1]

§ 8. **In Kansas.**— "In actions for libel and slander it shall be sufficient to state generally that the defamatory matter was published or spoken of the plaintiff, and if the allegation be denied the plaintiff must prove on the trial the facts showing that the defamatory matter was spoken or published of him. The defendant may allege the truth of the matter charged as defamatory, and may prove the same and any mitigating circumstances to reduce the amount of the damages, or he may prove either."[2]

§ 9. **And in Arizona Territory.**— In an action for libel or slander, "it is not necessary to state in the complaint extrinsic facts for the purpose of showing the application of the defamatory matter out of which the cause of action arose. It is sufficient to state generally that the same was published or spoken concerning the plaintiff, and if such allegation be controverted the plaintiff must establish on the trial that it was so published or spoken."[3]

[1] Statutes of Florida, Bush's Dig., 488.

[2] Dassler's Compiled Laws of Kansas, 618.

[3] Arizona Compiled Laws, 1877, p. 417.

§ 10. **The Principles of the Common Law.**— While it has been truthfully said that the common-law system of pleading was not intended for the especial use of mental dyspeptics, it must, we think, be admitted that its usefulness has ceased to exist. In England, the place of its birth, it has been completely abolished. In this age of the world lawyers in practice generally find little time to draw allegations or inducements of general good character and innocence already presumed by law to exist and never necessary to prove.

The principles of the common law upon which the system was founded, however, still remain in full force, and are of every-day application in the courts of law throughout the United States. It is now our purpose to illustrate these principles so far as they apply to the subject of pleadings in actions for defamation.

§ 11. **Statement of the Claim Defined.**— The complaint, the statement of the claim, or, as it was formerly and still is in many jurisdictions called, the declaration, is a specification in methodical and legal form of the circumstances which constitute the plaintiff's cause of action, which necessarily consists of the statement of a legal right, or in other words a right recognized in a court of law, and of an injury to such right remedial at law by an action.[1]

The subject may be well illustrated by an analysis of a declaration in slander at common law and an examination of its form and particular parts or essential averments.

§ 12. **The Declaration in Actions for Defamation at Common Law — Its Form and Particular Parts.**— At common law the declaration may be divided into the following parts:

First, the Title.
Second, Designation of the Parties Litigant.
Third, Inducement of Good Character.
Fourth, Inducement of Innocence of the Offense Imputed.
Fifth, Inducement of the Resulting Effect of Good Character.
Sixth, Statement of Extrinsic Matter.
Seventh, Statement of Malicious Intent.
Eighth, the Colloquium.
Ninth, the Imputation and Innuendoes.

[1] Chitty's Pleading, 14th Am. ed., 240.

Tenth, General Statement of Damages.
Eleventh, the *Ad Damnum.*
Twelfth, the Conclusion.

THE SUBJECT ILLUSTRATED — DECLARATION IN SLANDER AT COMMON LAW — INDIRECT IMPUTATION OF LARCENY.

§ 13. **First, the Title — The Court.—**

In the —— Court of —— County.

—— Term, A. D. 18—.

STATE OF ——, } ss.
—— County. }

§ 14. **Second, Designation of the Parties Litigant.**— A. B., the plaintiff in this suit, by L. M., his attorney, complains of C. D., the defendant in this suit, summoned, etc., of a plea of trespass on the case.[1]

§ 15. **Third, Inducement of Good Character.**— For that whereas the said plaintiff now is a good, true, honest, just and faithful citizen of the county and state aforesaid, and as such has always behaved and conducted himself, and until the committing of the several grievances by the said defendant as hereinafter mentioned was always reputed, esteemed and accepted by and among all his neighbors and other good and worthy citizens of this state to whom he was in anywise known to be a person of good name, fame and credit, to wit, at the county and state aforesaid.[2]

§ 16. **Fourth, Inducement of Innocence of the Offense Imputed.**— And whereas, also, the said plaintiff has not ever been guilty, or until the time of the speaking and publishing of the several false, scandalous, malicious and defamatory words by the said defendant as hereinafter mentioned, been

[1] The essential parts of the declaration relating to the title of the court, the venue and designation of the parties litigant remain the same at common law, and are essential to every well-drawn complaint.

[2] It is usual at common law to commence the declaration in all actions for defamation with an inducement of the plaintiff's good character; but as this inducement is not traversable it is unnecessary, and may be wholly omitted, and the declaration commenced with a statement of the defendant's malicious intent, etc. It was not customary, however, to allege this inducement where the defamation did not affect the plaintiff in his moral character, but merely imputed to him insolvency or incapacity in the way of his trade. 2 Chitty's Pleadings, 620; Coleman v. Southwick, 9 Johns. (N. Y.), 48.

suspected to have been guilty of larceny or of any other crime as hereinafter stated to have been charged upon and imputed to him by the said defendant.[1]

§ 17. **Fifth, Inducement of the Resulting Effect of Good Character.**— By means whereof the said plaintiff, before the speaking and publishing of the several false, scandalous, malicious and defamatory words by the said defendant as hereinafter mentioned, had deservedly obtained the good opinion and credit of all his neighbors and other good and worthy citizens of the state and county aforesaid, to whom he was in anywise known, to wit, at the county and state aforesaid.[2]

§ 18. **Sixth, Statement of Extrinsic Matter — Commission of an Offense.**— And whereas, also, before and at the time of the speaking and publishing of the several false, scandalous, malicious and defamatory words by the said defendant as hereinafter mentioned, certain goods and chattels, to wit, three pairs of shoes of the value of, to wit, $3, the personal goods of one E. F., had been and were feloniously stolen, taken and carried away, to wit, at the county and state aforesaid.[3]

[1] This exculpatory averment, though usual, does not seem to be essential, especially as the charge is afterwards alleged to have been falsely made; if it were truly made it lies on the defendant to allege and prove the truth. 2 Wils., 147; Hooker v. Tucker, Holt's R., 39; Bendish v. Lindsay, 11 Mod., 194; 2 Chitty's Pleadings, 620.

[2] This inducement also is not traversable, and therefore wholly unnecessary, though it is usually inserted where the declaration is for a libel or for words affecting the plaintiff in his profession or trade. The inducement respecting such profession or trade usually precedes this inducement, and which in such cases, in addition to the statement of the plaintiff's good character as given, runs thus: "And also by reason of the premises the plaintiff, in the way of his aforesaid trade and business, was daily and honestly acquiring great gains and profits therein, to wit, at, etc., aforesaid." 2 Chitty's Pleadings, 620.

[3] As to such averments great caution and discretion are requisite; to introduce extrinsic facts unnecessarily may be prejudicial either in imposing the burden of unnecessary proof on the plaintiff, or in relieving the defendant from the allegation and proof of that which is essential to his defense. This is not all; it is often matter of policy, independent of the immediate object of the pleader, to set forth a good cause of action, to introduce allegations with the collateral view of allowing the plaintiff to go into evidence from which he would otherwise be excluded. It sometimes happens that extrinsic facts of little importance to the mere legal cause of action are of great importance with a view to the introduction of such evidence as is likely to influence a jury; care should, however, be taken to introduce other

§ 19. **The Inducement Explained.**— In all cases where the alleged defamatory words, whether spoken, written or otherwise expressed, do not naturally in themselves convey the meaning the plaintiff would assign to them, or where they are ambiguous or equivocal, and require explanation by reference to some outside or extrinsic matter to show that they are actionable, it must be expressly stated that such matter existed, and that the defamation related thereto.[1] The allegation thus required is called the inducement or statement of extrinsic matter.

For example: If the imputation complained of is that the plaintiff was "forsworn," this not being actionable in itself because it does not necessarily impute the crime of perjury, the pleader must specially allege, *by way of inducement*, that there had been some judicial proceedings in which the plaintiff had been sworn as a witness and gave evidence, and that the defendant in speaking the words complained of referred to such evidence in using the word "forsworn," and intended to charge that the plaintiff had been guilty of perjury. Where the words charged were, "He had a hand in the affair," they do not necessarily impute a crime. Upon their face they are apparently innocent, but when spoken of and concerning the plaintiff, and of and concerning a certain larceny then recently committed in the vicinity, the apparent meaning is changed by extrinsic circumstances, and they become actionable. Where the matter complained of in the declaration as a libel does not upon its face apply to the plaintiff and impute a libel, the pleader must state, by way of inducement, such facts as will support such a meaning and show the libelous application of the matter to the plaintiff.[2]

§ 20. **Illustrations — American Cases.—**

1. A Massachusetts Case: *Bloss v. Tobey*, 19 Mass., 320.

The declaration charged the defendant with having said that the plaintiff had burnt his own store in Alford. The words were introduced with a colloquium "of and concerning the plaintiff, and of and concerning a certain

counts strictly confined to the legal and technical cause of action. 2 Starkie on Slander, 386.

[1] 1 Chitty's Pleading, 14th Am. ed., 400; Newell v. Howe, 31 Minn., 235; 17 N. W. Rep., 283; Bloss v. Toby, 2 Pick. (Mass.), 320; Case v. Buckley, 15 Wend. (N. Y.), 327; Linville v. Earlywine, 4 Blackf. (Ind.), 470; Harris v. Burley, 8 N. H., 256.

[2] 1 Chitty's Pleading, 14th Am. ed., 400.

store of the plaintiff's, situated in said Alford, before that time, to wit, on the 6th day of December last past, consumed by fire," and alleged that the defendant did speak, utter and publish the following false, scandalous and malicious words of and concerning the plaintiff, viz.: "He [meaning the plaintiff] burnt it [meaning the plaintiff's store in Alford aforesaid] himself [again meaning the plaintiff]; and further meaning and insinuating by the several words aforesaid that the plaintiff had been guilty of the crime of wilfully and maliciously burning his own store in Alford aforesaid." Now these words are not actionable, unless it is a crime punishable by law for a man to destroy by fire his own property; and we cannot find that, either by the common law or by any statute of this commonwealth, such an act, unaccompanied by an injury to or by a design to injure some other person, is criminal; and although it is alleged by the innuendo that the defendant meant and intended to charge the plaintiff with having done this act wilfully and maliciously, yet the words do not thereby acquire any force of meaning which they had not in themselves, the office of an innuendo being only to make more plain what is contained in the words themselves as spoken, which they do not bear when taken by themselves with the aid of an innuendo. The words spoken as stated in the count are simply, "He burnt it." These words are innocent in themselves, though they may have a defamatory meaning if they relate to any subject the burning of which is unlawful in order to give them that character. That they may be actionable the plaintiff should have set forth in a colloquium the circumstances which would render such a burning unlawful, or by an averment in the preceding part of his count, without the form of a colloquium, and they should have averred that the words spoken were of and concerning those circumstances. Thus, if goods belonging to another person were in the store, or if goods belonging to the plaintiff had been insured, it should have been averred that such was the case, and that the words spoken related to a store with such goods in it. But there is nothing in the count that indicates that any goods were in the store, or that any damage had happened or was designed to any person except the plaintiff himself, so that the whole accusation against him, as represented in this count, is that he wilfully and maliciously burnt his own store. The count was held bad, as it contained nothing more than the allegation that the defendant said of the plaintiff he had burnt his own store, which for the reasons given is not actionable.

Digest of American Cases.—

1. Whatever circumstances are necessary to show that an article which does not upon its face asperse the plaintiff was intended and understood as libelous in meaning, and as referring to plaintiff, must be alleged in the complaint and by averments; they will not be inferred from innuendoes. Thus, if the words appear innocent, plaintiff cannot show they were ambiguous or ironical, unless under proper averments. Stewart v. Wilson, 23 Minn., 449.

2. Where the declaration stated that the plaintiff, at the time of publishing the slanderous words, was and long before had been a blacksmith, and carried on the business and trade of a blacksmith honestly, and found and provided all such iron as was necessary and required of him in his business, and made correct charges, always kept honest, true and faithful accounts

with all persons relating to his trade, etc., yet the defendant, in order to injure him in his business, and cause it to be believed, etc., in a certain discourse of and concerning the plaintiff in his said business spoke and published the following words, to wit: "He keeps false books, and I can prove it," etc.— this was *held* to be sufficient without a more special averment that there was a discourse of and concerning the plaintiff's trade, and that the words were spoken of his trade. Burtch v. Nickerson, 17 Johns., 217.

3. It was alleged in a declaration in slander that in a certain cause before a court of three justices of the peace, constituted under the act concerning apprentices and servants, to hear and determine a certain cause between the people, etc., and the defendant, the plaintiff was examined on oath administered by the said court, they having full power to administer the same, and had given evidence for and in behalf of the people; and that the defendant spoke of and concerning the plaintiff and the prosecution, and the evidence given by the plaintiff on the trial, and on a point material to the prosecution, these words, viz.: "You have sworn to a damned lie, and I can prove it." This was held good, there being a sufficient averment of the jurisdiction of the court, and the false title of the cause may be rejected as surplusage. Chapman v. Smith, 13 Johns., 78.

4. In slander, the declaration stated that the plaintiff was a justice of the peace, and that the defendant, meaning to injure and expose him to prosecution for corruption, etc., in a certain discourse, etc., said of the plaintiff, in his office of justice: "L. [meaning the plaintiff] had been feed by A. W. [meaning A. W., who lately had a cause pending and determined before the plaintiff, and that he [the defendant meaning] could do nothing when the magistrate was in that way against him [the defendant meaning]." After verdict the declaration was held sufficient. Burtch v. Nickerson, 17 Johns. (N. Y.), 217.

5. A declaration in an action for slander, alleging with considerable fullness various occupations and business enterprises in which plaintiff was engaged, and that during his absence on a journey of business and pleasure defendants made certain statements complained of to vex, harass, oppress, impoverish and wholly ruin plaintiff in his trade and business, is not defective in the recitals as to his business. Ayres v. Toulmin, 74 Mich., 44, 41 N. W. Rep., 855.

6. Where a suit is brought for libel it is unnecessary for plaintiff to characterize the suit by averment in his complaint. If a libel consisted in reporting plaintiff's standing as a merchant "in blank," the complaint should inform the court and the defendant of that fact, with such explanations as to what was meant by the report as may be necessary to show that it was injurious and defamatory. A complaint in such case which undertakes to state the substance of the language used, or its meaning, is bad on general demurrer. A complaint in an action for libel is not insufficient because it does not state whether plaintiff asks for actual or exemplary damages. Under the Texas act of March 31, 1885, in an action against a foreign corporation it is not necessary to allege that it had an agent or representative in the county, and that its principal office was also in the county; but it is enough to allege either that it had an agent or representative in the county or that its principal office was there. Bradstreet Co. v. Gill, 72 Tex., 115, 9 S. W. Rep., 753.

7. Where plaintiff sets out the parts of the writing constituting the alleged libel, together with averments as to its publication, by reducing the libelous matter to writing, and reading the same to various persons, it is improper to require him to either set out the whole writing or file it with the petition; there being nothing in the extracts to indicate that their meaning might be qualified or explained by other parts. Wallis v. Walker, 73 Tex., 8, 11 S. W. Rep., 123.

8. In slander for words alleged to impute adultery to the wife, the declaration contained no allegation that the wife or the person with whom she was said to have committed the offense was married at the time it was said to have been committed, and on motion in arrest of judgment it was held bad. Merritt v. Dearth, 48 Vt., 65.

9. In suits by two for slander the first declaration alleged that defendant said: "Eliza Higgins took it [the murdered child] away;" that "the child belonged to Aunt Jerusha, and Eliza Higgins was her aid;" that "Eliza Higgins buried it;" and the second, that "my boy told me that Liza Higgins had that young one in her cellar two or three days, and he says Bart Oliver told him so." *Held*—(1) that the declarations were not demurrable because they did not contain an allegation that plaintiff Jerusha A. Young was intended by the words "Aunt Jerusha," or "Jerusha Young," or was known or called by either or both of those names, or that plaintiff Eliza H. Higgins was known also as "Eliza Higgins" or "Liza Higgins;" (2) that the words used did not in themselves import the commission of a criminal offense; (3) that the allegation that such words were spoken at divers times in presence of divers persons and in divers places was insufficient. Young v. Cook, 144 Mass., 38, 10 N. E. Rep., 719.

10. In an action for slander the plaintiff alleged that he was informed and believed that defendant, in a conversation with one E. in regard to the burning of certain houses, in the presence and hearing of E. and divers other persons maliciously spoke of and concerning the plaintiff the false and defamatory words following, viz.: "That damned scoundrel [meaning plaintiff] knows all about it [meaning the burning of said houses] from beginning to end;" thereby intending falsely to charge plaintiff with having wilfully, etc., aided and abetted in setting fire to and burning said houses. It was held that the allegation constituted a cause of action entitling the plaintiff to have the issue submitted to the jury. Reeves v. Bowden, 97 N. C., 29, 1 S. E. Rep., 549.

11. Where the language is libelous and fairly susceptible of the meaning claimed for it by the plaintiff, it is proper to aver in the complaint the meaning thereof as intended by the defendant in publishing the charge, and as understood by those who read it; and such averments may be treated as substantive allegations of fact. Where words amount to a libelous charge against some person, but the application thereof to the plaintiff is left uncertain, such application may be shown by proof of extrinsic facts; and under the Minnesota statute it is not necessary to allege them in the complaint. Petsch v. St. Paul Dispatch Printing Co., 40 Minn., 291, 41 N. W. Rep., 1034.

12. A complaint in an action for libel need not set out the whole paper writing in which the libel is contained, where there is nothing in the extracts taken therefrom to indicate that their meaning might be qualified by

the other parts, or that the other parts are needed to explain the charges made. Wallis v. Walker 73 Tex. 8, 11 S. W. Rep., 123.

13. Where a publication, in its nature libelous, does not on its face necessarily point to any particular individual as the person libeled, it is necessary, for the maintenance of an action upon it, that the plaintiff, by way of inducement, should allege such facts and circumstances as, when read in connection with the innuendoes, make the conclusion inevitable in the mind of the reader that the plaintiff was the one intended. Miller v. Maxwell, 16 Wend. (N. Y.), 9.

14. An averment in a count for libel that A. was supervisor of an election at B., at which the defendant charged that there was false swearing, does not sufficiently apply that charge to A.; nor is a charge of false swearing a sufficient imputation of perjury. Lewis v. Soule, 3 Mich., 514.

§ 21. **The Inducement of Extrinsic Matters, when Necessary.**— If the words have the slanderous meaning alleged, not by their own intrinsic force, but by reason of the existence of some extraneous fact, the plaintiff must undertake to prove that fact, and the defendant must be at liberty to disprove it. The fact then must be averred in a traversable form, with a proper colloquium, to wit, an averment that the words in question are spoken of and concerning such usage, or report, or fact, whatever it is, which gives the words, otherwise indifferent, the particular defamatory meaning imputed to them. Then the word "meaning" or "innuendo" is used with great propriety and effect in connecting the matter thus introduced by averments and colloquia with the particular words laid, showing their identity, and drawing what is now the legal inference from the whole declaration, including the averments and colloquia, that such was, under the circumstances thus set out, the meaning of the words used. These rules are necessary to bring the case of slander within the well-known rule of pleading which requires that a declaration shall contain enough to give notice to the defendant of all the material facts intended to be proved, and to enable the court to perceive from the record that a good title is set out by the plaintiff to enable him to have a judgment.[1]

§ 22. **Illustrations — Digest of American Cases.—**

EXTRINSIC MATTER NECESSARY.

1. The declaration, in an action for slander brought by George H. Thomas against Charles E. Blasdale, was as follows: "And the plaintiff says the defendant publicly, falsely and maliciously accused the plaintiff of the

[1] Carter v. Andrews, 38 Mass., 1.

crime of murder by words spoken of the plaintiff substantially as follows, to wit: 'He [meaning the plaintiff] killed her [meaning the plaintiff's wife, Mary J. Thomas] by his bad conduct [meaning the bad conduct of the plaintiff], and I [meaning the defendant] think he knows more about her being drowned than anybody else. He [meaning the plaintiff] is to blame for it.'" No extrinsic or explanatory circumstances were set out which might have given a significance to the words. A demurrer was sustained to the declaration and the plaintiff appealed. The supreme court said in deciding the question: "We have only to consider whether the words themselves, taken in their natural sense and without a strained construction, may fairly import a criminal charge of homicide. The words are, 'He killed her by his bad conduct, and I think he knows more about her being drowned than anybody else. He is to blame for it.' The explanation that the killing was by his bad conduct shows that no charge of killing in a criminal sense was intended or fairly to be understood, and the demurrer was properly sustained." Thomas v. Blasdale, 147 Mass., 438, 18 N. E. Rep., 214. Citing Young v. Cook, 144 Mass., 38, 10 N. E. Rep., 719; Boynton v. Stocking Co., 146 Mass., 221, 15 N. E. Rep., 507; Twombly v. Monroe, 136 Mass., 464.

2. "In an action for libel or slander it is not necessary to state in the complaint any extrinsic fact for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose, but it is sufficient to state generally that the same was published or spoken concerning the plaintiff; and if such allegation be controverted the plaintiff shall be bound to establish, on the trial, that it was so published or spoken." Code, sec. 141. This section does not dispense with the necessity of an averment or innuendo, when it becomes essential to show the meaning of the words themselves; and the fact that the code dispenses with the averment of extrinsic facts, before necessary to point the application of the words to the plaintiff, justifies the inference that in other respects the rule formerly prevailing remains unchanged. Pike v. Van Wormer, 5 Pr. R., 171, 174, 175; Anon., 8 How., 406; Duel v. Agan, 1 Code Rep., 134; Wood v. Gilchrist, id., 117.

3. In Massachusetts an indictment charged that the defendant, intending to injure the reputation of "one J. K., esquire, a member of the honorable senate of the general court of Massachusetts aforesaid, and chairman of the committee of accounts, duly appointed thereto by the legislature of the said commonwealth, and maliciously intended to deprive the said J. K. of his office aforesaid, and the confidence of the people of his senatorial district," framed a libel of, concerning and against J. K., and caused the same to be printed in a public newspaper under a paragraph headed, "The new nomination in Middlesex," in the following words: "In this committee of accounts [meaning the committee of legislature aforesaid] which had advertised for sealed proposals for the contract of printing, the honorable chairman, Mr. K. [meaning the said J. K.], proposed, before a seal was broken, that the contract should be given to the Boston "Statesman" [meaning to the proprietor of that paper], provided their proposals were not more than $500 higher than any others. This was no more nor less than a proposal to give $500 from the treasury of Massachusetts to that reprobated

Jackson press." It was held that the publication was not on the face of it, libelous, and that the indictment could not be sustained, inasmuch as it did not aver such extrinsic facts as would render the words libelous, with a colloquium that the words were published of and concerning such facts. Com. v. Child, 30 Mass., 198.

4. Where a libel is published charging gross misconduct upon the state printer and upon the editor of a certain newspaper, designating it by its name or title, the person holding the post of state printer, and being the editor of the paper designated, may maintain an action in his own name by prefatory averments in his declaration that he at the time was state printer and editor of the paper. Where a slanderous charge may be collected from the words themselves, or from the general scope of the publication, it is not necessary to make any averment as to circumstances to the supposed existence of which the words refer. Croswell v. Weed, 25 Wend., 621.

5. In an action by a foreign corporation for an alleged libel on demurrer to the declaration, it was held that the charter of the plaintiff should be set out at length in order that it might be seen whether the publication was false in stating the mode in which it authorized the business of the company to be done, and which was the subject of the criticism which constituted the alleged libel. Nor could the charter be treated as properly pleaded, which was only brought before the court as a part of the alleged libelous publication. Neither would the regular formula, to the effect that the defendant falsely and maliciously wrote, published, etc., be sufficient in a case of this character. It is sufficient in an action by a natural person for words actionable in themselves, because the law presumes such person to be of good credit and character until the contrary is made to appear. But it cannot be presumed that the legislature of a foreign state has not granted an unwise charter to a corporation. Hahneman Life Ins. Co. v. Bebee, 48 Ill., 87.

§ 23. **The Inducement of Extrinsic Matters, when Not Necessary.**— The inducement is not necessary where the defamatory matter is *prima facie* or in itself actionable. A declaration stating the defendant's malicious intent and the defamatory matter showing that it refers to the plaintiff is sufficient. Where the defamatory matter can be collected from the words themselves there need be no averment as to circumstances to the supposed existence of which the words referred. As the gist of the action appears on the face of the libel or slanderous words there can be no reason that the plaintiff should resort to any statement of the circumstances to which the defendant may have alluded. If these circumstances are facts to the extent represented, it is for the defendant to plead and establish by evidence their truth.[1]

For example: If the imputation is "He perjured himself,"

[1] 1 Chitty's Pleading, 14th Am. ed., 402.

or that "he perjured himself in the action," it will not be necessary to state in the declaration, by way of inducement, that there was an action. The statement in the defamatory matter itself of a particular fact dispenses with the proof of that particular fact.[1]

§ 24. **Illustrations — Digest of American Cases.—**

EXTRINSIC MATTER NOT NECESSARY.

1. In the case of Thomas v. Dole, recently decided in Massachusetts, the declaration was as follows: "And the plaintiff says the defendant publicly, falsely and maliciously accused the plaintiff of the crime of murder by words spoken of the plaintiff substantially as follows, to wit: 'He [meaning the plaintiff] knows how she [meaning the plaintiff's wife] came to her death [meaning the death of plaintiff's wife]. He [meaning the plaintiff] killed her [meaning the plaintiff's wife]. There was foul play there.'" No extrinsic matter explanatory of the words was set out in the declaration and a demurrer was sustained. An appeal being taken, the supreme court in passing upon the question said: "The words are, 'He knows how she came to her death. He killed her. He is to blame for her death. There was foul play there.' The charge of having killed her is general. The statement that there was foul play may naturally be found to signify something more than mere bad conduct. The words, 'He is to blame for her death,' taken with the context, do not necessarily weaken the force of the more direct charges. Taken as a whole the court cannot say that these words may not fairly be considered to impute a crime to the plaintiff. It has long been held that a general charge of killing, unexplained, is sufficient. The demurrer should have been overruled." Thomas v. Dole, 147 Mass., 438, 18 N. E. Rep., 214. Citing Cooper v. Smith, Cro. Jac., 423; 1 Roll. Abr., 77; 1 Com. Dig., "Action on the Case for Defamation (D., 2);" Eckart v. Wilson, 10 Serg. & Raw., 44; Taylor v. Casey, Min., 258; Hays v. Hays, 1 Humph., 402.

§ 25. **Special Inducements as to Professions, Trades, etc.** In declarations for libels and slanders which become actionable by their having affected a person in his trade, profession or business, there must be a distinct allegation, by way of inducement, that the plaintiff was at the time of the publication of the alleged defamatory matter in such profession or in the exercise of such trade or business. But in drafting the inducement the pleader should be careful to avoid unnecessary minuteness in showing the trade or profession of the plaintiff. A general allegation that he exercised it is all that is necessary or judicious.[2]

[1] Cro. Car., 337; 1 Starkie on Slander, 392; 1 Chitty's Pleading, 14th Am. ed., 402.

[2] 1 Chitty's Pleading, 14th Am. ed., 400.

ILLUSTRATIONS: AN OLD ENGLISH FORM.

And whereas also the said plaintiff, before and at the time of the committing of the said grievances by the said defendant, was, and from thence hitherto hath been, and still is, one of the justices of our lord the king assigned to keep the peace of our said lord the king in and for the county of ——, and also to hear and determine divers felonies and other misdemeanors committed in the said county, and during all that time governed and conducted himself in his said office with justice, uprightness and integrity, to wit, at, etc. 2 Starkie on Slander, 391.

AN ILLINOIS FORM — COMMON LAW.

For that whereas the plaintiff, before and at the time of the committing by the defendant of the several grievances hereinafter mentioned, exercised and carried on, and still does exercise and carry on, the business of a merchant in, etc., and has always conducted the same with punctuality in dealing, keeping his engagements and paying his debts, and was deservedly held in great credit and esteem by his neighbors and those with whom he had dealings in his trade and business as such merchant, whereby he daily acquired divers gains and emoluments in his said trade and business, to the support and maintenance of himself and family, and the great increase of his fortune. Puterbaugh's Com. Law, 483.

A MODERN ENGLISH FORM.

The plaintiff is and at the times hereinafter mentioned was a baker, carrying on business at ——, in the county of ——. Odgers on L. & S., 621.

§ 26. **Declaring upon Defamatory Words at Common Law — Traverse of Extraneous Facts.** — The rule of the common law is well established that to maintain an action upon the case for slanderous words spoken without the averment and proof of special damages the plaintiff must prove that the defendant uttered language the effect of which was to charge him with some crime or offense punishable by law. This might be done by the mere force and effect of the words used; or words might be used in a conventional, ironical, figurative or artificial sense, not *proprio vigore* importing a charge of crime, but having that effect by reason of some well-understood local or technical usage or by reason of the existence of some extraneous fact to which the speaker alludes. In the most common mode of declaring which prevailed at common law the practice was to set forth the words exactly and then aver the particular usage or the extraneous facts, giving to the words their slanderous effect and import, and to allege that the words were spoken with reference to such facts or usage, and thus these facts were put in issue to be traversed and

tried if denied. Whether the words are themselves actionable when they directly impute a crime, or when, by aid of the averment, colloquia and innuendoes, if proved, they have that effect, is a question of law, because the construction, meaning, force and effect of language, written or spoken, is matter of law. The law must necessarily take cognizance of the rules and usages of language. On the trial of such an issue the course would be to leave to the jury, on the evidence, the questions of fact whether averments of extraneous facts or usage, the colloquia and innuendoes are true, and for the court to direct the jury whether, if found true, and if found that the words spoken were used with reference to them, the words are actionable.[1]

§ 27. **Seventh, Statement of Malicious Intent.**— Yet the said defendant, well knowing the premises, but greatly envying the happy state and condition of the said plaintiff, and contriving and wickedly and maliciously intending to injure the said plaintiff in his good name, fame and credit, and to bring him into public scandal, infamy and disgrace with and among all his neighbors and other good and worthy citizens of the state and county aforesaid, and to cause it to be suspected and believed by those neighbors and citizens that he, the said plaintiff, had been guilty of larceny, as hereinafter stated to have been charged upon and imputed to him by the said defendant, and to subject him to the pains and penalties of the laws of this state made and provided against and inflicted upon persons guilty thereof; and to vex, harass, oppress, impoverish and wholly ruin him, the said plaintiff.

§ 28. **The Statement Essential.**— It is essential that the declaration or complaint should aver a malicious intent. Malice is the gist of the action; but it is not necessary that the word maliciously should be used. It is sufficient to aver that the defamatory matter was published falsely or wrongfully.[2] The averment, under the modern English practice, is very simple: "The defendant falsely and maliciously spoke and published of the plaintiff."[3]

[1] Dunnell v. Fiske, 11 Met. (52 Mass.), 551.

[2] 2 Chitty's Pleading, 622; 1 Fast, 563; 1 T. R., 545.

[3] Odgers on L. & S., 619.

§ 29. **Eighth, the Colloquium.**— Heretofore, to wit, on the —— day of ——, A. D. 18—, at the county and state aforesaid, in a certain discourse which the said defendant then and there had of and concerning the said plaintiff, and of and concerning the said larceny of the said goods and chattels, in the presence and hearing of divers persons.

§ 30. **The Colloquium or Statement that the Defamatory Matter Refers to the Plaintiff — The Term Defined.**— In its technical sense the term colloquium signifies an averment in a declaration that there was a conversation or discourse on the part of the defendant which connects the slander with the plaintiff or with his office, profession or trade.[1]

§ 31. **The Application to the Plaintiff of the Defamatory Matter Must be Averred.**— In actions for defamation it has always been held necessary, both in England and in this country, to aver in the declaration the application of the defamatory words to the plaintiff, and if in themselves they do not make the meaning clear, to allege also what will show their defamatory character. The technical strictness of the common law has been relaxed in England, and also in most of the states of the Union. The fundamental principles of the statutory enactments do not, however, differ materially from the requirements of the common law. The allegations must show not only that the words apply to the plaintiff, but also in what sense they are used, and how they are defamatory. Statements that they were used "concerning the plaintiff" are insufficient, if from their character they do not intelligibly apply to him in a defamatory sense. The defendant is entitled to be informed by the declaration what is imputed to him — what injury he is said to have inflicted, and how he is said to have inflicted it. If the meaning of the language is clear, and a charge that it was used of the plaintiff shows how it would naturally injure him, nothing more is necessary. But if it is ambiguous, and, with an allegation that it was published of another, it is not apparent whether it was applicable to him or whether it was applicable in a defamatory sense, or, if it was, in which of possible different defamatory senses, all such additional facts must be alleged as will make its meaning clear.

[1] 3 Bulstrode, 83; Starkie on Slander, 209.

General allegations and innuendoes are not enough. General allegations that the defendant charged the plaintiff falsely and maliciously with an act, such as the commission of a crime, accompanied with innuendoes however broad and sweeping, will not aid a declaration otherwise imperfect. It is a familiar doctrine that innuendoes do not enlarge but merely restate in plainer terms the meaning of the language which precedes them.[1]

§ 32. **Illustrations — American Cases.—**

1. A Massachusetts Case: *McCallum v. Lambie*, 145 Mass., 234.

Under the public practice act of Massachusetts, which requires that the substantive facts necessary to constitute a cause of action shall be stated with substantial certainty and without unnecessary verbiage; and in actions for slander, where the natural import of the words is not otherwise intelligible, the declaration shall contain a concise and clear statement of such things as are necessary to make them intelligible to the court and jury in the same sense in which they were spoken. A declaration for a libel was filed in words and figures as follows:

"*First count:* The plaintiff says the defendant falsely and maliciously accused the plaintiff of conspiring with Chauncey H. Pierce, of said Northampton, to defraud the neighbors and friends of said plaintiff and said Pierce, and the defendant caused said false and malicious libel to be published in a newspaper published in Northampton called the 'Hampshire County Journal,' a copy of which is hereto annexed, viz.: 'As to the electric light company, I doubt not all are willing it should pay a fair dividend — six per cent., even ten per cent., on the actual value of the plant. Here comes the rub: When the Northampton Electric Light Company was capitalized for $40,000 its actual value was not $15,000. It was a plan of the Thompson-Houston Company to make a good sale, as no profit could be made with the sharp, bitter competition of the Schuyler Company in the field; and it was a scheme by which certain parties [meaning the plaintiff and said Pierce] attempted to make $20,000 or more by buying a property worth in the neighborhood of $15,000 and capitalizing it for $40,000, and by selling stock to their neighbors and friends [meaning the neighbors and friends of the plaintiff and said Pierce], which was more than half water [meaning that more than half of the par value of said stock represented no assets and was of no real value]. In fact the Thompson-Houston plant, at the time it was sold and capitalized for $40,000, was not worth near $15,000, as a large sacrifice had to be made and was made by the projectors [meaning plaintiff and said Pierce], who dare not force the loss of removing the Schuyler competition on the stockholders after making one hundred per cent. and more on the stock sold."

"*Second count:* The plaintiff says that he is engaged in the business of a merchant in said Northampton, and as a manufacturer in the city of

[1] McCallum v. Lambie, 145 Mass., Lambie, 145 Mass., 234; 13 N. E. 234; 13 N. E. Rep., 899; Britton v. Rep., 899. Anthony, 103 Mass., 37; Pierce v.

Holyoke, in the county of Hampden, in the said commonwealth; and the plaintiff says the defendant caused to be published in a newspaper published in said Northampton, called the 'Hampshire County Journal,' a false and malicious libel concerning the plaintiff [a copy whereof is hereto annexed], whereby the plaintiff was greatly injured in his trade, business and employment." (The copy annexed was the same as was annexed to the first count and which is set out above.)

To the declaration the defendant filed a demurrer, "because neither count states a legal cause of action substantially in accordance with the rules contained in the statute; because there is not set forth in either count anything which is by its natural import libelous, or which furnishes legal ground for an action for libel, or is actionable on any ground; because the matters set out with the accompanying averments in either count is not libelous as to plaintiff or at all; nor does it appear that the matter set out relates to the plaintiff." The court sustained the demurrer, and on exceptions in the supreme court it was held that the "concise and clear statement called for by the statute answering to the inducement and colloquium of the common law was wanting; the words alleged to have been published do not indicate their application to a particular person, much less how they apply to him, or what relation he had to the matters to which they refer. It is impossible to determine with certainty from them how many actors participated in the transaction or what part they respectively took, or whether the conduct of any one was moral or immoral, innocent or guilty. Their meaning as imputing what would expose to hatred, contempt or ridicule one of whom they are alleged to have been published is not intelligible, and can only be vaguely conjectured. The demurrer was rightly sustained." McCallum v. Lambie, 145 Mass., 234; 13 N. E. Rep., 899.

Digest of American Cases.

1. Where the declaration states a colloquium with G. of and concerning the children of G. and of and concerning C., one of the children of G., and the plaintiff in the suit, in particular, and that the defendant said, "Your children are thieves, and I can prove it," the colloquium conclusively points the words and designates the plaintiff as one of the children intended. And a colloquium is sufficient to give application to words still more indefinite. Gidney v. Blake, 11 Johns., 54.

2. Where words amount to a libelous charge against some person, but it is left uncertain as to the application thereof to plaintiff, such application may be shown by proof of extrinsic facts; and under General Statutes of Minnesota, 1878, chapter 66, section 115, it is not necessary to allege them in the complaint. Petsch v. St. Paul Dispatch Printing Co., 40 Minn., 291, 41 N. W. Rep., 1034; Prendergast v. Same, 40 Minn., 295, 41 N. W. Rep., 1036.

3. A complaint setting out the alleged libelous publication, and then averring thus: "Thereby charging and intending to charge that plaintiff was guilty of the crime of perjury and falsehood, and of making the false report in the leaving out of said report of the said item of $15,000, . . . when in truth and in fact the cost of said bridge was in said report," substantially complies with Revised Statutes of Indiana, section 372, declaring that it shall be sufficient to state generally that the defamatory matter was spoken of plaintiff. Prosser v. Callis, 117 Ind., 105, 19 N. E. Rep., 735.

4. Where the language as pleaded shows on its face that it was used of and concerning the plaintiff in an official capacity or special character, an express averment that it was so used is not necessary. Stoll v. Haude, 34 Minn., 193.

5. Where, in an action for slander, for charging a witness with false swearing, the colloquium alleges the charge to have been made with reference to a suit tried on a particular day, without specifying which of several suits between the same parties tried on the same day, it is sufficient. Harris v. Prudy, 1 Stew. (Ala.), 231.

6. In an action for slandering a person in his office, profession or trade, a colloquium regarding such office, profession or trade is always necessary. Gilbert v. Field, 3 Cai. (N. Y.), 329; Burtch v. Nickerson, 17 Johns. (N. Y.), 217.

7. Where the words charged to have been spoken are unequivocal and convey a direct imputation of crime, and point out with certainty the person to whom they are intended to apply, no colloquium is necessary. Walrath v. Nellis, 17 How. Pr. (N. Y.), 72; Crosswell v. Weed, 25 Wend. (N. Y.), 621; Rodebaugh v. Hollingsworth, 6 Ind., 339; Hall v. Montgomery, 8 Ala., 510; Power v. Miller, 2 McCord (S. C.), 220; Ashbell v. Witt, 2 N. & M. (S. C.), 364. But words not actionable in themselves may be made so by a colloquium and proper averments. Stancel v. Pryor, 25 Ga., 40. And an omission of the colloquium in a declaration charging the plaintiff with swearing to a lie is fatal. Harris v. Woody, 9 Mo., 118; Knight v. Sharp, 24 Ark., 602; Blair v. Sharp, Breese (Ill.), 11.

8. Where the words complained of derive their slanderous import from extrinsic facts, the declaration must aver those facts and connect them by a colloquium with the words complained of. Sanderson v. Hubbard, 14 Vt., 462; Stanley v. Brit, M. & Y. (Tenn.), 222; Harris v. Burley, 8 N. H., 256; Brown v. Brown, 14 Me., 317; Watts v. Greenleaf, 2 Dev. (N. C.) L., 115; Edgerly v. Swain, 32 N. H., 478; Kenney v. Nash, 3 Com. (N. Y.), 177; Tebbetts v. Goding, 9 Gray (Mass.), 254; Linville v. Earlywine, 4 Blackf. (Ind.), 470.

9. It must appear that the alleged slanderous words were spoken of the plaintiff or the action must fail. Care v. Shelor, 2 Munf. (Va.), 193; Dicken v. Shepherd, 22 Md., 399; Harvey v. Coffin, 5 Blackf. (Ind.), 566. But when the words complained of are *prima facie* slanderous, no averment of extrinsic matter is necessary. North v. Butler, 7 Blackf. (Ind.), 251.

10. It is a well-settled rule of law that no deduction from words spoken, not justified by the natural import, is warranted without a colloquium which gives the meaning pointed out by the innuendo, and the innuendo cannot extend the meaning beyond the previous statement. Beswick v. Chappel, 8 B. Mon. (Ky.), 486.

11. The allegation was, "She is a bad girl, a very bad girl, and unworthy to be employed by any company in Lowell; meaning thereby that the plaintiff was a prostitute and had been guilty of fornication, lewdness, lasciviousness and wantonness." It was held that the declaration was insufficient for want of averments and a colloquium that would warrant the innuendo. Snell v. Snow, 13 Met. (Mass.), 278. And a declaration alleging that "the defendant publicly and maliciously accused the plaintiff of the

crime of larceny in words substantially as follows: 'He is a thief,'" was held bad for not showing that the words were spoken of the plaintiff. Baldwin v. Hildreth, 14 Gray (Mass.), 221.

12. The words, "thereby accusing the plaintiff of stealing," in a declaration immediately following the words alleged to have been spoken, which do not of themselves amount to a charge of larceny, without any precise colloquium or averment showing such to have been the intention, are not sufficient to make a good declaration. Brown v. Brown, 14 Me., 317. But a declaration which, averring a colloquium concerning the plaintiff and A., charged the defendant with saying that A. thinks it a hard matter to commit fornication with "his niece" (meaning the plaintiff) was held sufficient without an averment that the plaintiff was A.'s niece. Miller v. Parrish, 8 Pick. (Mass.), 384.

13. Where the plaintiff averred that the defamatory words were spoken "whilst the plaintiff was giving testimony as a witness under the solemnities of an oath before an acting justice of the peace," the averment was held sufficient. Lewis v. Block, 27 Miss., 425.

14. Where the declaration is sufficient without regard to the colloquium and innuendoes they may be regarded as surplusage. Hudson v. Garner, 22 Mo., 423; Rodebaugh v. Hollensworth, 6 Ind., 339.

15. Where the declaration states a colloquium with G. of and concerning the children of G. and of and concerning the plaintiff in particular, one of the children of G., and that the defendant said, "You children are thieves and I can prove it," it was held that the colloquium sufficiently designated the plaintiff as one of the children intended. Gidney v. Blake, 11 Johns. (N. Y.), 54. And so where, in an action for charging a blacksmith with keeping false books, the declaration stated that the plaintiff, at the time of publishing the slanderous words, was and long before had been a blacksmith, and carried on the business and trade of a blacksmith honestly, and provided all such iron as was necessary and required of him in his business, and made correct charges and had always kept honest, true and faithful accounts with all persons relating to his trade, etc., yet the defendant, in order to injure the plaintiff in his business and to cause it to be believed, etc., in a certain discourse of and concerning the plaintiff in his said business, spoke and published the following words, etc., it was held that the declaration was sufficient without a more special averment that there was a discourse of and concerning the plaintiff's trade and that the words were spoken of his trade. Burtch v. Nickerson, 17 Johns. (N. Y.), 217.

16. Under the New York code a complaint setting forth that the plaintiff was "engaged in the wooden-ware business" sufficiently describes his employment as that of a buyer and seller of wooden-ware. Carpenter v. Dennis, 3 Sand., 305.

17. But a declaration is bad charging the defendant with saying to the father of the plaintiff, "You have brought up your sons to break open letters and steal money out of them; they have broken open letters and stolen money out of them," if there be no colloquium averred of the plaintiff or the sons of the persons addressed, although it is stated in the antecedent part of the declaration that the plaintiff is a son of the person addressed. Milligan v. Thorn, 6 Wend. (N. Y.), 412.

18. The omission in one count to aver that the words were spoken of and concerning the defendant is fatal to that count though there be an innuendo that the defendant meant the plaintiff. Sayre v. Jewett, 12 Wend. (N. Y.), 135.

19. The averment that the words were spoken of the plaintiff will cure the want of a colloquium after verdict; and so if the innuendo, instead of pointing the slanderous matter to the note therein described, referred merely to a note. Nestle v. Van Slyck, 2 Hill (N. Y.), 282.

20. The words alleged in the complaint to have been spoken were, "You have sworn false," "You have sworn false under oath," "You have lied under oath," without any averment that the words were spoken in reference to a judicial proceeding. It was held the action would not lie. But had these words been spoken, "You have sworn false when under oath, and if you had your deserts you would have been dealt with in the time of it," they might naturally have been understood to charge the crime of perjury and would have been actionable. Phincle v. Vaughn, 12 Barb. (N. Y.), 215.

§ 33. **Ninth, the Imputation with the Innuendoes.**— And then and there, in the presence and hearing of the last-mentioned citizens, falsely and maliciously spoke and published of and concerning the plaintiff, and of and concerning the said larceny of the said goods and chattels, the false, scandalous, malicious and defamatory words following, that is to say: "He [meaning the said plaintiff] had a hand in the affair" [meaning the said larceny of the said goods and chattels], and thereby then and there meaning that the said plaintiff had been and was guilty of feloniously stealing, taking and carrying away the said goods and chattels.

§ 34. **The Innuendo Defined.**— An innuendo in pleading is an averment which explains the defendant's meaning by reference to some antecedent matter. It is mostly used in actions for libel and slander.[1] An innuendo as "he, the said plaintiff meaning," is only explanatory of some matter expressed; it serves to apply the slander to the precedent matter, but it cannot add or enlarge, extend or change the sense of the previous words, and the matter to which it alludes must always appear from the antecedent parts of the pleading.[2] It is necessary only when the intent may be mistaken or where it can-

[1] Salk., 513; 1 Ld. Raymond, 256; 12 Mod., 139; 1 Saund., 243.

[2] 1 Chitty's Pleading, 383; Petton v. Ward, 3 Caines' Rep. (N. Y.), 76; Thomas v. Crosswell, 7 Johns. (N. Y.), 271; Sangton v. Hagerty, 35 Wis., 151; Peterson v. Sentman, 37 Md., 153; Dyer v. Morris, 4 Mo., 215; Gosling v. Morgan, 32 Penn. St., 273.

not be collected from the defamatory matter itself.[1] It is a statement by the plaintiff of the construction which he puts upon the words himself, and which he will endeavor to induce the jury to adopt at the trial. Where a defamatory meaning is apparent on the face of the libel itself, no innuendo is necessary; though even there the pleader occasionally inserts one to heighten the effect of the words. But where the words *prima facie* are not actionable, an innuendo is essential to the action. It is necessary to bring out the latent injurious meaning of the defendant's words; and such innuendo must distinctly aver that the words bear a specific actionable meaning.[2]

§ 35. **The Office of the Innuendo.**— The office of an innuendo is to define the defamatory meaning which the plaintiff seeks to put upon the words complained of, to show how they come to have the defamatory meaning claimed for them, and also to show how they relate to the plaintiff, whenever that is not clear upon the face of them. But an innuendo must not introduce new matter, or enlarge the natural meaning of words. It must not put upon them a construction which they will not bear. It cannot alter or extend the sense of the defamatory words, or make that certain which is in fact uncertain.[3] If the words are incapable of the meaning ascribed to them by the innuendo, and are *prima facie* not actionable, the judge at the trial will sometimes order a nonsuit. But if the words are capable of the meaning ascribed to them, however improbable it may appear that such was the meaning conveyed, it is properly the province of the jury to say whether they were in fact so understood.[4]

The office of the innuendo is to aver the meaning of the language published. Therefore, if the meaning of the language is plain, no innuendo is needed. The use of it can never change the import of the words, nor add to nor enlarge their sense. "An innuendo helps nothing unless the words to which it applied have a violent presumption of the innuendo."[5] If

[1] Rex v. Horne, Cowp., 679; 5 East, 463.

[2] Cox v. Cooper, 12 W. R., 75; 9 L. T., 329.

[3] James v. Rutlech, 4 Rep., 17.

[4] Van Vetchen v. Hopkins, 5 Johns. (N. Y.), 211; Hunt v. Goodlake, 43 L. J., C. P., 54; 29 L. T., 472; Broome v. Gosden, 1 C. B., 728; Patch v. Tribune Association, 38 Hun (45 N. Y. Supr. Ct.), 368.

[5] Castleman v. Hobbs, Cro. Eliz., 428.

the common understanding of men takes hold of the published words and at once applies without difficulty or doubt a libelous meaning thereto, an innuendo is not needed and would be but useless surplusage in pleading.[1]

§ 36. **The Law Stated by Chief Justice Shaw.**— The law proceeds on the hypothesis that what is the ordinary meaning and nature and intrinsic force of language is a question of law. When, therefore, words are set forth as having been spoken by the defendant of the plaintiff, the first question is whether they impute a charge of felony or any other infamous crime punishable by law. If they do, an innuendo undertaking to state the same in other words is useless and superfluous; if they do not, such an innuendo cannot aid it. It therefore often happens that where innuendoes are added which do alter and vary and even inflame and exaggerate the sense of the words much beyond their natural force and meaning, yet such innuendoes are held not to vitiate the declaration. The reason of which I take to be this: The words themselves imputing an infamous offense, the innuendo may be rejected as surplusage, and as the plaintiff is not allowed to go into evidence *aliunde* to show that the words were in fact used in the sense imputed by the innuendo, they can have no influence whatever. But if the words do not impute such infamous crime by their natural sense and meaning, then, as a general rule, the plaintiff is not entitled to recover; and as he cannot enlarge that meaning by an innuendo so as to let in proof of extraneous facts, his action must fail.[2]

§ 37. **Illustrations — American Cases.**—

1. **In a Wisconsin case,** the plaintiff, a butcher who kept a meat market, in his complaint alleged in the first count that the defendant, in a certain discourse concerning him in his trade and business of a butcher and retailer of meats, maliciously spoke, etc., of and concerning the plaintiff in his business and trade the following words: "That S. [the plaintiff meaning] had taken an unborn calf from a dead cow, dressed it and sold a quarter of it to Z. [meaning that the plaintiff had taken an unborn calf from a dead cow, dressed it for his meat market, and sold a quarter of it to Z. as food for herself and family to eat.]" To the complaint an objection was taken that the innuendo enlarged the meaning of the words spoken. In passing upon the question the court say: "The words in the innuendo not actually spoken are, 'for his meat market,' and 'as for food for herself and family to

[1] Bourreseau v. Detroit Eve. Jour., 63 Mich., 425, 30 N. W. Rep., 376.

[2] Carter v. Andrews, 33 Mass., 1.

eat.' We think that the words clearly mean that the plaintiff dressed the meat for his meat market. He cut it into quarters, or at least cut one quarter from it, just as he would do with any other calf for his meat market, and the sale of it to Mrs. Zimmerman was as clearly for the purpose of food for herself and her family, for she would not have bought a quarter for herself alone; and the only natural and usual purpose of buying a quarter of veal would be for food, and not to sell again, but to eat. The words spoken had reference to the plaintiff's business in their most natural meaning, and the innuendoes very properly connect them specifically with his trade and business as the keeper of a meat market and vender of meats. The language would be meaningless in respect to any other business or person." The innuendo sustained. Singer v. Bender, 64 Wis., 169; 25 N. W. Rep., 903.

2. **In a New York case** there were two counts. The words charged without the innuendoes were: "I believe he has got Mrs. B. down there. I am perfectly satisfied in my own mind that she is down there, and is pretty sick; her time has come around, and he is down there getting a child away from her. He is procuring an abortion upon her." In the first count, to the words charged, "her time has come around," was averred the innuendo "meaning that the usual period of parturition had arrived." Under the definition of the offense stated it will be seen that by the use of this innuendo the plaintiff has given a construction to this part of the words charged which precludes the idea of the commission or an attempt to commit or produce an abortion or miscarriage. A criminal abortion implies the premature expulsion of the fœtus before the period of gestation is completed; and adopting, therefore, the plaintiff's interpretation of the words charged, they do not impute to him an offense involving moral turpitude for which he could be punished criminally. The second count of the declaration, in which was averred to the same words the innuendo, "meaning that the said A. B. had gone to R. to be delivered of a quick child," was held sufficient. Butler v. Wood, 10 How. (N. Y.), 222.

Digest of American Cases.—

1. An innuendo cannot be aided by the mere opinion of a witness. Pittsburg & C. R'y Co. v. McCurdy, 114 Penn. St., 554.

2. Though an innuendo cannot supply the place of the colloquium, yet, if there be a colloquium sufficient to point the application of the words to the plaintiff, if spoken maliciously he must have judgment. Lindsey v. Smith, 7 Johns., 359.

3. Although the meaning of the words cannot be enlarged by an innuendo, yet they may be aided by the plea so as to support the declaration; as, if the defendant in his plea of justification allege or confess that he spoke the words by reason of a false oath taken by the plaintiff in a court of competent jurisdiction, it will aid the want of a colloquium concerning a proceeding in a court of competent jurisdiction. But a notice of justification with the general issue will not help the declaration. Vaughan v. Havens, 8 Johns., 109.

4. An innuendo cannot enlarge the meaning of the words, but only point out their application. Andrews v. Woodmansee, 15 Wend., 232. It is explanatory of the subject-matter sufficiently expressed before, but it cannot

extend the sense of the words beyond their own meaning unless it explain them by reference to some preceding averment or colloquium. It cannot be proved; but where an averment or colloquium introduces extrinsic matter into the pleading that is proper subject for proof. Van Vechten v. Hopkins, 5 Johns., 211. But where the matter stated in an innuendo is not necessary to support the action it may be rejected as surplusage. Thomas v. Croswell, 7 Johns., 264.

5. A complaint for slander charged defendant with stating that plaintiff "has" a loathsome disease, and "that is what is the matter with him, and now he is trying to get a pension for some other disease;" again, that he has got it "and has had it ever since he came out of the army." The complaint added "that the words charged and were meant to charge the plaintiff with having contracted and being afflicted with a disease," etc. *Held*, that the complaint sufficiently charged that defendant published that plaintiff had contracted a loathsome disorder, from the effects of which he was still suffering. Monks v. Monks 118 Ind. 238, 20 N. E. R., 744.

6. Where the words are clearly susceptible of the meaning given in the innuendo, the innuendo does not enlarge or extend their meaning beyond their natural import. Sheridan v. Sheridan, 58 Vt., 504. And if a publication on its face is libelous, the fact that its innuendoes enlarge the meaning of words and attribute to them a signification that they will not bear does not render demurrable the complaint setting forth the publication. Kraus v. Sentinel Co., 60 Wis., 425.

7. The assertion that plaintiff "has left town, though made to a person of whom plaintiff had purchased goods on credit which were then *in transitu*, is not capable of the innuendo that plaintiff had absconded and given up his business, and was insolvent. Nor is the statement that plaintiff "has obtained commissions on the sale of type-writers, without giving his partners any benefit thereof," made actionable by the innuendo that plaintiff had been guilty of defrauding his partners as a member of said firm, in the absence of any allegation that he was under obligation to share the profits of the sales with his partners. A charge that plaintiff "went to L. and collected $1,400 of our money, and went west with it," will bear the innuendo that plaintiff had absconded with money belonging to defendant and his associates in business. The statement that plaintiff is trying to get and convert to his own use the property of R. without paying for it may be properly connected with an innuendo that he is attempting to defraud R. out of his property. A remark that "if A. [plaintiff] had not gone away we should issue warrants for him" is susceptible of the meaning given it by the innuendo that plaintiff "had absconded, and had been guilty of some offense for which he was liable to arrest," and with that meaning is actionable. Ayres v. Toulmin, 74 Mich., 44, 41 N. W. Rep., 855.

8. Where the language is libelous, and fairly susceptible of the meaning claimed for it by the plaintiff, it is proper to aver in the complaint the meaning thereof as intended by defendant in publishing the charge, and as understood by those who read it. And such averments may be treated as substantive allegations of fact. Petsch v. St. Paul Dispatch Printing Co., 40 Minn., 291; Prendergast v. Same, 40 Minn., 295.

9. A charge in the declaration that the purpose of the publication apply-

ing the term "crank" to the plaintiff was "to impute to him sundry qualities, aims and methods highly inconsistent with usefulness as a lawyer or as an author" is not an appropriate averment or innuendo that the word was used in a defamatory sense, and the declaration is bad on demurrer. Walker v. Tribune Co., 29 Fed. Rep., 827.

10. A declaration alleged that defendant spoke of and concerning the plaintiff: "'He [meaning said plaintiff] poisoned my cattle. They were poisoned with Paris green. They were poisoned from a pail that had bran and poison in it, and V. [meaning said plaintiff] put it there;' thereby meaning and intending to charge that he, the said plaintiff, committed the crime of wilfully and maliciously administering the poison to the cattle of him, the said defendant, . . . whereby said cattle were poisoned and killed." *Held*, that the innuendo aided the want of averment of the statutory elements essential to the crime of poisoning cattle, and the declaration stated a cause of action. Champlin and Long, JJ., dissenting. Vickers v. Stoneman, 73 Mich., 419, 41 N. W. Rep., 495.

11. Where a libel consists in reporting the name of plaintiff in blank, in a report of business standing, which means that plaintiff is not in good standing, the complaint should so allege, giving the necessary explanation; and a complaint attempting to give the meaning of the libel, without alleging what it is, is demurrable. A suit for the false publication of plaintiff's business standing need not be characterized as for libel by averment in the complaint. Bradstreet Co. v. Gill, 72 Tex., 115, 9 S. W. Rep., 753.

12. Where a complaint for libel sets out statements which charge plaintiff and others with fraudulently obtaining money for an insurance society, and getting their share of it as members or managers, but does not charge the plaintiff with fraudulently appropriating the money of the society, a withdrawal of all the charges of libel except the words charging a fraudulent appropriation of the funds of the society to plaintiff's own use completely deprives the complaint of validity. Mosier v. Stoll, 119 Ind., 244, 20 N. E. Rep., 752.

13. A complaint in a merchant's action for saying that he adulterated sugar, cheated the government and swore he did not do so, must allege circumstances whence it may fairly be inferred that the words were so uttered as presumptively to work an injury; the innuendo does not render such allegation sufficient. It will not suffice to allege that he was, as a member of a firm, engaged in the business of refining sugar, without also alleging that the words were spoken of him in his business relation as a refiner. Havemeyer v. Fuller, 10 Abb. N. Cas. (N. Y.), 9.

14. In an action for slander at common law the words charged were "D. killed my beef." It was held, as there was no colloquium, the words did not necessarily import a felony, and their meaning could not be extended by an innuendo. Hansbrough v. Stinnett, 25 Gratt. (Va.), 495.

15. The office of the innuendo is to explain the words spoken and annex to them their proper meaning. It cannot extend their sense beyond their natural import unless something is put upon the record by way of introducing matter with which they can be connected. In such case words which are equivocal or ambiguous, or fall short in their natural sense of importing any libelous charge, may have fixed to them a meaning certain and de-

famatory, extending beyond their ordinary import. Beardsley v. Tappan, Blatchf., 588; Patterson v. Edwards, 7 Ill. (2 Gilm.), 720; Hays v. Mitchell, 7 Blatchf. (Ind.), 117; Coldwell v. Abbey, Hard. (Ky.), 529; Patterson v. Wilkinson, 55 Me., 42; Dorsey v. Whipps, 8 Gill (Md.), 457; McCuen v. Ludlam, 17 N. J. L. (2 Harr.), 12; Evans v. Tiffins, 2 Grant (Pa.) Cas., 451; Gosling v. Morgan, 32 Pa. St., 273; Herst v. Borbridge, 57 id., 62; Taft v. Howard, 1 D. Chip. (Vt.), 275; Nichols v. Packard, 16 Vt., 83; Cramer v. Noonan, 4 Wis., 231.

16. New matter cannot be introduced by innuendo. But, when the term "filly horse" was explained by innuendo that the plaintiff's wife was meant, her name being Hoss, *held*, that it was correct. Weir v. Hoss, 6 Ala., 881.

17. Words alleged, "she is sick," cannot be shown to have been understood by the hearers as meaning "she has had a child," without proper averment that they were so understood. Smith v. Goffard, 33 Ala., 168.

18. When the declaration charges the defendant with speaking of the plaintiff certain actionable words in the French language, the plaintiff must aver in his declaration what he understands to be the meaning in English of the French words charged; and he must prove on the trial, under the general issue, not only the speaking of some of the French words laid which are actionable, but he must also prove that the translation of those words is correct. Hickley v. Grosjean, 6 Blackf. (Ind.), 351.

19. A declaration containing only a recital of slanderous words and no direct charge that the words were spoken by the defendant is bad after verdict. Donaghe v. Rankin, 4 Munf. (Va.), 261.

20. A declaration charged the defendant with speaking of the plaintiff certain actionable words in the French language, and gave a translation of the words into English. *Held*, that by a demurrer to the declaration the correctness of the translation was admitted, and in determining on such demurrer whether the words laid were actionable, the court could be expected to examine only the English words. Hickley v. Grosjean, 6 Blackf. (Ind.), 351.

21. In an action for charging the crime of incest between the plaintiff and his sister it must be alleged in the declaration that both the plaintiff and his sister were at least sixteen years of age when the crime was charged to have been committed, and that the defendant meant to charge that the plaintiff had knowledge of the consanguinity at the time of the illicit intercourse charged. Lumpkins v. Justice, 1 Ind., 557.

22. Words that in themselves do not import a slanderous meaning must be rendered so by an innuendo and an averment that they were spoken of the plaintiff. Brittain v. Allen, 3 Dev. (N. C.) L., 167.

23. The further allegation, "then and thereby meaning it to be understood by such words that the plaintiff had been and was guilty of whoredom, and it was so undersood by J. M. and others," was *held* not to have sufficiently alleged the import of the word. Miles v. Vanhorn, 17 Ind., 245.

24. In an action of slander the meaning of any word used in the alleged slanderous charge need not be alleged if it is an English word and well understood, although from its obscenity it is not inserted in any dictionary. Edgar v. McCutchen, 9 Mo., 768.

25. Where the words are ambiguous in themselves there must be innuendoes, even under the Wisconsin code. Van Slyke v. Carpenter, 7 Wis., 173.

26. The innuendo cannot enlarge ambiguous words, not necessarily of themselves imputing crime, beyond the averment of the speaker's intention. Weed v. Bibbins, 32 Barb. (N. Y.), 315.

27. To say of a man that he was seen ravishing a cow imports that the person so seen was committing the crime of bestiality and buggery with a cow; but where the words alleged to have been spoken of the plaintiff were that he had been "seen afoul of a cow," it was *held* that they did not warrant an innuendo that he was guilty of bestiality. But if the defendant had been in the practice, by the words laid, of imputing the crime of bestiality, or if he had used them on the occasion alleged in that sense, and they were so understood by the hearers, there should have been a special averment to that effect. Harper v. Delp, 3 Ind., 225.

28. The word "screwed" does not in itself imply sexual intercouse; but in certain localities it may have that import. When this occurs the pleading founded upon it, as slanderous, must affirmatively allege its import at the time and place of use. Miles v. Vanhorn, 17 Ind., 245.

29. Words laid in a declaration which are not actionable in themselves and have no colloquium to connect them with extrinsic circumstances are not helped by an innuendo of a charge of larceny. Lukehart v. Byrely, 53 Pa. St., 418.

30. A judgment in slander will not be arrested because an innuendo enlarges the natural meaning of the words spoken. Shultz v. Chambers, 8 Watts (Pa.), 300.

31. Where the words taken by themselves do not necessarily import a charge of crime, yet where it is alleged in the innuendo that the defendant meant by the words that the act was maliciously done, they will be taken after verdict to have been intended to import such a crime. Tuttle v. Bishop, 30 Conn., 80.

32. In a complaint of two counts, each alleging the speaking of the same words, one may be *held* bad and the other good by reason of difference in the innuendo. Butler v. Wood, 10 How. (N. Y.) Pr., 222.

33. A declaration in which the words spoken and the innuendo were first set forth, and then a fact necessary to warrant the innuendo, was *held* sufficient. Brittain v. Allen, 2 Dev. (N. C.) L., 120; 3 id., 167.

34. Where the words charged in an action of slander do not amount to slander they will not be aided by an innuendo. Moseley v. Moss, 6 Gratt. (Va.), 534.

35. Under the new Massachusetts practice act of 1852, chapter 312, a declaration in slander is sufficient which alleges that the defendant publicly, falsely and maliciously charged the plaintiff with the crime of perjury by words spoken of the plaintiff substantially as follows: "He has been to New Bedford and swore to a pack of damned lies;" and that the plaintiff, at a certain term of court held at New Bedford, was summoned and attended as a witness in the case of a certain libel for divorce, and did before a certain judge of said court testify as a witness under oath; and that it is

to this subject that the defendant's malicious declarations refer. Gardner v. Dyer, 5 Gray (Mass.), 22.

86. A declaration for having criminal intercourse, with an innuendo that adultery was thereby intended, is sufficient after verdict, though it is not averred that the plaintiff is a married man. Beirer v. Bushfield, 1 Watts (Pa.), 23.

87. Though an innuendo cannot supply the place of a colloquium, yet if there is a colloquium sufficient to point the application of the words to the plaintiff, if spoken maliciously he must have judgment. Lindsey v. Smith, 7 Johns. (N. Y.), 359.

88. If the words charged do not imply a criminal charge subject to infamous punishment, neither an innuendo nor verdict will help them; but when they are used in a double sense, the plaintiff may, by an innuendo, aver the meaning with which he thinks they were spoken, and the jury may find whether they were spoken with that meaning or not. Dottarer v. Bashey, 16 Pa. St., 204.

89. The office of an innuendo being to explain words alleged to have been spoken, if the words themselves are perfectly clear in their meaning and object, it is unnecessary, and if inserted is mere surplusage. Gage v. Shelton, 3 Rich. (S. C.), 242. Therefore, in an action of slander, where the words alleged to have been spoken clearly charged the killing of a horse, and the innuendo that the defendant intended to charge the plaintiff with arson, it was held that the innuendo might be stricken out and the declaration sustained as alleging the charge of killing a horse. Gage v. Shelton, 3 Rich. (S. C.), 242.

90. Where the words charged as libelous were, the person "who was deprived of a two-penny justiceship for malpractice in packing a jury," and they were explained by an innuendo as meaning "that the plaintiff had packed a jury and had been guilty of malpractice in packing a jury," it was held that the innuendo was warranted by the libelous words charged. Mix v. Woodward, 12 Conn., 262.

91. The innuendo in a declaration in slander should be warranted by the previous allegations. Stucker v. Davis, 8 Blackf. (Ind.), 414.

92. A. sued B. for calling him a "whoremaster," and for charging him with using "short weights and measures" in his business as a merchant. In the counts setting forth the first alleged slander, the innuendo enlarged and amplified the meaning of the words spoken. It was held that the innuendo could only explain the meaning of the words spoken by the connection with the colloquium or inducement first averred, and that it could not enlarge their meaning; in case of words which might have two meanings, one of them harmless, the innuendo might set out that the words were used in their injurious sense. The slander must appear substantially from the colloquium; it cannot be created by the innuendo. The natural meaning of the words must be slanderous in the connection in which they were spoken. Joralemon v. Pomeroy, 22 N. J. L. (2 Zab.), 271.

93. An innuendo cannot perform the same office as a colloquium. Fitzsimmons v. Cutter 1 Aik. (Vt.), 33.

Digest of English Cases.—

(1) Libel.

1. "The mismanagements of the navy have been a greater tax upon the merchants than the duties raised by government." An innuendo, "the royal navy of this kingdom," *held* not too wide. R. v. Tutchin, 14 How. St. Tr., 1095; 5 St. Tr., 527; 2 Ld. Raym., 1061; Salk., 50; 6 Mod., 268; R. v. Horne, Cowp., 672; 11 St. Tr., 264; 20 How. St. Tr., 651. But where a libel alleged that a gentleman was on a certain night hocussed and robbed of £40 in the plaintiff's public house, an innuendo, "meaning thereby that the said public house was the resort of, and frequented by, felons, thieves, and depraved and bad characters," after verdict for the defendant, was held too wide. Broome v. Gosden, 1 C. B., 728; Clarke's Case de Dorchester, 2 Rolle's Rep., 136.

2. An information was filed against a Nonconformist minister for a libel upon "the bishops" contained in a book called "A Paraphrase upon the New Testament." An innuendo, "the bishops of England," was held to be allowable, if from the nature of the libel this was clearly what was meant. R. v. Baxter, 3 Mod., 69.

3. The libel accused a gentleman of saying, "He could see no probability of the war's ending with France until the little gentleman on the other side of the water was restored to his rights." Innuendo, "the prince of Wales," allowed to be good; in fact the court thought the meaning was clear without any innuendo. Anon., 11 Mod., 99; R. v. Matthews, 15 How. St. Tr., 1323.

4. Libel complained of: "He has become so inflated with self-importance by the few hundreds made in my service — God only knows whether honestly or otherwise — that," etc. Innuendo, "meaning thereby to insinuate that the plaintiff had conducted himself in a dishonest manner in the service of the defendant." The court refused to disturb a verdict for the plaintiff. Clegg v. Laffer, 3 Moore & Sc., 727; 10 Bing., 250.

(2) Slander.

1. The defendant said: "Master Barham did burn my barn with his own hands, and none but he." At that date it was not felony to burn a barn, unless it were either full of corn or parcel of a mansion-house. An innuendo, "a barn full of corn," was held too wide. "That is not," says De Grey, C. J., commenting on this case in Cowp., 684, "an explanation of what was said before, but an addition to it. But if in the introduction it had been averred that the defendant had a barn full of corn, and that in a discourse about the barn the defendant had spoken the words charged in the libel of the plaintiff, an innuendo of its being the barn full of corn would have been good. For by coupling the innuendo in the libel with the introductory averment, 'his barn full of corn,' it would have made it complete." Barham's Case, 4 Rep., 20; Yelv., 21; Capital and Counties Bank v. Henty & Sons (C. A.), 5 C. P. D., 514; 49 L. J., C. P., 830; 28 W. R., 851; 43 L. T., 651; H. L., 7 App. Cas., 741; 52 L. J., Q. B., 232; 31 W. R., 157; 47 L. T., 662; 47 J. P., 214.

2. The words, "We have no doubt sufficient information will be obtained for a strong case to lay before the home secretary to enable that functionary to cause it to be intimated to the suspected party that his presence here can be dispensed with, as far as it may be attended with danger to himself," were held in the exchequer chamber not to support an innuendo meaning thereby that the prosecutor was suspected of having had committed some crime which would bring his life into danger from the laws of England. Gregory v. The Queen (No. 2), 5 Cox, C. C., 252.

3. The words complained of in their natural sense conveyed only suspicion, and were therefore not actionable; they were innuendoes, but none of them stated that the words imputed felony, though there was a prefatory averment stating that defendant's motive was to cause it to be believed that plaintiff had been guilty of felony. *Held*, that this prefatory averment could not be substituted for the innuendoes whereby plaintiff undertook to give the meaning of the words spoken. Simmons v. Mitchell, 6 App. Cas., 156; 50 L. J., P. C., 11; 29 W. R., 401; 43 L. T., 710; 45 J. P., 237.

4. "He hath forsworn himself." These words are not in themselves a sufficient imputation of perjury, because he is not said to have sworn falsely while giving evidence in court. Hence an innuendo "before the justice of assize" is clearly bad; for it is not an explanation of defendant's words, but an addition to them. Anon., 1 Roll. Abr., 82; Holt v. Sholefield, 6 T. R., 691.

5. Barham brought an action for the defendant, saying of him: "Barham burnt my barn;" innuendo, "a barn with corn." The action was held not to lie, because burning a barn, unless it had corn in it, was not felony; but if, in the introduction, it had not averred that the defendant burnt a barn full of corn, and that in the discourse about the barn the defendant had spoken the words charged in the declaration, an innuendo of it being a barn full of corn would have been good; for by coupling the innuendo in the libel with the introductory averment, it would have been complete. Here the extrinsic fact that the defendant had a barn full of corn is the averment. The allegation that the words were uttered in a conversation in reference to that barn is the colloquium, and the explanation given to the words thus spoken is the innuendo. Barham's Case, 4 Coke's Rep., 20; Rex v. Horne, Cowp., 184; Van Vechten v. Hopkins, 5 Johns. (N. Y.), 211; Hawkes v. Hawkey, 8 East, 427.

§ 38. **Truth of the Innuendo a Question for the Jury.**—The defendant is in no way embarrassed by the presence of the innuendo in the statement of the claim; in fact, it is to him an advantage. He can either deny that he spoke the words, or he can admit that he spoke them, but deny that they conveyed that meaning. He can also plead that the words were true, either with or without the alleged meaning. It will then be for the jury to say from the proofs whether the plaintiff's innuendo is sustained. If not, the plaintiff may fall back upon

the words themselves, and urge that, taken in their natural and obvious signification, they are actionable in themselves without the alleged meaning, and that therefore his unproved innuendo may be rejected as surplusage.[1]

§ 39. **The Plaintiff Must Abide by His Innuendo.**— He will not be allowed in the middle of the trial to start a fresh innuendo not in the pleadings; he must abide by the construction put on the words in his statement, or else rely on their natural and obvious import.[2] He cannot during the trial set up a third construction of the words different both from their *prima facie* meaning and from that pointed out by the innuendo.[3]

§ 40. **When the Innuendo Will Vitiate the Pleading.**— If the innuendo materially enlarge the sense of the words, it will vitiate the declaration or indictment.[4] But when the matter stated in the innuendo is not necessary to support the action, it may be rejected as surplusage.[5]

§ 41. **When an Innuendo May be Treated as Surplusage.**— The fact that an innuendo attributes a meaning to words which they will not bear is no ground for sustaining a demurrer to the declaration on the ground that it does not contain facts sufficient to sustain a cause of action. The objectionable innuendo may be treated as surplusage and the words still be defamatory. If an innuendo enlarge the sense materially, which can only happen when the sense which it attributes to the words is that which alone renders them actionable, the proper course for the defendant is to demur; and if the court be of the opinion that the innuendo is not justified by the antecedent facts to which it refers, and that rejecting it the words are not actionable, it is certain that judgment must be rendered in his favor on the demurrer. But where the words complained of, although their sense may be enlarged by the innuendoes, are plainly actionable on their face, a denial of their

[1] Harvey v. French, 1 Cr. & M., 11; 2 M. & Scott, 591; 2 Tyrw., 585; Odgers on L. & S., 101.

[2] Simmons v. Mitchell, 6 App. Cas., 126; 50 L. J., P. C., 11; 29 W. R., 401; 43 L. T., 710; 45 J. P., 237.

[3] Hunter v. Sharpe, 4 F. & F., 983; 15 L. T., 421; Ruel v. Tatnell, 29 W. R., 172; 43 L. T., 507; Brembridge v. Latimer, 12 W. R., 878; 10 L. T., 816; Maguire v. Knox, Ir. R., 5 C. L., 408.

[4] Thomas v. Croswell, 7 Johns. (N. Y.), 271; 5 Binn. (Penn.), 218; 6 T. It., 691.

[5] Kraus v. Sentinel Co., 60 Wis., 425; 19 N. W. Rep., 384; 1 Bouvier's Law Dict., 639.

truth would be frivolous and nugatory; as, rejecting the innuendo, the cause of action would remain. The denial would be immaterial as an issue of fact and groundless as an issue of law.[1]

§ 42. **Cannot Restrict the Defendant's Rights — The Defense Must be as Broad as the Attack.**— Where a libelous publication charges in positive terms the commission of several criminal offenses, and the party complaining of the publication sets out the article at length in his declaration, but with an innuendo that the defendant in publishing it intended to charge the commission of one of the alleged offenses only, he cannot by so doing restrict the defendant to evidence justifying the charge contained in the innuendo alone; and evidence relating to the other offenses charged in the alleged libelous publication are admissible.[2]

§ 43. **Illustrations — American Cases.**—

1. A Michigan Case: The plaintiff, who was a physician practicing at Battle Creek, Michigan, brought an action against the Detroit Post & Tribune Co. for libel published in its paper in July, 1881. The article, published under the head of Battle Creek News, was as follows: "The greatest excitement was caused here to-day by the issuing of a warrant for the arrest of Dr. F. W. B., a wealthy and leading physician of this city, on the charge of abortion on the person of Miss Anna P., a young lady of seventeen. The facts as embodied in the sworn affidavit are these: Miss Anna P. is a beautiful young lady, and the only daughter of an English lady. About a year ago she was taken sick and Dr. B. was called to attend her professionally. During his visits to the house he managed, by various promises of large sums of money, houses, etc., to seduce the young lady, who has always borne a pure and spotless character. After this criminal intercourses were frequent, until a few weeks ago, when the girl was discovered to be *enceinte*, and to cover up the discovery he produced an abortion, in which operation the girl, who is frail and delicate, nearly died. He never kept his promises to her; and this was the way the matter leaked out and the officers got hold of it, whereupon they obtained the girl's and the mother's affidavits yesterday, and also the vials containing the medicines he gave her to procure the abortion. Upon this evidence the warrant was issued. There does not appear to be the least doubt of his guilt of the triple crime of seduction, adultery and abortion. The doctor is a married man, and has a large and respectable family of grown-up children, and a wife who is nearly heart-broken at this development of her husband's perfidy. So great has been the excitement on the streets that threats of tar and feathers have been openly made."

[1] Fry v. Bennett, 5 Sandf. (N. Y.), 65; Kraus v. Sentinel Co., 60 Wis., 425; 19 N. W. Rep., 384; Thomas v. Croswell, 7 Johns. (N. Y.), 264.

[2] Bathrick v. Detroit P. & T. Co., 50 Mich., 629; 16 N. W. Rep., 172.

In his declaration the plaintiff avers in the usual form his previous good standing and reputation among his fellow-citizens, the publication of the article with malicious intent to injure him, with the following innuendo: "thereby meaning and intending to charge and accuse the plaintiff of the crime of wilfully causing a woman pregnant with child to abort and miscarry by giving premature birth to the *fœtus* or child of which she was pregnant, and that a warrant was issued for the arrest of the plaintiff for the commission of said crime of abortion." The most important question in the case was how far the plaintiff's reputation was put in issue by the charge made against him. The article distinctly charged him with three criminal offenses — seduction, adultery and criminal abortion. In the declaration the article is set out at length, but the innuendo restricts the meaning to the charge of criminal abortion. It was claimed by the plaintiff at the trial and conceded by the court that the innuendo narrowed the investigation to this one charge, and that nothing else could be inquired into but the alleged criminal abortion and the injury that would be caused to the plaintiff by falsely making this charge. Taking this view of the case the court excluded evidence offered by the defendant to show that the general reputation of the plaintiff as a man of chastity was bad before the article complained of was published.

In delivering the opinion of the court on the effect of the innuendo Cooley, J., says: That this ruling would have been erroneous had not the innuendo limited the alleged meaning of the article to a charge of criminal abortion is scarcely contended. The plaintiff sues for the injury to his reputation, and if his reputation was bad before in respect to the very matters which are now charged against him his injury may be little or nothing. He therefore, when he brings suit, puts his previous reputation in issue; and the defendant may give evidence to show that the alleged libel, even if false, did not probably cause injury. Earl of Leicester v. Walter, 2 Camp., 251; Clark v. Brown, 116 Mass., 509; Bridgman v. Hopkins, 34 Vt., 532. In this case the printed article imputes several criminal offenses; but the plaintiff claims he has put his reputation in issue as to one of them only, because by his innuendo he imparts to the defendant the meaning which charges only that one. This, so far as we know, is making the innuendo perform a new office in pleading. Its usual office is to explain doubtful allusions in the publication, and it becomes unnecessary when the matter published is of itself disgraceful. Anson v. Stuart, 1 Term R., 748; Williams v. Gardiner, 1 Mees. & W., 245; Hoare v. Silverlock, 12 Q. B., 624. "A writing may be so expressed, and in such clear and unambiguous words, as that it may amount of itself to a libel. In such case the court wants no circumstances to make it clearer than it is of itself; and therefore all foreign circumstances introduced upon the record would only be matter of supererogation. Rex v. Horne, Cowp., 672-683. Such was the case with this publication." It is clear and explicit in its charge of crime, and no innuendo was needed to explain the words or point their application. They charge, in the most positive terms, seduction, adultery and criminal abortion; but as the plaintiff, for the purposes of this case, has elected to interpret the words as charging the last offense only, he insists that for the purpose of the trial the defendant shall adopt the same in-

terpretation and ignore the other charges altogether. This is his view of the manner in which the innuendoes have narrowed the contention. It is a very proper rule that where the plaintiff by innuendo imparts to the publication a particular meaning he will not be at liberty on the trial to reject that meaning and impute another. Strader v. Snyder, 67 Ill., 404, 413. But this publication means all that is imputed and also a good deal more. In respect to its further meaning the plaintiff tenders no issue, and apparently claims no damages. But his claim is generally that he is damnified by the whole publication, and he puts it before the jury that they may judge from it the extent of his injury. The jury must plainly see that it makes severally damaging charges, and that if the plaintiff is guilty as charged he is unfit for associating with respectable people. The plaintiff ignores some of these charges, neither by his pleading admitting nor denying them, but electing for reasons of his own not to recognize the fact that they are made at all. This, however, does not withdraw them from the consideration of the jury so long as the whole article is before them and damages claimed because of it. There is a sting in every sentence of the article, and the jury must see and feel that unless it is justified the whole is atrocious. The plaintiff complains of the whole as an injury to his reputation, and nevertheless proposes that the defendant shall not be suffered to show that as to some portion of the damaging charges he had no reputation which such charges could injure. The obvious reply to this proposition would seem to be that the right of defense must be as broad as the right of attack, and that if he proposed to narrow the controversy to the single charge he should have complained only of that portion of the action which made it instead of putting the whole before the jury and counting upon the whole as damaging. It may be replied, however, and perhaps with truth, that in the published article the several charges were so inseparably connected that it was impossible to count upon any one of them separately, and to select for that purpose the parts of the article which referred to it, while excluding the remainder. But this suggests the question whether the three charges of criminal conduct are not substantially one; whether, taken together, they did not impute one great crime, beginning with the seduction and culminating in criminal abortion — three offenses in law, but all parts of a single transaction, which the plaintiff was alleged to have entered upon to gratify a criminal passion, and to have persisted in until the final culmination in the destruction of the principal evidence against him. And this, we think, is the proper view to take of the publication. It charges, in effect, one piece of criminal conduct, comprehending three aggravated offenses. Unconnected charges and aspersions have not been raked together with the view to make some give color to the others, but the attack upon the reputation of the plaintiff is single, and could only be satisfactorily investigated as an entirety. The plaintiff could count upon this as an entirety, complaining of it as false, malicious and injurious, and thus put upon defendant the necessity of justifying or excusing the whole. The judgment was set aside. Bathrick v. Detroit P. & F. Co., 50 Mich., 629; 16 N. W. Rep., 172.

§ 44. **Form of a Second Count.**— And afterwards, to wit, on the day and year last aforesaid, at the county aforesaid, in

a certain other discourse which the said defendant then and there had of and concerning the said plaintiff, and of and concerning the said larceny of the said goods and chattels in the presence and hearing of divers other persons, the said defendant, further contriving and intending as aforesaid, then and there, in the presence and hearing of the said last-mentioned persons, falsely and maliciously spoke and published of and concerning the said plaintiff, and of and concerning the said larceny of the said goods and chattels, the false, scandalous, malicious and defamatory words following, that is to say, etc.

§ 45. **Illustrations — Digest of American Cases.—**

1. The plaintiff may refer in one count to preceding parts of the declaration, and so support it; and he need not expressly refer to a preceding part, so that it clearly appears that he has reference to it. In slander the first count charged a trial, that plaintiff gave evidence, and that the words were spoken of and concerning the trial, etc.; and the third count charged that the words therein set forth were published of the plaintiff, and of and concerning the action tried as aforesaid, and of and concerning the evidence of the plaintiff given on the said trial as aforesaid. *Held*, that the third count was sufficient. Crookshank v. Gray, 20 Johns., 344.

2. It is unnecessary to preface each count with all the inducements and allegations contained in the first; but they may be adopted in the succeeding counts by reference to the first. Loomis v. Swick, 3 Wend., 205.

3. Where, in an action for slanderous words spoken of plaintiff as a tradesman, the first count fully sets out the business occupations in which plaintiff is and has been engaged, and alleges the malicious intent of defendant in speaking the words — and his purpose to ruin plaintiff in his business — complained of, and the subsequent counts, without repetition of such allegations, aver that defendant in other conversations had "concerning plaintiff and his said business, "contriving and intending as aforesaid," spoke certain other slanderous words, the latter counts sufficiently charge the slander to have been of plaintiff in his business character, as it is unnecessary to repeat allegations of the former count so referred to as to be plainly understood. Ayres v. Toulmin (Mich.), 41 N. W. Rep., 855.

§ 46. **Tenth, General Statement of Damages.**— By means of the speaking and publishing of which said several false, scandalous, malicious and defamatory words by the said defendant as aforesaid, the said plaintiff has been and is greatly injured in his good name, fame and credit, and brought into public scandal, infamy and disgrace with and among all his neighbors and other good and worthy citizens of this state, insomuch as divers of those neighbors and citizens to whom the innocence and integrity of the said plaintiff in the premises were unknown have on account of the speaking and publishing of which said several false, scandalous, malicious and

defamatory words by the said defendant as aforesaid, from thence hitherto suspected and believed and still do suspect and believe the said plaintiff to have been and to be a person guilty of larceny so as aforesaid charged upon and imputed to him by the said defendant, and have by reason of the committing of the said grievances by the said defendant as aforesaid, from thence hitherto wholly refused and still do refuse to have any transaction, acquaintance or discourse with him, the said plaintiff, as they were before used and accustomed to have and otherwise would have had, and also by means of the premises the said plaintiff has been and is otherwise much injured and damnified, to wit, at the county aforesaid.[1]

§ 47. **Eleventh, the Ad Damnum.**— To the damage of the plaintiff of —— dollars.

§ 48. **Twelfth, the Conclusion.**— And therefore he brings suit, etc. By —— ——, his Attorney.

§ 49. **Statement of Special Damages in Actions for Defamation.**— Special damages are such as in fact have actually occurred as the result or consequence of the injury complained of, and not implied by law. They are either superadded to general damages arising from the act injurious in itself, as where some particular loss arises from the uttering of slanderous words actionable in themselves; or are such as arise from an act indifferent and not actionable in itself, but injurious only in its consequences, as where words become actionable only by reason of special damage ensuing.

Special damages must always be the legal and natural consequence arising from the defamation itself, and not a mere wrongful act of a third person. Whenever special damages are claimed, in order to prevent a surprise on the defendant, which might otherwise ensue at the trial, the law requires the

[1] The general rule is that where the law infers damages and the words are actionable in themselves, no special damage need be laid in the declaration; but if the words are only actionable in respect of some particular injury which has resulted from them, the general statement of damages will be insufficient. Special damages must be alleged. 1 Chitty's Pleadings, 408; Shipman v. Burrows, 1 Hall, 399; Dloyt v. Tanner, 20 Wend., 190; Broad v. Deuster, 8 Biss., 265; Montgomery v. Knox, 23 Fla., 595; Havemeyer v. Fuller, 60 How. Pr., 316; Newbit v. Statuck, 35 Me., 315; Swift v. Dickerman, 31 Conn., 285; DePew v. Robinson, 95 Ind., 109; Trimble v. Anderson, 79 Ala., 514; Malloy v. Bennett, 15 Fed. Rep., 371.

plaintiff to state the particular damage which he has sustained, or he will not be permitted to give evidence of it at the trial.[1]

§ 50. **Illustrations.**—

1. Loss of Acquaintances: An Old English Precedent.—By means of which said premises the said plaintiff hath been and is greatly injured in his credit and reputation, and brought into public scandal and disgrace with and amongst all his neighbors, friends and acquaintances, insomuch that divers of those friends and neighbors, and especially A. B., C. D., E. F., etc. (the persons hereinbefore named in that behalf), have wholly refused to permit any intercourse or society with him or to receive and admit him into their respective houses or company, or to find or provide for him meat, drink or any other benefit and advantage in any manner whatsoever, as they before that time had done and otherwise would have continued to have done; whereby the said plaintiff hath lost all those valuable benefits and advantages, being to him theretofore of great value, to wit, of the value of £——; and hath been and greatly is reduced and prejudiced in his fortunes and pecuniary circumstances, and obliged to incur a much greater expense in his necessary living and supporting himself, to a large amount, to wit, to the amount of £——, than he theretofore had done and otherwise would have continued to do, and hath been and is greatly impoverished; and all his friends have wholly withdrawn their friendship and acquaintance, to wit, at, etc., aforesaid, to the damage of the said plaintiff of £——; and therefore he brings suit, etc. 2 Chitty's Pleadings, 641.

2. An American Form.—By means of the committing of which said several grievances by the defendant the plaintiff has been greatly injured in his said good name, credit, reputation, trade and business; and one G. H., then one of the creditors of the plaintiff, thereupon, by reason of the speaking and publishing of the said false, scandalous, malicious and defamatory words by the defendant as aforesaid, then and there sued out of the —— court of the said county a certain writ of attachment against the goods and chattels of the plaintiff, and caused the stock of goods and merchandise of the plaintiff to be seized, and the same then and there were seized, by virtue of the said writ, to satisfy the debt of the plaintiff to the said G. H.; and thereby the store of the plaintiff was then and there closed and kept closed for a long space of time, to wit, —— days, during all which time the plaintiff was hindered and prevented from carrying on his said trade and business; and he was thereby also compelled to and did then and there pay out divers sums of money, amounting to —— dollars, in and about the said attachment suit, and for costs in that behalf, and in obtaining the release of his said goods and merchandise from the attachment aforesaid; and divers persons who had, before the speaking of the said false, scandalous, malicious and defamatory words by the defendant as aforesaid been accustomed to deal, and divers other persons who would otherwise have dealt, with the plaintiff in his said trade and business, have since that time and wholly on that account respectively refused to do so; and particularly

[1] 1 Chitty's Pleadings, 397; 1 Adolph. & Ellis, 48; De Forest v. Leote, 16 Johns. (N. Y.), 122; Peckham v. Holman, 11 Pick. (Mass.) 484.

one E. F., by reason of the speaking and publishing of the said false, scandalous, malicious and defamatory words by the defendant as aforesaid, then refused and thence hitherto has refused to have any dealings or transactions with the plaintiff in his said trade and business, as he, the said E. F., otherwise might and would have had; and by means of the several premises the plaintiff has there lost and been deprived of divers great gains and profits which otherwise would have accrued to him in his said trade and business and has been and is otherwise injured [*here add any other cause of special damage that may accord with the facts*], to the damage of the plaintiff of —— dollars; and therefore he brings his suit, etc. Puterbaugh's Common Law, 483.

3. English Modern Forms — Words Actionable in Themselves — Imputation of Insolvency.—"1. The plaintiff is a private gentleman owning lands in Shropshire. The defendant is a solicitor carrying on business at Shrewsbury.

"2. Between the 13th of November, 1886, and the 31st of January, 1887, the defendant has repeatedly spoken and published of the plaintiff falsely and maliciously, and with the deliberate intention of injuring and annoying the plaintiff, and causing his creditors to press for immediate payment of their debts, the words following: 'Mr. X. [meaning the plaintiff] is insolvent. He owes money right and left. He cannot face his creditors. He is leaving the county deeply in debt. Does he owe you any money? You must look sharp after it. He cannot pay. You had better let me issue a writ against him for the amount.'

"3. The plaintiff has thereby been greatly injured in his credit and reputation, and has also suffered special damage, whereof the following are the particulars:

"(*a*) In consequence of what the defendant said to him, one George Morris pressed the plaintiff for payment of the sum of £40 before the agreed period of credit had expired, and has issued a writ against the plaintiff for that amount, which he would not otherwise have done.

"(*b*) In consequence of what the defendant said to them, the directors of the Shropshire Banking Company applied to the plaintiff for the sum of £250, for which he was a surety to them for one A. B., and required the immediate payment thereof, which they would not otherwise have done.

"(*c*) Mrs. Ann Graham was induced by what the defendant said to call in the sum of £350 secured to her by an indenture of mortgage dated the 18th day of July, 1884, and made between her and the plaintiff, and to threaten in default of payment to exercise the power of sale contained in the said indenture, which she otherwise would not have done.

"And the plaintiff claims £500 damages." Odgers on L. & S., 629.

4. Words Not Actionable in Themselves.—"1. In the month of May last the plaintiff and his brother, Mr. W. C., were candidates for membership of the Reform club. The defendant was a member of the said club.

"2. Upon a ballot of the members of the said club the plaintiff and his brother were not elected to membership.

"3. Subsequently to the said ballot a meeting of the members of the said club was called to consider a proposed alteration of the rules regulating the election of members, and the defendant took an active and personal interest in the matter.

"4. With a view to retain the regulations as they then existed, and to secure the exclusion of the plaintiff from membership of the said club, the defendant falsely and maliciously spoke and published of the plaintiff, together with his said brother, the words following, that is to say [*words not actionable per se*]; meaning thereby that the plaintiff had been guilty of conduct which unfitted him for membership of the Reform or any similar club.

"5. By reason of the said defamatory publications the defendant induced or contributed to inducing a majority of the members of the said club to retain the regulations under which the plaintiff had been rejected, and thereby prevented the plaintiff from again seeking to be elected to the said club. The plaintiff thus lost the advantage which he would have derived from again becoming a candidate with the chance of being elected, and the plaintiff suffered in his reputation and credit.

"The plaintiff claims £5,000 damages." Odgers on L. & S., 631.

§ 51. **Defamatory Words Spoken in a Foreign Language.**— In actions for defamation, if the words are alleged to have been spoken or otherwise published in a foreign language, the words must be set out in the language in which they were spoken or published and a translation thereof into English added. Giving the translation without the original or the original without a translation is not sufficient.[1]

§ 52. **Illustrations — American Cases.**—

In an action for slander in the Jackson county circuit court of Wisconsin, the averments of the complaint were: "He [the plaintiff meaning] is a swindler. He [the plaintiff meaning] has swindled everybody. He [the plaintiff meaning], and speaking in the German language, is a 'spitzbube,' meaning, and the persons so hearing so understanding, that the plaintiff was a thief and a robber. That the language so spoken by the defendant was the German language, and the persons so present and hearing the same all understood the German language, and so understood the words spoken of and concerning the plaintiff by the said defendant as imputing the crimes aforesaid." The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The court overruled the demurrer, and the defendant, abiding by the same, took an appeal. The decision of the circuit court was reversed, and the cause remanded with directions to sustain the demurrer. Taylor, J., said: "The allegations of the complaint showing that the slanderous words were spoken in the German language, it was clearly the duty of the pleader to set out the words in that language. It is equally clear that after having set out the slanderous words in the German language, if they were in fact spoken in that language, such words should have been followed by a translation into the English language and an allegation of the correctness of such translation." Pelzer v. Benish, 67 Wis.. 291; 30 N. W. Rep., 366.

[1] Warmouth v. Cramer, 3 Wend. (N. Y.), 394; Pelzer v. Benish, 67 Wis., 291; 30 N. W. Rep., 366; Kerschlaugher v. Slusser, 12 Ind., 453; Simonson v. Herold Co., 61 Wis., 626; 21 N. W. Rep., 799.

2. An American Common-law Form.— Yet the defendant, well knowing the premises, but contriving and maliciously intending to injure the plaintiff, and to bring him into public scandal and disgrace, on, etc., in, etc., in a certain discourse which the defendant then and there had, of and concerning the plaintiff, in the presence and hearing of divers persons, falsely and maliciously, in the presence and hearing of the said divers persons, who then and there understood the German language, spoke and published of and concerning the plaintiff the false, scandalous, malicious and defamatory words following in the said German language, that is to say [*here set forth the words in the German language*]; which said words signified and meant, in the English language, as follows, that is to say [*here set forth a correct translation of the words in English, with innuendoes*]. Puterbaugh's Common Law, 482.

3. A Modern English Precedent.— (1) The plaintiff is a farmer residing at ——, in the county of Glamorgan.

(2) On the —— day of ——, 18-6, the defendant falsely and maliciously wrote [or spoke] and published of the plaintiff in the Welsh language the words following, that is to say: [*Here set out the libel verbatim in Welsh.*]

(3) The said words mean in English, and were understood by those to whom they were published [or those who heard them] to mean: [*Here set out the translation.*]

Or if an innuendo is necessary as well as a translation:

(3) The following is a literal translation of the said words: "He is a devil of a shaved pig." The defendant meant thereby, and those who read [or heard] the said words understood him to mean thereby, that the plaintiff was insolvent and had been stripped of his last penny and was unable to pay his just debts.

(4) Whereby the plaintiff was much injured in his credit and reputation, etc. [*Add any special damage that may exist.*]

And the plaintiff claims £—— damages. Odgers on L. & S., 619.

Statement of the Claim in Actions for Slander of Title.

§ 53. **Requisites of the Declaration.**— Under the common-law practice it was necessary that the words spoken, if the slander was by words, or if by sign then the particular sign, should be set forth precisely in the declaration; and there was no difference in principle as to this whether the action was for slander in its simplest form or for slander of title.[1]

§ 54. **Illustrations — Digest of English Cases.**—

1. In a case in which the action was brought for slander of the plaintiff's title to some tulips about to be offered for sale by public auction, the precise words used were not set out in the declaration, but merely the effect of them, alleging in general terms that the defendant wrongfully, injuriously, etc., asserted and represented in the presence and hearing of divers persons (naming them) that the said tulips were stolen property. On mo-

[1] Folkard's Starkie, 140.

tion in arrest of judgment the declaration was pronounced bad for not setting out the words verbatim. Gutsole v. Mathers, 1 M. & W., 495; 1 Tyrw. & Gr., 694.

2. Where the declaration alleged that by reason of the said slander divers persons who were desirous of purchasing plaintiff's interest in the said premises were deterred from so doing, and it appeared from the evidence that the property was leasehold and that the plaintiff did not offer for sale the whole of his interest, but merely the grant of an under-lease for the residue of an unexpired term, it was held that the evidence did not support the declaration. Millman v. Pratt, 3 D. & R., 728; 2 B. & C., 486.

3. In an action for slander of title to goods it should it seems, be alleged in the declaration that the defendant knew that his claim was without foundation or that there was an absence of reasonable and probable cause for making it. Wren v. Weild, 10 B. & S., 51.

§ 55. **Statement of Special Damages.**— There must be an express allegation of some particular damage resulting to the plaintiff from such slander. And the necessity for an allegation of actual damage in the case of slander of title cannot depend upon the medium through which that slander is conveyed — that is, whether it be through words or writing or print; it rests on the nature of the action itself, viz., that it is an action for special damage actually sustained, and not an action of slander.[1] The special damage alleged must appear on the face of the declaration to be the necessary or natural result of the facts stated in the declaration; if it only appear inferentially it will not be sufficient.[2]

§ 56. **Statement of the Negotiation for Sale of the Property.**— Where the words were, "his right and title thereunto is nought, and I have a better title than he," the words were alleged to be spoken falsely and maliciously; and it was also alleged that the plaintiff was likely to sell, and was injured by the words, and that by reason of speaking them he could not recover his tithes. After verdict for the plaintiff, on motion in arrest of judgment, it was held that the action did not lie, as the plaintiff had not shown a special damage, and the verdict could not supply it; that the declaration ought to have alleged that there was a communication had before the words spoken touching the sale of the lands whereof the title was slandered, and that by speaking them the sale was hindered.[3]

[1] Malachy v. Soper, 3 Bing. N. C., 49; 15 C. B., 411; Folkard's Starkie, 385. 140.

[2] Haddon v. Lott, 24 L. J., C. P., 41

[3] Cane v. Golding, Rep., 169.

It has been held on demurrer in the Irish courts that an allegation that a voluntary promise to confer a benefit on the plaintiff had been retracted or delayed in consequence of the words spoken by the defendant is a sufficient statement of special damage; and it is not necessary to aver the intention of the promisor to perform it.[1]

§ 57. **Statement of the Cause of Action — Illustrations — General Digest of American Cases.—**

1. In slander the complaint must set out the actionable words spoken, not simply a narrative of what occurred on a certain occasion; and they must amount to a direct charge, not a mere suspicion of the commission of the alleged offense. Burns v. Williams, 88 N. C., 159. If one is sued for slander, consisting of charges of perjury, larceny and adultery, the charges should be separately stated, although, under the Missouri code, one action may embrace them all. Christal v. Craig, 80 Mo., 367.

2. A declaration charging that the defendant publicly, falsely and maliciously slandered the plaintiff, and setting out the language used, and that the plaintiff was thereby injured in his feelings, reputation, standing and business in a certain sum, which sum is claimed, sets out a good cause of action. Doullut v. McManus, 37 La. Ann., 800.

3. The complaint in an action on a libel published in a foreign language, where the signification only is alleged in English, must aver that the libel was so understood. Simonson v. Herold Co., 61 Wis., 626.

4. The degree of certainty with which a libel should be set forth in a declaration depends on the subject-matter; and where ridicule consists mainly in postures and movements, the use of language somewhat general is unavoidable. Ellis v. Kimball, 16 Pick. (Mass), 132.

5. Where a declaration for publishing a libel does not purport to set it forth *in hæc verba*, and a libel corresponding with the declaration is produced on the trial, if the jury believes that the defendant published any part of the libelous matter they must find for the plaintiff. Metcalfe v. Williams, 3 Litt. (Ky.), 387.

6. Plaintiff brought a libel suit against the proprietor of a medicine, charging that he caused to be published in a newspaper a pretended report of a conversation between plaintiff and a reporter, wherein plaintiff's mother was held up to ridicule as the performer of absurd antics, which it was claimed the medicine cured. It was *held* that the declaration was sufficient to withstand a demurrer. Stewart v. Swift Specific Co., 76 Ga., 280.

7. Though it is not proper to join in the same counts, as ground of recovery, a slander and a libel, yet when the written accusation is matter of inducement and preliminary to the verbal one, it may be set forth as usual in the declaration. Hoyt v. Smith, 32 Vt., 304.

8. In an action for libel, the entire article alleged to be libelous need not be set out; if omitted parts explain those set out, the defendant may avail himself of them on the general issue. Weir v. Hoss, 6 Ala., 881.

[1] Corcoran v. Corcoran, 7 Ir. C. L. Rep. (N. S.), 272; Folkard's Starkie, 141.

9. An averment that the alleged defamatory words were wholly irrelevant and improper, and were used "without justifiable cause," is not equivalent to an allegation of want of reasonable or probable cause. Lawson v. Hicks, 38 Ala., 279.

10. In an action for words imputing an offense criminal by statute only, the statute need not be referred to. Elam v. Badger, 23 Ill., 498.

11. Where slanderous words of a foreign language were uttered in the presence of those who understood that language, and the words were averred in the complaint in the English language, it was *held* that the original words should have been averred with an innuendo stating their meaning in English; and this amendment was allowed after trial and verdict for the plaintiff, where no surprise was shown on the part of the defendant. Littmann v. Ritz, 3 Sandf. (N. Y.), 734.

12. A complaint which avers that defendant spoke certain words of and concerning the plaintiff, and setting forth the words which appear actionable *per se*, sufficiently states a cause of action. Malone v. Stilwell, 15 Abb. (N. Y.) Pr., 421.

13. It is not necessary to set forth the imputation of larceny with the particularity necessary in an indictment for that offense. Thompson v. Berkly, 27 Pa. St., 263.

14. In an action of slander by a female for saying of her that she is the mother of a mulatto child, she need not aver that she is unmarried or that she is married to a white man or that she is a white woman. Smith v. Hamilton, 10 Rich. (S. C.), 44.

15. A declaration alleged that the discourse of the defendant was had concerning a trial between the plaintiff and the defendant before one A., a justice of the peace, and concerning an oath the plaintiff took on said trial before said justice in proving his account. *Held*, that the declaration sufficiently showed the existence of a suit before a competent tribunal, and that the oath taken was as to a matter material to the issue. Sharp v. Wilhite, 2 Humph. (Tenn.), 434.

16. Where a complaint for slander alleged that the plaintiff "was engaged in the wooden-ware business" and that the defendant had charged him with insolvency, it was held that the first allegation showed that the plaintiff was in a regular mercantile business, and therefore that the words, which amounted to a charge of insolvency and thereby injured his credit, were actionable. Carpenter v. Dennis, 3 Sandf. (N. Y.), 305.

17. In an action of slander the plaintiff set forth words as spoken by the defendant, one clause of which only was actionable. It was held on motion to strike out the other clauses that the whole, though not necessarily, was properly pleaded, since the whole conversation must be proved upon the trial. Deyo v. Brundage, 13 How. (N. Y.) Pr., 221.

18. In a declaration in slander charging the defendant with having adopted certain slanderous words used by another the words spoken in the first instance must be set forth; it is not enough to say that the speaker did charge and impute to the plaintiff the crime of perjury. Blessing v. Davis, 24 Wend. (N. Y.), 100.

19. The plaintiffs declared for slanderous words concerning them in their business: "J. F. & Co. [meaning the plaintiffs] are down." *Held* bad on

special demurrer, for the want of a direct allegation that the words were spoken of and concerning the plaintiffs. Titus v. Follet, 2 Hill (N. Y.), 318.

20. Averments were introduced into the declaration in a slander suit of words spoken by the defendant imputing dishonesty to L., the name of L. being followed by the innuendo, "meaning the plaintiffs' agent and clerk;" but there was nothing else in the declaration showing any connection between L. and the plaintiffs. *Held* that, in the absence of a direct averment connecting L. with the plaintiffs or their business, the words alleged to have been spoken concerning him were not actionable in favor of the plaintiffs. Smith v. Hollister, 32 Vt., 695.

21. In slander for words spoken in German the complaint set forth the same in German with an English translation. *Held*, that even if the German words were actionable, yet if those used in the translation were not, the complaint did not show a cause of action. K—— v. H——, 20 Wis., 239.

22. Where the complaint alleged that the words used had a provincial meaning in the neighborhood where they were spoken, and alleged what they meant and were understood to mean, showing that the words as they were meant and were understood charged that the plaintiff had been guilty of bestiality with a sow, it was held to sufficiently show a cause of action. Wrigley v. Snyder, 45 Ind., 541.

23. The form of declaration prescribed by the act of Georgia of 1847 must be followed without material variation so far as it goes; but the words set forth may be accompanied by such explanatory allegations or innuendoes as serve to state the cause of action clearly and distinctly, and an amendment supplying such innuendoes should be allowed. Hawks v. Patton, 18 Ga., 52.

24. An averment that the defendant "did, in certain conversations or discourses, utter, publish and declare," sufficiently implies that the words were spoken in the presence of other persons. Hurd v. Moore, 2 Oreg., 85. It is sufficient if the words are laid to have been spoken "in the presence" of others. Brown v. Brashier, 2 Pa., 114. A count charging that the defendant published a slanderous charge concerning the plaintiff is sufficient without averring specially the presence of others. Burton v. Burton, 3 Iowa, 316. The declaration in an action of slander alleged that the defendant spoke the slanderous words in the presence and hearing of A. and B. and divers other good citizens of the state. *Held*, that the declaration need not specify the names of the "other good citizens;" and that the words spoken might be proved by any person who heard them, though his name was not mentioned in the declaration. Bradshaw v. Perdue, 12 Ga., 510.

25. A declaration in slander for charging the plaintiff with swearing to a lie as a witness in a proceeding before a justice of the peace, in which it is not stated that the justice had jurisdiction or power to administer the oath, or that the testimony was material, although bad on demurrer, is good after verdict. Palmer v. Hunter, 8 Mo., 512.

26. In an action of slander by husband and wife for words spoken of the wife charging her with having had sexual intercourse with the defendant, it is not necessary that the declaration should aver that the plaintiffs were husband and wife at the time the words were uttered, where the statute punishes both adultery and fornication. Benaway v. Conyne, 3 Chand. (Wis.), 214.

27. It is allowable to include in the same declaration divers distinct words of slander of different import. Hally v. Nees, 27 Ill., 411.

28. A count in slander stated that the defendant had spoken of and concerning the plaintiff these false and slanderous words, viz.: "John Butler [meaning the said plaintiff] swore a lie, in the case of Noah Anderson against myself [meaning him, the said defendant, and referring to a suit previously determined in the Pike circuit court], and I [the said defendant meaning] can prove it." *Held*, that this was not a sufficient statement that the defendant had charged the plaintiff with perjury. Cummins v. Butler, 3 Blackf. (Ind.), 190.

29. In an action of slander for charging the plaintiff with the crime of incest, the words alleged to have been spoken were to the effect that the plaintiff had carnal intercourse with his daughter, but without alleging that he had any knowledge of the relationship. It was held that a demurrer thereto should have been sustained. Griggs v. Vickroy, 12 Ind., 549.

30. Where, in an action of slander, brought by an unmarried female, the plaintiff's petition alleged that the defendant had charged her with having given birth to a child, without any averment showing that the hearers understood that the language used conveyed a charge of bastardy, or imputed a want of chastity to the plaintiff, to which petition the defendant demurred, it was held that the demurrer should be sustained. Wilson v. Beighler, 4 Iowa, 427.

31. In an action of slander for charging the plaintiff with having sworn falsely to his schedule, it is not necessary to so state the charge of false swearing in the preliminary part of the declaration as would be necessary in an indictment for perjury; but enough ought to appear, in words or by legal intendment, to show "an oath in a court of justice." Simpson v. Vaughan, 2 Strobh. (S. C.), 32. A charge of having committed an offense must, to constitute a good count for slander at common law, amount to such an offense or crime as would subject the plaintiff to the punishment annexed to it. Shroyer v. Miller, 3 W. Va., 158.

32. In a declaration for publishing a libelous article in a newspaper it is not necessary to aver that the publication was made to divers persons or to any third person; it is enough to aver that the libel was printed and published in a newspaper. Sproul v. Pillsbury, 72 Me., 20.

33. Actionable words, not counted on, cannot be given in evidence; but it is not necessary that a charge, to be actionable, should be in direct terms. It is only necessary to aver that the defendant by means of the words insinuated and meant to be understood by the hearers as charging the plaintiff with the crime imputed, and the question is one for the jury. Thus, where a defendant speaking of an oath taken by the plaintiff, and of the defendant's having complained to the grand jury for perjury, said: "He went to the grand jury and asked them if they wanted more witnesses, and that they said they had witnesses enough to satisfy them." It was *held* that such words, if properly averred, were actionable. Randell v. Butler, 7 Barb. (N. Y.), 260.

34. A declaration in slander stated that the defendant, on a certain day and on divers other days and times, spoke of the plaintiff certain slander-

ous words. It was *held* that the words "and at divers other days and times" were surplusage and not a ground of special demurrer. Cummins v. Butler, 3 Blackf. (Ind.), 190.

35. In an action of slander the charge complained of was that of perjury in another action between the present parties before a justice. It was objected to the declaration in this suit that there was no averment that the justice had jurisdiction of the cause of action. The declaration contained an averment that the plaintiff was, at the instance of the defendant, examined on oath administered by said justice according to law, as a witness for the defendant. It was *held* that this allegation was a statement in substance that the justice had jurisdiction of the cause. Shellenbarger v. Norris, 2 Ind., 285.

36. A petition in an action for libel is defective in not stating explanatory facts, and such defect is not cured by the insertion of innuendoes; nor without an allegation of special damages is the publication of a statement imputing blame but not characterizing the charge actionable. Salvatelli v. Ghio, 9 Mo. App., 155.

37. In A.'s action for a libel alleged to have been in a letter written and published with B.'s advice and assistance, B. answered that the words set forth were not correct extracts, but were garbled and incomplete; also that the letter, as to the matters stated in the complaint, was true. On A.'s motion the letter, which contained much irrelevant matter, was stricken from the answer. It was *held* that the rules of evidence admitting enough of the contents to explain the sense in which the libelous words were used was not a rule of pleading, and did not require the letter to be made part of the answer. Kelly v. Waterbury, 87 N. Y., 179.

38. Indecent words, tending only to aggravate damages, need not be repeated in a declaration for slander. Stevens v. Handly, Wright (Ohio), 121, 123.

39. A declaration in slander against husband and wife, charging that the wife had said that A. and his wife made no bones to say that the plaintiff had stolen their thread, and averring that neither A. nor his wife had ever said so, was held good on demurrer. Whittam v. Young, 1 Blackf. (Ind.), 299.

40. In an action for slander by charging the plaintiff with perjury, the complainant need not allege that the evidence given by the plaintiff was material to the issue. Whitsel v. Lennen, 13 Ind., 535; Wolbrecht v. Baumgartner, 26 Ill., 291; Cannon v. Phillips, 2 Sneed (Tenn.), 185. A declaration in slander for charging the plaintiff with "swearing to a lie" as a witness on a trial in a justice's court is good, though it is not stated that the justice had jurisdiction or that the testimony was given upon a material point. Niven v. Munn, 13 Johns. (N. Y.), 48; Chapman v. Smith, 13 Johns. (N. Y.), 78; Dalrymple v. Lofton, 2 McMull. (S. C.), 112.

41. In an action of slander, in which it is alleged that the defendant accused the plaintiff of killing a particular person, it is necessary to allege that such person is dead. Chandler v. Holloway, 4 Port. (Ala.), 17. To the contrary, Stallings v. Newman, 26 Ala., 800; Tenny v. Clement, 10 N. H., 52.

42. A declaration in an action for slander, in charging one with having sworn falsely before a justice of the peace, referring in each count to the

inducement set forth in the commencement by the words, "N. T., esquire, aforesaid," is good. Canterbury v. Hill, 4 Stew. & P. (Ala.), 224.

43. A declaration for libel stated by way of inducement that there were vague reports in circulation that the plaintiff had done something disreputable and disgraceful to his character in connection with breaking or causing to be broken a lock or locks, for the purpose of taking on execution money in the possession of one A. M. B., and then set forth a publication by the defendant in relation to money which he owed the defendant, in which it was said "there will be no locksmith necessary to get at the ready," which the declaration averred related to the reports, and was intended to charge the plaintiff with having done something disgraceful. It was held that this was insufficient, and that the substance of the report should have been stated. Stone v. Cooper, 2 Den. (N. Y.), 293.

44. In complaints for slander the words spoken should not be alleged with a *continuendo*. Slanderous words spoken at one time constitute one cause of action. The same or other slanderous words spoken at other times constitute other causes of action; but if relied upon they should be separately pleaded in separate paragraphs. Swinney v. Nave, 22 Ind., 178. A count of a petition in an action for slander which sets out the entire conversation in which the slander was spoken contains only one cause of action, although the conversation consists of several parts, each of which is actionable. Cracraft v. Cochran, 16 Iowa, 301.

45. A complaint not stating words spoken, but merely the tenor and import of the words, is bad on demurrer. Forsyth v. Edmiston, 5 Duer, 653.

46. The complaint stated, in substance, that an examination of S. by one T., a justice of the peace, was reduced to writing and filed with him, and that on a complaint against S. for perjury committed before him, heard before E. and A., two justices of the peace, he produced, filed and deposited it with them, and that defendant charged plaintiff with having stolen it. *Held*, that it was bad for not showing that the examination was taken by T. in a complaint pending before him, nor its occasion or purpose, nor whether it was a civil or criminal proceeding, nor that T. had jurisdiction; and that the objection was not obviated by section 161 of the code. Ayres v. Covill, 18 Barb., 260.

47. When the words spoken of the wife are actionable *per se*, the wife must join; but, if they be not, the husband must sue alone. These rules are not altered by the fact that they live apart under a deed of separation. If a count by husband and wife contains words actionable *per se*, as well as others spoken of the wife, the defendant cannot demur, and may on the trial object that the action for the latter words cannot be maintained by both. Beach v. Ranney, 2 Hill, 309.

48. In slander the plaintiff may, in the same count, charge words not actionable *per se* with words actionable in themselves in aggravation of damages. Dioyt v. Tanner, 20 Wend. (N. Y.), 190.

49. A complaint for words imputing a loathsome disease, but without alleging that defendant charged its present existence, and without alleging special damages, is bad on demurrer. Pike v. Van Wormer, 5 How. (N. Y.) Pr., 171.

50. It is sufficient to allege that the words are false and malicious, with-

out laying a *scienter*, even where the words were part of a privileged communication. Andrew v. Deshler, 43 N. J. L., 16.

51. In an action of slander it is unnecessary to preface each count with all the inducements and allegations contained in the first; a reference to them is sufficient. Loomis v. Swick, 3 Wend. (N. Y.). 205.

52. A declaration charged the defendant with saying, "You have sworn to a lie, and I can prove it by Joe McClain, clerk of the county court." It was *held* that it showed no cause of action, because it did not aver that the oath was taken before the clerk in a matter in which he had authority to administer the oath. Jones v. Marrs, 11 Humph. (Tenn.), 214. A declaration charging the words spoken, as follows: "He [meaning plaintiff] has sworn falsely," etc., "against me [meaning defendant], and he [meaning defendant] could prove it," was held bad after verdict. By "he," in the latter clause, as pleaded, the defendant could not have meant himself. Bowdish v. Peckham, 1 D. Chip. (Vt.), 146.

53. In an action for words spoken, charging the plaintiff with the commission of a crime, it is not necessary for the plaintiff to aver or prove that he was physically able to commit the crime. Chambers v. White, 2 Jones (N. C.), L., 383.

54. In a declaration for slander, in charging the plaintiff with perjury in another state, it must be averred that, by the laws of such other state, perjury is an offense to which is annexed an infamous punishment. Sparrow v. Maynard, 8 Jones (N. C.), L., 195.

55. In slander the declaration stated that the plaintiff was a justice of the peace, and that the defendant, meaning to injure and expose him to prosecution for corruption, etc., in a certain discourse, etc., said of the plaintiff in his office of a justice, "L. [meaning the plaintiff] had been feed by A. [meaning A., who had a cause pending and undetermined before the plaintiff], and that he could do nothing when the magistrate was in that way against him [the defendant]." On a motion in arrest of judgment this declaration was held sufficient. Lindsey v. Smith, 7 Johns. (N. Y.), 359.

56. In a complaint in an action for slander, after setting forth the uttering of the offensive words on a day named, adding, "and on divers other days and times between that day and the commencement of this suit," does not render the complaint defective, as mingling several causes of action; for only one set of words is set forth, and evidence of the repetition is admissible in proof of malice. Adding, after setting forth actionable words, "and also the defendant spoke other words of like falsity and defamation," etc., does not render the complaint demurrable. Gray v. Nellis, 6 How. (N. Y.) Pr., 290.

57. In an action by an unmarried female for the false speaking of words imputing to her a want of chastity, if the words charged do not in themselves impute a want of chastity they must be connected with an averment of the extrinsic facts necessary to show that they contained such imputation; for example, where the words charge a past pregnancy and miscarriage the complainant must aver that the plaintiff was unmarried at such time as would make the pregnancy charged an imputation on her chastity; and this notwithstanding it is alleged that she is an infant and unmarried. Smith v. Gafford, 31 Ala., 45.

58. If slanderous words were spoken under such circumstances as not to import a charge of a crime, the declaration is not demurrable unless it set out those circumstances. Little v. Barlow, 26 Ga., 423.

59. Where the words charged in the declaration indicate that if the plaintiff did testify falsely in the matter touching which the defendant impugned his veracity, his testimony must have been intentionally and corruptly false upon a point material to the issue, it is not necessary that the declaration should allege that the slanderous words imputed the crime of perjury, according to the laws of Alabama. Williams v. Spears, 11 Ala., 128.

60. In slander for words spoken which are actionable in themselves, it is not necessary to aver in the declaration the name of the person to whom or in whose presence they were spoken. Ware v. Cartledge, 24 Ala., 622.

61. In a declaration claiming damages for words calculated to injure the plaintiff's reputation as an attorney at law, it is not sufficient to allege that the plaintiff was an attorney. It must be alleged and proved that the words were used in reference to his profession. Van Epps v. Jones, 50 Ga., 238.

62. It is not necessary that there should be the same certainty in stating the crime imputed as in an indictment for the crime, in order to render words actionable. Miller v. Miller, 8 Johns. (N. Y.), 74.

63. A count in slander, averring that the defendant uttered and published these words: "He [meaning the plaintiff] has been with a sow, and I [meaning the defendant] can prove it," followed by an averment that the words were intended to charge the plaintiff with the crime against nature, etc., was held sufficient. Goodrich v. Walcott, 3 Cow. (N. Y.), 281; 5 id., 714.

64. Judgment will not be arrested in an action of slander for charging the plaintiff with altering a note, because the plaintiff in his declaration in the inducement to the charge avers that the note charged to be altered was a genuine one, such averment being equivalent to the ordinary averment of innocence of the guilt imputed. Harmon v. Carrington, 8 Wend. (N. Y.), 488.

65. After verdict, on a motion in arrest or on error, a declaration in slander is good where the words are of doubtful meaning but capable of a slanderous sense, although there is no averment beyond that of intent to charge a specific crime; a stricter rule obtains where a demurrer is interposed. Kennedy v. Gifford, 19 Wend. (N. Y.), 296.

66. In an action for slander in stating that the defendant was the author of a libel, an averment in the complaint that the plaintiff was not the author, and had no complicity therein, was held sufficient, *prima facie*, to show that there was a want of probable cause, where the defendant's statement complained of was made a privileged communication, but without indicating what he relied on as the ground for making it. Viele v. Gray, 10 Abb. (N. Y.) Pr., 1; 18 How. Pr., 550.

67. In an action of slander, where the charge was that the plaintiff had sworn to a lie at a certain trial, it was held that the plaintiff need not set forth in his declaration the whole of his evidence at the trial, unless the defendant had specified the language in which the plaintiff had sworn falsely. Smith v. Smith, 8 Ired. (N. C.) L., 29.

68. In an action for slander where the complaint alleged that the slan-

derous words were spoken at the town of Russell, in the presence of divers good and worthy citizens, on or about October 10, 1880; on or about July 10, 1880; on or about July 20, 1881, and on or about July 10, 1881,—it was held sufficiently definite without further particularity as to persons, place or time. Gardinier v. Knox, 27 Hun (N. Y.), 500. Boardman, J., dissenting.

69. In an action of slander for words actionable by statute, but not at common law, the declaration did not aver the cause of action to be contrary to the form of the statute. It was held that after verdict this was no objection. Wilcox v. Webb, 1 Blackf. (Ind.), 268.

70. A declaration in slander charged the defendant with having said that the plaintiff had sworn false on a certain trial before a justice of the peace, but there was no averment that the testimony alleged to be false was material. It was held the declaration could not be objected to after verdict for the want of that averment. Wilson v. Harding, 2 Blackf. (Ind.), 241.

71. In an action of slander, brought under the act of Maryland of 1838, chapter 114, entitled "An act to protect the reputation of unmarried women," the declaration charged that the words were spoken "against the form of the statute in such case made and provided." It was held that this was a sufficient reference to the statute, the charge being an assault on the chastity of a *feme sole*. Terry v. Bright, 4 Md., 430.

72. In a case for slander, one count alleged that the plaintiff and two others gave a note payable to the defendant or order; that the defendant said of the plaintiff and of the note, "I never put my name on the back of the note, but he must have done it." There was no averment in that count explaining the sense in which the words were spoken. It was held that this count was bad after verdict on motion to arrest the judgment. Atkinson v. Scannon, 22 N. H. (2 Fost.), 40.

Statement of the Defense.

§ 58. **The General Issue.**—The first pleading or statement on the part of the defendant at common law was called the general issue, or plea of not guilty.

§ 59. **Illustration—Its Form.**—

And the defendant C. D. by —— ——, his attorney, comes and defends the wrong and injury, when, etc., and says that he is not guilty of the said supposed grievances laid to his charge in manner and form as the plaintiff has in his said declaration thereof complained against him, and of this he puts himself upon the country, etc.

§ 60. **The General Effect of the Plea.**—In an action of oral or written slander, the plea of the general issue operates as a denial of the extrinsic facts stated in the inducement, the speaking the words or publication of the libel, the truth of the colloquium or the application of the words to the plaintiff, and to the extrinsic facts alleged in the declaration, and the damage, where special damage is necessary to maintain the action,

or more than nominal damage is claimed. Where the defense is that the libel or words were published or spoken, not in the malicious sense imputed by the declaration, but in an innocent sense, or upon an occasion which warranted the publication, this matter may be given in evidence under the general issue.[1]

§ 61. **Slander of a Person in His Office, Profession or Trade.**— In an action of slander of the plaintiff in his office, profession or trade, the plea of not guilty will operate in denial of speaking the words, of speaking them maliciously and in the sense imputed, and with reference to the plaintiff's office, profession or trade; and it will operate as a denial of the fact of the plaintiff holding the office or being of the profession or trade alleged.

§ 62. **Words Not Actionable in Themselves.**— In actions for words not actionable in themselves, special damage is necessary to maintain the action, and is therefore part of the wrongful act complained of and denied by the general issue. The plea of not guilty puts in issue both the act complained of and its consequences.[2]

§ 63. **Privileged Communications.**— In the defense of this action under the general issue the defense of privileged communication may be given in evidence, "as it goes to the very root of the matter of complaint."[3] This defense may also be specially pleaded.

§ 64. **Burden of Proof Cast upon the Plaintiff.**— In all cases of defamation the plea of the general issue puts the plaintiff upon proof of every material allegation of his declaration:

1. The special character and extrinsic facts when they are essential to the action.
2. The publication of defamatory matter
3. The truth of the colloquium.
4. The malicious intent where malice in fact is material.
5. The damages where special damages are claimed.[4]

[1] Heard on L. & S., § 240.

[2] Wilby v. Elston, 7 D. & L., 143; Norton v. Scholefield, 1 Dowl. (N. S.), 638.

[3] Lillie v. Price, 5 Adol. & El., 645; 5 Dowl., 432; 1 N. & P., 16; Hoare v. Silverlock, 9 C. B., 20; 1 Saund., 130 (6th ed.); Bradley v. Heath, 12 Pick., 163; Remington v. Congdon, 2 Pick., 310; O'Brien v. Clement, 15 Mees. & W., 435, 437, per Parke, B. And see Lucan v. Smith, 1 H. & N., 481.

[4] 2 Greenleaf on Evidence, § 411.

§ 65. **Modification of the Common Law.**— Under the New York code the answer corresponds to the common-law plea of the general issue. It must contain (1) a general or specific denial of each material allegation of the complaint to be controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief; (2) a statement of any new matter constituting a defense or counter-claim, in ordinary and concise language, without repetition.

In actions for slander and libel it provides "the defendant may, in his answer, allege both the truth of the matter charged as defamatory, and any mitigating circumstances to reduce the amount of damages; and whether he prove the justification or not, he may give in evidence the mitigating circumstances."

The general issue in these actions at common law had, it would seem, a much more extended effect than the general denial of the New York code. Under it many matters of defense were admissible which under the code must be specially pleaded.

§ 66. **Notice of Special Matter.**— In some states where the common-law system is in force the defendant is allowed to plead the general issue, and to give notice in writing under the same of any special matters intended to be relied upon as a defense at the trial. The notice is not a plea, and calls for no answer from the plaintiff. No issue of law or fact can be made upon it. Under it no question arises until the defendant offers evidence to support it on the trial. If it is then found insufficient no evidence can be admitted under it.[1] The true way to test the sufficiency of a notice is to inquire whether the matter contained in it, if pleaded specially, would be good on general demurrer.[2]

§ 67. **Illustration.**—

In a New York case the declaration alleged that the defendant charged the plaintiff with a larceny. The defendant pleaded the general issue with a notice of special matter. The notice stated that the plaintiff sold the defendant's shingles without authority, and afterwards denied all knowledge of the matter. These matters by no means impute the commission of a larceny, but rather the telling of a lie. It is not stated that the shingles were taken privately or feloniously. And if they were not, a subsequent

[1] Burgwin v. Babcock, 16 Ill., 28. [2] Shepard v. Merrill, 13 Johns. (N. Y.), 475.

denial of the taking would not make it felonious. Applying the test then to the notice it is clearly insufficient. Shepard v. Merrill, 13 Johns., 475.

§ 68. **Plea of Justification — Truth of Defamatory Words.** The defendant cannot prove, under the plea of the general issue at common law, the truth of the defamatory words either in bar of the action or in mitigation of damages. If he desires to confess the publication of the defamatory words and avoid the consequences by asserting the truth of the same, he can do so under the plea of justification. The truth of the defamatory words is, if pleaded, a complete defense to any action of libel or slander, though alone it is not a defense in a criminal trial. The burden, however, of proving that the words are true is on the defendant. The falsity of all defamatory words is presumed in the plaintiff's favor, and he need give no evidence to show them false. The defendant can rebut this presumption by giving evidence in support of the plea of justification. If the jury are satisfied that the words are true in substance and in fact, they must find for the defendant, though he may have spoken the words maliciously. On the other hand, if the words are false and there be no other defense, the jury must find for the plaintiff, although they may be satisfied that the defendant in good faith reasonably believed the words to be true at the time he uttered them.[1]

§ 69. **The Plea at Common Law.**— At common law the plea of justification must be pleaded with the greatest precision. It ought to state the charge with the same degree of certainty and precision as is required in an indictment. The object of the plea is to give the plaintiff, who is, in truth, an accused person, the means of knowing what are the matters alleged against him. It is said that he must know them already; it is true that he knows his own conduct, but he does not know what another means to impute to him. It is because the acts charged against the plaintiff are within the peculiar knowledge of the defendant that he ought to specify them in his plea.[2]

§ 70. **Requisites of the Plea.**— In framing an answer or a plea of justification the following rules should be observed:

(1) It is necessary, although the libel contains a general im-

[1] Odgers on L. & S., 170.

[2] Heard on L. & S., § 240; 2 Strange, 1200.

putation upon the plaintiff's character, that the plea should state specific facts showing in what instances and in what manner he has misconducted himself.

(2) The matter set up by way of justification should be strictly conformable with the slander laid in the declaration or statement of the claim, and must in substance be proved as laid.

(3) If the matter of justification can be extended to the whole of the libel or slander the plea should not be confined to a part only, leaving the rest unjustified.[1]

§ 71. **It Must be Specially Pleaded.**— A justification must always be specially pleaded, and with sufficient particularity to enable plaintiff to know precisely what is the charge he will have to meet. If the libel makes a vague general charge — as, for instance, that the plaintiff is a swindler — it is not sufficient to plead that he is a swindler. The defendant must set forth the specific facts which he means to prove in order to show that the plaintiff is a swindler.[2] The plea is always construed strictly against the party pleading it.[3] It must justify the whole of the words to which it is pleaded, and set forth facts issuably.[4]

§ 72. **The General Rule.**—

(1) *Where the imputation complained of is a conclusion* or inference from certain facts, the plea of justification must aver the existence of a state of facts which will warrant the inference of the charge.[5]

Though the charge imputed to the plaintiff be general, as laid in the declaration, the defendant must, in his plea, charge him with specific instance of offenses of the same nature with the general charge. Thus, a defendant is not at liberty to charge a person with swindling without showing specific instances of it; for whenever one charges another with fraud,

[1] 1 Chitty's Pleadings, 494; Puterbaugh's Com. Law, 492; 1 Starkie on Slander, 480.

[2] Johnson v. Stebbins, 5 Ind., 364; Jacocks v. Ayers, 7 How. Pr. (N. Y.), 215; Jones v. Cicel, 5 Eng., 593; Van Ness v. Hamilton, 19 Johns. (N. Y.), 349; l'Anson v. Stuart, 1 T. R., 748.

[3] Leyman v. Latimer, 3 Ex. D., 15, 352.

[4] Jones v. Stevens, 11 Price, 235; Newman v. Baily, 2 Chit., 665; Holmes v. Catesby, 1 Taunt., 543.

[5] Van Ness v. Hamilton, 19 Johns. (N. Y.), 349; Johnson v. Stebbins, 5 Ind., 364; Buddington v. Davis, 6 How. Pr. (N. Y.), 401.

he must know the particular instances upon which his accusation is founded, and therefore ought to disclose them.[1]

Illustration: The imputation was, "He is a regular smasher." Declaration: "The plaintiff has suffered damage by the defendant falsely and maliciously speaking and publishing of the plaintiff on May 8, 1886, the words following, that is to say: 'He is a regular smasher;' meaning thereby that the plaintiff had uttered, and was in the habit of uttering, counterfeit coin, with the knowledge that such coin was counterfeit, and had been guilty of an indictable offense." To which the following plea was held sufficient: "The said words are true in substance and in fact. On March 27, 1880, the plaintiff uttered and passed to the defendant a counterfeit florin, well knowing the same to be counterfeit. On May 8, 1880, the plaintiff uttered and passed to the defendant another counterfeit florin, well knowing the same to be counterfeit. Wherefore the defendant says that the plaintiff is a regular 'smasher,' and has uttered, and has been in the habit of uttering, counterfeit coin, well knowing the same to be counterfeit; and has been guilty of divers misdemeanors." Odgers on L. & S., 624.

(2) *Where the imputation is a charge of some specific act or acts*, it is sufficient if the plea allege in legal language that the charge is true.[2]

Illustration: In an action on the case for calling the plaintiff a thief, and saying that he stole two sheep of J. S., the defendant pleaded that the plaintiff stole the same sheep, by reason of which he called him thief, as well he might; and the plea was held to be good. Br. Action sur Cas., 27 H. 8, 22, pl. 3; 1 Roll. Abr., 87.

§ 73. **Defamatory Matter Must be Justified as Explained by the Innuendoes.**— When no defense but the general issue is interposed, the language of a libel may be shown to fairly bear a mitigated sense. But when a libel is justified generally, the doctrine is well settled that, so far as the justification is concerned, it is justified as applied or explained by the innuendoes; and therefore there can be no justification made out by the evidence unless the facts are proven true as alleged in the declaration and with the meaning there averred, unless with the aid of the colloquium such meaning is repugnant.[3]

§ 74. **Under the English Practice.**— Under the rule in England it seems to be held, where the words are laid with an innuendo, the defendant may justify either with or without the

[1] 1 Starkie on Slander, 478; Styles, 118, Strachey's Case.

[2] 1 Starkie on Slander, 478.

[3] Atkinson v. Detroit Free Press Co., 46 Mich., 341; 9 N. W. Rep., 501; Bissell v. Cornell, 24 Wend., 354; Tillotson v. Chatham, 8 Johns., 56; Gage v. Robinson, 12 Ohio, 250; Helsham v. Blackwood, 11 C. B., 111; Lewis v. Clement, 3 B. & A., 702; 3 Br. & B., 297; 1 Wms. Saund., 160 and notes; 1 Chitty, Pl., 433; Bailey v. Kalamazoo Pub. Co., 40 Mich., 251.

meaning alleged in such innuendo; or he may do both.[1] He may deny that the plaintiff puts the true construction on his words, and assert that if taken in their natural and ordinary meaning his words will be found to be true; or he may boldly allege that the words are true, even in the worst signification that can be put upon them. But it seems that he may not put a meaning of his own on the words, and say that in that sense they are true; for if he deny that the meaning assigned to his words in the complaint is the correct one, he must be content to leave it to the jury at the trial to determine what meaning the words naturally bear.[2] Nor can he plead that he did not publish precisely the words stated in the claim, but something similar, and that something similar is true in substance and in fact.[3]

§ 75. **Libels Containing One Specific Charge.**— Where the gist of the libel consists of one specific charge, which is proved to be true, defendant need not justify every expression which he has used in commenting on the plaintiff's conduct. Nor, if the substantial imputation be proved true, will a slight inaccuracy in one of its details prevent defendant's succeeding, provided such inaccuracy in no way alters the complexion of the affair, and would have no different effect on the reader than that which the literal truth would produce.[4] If epithets or terms of general abuse be used which do not add to the sting of the charge they need not be justified;[5] but if they insinuate some further charge in addition to the main imputation, or imply some circumstance substantially aggravating such main imputation, then they must be justified as well as the rest.[6] In such case it will be a question for the jury whether the substance of the libelous statement has been proved true to their satisfaction.[7] "It would be extravagant,"

[1] Watkin v. Hall, L. R., 3 Q. B., 396; 37 L. J., Q. B., 125; 16 W. R., 857; 18 L. T., 561.

[2] Brembridge v. Latimer, 12 W. R., 878; 10 L. T., 816.

[3] Odgers on L. & S., 170.

[4] Alexander v. N. E. Rail. Co., 34 L. J., Q. B., 152; 11 Jur. (N. S.), 619; 13 W. R., 651; 6 B. & S., 340. See Stockdale v. Tarte, 4 A. & E., 1016; Blake v. Stevens, 4 F. & F., 239; 11 L. T., 544.

[5] Edwards v. Bell, 1 Bing., 403; Morrison v. Harmer, 3 Bing. N. C., 767; 4 Scott, 533; 3 Hodges, 108.

[6] Maule, J., in Helsham v. Blackwood, 11 C. B., 129; 20 L. J., C. P., 192; 15 Jur., 861.

[7] Warman v. Hine, 1 Jur., 820; Weaver v. Lloyd, 2 B. & C., 678; 4

said Lord Denman,[1] "to say that in cases of libel every comment upon facts requires a justification. A comment may introduce independent facts, a justification of which is necessary, or it may be the mere shadow of the previous imputation."[2]

§ 76. **Illustrations.—**

1. Plea of Justification — Imputation of Perjury.— And for a further plea in this behalf the defendant says that the plaintiff ought not to have his aforesaid action against him, the defendant, because he says that, before the committing of the said supposed grievances in the said declaration mentioned, to wit, on, etc., in, etc., at a term of the —— court of the said county, begun and held at ——, within and for the said county, on, etc., before the honorable E. F., then being judge of the same court, a certain issue duly joined in the said court, between one G. H. and one L. M., in a certain plea of trespass, came on to be tried in due form of law, and was then and there tried by a certain jury of the country, duly summoned, impaneled and sworn between the parties aforesaid; and that upon the said trial the plaintiff appeared as a witness on the part of the said L. M., and was duly sworn, and took his oath before the said court, to speak the truth, the whole truth, and nothing but the truth, touching the matters in issue on the said trial; and that at and upon said trial certain questions became and were material, in substance as follows, that is to say [*here state the material questions*]; and that the plaintiff, being so sworn as aforesaid, and being then and there lawfully required to depose the truth in a proceeding in a court of justice, at and upon the said trial, in the court aforesaid, then and there falsely, wilfully, voluntarily and corruptly did say, depose and swear, among other things, in substance and to the effect following, that is to say [*here state the evidence, as fully as the words in the declaration*]; whereas, in truth and in fact [*here negative the plaintiff's evidence, as in an indictment for perjury*]. And the plaintiff did thereby in the said court, so held as aforesaid, upon his said oath upon the trial as aforesaid, in the manner and form as aforesaid, commit wilful and corrupt perjury. Wherefore the defendant, at the time mentioned in the said declaration, in, etc., spoke and published of and concerning the plaintiff the said several words in the said declaration mentioned, as it was lawful for him to do for the cause aforesaid. And this the defendant is ready to verify; wherefore he prays judgment if the plaintiff ought to have his aforesaid action against him, etc. Wharton's Precedents, 294.

2. Plea of Justification — Imputation of Passing Counterfeit Money — A Modern English Form.— The said words are true in substance and in fact. On March 27, 1880, the plaintiff uttered and passed to the defendant a counterfeit florin, well knowing the same to be counterfeit. On May 8, 1880, the plaintiff uttered and passed to the defendant another counterfeit

D. & R., 230; 1 C. & P., 295; Behrens v. Allen, 8 Jur. (N. S.), 118; 3 F. & F., 185.

[1] Cooper v. Lawson, 8 Ad. & E., 753; 1 P. & D., 15; 1 W., W. & H., 601; 2 Jur., 919.

[2] Lefroy v. Burnside (No. 2), 4 L. R., Ir., 556; Odgers on L. & S., 171.

florin, well knowing the same to be counterfeit. [*State any other instances in which the plaintiff passed bad coin to the defendant or others.*] Wherefore the defendant says that the plaintiff is a regular "smasher," and has uttered, and has been in the habit of uttering, counterfeit coin, well knowing the same to be counterfeit; and has been guilty of divers misdemeanors. Odgers on L. & S., 641.

§ 77. Illustrations — Digest of American Cases.—

I. The Plea Generally.

1. The defense of justification must aver particulars, and not merely allege the truth of the words. Robinson v. Hatch, 55 How. (N. Y.) Pr., 55.

2. A plea of justification by its nature is in confession and avoidance, and when properly made is a complete bar. But it is not a complete bar unless it confesses and avoids by justifying the entire charge substantially as made. Anything short of that is necessarily another and different charge. Gault v. Babbitt, 1 Brad. (Ill.), 130.

3. In a plea in justification of a libel, that the subject comprehends multiplicity of matter tending to prolixity is no excuse for general pleading; nor is it sufficient that the plea is as general as the charge in the declaration; but it ought to state specifically the facts on which the charge was founded, to give the defendant an opportunity of denying and taking issue upon them. As where the defendant charged the plaintiff, being a member of the council of revision, with receiving money for services rendered in procuring an act of incorporation to be passed, he must, in his plea of justification, state the particular facts which make out the charge with certainty, so that the plaintiff may take issue on those very facts. Van Ness v. Hamilton, 19 Johns. (N. Y.), 349.

4. The defendant will not be permitted to prove a justification under an answer merely denying the allegations of the complaint and alleging that the words charged to have been uttered were true. Tilson v. Clarke, 45 Barb. (N. Y.), 178.

5. In Iowa, in actions for libel and slander, both the truth of the matter charged and mitigating circumstances may be alleged in reduction of damages, and when the allegation of truth is not sustained it is not of itself proof of malice; and after failure of such plea, evidence of mitigating circumstances may be given. Kinyon v. Palmer, 18 Iowa, 377.

6. A denial of having spoken the words charged and an averment of their truth are consistent defenses, and may be separately stated in the same answer. Payson v. McCumber, 3 Allen (Mass.), 69.

7. Whether a person who repeats a slander, but who at the same time names the person from whom he received it, may plead that circumstance in justification depends on the intent with which the name of the author is repeated. Dole v. Lyon, 10 Johns. (N. Y.), 447.

8. Where the answer denies each and every allegation of the complaint and also sets up a justification, the court will not on motion compel the defendant to elect one of the defenses and strike out the other; they are not necessarily inconsistent. Ormsby v. Douglass, 5 Duer (N. Y.), 665.

9. The charge was, "M. has robbed me. She is a thief; has stolen my spoons, my gold pen and pencil." It was held that in justifying the de-

fendant might, by reason of the general charge that she was a thief, allege other thefts than those of the articles mentioned. Jaycocks v. Ayers, 7 How. Pr. (N. Y.), 215.

10. In an action of slander for charging the plaintiff with having stolen the defendant's shingles, a justification stating that the plaintiff had sold the defendant shingles without authority, and afterwards denied that he knew anything respecting them, without alleging that the plaintiff took them privately or feloniously, does not amount to a charge of larceny and is bad as a justification; nor can those facts be given in evidence in mitigation of damages. The truth of slanderous words cannot be given in evidence, under the general issue, without notice, either in justification or mitigation of damages. Shepard v. Merrill, 13 Johns., 475.

11. The defendant cannot give in evidence, under the general issue, matter which might have been pleaded, nor of any other crime than the one charged, either in bar or in mitigation of damages. If the defendant attempt to justify a charge of felony, he must justify as to the specific charge laid, and cannot set up a charge of the same kind, but distinct as to the subject-matter. Andrews v. Van Duzer, 11 Johns., 38.

12. If defendant charge A. with criminally procuring an abortion, and he gives notice that he will prove that A. assisted in procuring one, without the averments necessary to show the assistance criminal, he can give no evidence under it; for the justification must be as broad as the charge. Bissell v. Cornell, 24 Wend., 354.

13. In slander, where the charge is crime, a conviction of the plaintiff of the crime is, in general, admissible to sustain a justification, but it is only *prima facie* evidence and must be excluded if the defendant was a witness in the criminal prosecution. Maybee v. Avery, 18 Johns., 352. If the charge be of a particular larceny, of which the defendant was convicted, the conviction is a full justification, though a pardon was granted. Baum v. Clause, 5 Hill, 196.

14. An answer in justification of a libel imputing perjury which relies upon the truth of the words published, but does not aver that the words were true in the sense imputed to them in the complaint, is bad. Downey v. Dillon, 52 Ind., 442.

15. The article claimed to be a libel charged the plaintiff, her uncle's housekeeper, with larceny, in openly giving some second-hand clothing in charity. But it was held, as this was not larceny, the proof of it was not a justification. Mielenz v. Quasdorf, 68 Iowa, 726.

16. A plea of justification must be as broad as the libel, and answer every material part of the declaration. It is not a good plea that the plaintiff was a public man, a lecturer and speaker, and professed to be an educator of the public, and that the defendant, a public journal, made the publication with good intent, having reason to believe it to be true. A journal has no right to make specific charges against a man unless they are actually true. Honesty of motive is not a sufficient defense. Smith v. Tribune Co., 4 Biss., 477. To make out a defense by way of justification of libel, the truth of the publication must be proved just as it is charged. Proving the truth of a part of the charge made in the publication is not a defense. Whittemore v. Weiss, 33 Mich., 348; Palmer v. Smith, 21 Minn., 419;

Smith v. Tribune Co., 4 Biss., 477. An allegation that the plaintiff in order to avoid arrest for a participation in an offense feigned insanity and took refuge in a lunatic asylum is a material part of the libel. Smith v. Tribune Co., 4 Biss., 477.

17. An answer in justification of an alleged slander charging perjury in testimony given on a trial, which sets out as material testimony given by the plaintiff on such trial and alleges it to have been false, but does not allege that it was known to the witness to be false, or that it was wilfully and corruptly given, is bad on demurrer as not stating facts sufficient to constitute the crime sought to be justified. Downey v. Dillon, 52 Ind., 442.

18. In an action by a female for slanderous words containing a general imputation of whoredom, an answer of justification which does not allege any specific act of whoredom on the part of the plaintiff, but alleges that she is of notorious bad character for chastity and that the words charged in the complaint are true, is not sufficient in law. Sumnan v. Brewin, 52 Ind., 140.

19. When a libel imputes to a party the commission of a crime, and a plea of justification is interposed, the defendant must fasten upon the plaintiff all the elements of the crime both in act and intent. But, to this end, the strict rule of the criminal law as to the sufficiency of the evidence to overcome in the minds of the jury the natural presumption of innocence does not apply. The proof may be by a preponderance of the evidence, and not conclusive beyond a reasonable doubt. McBee v. Fulton, 47 Md., 403; Kidd v. Fleck, 47 Wis., 443. Though in some states a contrary rule is held.

20. When the plea of not guilty is filed, notwithstanding pleas of justification are also filed, the plaintiff must prove the speaking of the words alleged, and the pleas cannot be used to convict the defendant; nor will he be bound to make his defense until he is proven guilty. Fornan v. Childs, 66 Ill., 544.

II. What is a Justification.

1. The truth of the words spoken is a justification in an action for oral slander, although they may have been spoken maliciously and without any reason to suppose that they were true. Foss v. Hildreth, 93 Mass., 76.

2. A plea of justification for false swearing must not only state the circumstances under which the false swearing occurred, but must also aver that the matter sworn to was material to the cause of action. McGough v. Rhodes, 12 Ark., 625.

3. In a civil action for a libel, where the truth of the alleged libel is pleaded in justification, it may be proved as a complete bar; and in such case the motives with which the publication was made are not material. Joannes v. Jennings, 6 Thomp. & C. (N. Y.), 138; 4 Hun, 66.

4. Truth of the libelous words is a complete defense in a civil action — not merely a ground of mitigation of damages. In criminal prosecutions the truth of the matter charged as libelous is not a full and complete defense, unless the publication appears to have been made for public benefit or justifiable ends. Castle v. Houston, 19 Kan., 417.

5. To constitute a justification the answer should aver the truth of the defamatory matter charged. It is not sufficient to set up the facts which

only intended to establish the truth of such matter. Thrall v. Smiley, 9 Cal., 529.

6. To an action for charging the plaintiff with having forged a certain instrument of writing, the truth was pleaded in justification. It was held (1) that such a plea could not be objected to because it avers the forged instrument to be in the plaintiff's possession or destroyed; (2) that in a plea with such an averment the instrument need not be particularly described, as would be otherwise required. Kent v. David, 3 Blackf. (Ind.), 301.

7. To an action for saying that a certain statement made by the plaintiff under oath in a trial of a certain cause was false, a plea in justification that the plaintiff did in that statement commit perjury is good; but a plea that he committed perjury in other parts of his testimony on the same trial is bad. Starr v. Harrington, 1 Ind., 515.

8. In an action of slander, if the brief statement purports to justify the speaking of the words charged, the speaking of them must be fully and distinctly admitted and justified or the statement will be held defective. Where the words spoken impute a crime it is not necessary, in order to support a plea or brief statement in justification, to produce the same amount of testimony as would be necessary to convict the plaintiff on an indictment for the crime. The ordinary rule of evidence in civil cases applies. Folsom v. Brown, 25 N. H. (5 Fost.), 114.

9. It is no excuse, for general pleadings in a plea in justification of a libel that the subject comprehends multiplicity of matter tending to prolixity. Nor is it sufficient that the plea is as general as the charge in the declaration; it ought to state specifically the facts on which the charge was founded, in order to give the defendant an opportunity of denying and taking issue upon them. As, where the defendant charged the plaintiff with being a member of the council of revision, with receiving money for services rendered in procuring an act of incorporation to be passed, he must, in his plea of justification, state the particular facts which make out the charge with certainty, so the plaintiff may take issue on those very facts. Van Ness v. Hamilton, 19 Johns. (N. Y.), 349.

10. In an action for slander the defendant answered, "I have no recollection or belief of having so accused; but, if I did, the charge was true." It was held that the answer was good under the code. Buhler v. Wentworth, 17 Barb. (N. Y.), 649.

11. An answer which shows that the defendant was informed and believes the charges were true; that the offenses charged were in fact committed, and, as defendant believes, by the plaintiff; and disavowing malice in making the charges,— is proper as a justification, and is not obnoxious to a motion to make more definite and certain. Steinman v. Clark, 10 Abb. (N. Y.) Pr., 132.

12. Where the charge is made directly, the plea of justification should aver the truth of the charge as laid in the declaration; but when the charge is made by insinuation and circumlocution, so as to render it necessary to use introductory matter to show the meaning of the words, the plea should aver the truth of the charge which the declaration alleges was meant to be made. Snow v. Witcher, 9 Ired. (N. C.) L., 346.

13. A plea of justification, in an action for slander, should specify the

crime with certainty. Nall v. Hill, Peck (Tenn.), 325; Andrews v. Vanduzar, 11 Johns. (N. Y.), 38; Billings v. Waller, 28 How. (N. Y.) Pr., 97. And the defendant must justify the very words complained of. Ormsby v. Douglass, 2 Abb. (N. Y.) Pr., 407.

14. Under a plea of justification, where proof is offered by the defendant tending to show that the plaintiff was guilty of an imputed offense, and it is sought to repel the defendant's proof on that subject and show the plaintiff's innocence by evidence of good character, his evidence on that point and for that purpose must be confined to those traits of character which the imputed offense involves. In this case, where the imputed offense was indecent behavior towards school-girls, proof of the plaintiff's character for "modesty and chastity" was held to be properly admissible. McBee v. Fulton, 47 Md., 403.

15. A sale of goods for the purpose of preventing them from being attached by the creditors of the vendor is a fraud in law, which, in an action of slander, will justify the application of the epithets "cheat" and "swindler" to the parties concerned in it. Odiorne v. Bacon, 6 Cush. (60 Mass.), 185.

16. In slander for accusing the plaintiff with having stolen an ax several years before from one L., *held*, that the defendant might defeat the action by proving the truth of the words, notwithstanding the plaintiff, after being convicted of the offense, was regularly pardoned. Baum v. Clause, 5 Hill, 196.

17. To sustain a justification of a libel charging perjury, either two witnesses, or one witness and corroborating circumstances, are necessary; but there is no rule that the corroborating circumstances must be equivalent to the testimony of a second witness. Ransone v. Christian, 56 Ga., 351.

III. What is Not a Justification.

1. In an action for a charge of stealing hogs, it is not a good plea that the plaintiff had stolen one hog. Swan v. Rarey, 3 Blackf. (Ind.), 298. And where the charge was, "Shut your mouth, you damned whore," the defendant admitting speaking the words, but alleging that at the time he used them the plaintiff kept a house of ill-fame, it was held that under the pleadings the truth of the matter pleaded would be no justification, but would only go in mitigation of damages. Swartzell v. Day, 3 Kan., 244.

2. Where the words spoken were, "B. is a thief and has stolen corn," a plea that the "plaintiff had no action because he is a thief" was held insufficient, there being no confession of the speaking of the words. Samuel v. Bond, Litt. (Ky.) Sel. Cas., 158. Where the plaintiff declared that the defendant had said of him "he had stolen a pot and waiter," a plea in justification that the plaintiff stole "a waistcoat pattern" is not admissible. Eastland v. Caldwell, 2 Bibb (Ky.), 21.

3. In an answer averments of a general report that the plaintiff had been guilty of the crime imputed to him by the words complained of, as a defense, are irrelevant and will be stricken out on motion. Vanbenscoten v. Yaple, 13 How. Pr. (N. Y.), 97.

4. A plea of justification which does not admit the speaking of the words charged is bad on demurrer. Davis v. Matthews, 2 Ohio, 257; Anibal v. Hunter, 6 How. Pr. (N. Y.), 255.

5. In an action for slander based on a charge of perjury, the defendant justified the charge in the following words: "The defendant avers that the said plaintiff, in swearing to a bill of complaint in the court at Dresden against S. S., executor of J. S., swore falsely by stating in said bill that said estate owed nothing, when said plaintiff knew at the time he swore to said bill that the estate was indebted," etc. It was held that the circuit judge properly refused to hear proof upon this specification, for it gave the plaintiff no information of the indebtedness to be proved. The fact that the plaintiff took issue on the defective plea did not vary the case. Steele v. Phillipps, 10 Humph. (Tenn.), 461.

6. Under a statute allowing the defendant to plead as many matters as he may think necessary for his defense, and pleas of not guilty and justification are pleaded to a charge of slander, the latter plea does not amount to an admission of record of the speaking of the words charged. Wright v. Lindsay, 20 Ala., 428.

7. Where the defendant admits the speaking of the words, but justifies on the ground that they were true, he does not thereby admit probable cause so as to preclude him from showing a want of it in an action for a vexatious suit. Sterling v. Adams, 3 Day (Conn.), 411.

8. The plea of justification puts in issue the general character of the plaintiff. Bryan v. Gurr, 27 Ga., 378.

9. If interposed in good faith, and in the honest belief that it will be sustained, it will not as a matter of course aggravate the damages. Sloan v. Petrie, 15 Ill., 425.

10. Although the meaning of defamatory words cannot be enlarged by an innuendo, yet they may be enlarged by a plea of justification so as to support the declaration; as where a defendant in his plea confesses that he spoke the words by reason of a false oath taken by the plaintiff in a court of competent jurisdiction it will aid the want of a colloquium concerning proceedings in such court. Vaughn v. Havens, 8 Johns. (N. Y.), 109.

11. Where there is a publication concerning the business of a firm, and one of the members brings a suit alleging the publication to be a libel of and concerning him in his trade and business, a plea of justification is an admission that the plaintiff is one of the firm mentioned in the publication. Fidler v. Delevan, 20 Wend. (N. Y.), 57.

12. Where the defendant is charged with having imputed perjury to the plaintiff, the plea of justification is not sustained if the evidence shows that the plaintiff was honestly mistaken in what he swore to. Jenkins v. Cockesham, 1 Ired. (N. C.) L., 309.

13. Where a declaration does not show that the words spoken were material, yet a plea of justification shows that fact, the defect in the declaration is cured. Witcher v. Richmond, 8 Humph. (Tenn.), 473.

14. A plea of justification to a declaration for a libel must justify the publication according to the sense given it by the plaintiff. The charge is not to be repeated; it must be directly met. Fuller v. Delevan, 20 Wend. (N. Y.), 57.

15. An invalid and insufficient plea of justification in an action of slander, upon which no judgment could have been rendered, is entitled to no weight in aggravation of damages under the plea of not guilty. Braden v. Walker, 8 Humph. (Tenn.), 34.

16. The complaint for a libel alleged that the defendant charged the plaintiff (a dramatic author) with appropriating a play called "Flirtation." The answer stated, in justification, that the plaintiff had appropriated a play called "Mock Marriage." It was held that such a justification must be stricken out as irrelevant. Daly v. Byrne, 1 Abb. (N. Y.) N. Cas., 150.

17. The rule that a defendant in slander cannot justify by proving the plaintiff to have been guilty of another crime of the same kind as that alleged to have been in the accusation was applied where a party sought to justify his charge of sodomy with a mare by proof of sodomy with a cow. Downs v. Hawley, 112 Mass., 237.

18. Where the defense was a justification it was held that the defendant might prove palliating circumstances in mitigation of damages; but evidence that the person from whom he received the injurious statements was warranted in believing them is not competent. Hawkings v. Globe P. Co., 10 Mo. App., 174.

19. When the words charged to have been spoken impute to the plaintiff the crime of perjury without any qualification or explanation, the defendant, to make out a justification, must prove that the plaintiff in giving his evidence wilfully and corruptly swore false. It is not enough to prove that the facts sworn to by the plaintiff were not true, though it proceeded from mistake and misapprehension. McKinley v. Rob, 20 Johns. (N. Y.), 351.

20. When slanderous words are published, such as impute the crime of perjury, the law will imply malice and consequent injury. In such a case anger affords no justification. It can only palliate the offense and reduce the damages where the plaintiff has provoked the slander. Flagg v. Roberts, 67 Ill., 485.

21. In an action brought for accusing the plaintiff of the crime of buying and selling by unsealed weights and measures, and also of the crime of gross fraud and cheating at common law, a justification of the words spoken on the ground that they were true cannot be supported by evidence that the plaintiff "applied to a person to take some damaged meat and sell it without letting it be known that the plaintiff was concerned in the transaction." Chapman v. Odway, 87 Mass., 593.

§ 78. General Digest of English Cases.—

1. The libel complained of was headed, "How Lawyer B. Treats his Clients," followed by a report of a particular case, in which one client of Lawyer B. had been badly treated. That particular case was proved to be correctly reported, but this was held insufficient to justify the heading, which implied that Lawyer B. generally treated his clients badly. Bishop v. Latimer, 4 L. T., 775; Mountney v. Watton, 2 B. & Ad., 673; Chalmers v. Shackell, 6 C. & P., 475; Clement v. Lewis, 3 Brod. & Bing., 297; 7 Moore, 200; 3 B. & Ald., 702.

2. The editor of one newspaper called the editor of another "a felon editor." Justification, that the plaintiff had been convicted of felony and sentenced to twelve months' imprisonment. The court of appeal held the plea bad for not averring that the plaintiff was still enduring the punishment when the words were uttered; for that by the 9 Geo. 4, chapter 33, section 3, a person who has been convicted of felony and who has undergone the full punishment is in law no longer a felon. [A strong decision;

for ordinary readers unacquainted with that statute would surely understand 'felon editor' to mean a man who had been convicted of felony, but was now out of prison, editing a paper. The felon when in prison is usually called a "convict."] Odgers on L. & S., 174; Leyman v. Latimer, 3 Ex. D., 15, 352; 47 L. J., Ex., 470; 25 W. R., 751; 26 W. R., 305; 37 L. T., 360, 819; 14 Cox, C. C., 51.

3. Words complained of, that the plaintiff was a "libelous journalist." Proof that he had libeled one man, who had recovered from him damages £100, held insufficient. Wakley v. Cooke and Healey, 4 Ex., 511; 19 L. J., Ex., 91.

4 Libel complained of: That the plaintiff, a proctor, had three times been suspended from practice for extortion. Proof that he had once been so suspended was held insufficient. Clarkson v. Lawson, 6 Bing., 266; 3 M. & P., 605; 6 Bing., 587; 4 M. & P., 356; Johns v. Gittings, Cro. Eliz., 239; Goodburne v. Bowman, 9 Bing., 532; Clark v. Taylor, 2 Bing. N. C., 654; 3 Scott, 95; 2 Hodges, 65; Blake v. Stevens, 4 F. & F., 232; 11 L. T., 543. But when the libel complained of exposed the "homicidal tricks of those impudent and ignorant scamps who had the audacity to pretend to cure all diseases with one kind of pill," asserted that "several of the rot-gut rascals had been convicted of manslaughter, and fined and imprisoned for killing people with enormous doses of their universal vegetable boluses," and characterized the plaintiffs' system as "one of wholesale poisoning;" and it was proved at the trial "that the plaintiffs' pills, when taken in large doses, as recommended by the plaintiffs, were highly dangerous, deadly and poisonous," and "that two persons had died in consequence of taking large quantities of them; and that the people who had administered these pills were tried, convicted and imprisoned for the manslaughter of these two persons"—this was held a sufficient justification, although the expressions "scamps," "rascals" and "wholesale poisoning" had not been fully substantiated, the main charge and gist of the libel being amply sustained. Morrison v. Harmer, 3 Bing. N. C., 767; 4 Scott, 533; 3 Hodges, 108; Edsall v. Russell, 4 M. & Gr., 1090; 5 Scott, N. R., 801; 2 Dowl. (N. S.), 641; 12 L. J., C. P., 4; 6 Jur., 996.

5. Libel complained of: That no boys had for the last seven years received instruction in the Free Grammar School at Lichfield, of which plaintiff was head-master, and that the decay of the school seemed mainly attributable to the plaintiff's violent conduct. Plea of justification, that no boys had in fact received instruction in the school for the last seven years, and that the plaintiff had been guilty of violent conduct towards several of his scholars, was held bad on special demurrer, because it wholly omitted to connect the decay of the school with the alleged violence, and therefore left the second part of the libel unjustified. Smith v. Parker, 13 M. & W., 459; 14 L. J., Ex., 52; 2 D. & L., 394.

6. Libel complained of: "L., B. and G. are a gang who live by card-sharping." Pleas: Not guilty, and a justification giving several specific instances in which persons named had been cheated by the trio at cards. *Held*, by Cockburn, C. J., when two specific instances had been proved, that the plea had been proved in substance, and that it was not necessary to prove the other instances alleged. Reg. pros. Lambri v. Labouchere, 14 Cox, C. C., 419; Wilmett v. Harmer and another, 8 C. & P., 695.

7. Libel complained of: "I see that the restoration of Skirlaugh church has fallen into the hands of an architect who is a Wesleyan, and can have no experience in church work. Can you not do something to avert the irreparable loss which must be caused if any of the masonry of this ancient gem of art be ignorantly tampered with?" Justification: "The facts contained in the letter are true, and the opinions expressed in it, whether right or wrong, were honestly held and expressed by the defendant." Particulars under this plea: "The plaintiff cannot show experience in church work, *i. e.*, of the kind which in the opinion of the defendant was requisite." *Held*, that this was no justification at all, because the letter obviously meant that the plaintiff could show no experience in the work which he had been employed to execute. Verdict for the plaintiff. Botterill v. Whytehead, 41 L. T., 588.

8. Libel complained of: That the plaintiff had "bolted," leaving some of the tradesmen of the town to lament the fashionable character of his entertainment. Proof that he had quitted the town, leaving some of his bills unpaid, *held* insufficient. O'Brien v. Bryant, 16 M. & W., 168; 16 L. J., Ex., 77; 4 D. & L., 341.

9. Libel complained of: That the plaintiff, having challenged his opponent to a duel, spent the whole of the night preceding in practicing with his pistol, and killed his opponent, and was therefore guilty of murder. Proof that the plaintiff had killed his opponent, and had been tried for murder, *held* insufficient; for the charge of pistol practicing was considered a separate and substantial charge, and it was not justified. Helsham v. Blackwood, 11 C. B., 128; 20 L. J., C. P., 187; 15 Jur., 861.

10. The libel complained of was a notice published by a railway company, to the effect that the plaintiff had been convicted of riding in a train for which his ticket was not available, and was sentenced to be fined £1, or to three weeks' imprisonment in default of payment. Proof that he had been so convicted and fined £1, and sentenced to a fortnight's imprisonment in default of payment, *held* sufficient; as the error could not have made any difference in the effect which the notice would produce on the mind of the public. Alexander v. N. E. R. Co., 34 L. J., Q. B., 152; 11 Jur. (N. S.), 619; 13 W. R., 651; 6 B. & S., 340. But see Gwynn v. S. E. R. Co., 18 L. T., 738; Biggs v. G. E. R. Co., 16 W. R., 908; 18 L. T., 482; Lay v. Lawson, 4 Ad. & E., 795; Edwards v. Bell, 1 Bing., 403; Tighe v. Cooper, 7 E. & B., 639; 26 L. J., Q. B., 215; 3 Jur. (N. S.), 716.

§ 79. **Effect of Failure to Establish the Plea.**— The fact that a party fails to establish the truth of his plea of justification by a preponderance of proof is not of itself conclusive evidence of malice. It is sufficient if he believed it was true. Such a defense can only be deemed proof of malice where it appears from the whole case that it was made with malicious intent; and even then it is simply proof, but not conclusive proof, of malice.[1]

[1] Hawyer v. Hawyer, 78 Ill., 412.

§ 80. **Plea of Justification in Actions for Slander of Title.**— A declaration stated that the plaintiff advertised certain of his goods for sale by public auction, and the defendant printed and published of and concerning the plaintiff and the said sale as advertised a false, malicious and defamatory libel, to the effect that certain of the goods were his (defendant's) property; and warning persons that in case they should purchase the same, or any part thereof, they would be held responsible to the defendant. The defendant pleaded in justification that the plaintiff did unlawfully detain from the defendant certain goods (describing them), the property of the defendant, and that the defendant was informed and believed that the plaintiff did intend to dispose of them at the said sale, and therefore the defendant published the said words for the purpose of warning all persons from purchasing the said goods so detained as aforesaid, and not otherwise; and it was held on demurrer that the plea was an answer to the action, though it might have been struck out or amended if, instead of demurring, application had been made to a judge at chambers.[1]

§ 81. **Bill of Particulars under the General Issue.**— It has been held in a recent case under the English practice act that although the defendant plead merely not guilty he may be required to deliver particulars where the slander consists of imputations of infringements of letters patent.[2]

Illustration: Where the plaintiffs carried on the business of machine makers, and in their business sold machines to certain persons, the defendant wrote letters and made verbal statements to such persons, alleging that the machines so sold were infringements of a patent which he had obtained for such machines, and making claims in respect of such alleged infringements and the use of the machines. An action having been brought by the plaintiffs in respect of the injury caused by these letters and statements, the defendant pleaded not guilty. The court ordered him to deliver particulars to the plaintiff, showing in what part or parts the machines of the plaintiffs mentioned in the declaration were an infringement of the defendant's patents, and pointing out by reference to line and page of his specifications what part of the inventions therein described he alleged to have been infringed. Wren v. Weild, 38 L. J., Q. B., 88.

§ 82. **The Replication.**— The general replication *de injuria* is the proper way of replying to a plea of justification in ac-

[1] Carr v. Duckett, 5 N. & H., 783; [2] Wren v. Weild, 38 L. J., Q. B., 29 L. J., Ex., 468; Folkard's Starkie, 88; Folkard's Starkie, 142. 141.

tions of oral and written slander. The practice is not to repeat the words over again in the replication, but merely to say "that the defendant of his own wrong, without the excuse by the said defendant in his said plea above alleged in that behalf, said and spoke the said words in the said declaration [or in the first, second, etc., counts of the said declaration mentioned]; for the speaking whereof the said plaintiff has above complained against him, to wit, at, etc., aforesaid, in the county aforesaid."[1]

§ 83. **Illustrations — Replication De Injuria — The Form at Common Law.—**

And the plaintiff, as to the plea of the defendant by him secondly above pleaded, says that he, the plaintiff, by reason of anything in that plea alleged, ought not to be barred from having his aforesaid action, because he says that the defendant, at the said time when, etc., in the said declaration mentioned, of his own wrong, and without the cause by him in that plea mentioned, did commit the said several grievances in the said plea mentioned, in manner and form as the plaintiff has in his said declaration above thereof complained against him, the defendant. And this the plaintiff prays may be inquired of by the country, etc.

§ 84. **Conclusion.**— It is not within the scope of this work to further discuss the rules of pleading relating to actions for defamation in the various courts of the United States. These rules depend largely upon local statutes, in most instances modifying the rules of the common law, and in some entirely abolishing them. Reference must therefore be had to local laws.

[1] Heard on L. & S., § 252; 1 Saunders, 244.

CHAPTER XXII.

PRECEDENTS OF PLEADINGS IN CIVIL CASES.

I. Slander.

II. Libel.

III. Libel and Slander.

It is not proposed in this chapter to present any set of forms of pleadings, in actions for defamation adapted to the different systems of the several states. The most that can be done is to present a collection of approved common-law precedents, both American and English, as well as the approved precedents

under the modern English system, trusting that in some of them the practitioner may find useful suggestions whether he pleads by the code or under the common law.

I. Slander.

§ 1. A Declaration in Slander at Common Law — Skeleton Form (Chicago Legal News, Form No. 767).—

In the —— Court of —— County.

—— Term, A. D. 18—.

State of ——, } ss.
—— County. }

—— ——, plaintiff in this suit, by —— ——, attorney, complains of —— ——, defendant in this suit, summoned, etc., of a plea of trespass on the case.

For that whereas the said plaintiff is a good, true, honest and virtuous inhabitant of this state, and as such from the time of —— nativity hitherto hath demeaned and behaved —— and from all and all manner of ——, and all such enormous ——, hath for the whole space of —— past life, until the time of speaking and uttering the false, scandalous, malicious and defamatory words hereafter mentioned to have been spoken, remained free and unsuspected. And the said plaintiff for the time aforesaid was esteemed and reputed a person of good name, fame, credit and reputation; by reason whereof —— had gained the love, good-will and esteem of all —— neighbors, and divers other good people of this state.

And whereas, also, the said plaintiff for a long time past, and before the speaking and uttering the false, scandalous and defamatory words hereafter mentioned to have been spoken, followed and carried on the lawful art, trade and business of a ——, and by means thereof gained and acquired many large sums of money.

Nevertheless, the said —— ——, not being ignorant of the premises, but contriving and fraudulently intending the said ——, not only to deprive —— of —— good name, fame and credit aforesaid, and to bring —— into scandal and disrepute among—— neighbors, but also to subject the said —— —— to prosecution and punishment for ——, on the —— day of——, one thousand eight hundred and ——, at the county aforesaid, to the —— and in the presence and hearing of divers persons of this state, did speak and utter, and with a loud voice publish and proclaim the following false, scandalous and defamatory words, to wit: You, the said —— ——, the plaintiff meaning, ——, thereby meaning and intending the said ——.

And whereas, also, the said —— ——, of —— further malice against the said plaintiff, to wit, on the same day and year, at the county aforesaid, of and concerning the said plaintiff, and in the presence and hearing of divers other people, did speak and utter, and with a loud voice publish and proclaim certain other false, scandalous and defamatory words, to wit: ——, the plaintiff meaning, ——, thereby meaning and intending the said ——.

And whereas, also, the said —— ——, of —— further malice against the said plaintiff, to wit, on the same day and year at the county aforesaid,

of and concerning the said plaintiff, and in the presence and hearing of divers other people, did speak and utter, and with a loud voice publish and proclaim certain other false, scandalous and defamatory words, to wit: ——, the plaintiff meaning, ——, thereby meaning and intending the said ——.

And whereas, also, the said —— ——, of—— further malice against the said plaintiff, to wit, on the same day and year, at the county aforesaid, of and concerning the said plaintiff, and in the presence and hearing of divers other people, did speak and utter, and with a loud voice publish and proclaim certain other false, scandalous and defamatory words, to wit: ——, the plaintiff meaning, ——, thereby meaning and intending the said ——. And the said plaintiff in fact saith that —— ——, the said plaintiff, is nowise guilty of the said several —— by the said false, scandalous and defamatory words so injuriously laid to —— charge, by reason whereof the said plaintiff has not only been greatly hurt and injured in —— good name, fame and reputation aforesaid, and been brought into disgrace and disrepute among —— neighbors and divers other persons who, ever since the speaking and uttering the said several false, scandalous and defamatory words so vehemently suspected —— of having been ——; and as also being a person meriting punishment, that they have refused to have any communion or conversation with ——, but ——, the said plaintiff, has been subjected and made liable to prosecution and punishment for the said ——. And the said plaintiff further in fact saith that divers persons who used to have dealings and business with——, the said plaintiff, in —— said lawful art, trade and business, and by means of whom the said plaintiff had gained large sums of moneys, have ever since the speaking and uttering the said several false, scandalous and defamatory words refused to have dealings or business with the said plaintiff as they were used and accustomed to have, and otherwise would have had, to wit, at the county aforesaid ——. To the damage of the said plaintiff of —— dollars, and therefore he brings his suit, etc.

—— ——,
Plaintiff's Attorney.

§ 2. **A General Form at Common Law** (Puterbaugh's Common Law, 477).—

In the Circuit Court.

February Term, A. D. 1889.

STATE OF ILLINOIS, }
Peoria County. }

A. B., the plaintiff, by E. F., his attorney, complains of C. D., the defendant, of a plea of trespass on the case. For that whereas the plaintiff, before and at the time of the committing by the defendant of the several grievances hereinafter mentioned, was a person of good name, credit and reputation, and deservedly enjoyed the esteem and good opinion of his neighbors and other worthy citizens of this state, yet the defendant, well knowing the premises, but contriving and maliciously intending to injure the plaintiff, and to bring him into public scandal and disgrace, on, etc., in the county aforesaid, in a certain discourse which the defendant then and there had of and concerning the plaintiff, in the presence and hearing of divers persons, falsely and maliciously, in the presence and hearing of

those persons, spoke and published of and concerning the plaintiff, the false, scandalous, malicious and defamatory words following, that is to say: He, etc. [*setting out the words with proper innuendoes, etc.*].

Second count: And afterwards, to wit, on, etc., aforesaid, in, etc., aforesaid, in a certain other discourse which the defendant then and there had, in the presence and hearing of divers other persons, of and concerning the plaintiff, the defendant, further contriving and intending as aforesaid, in the presence and hearing of those persons falsely and maliciously spoke and published of and concerning the plaintiff these other false, scandalous, malicious and defamatory words following, that is to say: He, etc. [*setting out the words with proper innuendoes*].

By means of the committing of which said several grievances by the defendant, the plaintiff has been and is greatly injured in his said good name, credit and reputation, and brought into public scandal and disgrace, and has been and is shunned and avoided by divers persons, and has been and is otherwise injured. To the damage of the plaintiff of —— dollars, and therefore he brings his suit, etc.

§ 3. **A Declaration for Words Charging Larceny** (Puterbaugh's Common Law, 481).—

[*Title, etc.*]

For that whereas the plaintiff, before and at the time of the committing by the defendant of the several grievances hereinafter mentioned, was a person of good name, credit and reputation, and deservedly enjoyed the esteem and good opinion of all his neighbors and worthy citizens of this state. Yet the defendant, well knowing the premises, but contriving and maliciously intending to injure the plaintiff, and to bring him into public scandal and disgrace, on, etc., in, etc., in a certain discourse which the defendant then and there had, of and concerning the plaintiff, in the presence and hearing of divers persons, falsely and maliciously, in the presence and hearing of the said persons, spoke and published, of and concerning the plaintiff, the false, scandalous, malicious and defamatory words following, that is to say: "He" (meaning the plaintiff) "stole my corn." "He" (meaning the plaintiff) "and S. H. stole my corn." "He" (meaning the plaintiff) "stole my hogs." "He" (meaning the plaintiff) "stole my eggs and apples." "He" (meaning the plaintiff) "keeps S. H. to steal my" (meaning the defendant's) "corn, and he" (meaning the plaintiff) "conceals it." Meaning and intending thereby to charge that the plaintiff had feloniously stolen, taken and carried away the goods and chattels of the defendant.

[*A second count may be here inserted, if deemed necessary, concluding the declaration as follows:*]

By means of the committing of which said several grievances by the defendant the plaintiff has been and is greatly injured in his said good name, credit and reputation, and brought into public scandal and disgrace, and has been and is shunned and avoided by divers persons, and has been and is otherwise injured; to the damage of the plaintiff of —— dollars, and therefore he brings his suit, etc.

§ 4. **A Short Form — Imputation of Robbery and Larceny** (Yates' Pleadings, 428).—

(1) [*Title.*]

(2) *First count:* For that whereas the said plaintiff always was and is a good, true and honest citizen, and never was guilty of any of the crimes hereinafter laid to his charge; nevertheless, the said defendant, well knowing the premises, but contriving and maliciously intending to injure, defame and slander the said plaintiff in his good name, to wit, on the 23d day of December, 1834, at the city of Albany, in the county of Albany, in a certain discourse which the said defendant then and there had with the said plaintiff, in the presence and hearing of good and worthy persons, to, of and concerning the said plaintiff, these false, scandalous and malicious words did publish and declare, to wit: "You (the said plaintiff meaning) are a robber; you (the said plaintiff meaning) are a damned robber; I (the said defendant meaning) believe you are a robber and a thief; you (the said plaintiff meaning) are a counterfeiter (meaning that the said plaintiff had been guilty of counterfeiting money, or some evidence of debt, or some paper executed for a valuable consideration); I (the said defendant meaning) believe you are a counterfeiter."

(3) *Second count — Ad damnum and conclusion:* And whereas also the said defendant, with further malice towards the said plaintiff, afterwards, to wit, on the same day and year, and at the place aforesaid, in a certain other discourse which the said defendant then and there had in the presence and hearing of divers other good people, of and concerning the said plaintiff, did falsely and maliciously publish and declare, in the presence and hearing of these people, these other false and scandalous words, to wit [*here insert again the same words, or others*], by reason of the speaking, publishing and uttering of which said false, scandalous and malicious words the said plaintiff is greatly prejudiced in his good name, fame, credit and reputation; therefore the said plaintiff says that he is injured, and has sustained damage to the amount of one thousand dollars; and therefore the said plaintiff brings suit, etc.

§ 5. **For Indirect Imputation of Perjury.**—

(1) [*Title.*]

(2) [*General inducement of good character.*]

(3) [*Inducement — Exculpatory averment — Innocence of the charge in question.*]

(4) [*Inducement of the consequences of such character.*]

(5) *Special inducement — Statement of extrinsic matter:* And whereas a certain issue [*or* certain issues, *according to the fact*] joined between E. F. and G. H. in a plea of —— in the court of our said lord the king before the king himself, to wit, at Westminster, was [*or* were] duly tried at the assizes held in and for the county of ——, at ——, in the said county of ——, on, etc., by a certain jury of that county, in that behalf, before ——, the justices of our said lord the king assigned to take the assizes in the said county of ——. And the said A. B., at the said trial, was then and there duly sworn before the said justices at the said assizes, and was then and there examined and gave his evidence as a witness upon the said trial.

(6) *Statement of malicious intent — The colloquium — Charge and innuendoes:* Yet the said C. D., well knowing the premises, but contriving and maliciously intending to injure the said A. B. in his said good name, fame and character, and to bring him into public scandal, infamy and disgrace, and to cause it to be suspected and believed that he was guilty of perjury, and to subject him to the pains and penalties by law provided against persons guilty thereof, and to vex, harass, oppress and ruin him, the said plaintiff, heretofore, to wit, on, etc., at, etc., in a certain discourse which he, the said defendant, then and there had in the presence and hearing of divers good and worthy subjects of the realm, of and concerning the said A. B., and of and concerning the trial of the said issue [*or* issues], and the said evidence so as aforesaid given by the said A. B. at and upon the said trial, he, the said C. D., then and there in the presence and hearing of the said last-mentioned subjects, falsely and maliciously spoke and published of and concerning the said A. B., and the said trial, and the said evidence so given by the said A. B. on the said trial, the several false, scandalous, malicious and defamatory words following, that is to say: "He (meaning the said A. B.) forswore himself at the trial of that cause (meaning the said trial above mentioned)."

Second count: And for that the said C. D., contriving and intending as aforesaid, afterwards, to wit, on, etc., at, etc., in a certain other discourse which he, the said C. D., then and there had in the presence and hearing of divers other good and worthy subjects of this realm of and concerning the said A. B., and of and concerning the said trial, falsely and maliciously spoke and published, in the presence and hearing of the said last-mentioned subjects, the several other false, scandalous, malicious and defamatory words following, of and concerning the said A. B., and of and concerning the said trial, and of and concerning the said evidence so as aforesaid given by the said A. B. on the said trial, that is to say: "He (meaning the said A. B.) forswore himself at ——" (meaning at the said trial of the said issue).

(7) [*Averment of general damage.*]

(8) [*Averment of special damage.*]

(9) [*Conclusion — The ad damnum.*]

§ 6. For Charging the Plaintiff with Swearing Falsely (Wolbrecht v. Baumgarten, 26 Ill., 291).—

[*Title, etc.*]

For that whereas the plaintiff always was and is a good, true and honest citizen of this state, and, until the grievances hereinafter mentioned, unsuspected of any perjury, false swearing or other crime whatever, and thereby had deservedly gained the good opinion of all his neighbors, etc.; and whereas, before the speaking and publishing of the false and scandalous words hereinafter mentioned, to wit, on, etc., at, etc., the plaintiff in this suit had duly appeared before S. S., Esq., a justice of the peace in and for the town of ——, in the county of ——, and state of Illinois, duly elected and sworn as such justice of the peace, and being then and there a witness on the trial of a certain cause before said justice of the peace, in which the people of the state of Illinois were the plaintiffs, and G. W. was the defendant, and being then and there sworn by the said S. S., justice of the

peace as aforesaid, to testify upon the trial of said cause (the said S. S., Esq., as such justice, then and there having jurisdiction of the action, and having full power to administer such oath to the plaintiff), and having been duly sworn as aforesaid, the plaintiff did on oath testify and make certain statements material to the issue in the said cause then pending before the said S. S., Esq., justice of the peace as aforesaid. Yet the defendant, well knowing the premises, etc., and then and there maliciously and falsely intending to have it believed that the plaintiff had been guilty of false swearing and perjury, before the aforesaid justice of the peace, in the trial of the aforesaid cause, and that he, the plaintiff, was guilty of perjury therein, afterwards, to wit, on, etc., at the county aforesaid, in a certain conversation which the defendant then and there had with the plaintiff in the presence and hearing of divers good and worthy citizens of said county, of and concerning and to the plaintiff, and of and concerning his aforesaid oath and his evidence and the said oath on the trial of the cause aforesaid before S. S., Esq., justice of the peace as aforesaid, then and there, in a loud voice and in the presence and hearing of the aforesaid citizens, falsely, wickedly, wrongfully and maliciously uttered, spoke, published and proclaimed of and concerning and to the plaintiff, and of and concerning his oath and evidence as aforesaid, these false, scandalous, malicious and defamatory words following, that is to say: "You" (meaning the plaintiff) "have sworn to a damned lie" (meaning the oath and evidence aforesaid so taken as aforesaid by and before S. S., justice of the peace as aforesaid). "You" (meaning the plaintiff) "have sworn to a damned lie before S. S., and I can prove it." "You" (meaning the plaintiff) "have sworn to a lie. I can prove it by your own daughter." "You" (meaning the plaintiff) "have sworn that you never spoke to me previous to that time in the street; and that is a damned lie and I can prove it; and now go and sue me in court if you dare; you had better take down the names of witnesses." "You" (meaning the plaintiff) "have sworn falsely, and I can prove it." "You" (meaning the plaintiff) "have committed perjury, and I can prove it by your daughter." "You committed perjury." "You swore falsely." "You swore to a lie." "You swore to a damned lie." "I would not believe you under oath." "You are a damned liar, and you swore to a damned lie before S." "You swore falsely before S. on the trial," meaning thereby that the plaintiff had committed the crime of perjury, to wit, at the county aforesaid, to the damage of the plaintiff of —— dollars; wherefore he brings suit, etc.

§ 7. For Words Imputing a Propensity to Commit Sodomy, Spoken in Answer to a Question in an Action by the Keeper of a Bathing-house (2 Chitty's Pleadings, 641).—

[*Title, etc.*]

For that whereas the said plaintiff, before and at the time of the said defendant's committing the grievances heretofore mentioned, was, and from thence hitherto hath been and still is, lawfully possessed of certain rooms with the appurtenances at, etc. [*venue*], and during all that time kept the same for the purpose of persons bathing therein, for certain reward to the said plaintiff in that behalf, to wit, at, etc. [*venue*], aforesaid, whereby the

said plaintiff had acquired and was then daily and honestly acquiring sundry great gains and profits, to the comfortable support of himself and to the great increase of his riches, to wit, at, etc. [*venue*], aforesaid. And whereas also, before and at the time of the committing of the grievances hereinafter mentioned, one E. F. had been and was and still is suspected by divers persons, subjects of this realm, to have been guilty of sodomitical practices. Yet the said defendant, well knowing the premises, but greatly envying the happy state and condition of the said plaintiff, and contriving and wickedly and maliciously intending to injure the said plaintiff in his aforesaid good name, fame and credit and to bring him into public scandal, infamy and disgrace with and amongst all his neighbors and other good and worthy subjects of this realm to whom he was in anywise known, and cause it to be suspected and believed by those neighbors and subjects, that the said plaintiff had been and was guilty of sodomy and sodimitical practices, and to subject him to the pains and penalties of this kingdom, made and provided against and inflicted on persons guilty thereof, heretofore, to wit, on, etc., at, etc. [*venue*], in a certain discourse which he, the said defendant, then and there had in the presence and hearing of one J. S. in answer to a certain question then and there put to him by the said J. S. why he, the said defendant, had not returned to sleep at the said plaintiff's house, falsely and maliciously spoke and published of and concerning the said plaintiff the false, scandalous, malicious and defamatory words following, that is to say, etc. [*here set out the slander with innuendoes*]; with this, that the said plaintiff will verify that the said defendant thereby then and there meant to insinuate and have it understood by the said J. S. that the said plaintiff had been suspected to have been and had been guilty of sodomy and sodomitical practices, and so the said J. S. then and there understood the said word, to wit, at, etc. [*venue*], aforesaid.

And afterwards, to wit, on, etc., at, etc. [*venue*], aforesaid, in a certain other discourse which the said defendant then and there had with the said J. S. in presence and hearing of divers good and worthy subjects of this realm, the said defendant, further contriving and intending as aforesaid, then and there, in the presence and hearing of the said last-mentioned subjects, in answer to a certain question then and there put him by the said J. S., that is to say, why he, the said defendant, had not returned to the said plaintiff, he, the said defendant, then and there, in the presence and hearing of the said J. S., then and there falsely and maliciously spoke and published of and concerning the said plaintiff these other false, scandalous, malicious and defamatory words following, that is to say [*here state other words, and add such other counts as may be useful*]. By means of the committing of which said several grievances by the said defendant, the said plaintiff not only had been and is greatly injured in his aforesaid good name, fame and credit, and brought into public scandal, infamy and disgrace with and amongst all his neighbors and other good and worthy subjects of this realm, insomuch that divers of those neighbors and subjects, to whom the innocence and integrity of the said plaintiff in the said premises were unknown, have, on occasion of the speaking and committing of the said grievances, from thence hitherto suspected and believed and still do suspect and believe the said plaintiff to have been and to be a person

guilty of sodomitical practices, and have, on that account, from thence hitherto shunned and avoided the company and conversation of the said plaintiff, and have wholly refused and still do refuse to have any acquaintance or discourse with him, as they were before used and accustomed to do, and would have done again, had not the said grievances been so committed as aforesaid; and also, by reason and by means of the committing the said grievances, and on no other account whatsoever, the Rev. Mr. C. and family, Mr. L., Mr. A., Mr. P., etc., etc., and divers other persons who would otherwise have frequented and bathed in and from the said rooms, with the appurtenances, of the said plaintiff, and paid him certain reward in that behalf, have, on occasion of the committing of the said grievances by the said defendant, wholly declined and neglected so to do; and the said plaintiff hath thereby lost and been deprived of divers great gains and profits which might and would have otherwise arisen and accrued to him from the said persons so bathing in the said rooms, with the appurtenances, as aforesaid, and the said plaintiff hath been and is, by reason of the committing of the said several grievances, otherwise greatly injured and damnified, to wit, at, etc. [*venue*], aforesaid. To the damage of the said plaintiff of £——, and therefore he brings his suit, etc.

§ 8. **For Words Imputing a Want of Chastity** (Elam v. Badger, 23 Ill., 498).—

[*Title, etc.*]

For that whereas the plaintiff now is a virgin and a chaste woman, and from the time of her nativity hath been so, and hath been accounted, esteemed and reputed as such among her neighbors, as well as of good reputation and fame by all other people, and hath all her life-time continued untouched and unsuspected of the atrocious crimes of adultery or fornication, or any such enormous crimes; nevertheless the defendant, though well knowing the premises, but contriving maliciously and wickedly to injure and defame the plaintiff in her good name and reputation, and to bring her to disgrace and infamy, and to subject her to the penalties and punishment provided by law in such cases, to wit, on, etc., at, etc., in presence of divers good people of this state, in a certain discourse which the defendant then and there had of and concerning the plaintiff, did falsely and maliciously speak and publish of and concerning the plaintiff, and of and concerning a charge of fornication, and thereby intending to charge the plaintiff with having been guilty of said crime of fornication, and then and there intended that said citizens, who then and there heard of said charge, should so understand the defendant, and who then and there did so understand the defendant, the false, scandalous, malicious and defamatory words following, that is to say: "N. K. told me (meaning defendant) that he (N. K.) had s——d Miss B." (meaning plaintiff). "There is a man on the ground here that heard him (meaning N. K.) say so." "The man saw K. s——w her (meaning plaintiff) once." "N. K. told me (meaning defendant) that he (N. K. meaning) had s——d M. B. (meaning plaintiff)." "N. K. told me (meaning defendant) that he (N. K. meaning) had s——d M. B. (meaning plaintiff) at Elijah Stevens'." "Robert Smith told me (meaning defendant) that he (Robert Smith meaning) had heard of a number of men who had done the same thing." Meaning thereby then and there to charge that

the plaintiff, being and always having been an unmarried woman, had been and was guilty of the crime of fornication; by means of which false, scandalous and malicious words so spoken and published the plaintiff had fallen into disgrace, contempt and infamy with many persons with whom previously she was in great esteem; to the damage of the plaintiff of —— dollars, wherefore she brings suit, etc.

By —— ——, her Attorney.

§ 9. **For Words Spoken in a Foreign Language** (Puterbaugh's Common Law, 482).—

[*Title, etc.*]

For that whereas the plaintiff, before and at the time of the committing by the defendant of the several grievances hereinafter mentioned, was a person of good name and reputation, and deservedly enjoyed the esteem and good opinion of his neighbors and other worthy citizens of this state; yet the defendant, well knowing the premises, but contriving and maliciously intending to injure the plaintiff and to bring him into public scandal and disgrace, on, etc., in, etc., in a certain discourse which the defendant then and there had of and concerning the plaintiff, in the presence and hearing of divers persons, falsely and maliciously in the presence and hearing of the said divers persons, who then and there understood the German language, spoke and published of and concerning the plaintiff the false, scandalous, malicious and defamatory words following, that is to say [*here set out the words in the German language*], which said words signified and meant in the English language as follows, that is to say [*here set out the correct translation of the words in English with proper innuendoes*].

[*Here insert a second count if deemed necessary, and conclude as follows:*]

By means of the committing of which said several grievances by the defendant the plaintiff has been and is greatly injured in his good name and reputation, and brought into public scandal and disgrace; and has been and is shunned and avoided by divers persons, and has been and is otherwise injured; to the damage of the plaintiff of —— dollars, and therefore he brings his suit, etc.

§ 10. **For Words Spoken in the French Language Imputing a Want of Chastity** (Schmisseur v. Kreilich, 92 Ill., 349).—

[*Title, etc.*]

For that whereas the plaintiff, before and at the time of the committing by the defendant of the several grievances hereinafter mentioned, was a person of good name and reputation, and deservedly enjoyed the esteem and good opinion of her neighbors and other worthy citizens of this state; yet the defendant, well knowing the premises, but contriving and maliciously intending to injure the plaintiff, and to bring her into public scandal and disgrace, on, etc., in, etc., in a certain discourse which the plaintiff then and there had, of and concerning the plaintiff, in the presence and hearing of divers persons, falsely and maliciously, in the presence and hearing of the said divers persons, who then and there understood the French language, spoke and published of and concerning the plaintiff, the false, scandalous, malicious and defamatory words following, in the said French language, that is to say: "La fille, Kreilich, a faite la putaine avec mon

garçon." Which said words signified and meant in the English language as follows, that is to say: The girl, Kreilich (meaning the plaintiff), has acted the whore with my boy (meaning the boy of the defendant); meaning thereby then and there to charge that the said plaintiff, being and always having been an unmarried woman, had been and was guilty of fornication.

And also for that whereas afterwards, to wit, on, etc., aforesaid, in, etc., aforesaid, in a certain other discourse which the defendant then and there had of and concerning the plaintiff, in the presence of divers persons who then and there understood the French language, the defendant falsely and maliciously, in the presence and hearing of those persons, spoke and published of and concerning the plaintiff other false, scandalous, malicious and defamatory words following, in the said French language, that is to say: "Elle a fait la putaine à Bellville, à St. Louis et au village." Which said words signified and meant in the English language as follows, that is to say: She [meaning the plaintiff] has acted the whore in Bellville, in St. Louis and in the village; meaning then and there to charge that the said plaintiff, being and always having been an unmarried woman, had been and was guilty of fornication.

By means of the committing of which said several grievances by the defendant the plaintiff has been and is greatly injured in her said good name, credit and reputation, and brought into public scandal and disgrace, and has been and is shunned and avoided by divers persons, and has been and is otherwise injured; to the damage of the plaintiff of —— dollars, and therefore she brings her suit, etc.

§ 11. **For Slander by Question and Answer** (2 Chitty's Pleadings, 641; 8 T. R., 150; 4 B. & C., 247).—

(1) [*Title, etc.*]

(2) [*Inducement of good character, etc.*]

(3) [*Statement of extrinsic matter if necessary.*]

(4) [*Statement of malicious intent.*]

(5) *Special colloquium as follows:* to wit, on, etc., at, etc. [*venue*], in a certain discourse which he, the said defendant, then and there had with the said plaintiff of and concerning the said plaintiff, in the presence and hearing of divers good and worthy subjects of our lord the now king, and in answer to the following question, then and there, in the presence and hearing of the said last-mentioned subjects, put by the said plaintiff to the said defendant, that is to say, "What do you (meaning the said defendant) mean to say I (meaning himself, the said plaintiff) am a sheep-stealer;" then and there, in the presence and hearing of the said last-mentioned subjects, falsely and maliciously answered, spoke and published, to and of and concerning the said plaintiff these false, scandalous, malicious and defamatory words following, that is to say: "Yes, you (meaning the said plaintiff) are," thereby then and there meaning that the said plaintiff had been and was guilty of sheep-stealing. And afterwards, to wit, on the day and year aforesaid, at, etc., aforesaid, in a certain other discourse which the said defendant then and there had with the said plaintiff of and concerning the said plaintiff, in the presence and hearing of divers good and worthy subjects of our lord the now king, and in answer to

a certain question whereby the said plaintiff did then and there, in the presence and hearing of the said last-mentioned subjects, interrogate and ask the said defendant whether the said defendant meant to say that the said plaintiff was a sheep-stealer, then and there, in the presence and hearing of the said last-mentioned subjects, falsely and maliciously, answered, spoke and published to and of and concerning the said plaintiff, the false, scandalous, malicious and defamatory words following, that is to say: "Yes, you (meaning the said plaintiff) are," thereby then and there meaning that the said plaintiff had been and was guilty of sheep-stealing.

(6) [*Statement of damages and conclusion.*]

§ 12. **For Words Spoken Ironically** (2 Chitty's Pleadings, 641).—

(1) [*Title, etc.*]

(2) [*Inducement of good character, etc.*]

(3) [*Statement of extrinsic matter if necessary.*]

(4) [*Statement of malicious intent.*]

(5) [*The colloquium.*]

(6) [*The imputation, etc., as follows:* In an ironical manner,[1] falsely and maliciously spoke and published of and concerning the said plaintiff the ironical, false, scandalous, malicious and defamatory words following, that is to say, he (meaning the said plaintiff) is no thief (thereby then and there meaning that the said plaintiff had been and was a thief, and the said subjects of our said lord the king then and there understood that that was the meaning of the said words).

(7) [*Statement of damages and conclusion.*]

§ 13. **Declaration by Husband and Wife against Husband and Wife for Slander by the Wife — Imputation of Perjury** (Yates' Pleadings, 425).—

(1) [*Title, etc.*]

(2) *Inducement of good character and exculpatory statement:* For that whereas the said Nancy, the wife of the said J. R., now is, and always since her nativity hath been, a good, faithful and honest citizen, free, and until the grievances hereinafter mentioned unsuspected of any perjury, false swearing or other crime whatever, and thereby had deservedly gained the good opinion of all her neighbors, and all others who knew her.

(3) *Statement of extrinsic matter:* And whereas, before the speaking and publishing the false and scandalous English words in this count mentioned, to wit, on, etc., at, etc. [*venue*], the said Nancy, the wife of the said J. R., had duly appeared before John O. Cole, Esq., then and yet a justice of the peace in the said city of Albany (commonly called a police justice), duly appointed and sworn as such, and then and there complained, and on oath deposed before the said John O. Cole, Esq., as such justice (he then and there as such justice having full power to administer such oath to the said Nancy), that the said Hannah had before that time been guilty of a breach of the peace towards her, the said Nancy, to wit, at the city and county

[1] If words are spoken ironically, there must be an express averment that they were so spoken. 11 Mod., 86.

aforesaid, and prayed a warrant to be issued by the said justice against the said Hannah thereupon, and which the said justice then and there granted, and upon which the said Hannah was then and there duly arrested and held to bail by the said justice.

(4) *Statement of malicious intent — The colloquium, charge and innuendoes:* Yet the said Hannah, wife of the said Conrad, well knowing the premises, but greatly envying the happy state and condition of the said plaintiff, and then and there maliciously and falsely intending to have it believed that the said Nancy had been guilty of false swearing and perjury before the aforesaid justice, in order to obtain such warrant as aforesaid, and that she was guilty of perjury therein, afterwards, to wit, on, etc., at, etc., in a certain conversation which the said Hannah then and there had with divers good and worthy citizens of and concerning the said Nancy, and of and concerning her aforesaid oath before the said John O. Cole, Esq., then and there in a loud voice, and in the presence and hearing of those citizens, falsely, wickedly, wrongfully and maliciously uttered, spoke, published and proclaimed of and concerning the said Nancy, and of and concerning her said oath, these false, scandalous, malicious and defamatory English words, following, that is to say: "She (the said Nancy meaning) has been to the police and taken a false oath against me (the said Hannah meaning, and also meaning the oath aforesaid, so taken as aforesaid before the said John O. Cole, Esq.); she (the said Nancy meaning) has sworn false against me; she (the said Nancy meaning) has sworn falsely before the police; she (the said Nancy meaning) is guilty of perjury; she (the said Nancy meaning) has sworn false; all which is to the great damage of the said plaintiffs.

(5) *Second count — Statement of general damages — Ad damnum and conclusion:* And whereas the said Ann, the wife of the said Conrad R., of her further malice towards the said Nancy, afterwards, to wit, on the day and year and at the place last aforesaid, in the presence and hearing of divers other good and worthy citizens, and in a loud voice, falsely, wickedly and maliciously spoke, uttered, published and proclaimed of and concerning the said Nancy, in order to have it believed that she was guilty of perjury, these other false, scandalous, malicious and defamatory English words following, to wit: "Mrs. R. (the said Nancy meaning) has sworn false; she (the said Nancy meaning) has taken a false oath; she (the said Nancy meaning) is guilty of perjury; she (the said Nancy meaning) is perjured; she (the said Nancy meaning) is forsworn; she (the said Nancy meaning) has sworn false before John O. Cole (the hereinbefore named John O. Cole, Esq., meaning); she (the said Nancy meaning) will yet be punished for her crime (the crime of perjury meaning, and that the said Nancy had been guilty of that crime); she (the said Nancy meaning) has told a lie under oath." By means of all which premises the said Nancy is not only hurt and damnified in her good name, fame, credit and reputation, but hath also been brought in great danger of being imprisoned for perjury, and hath been otherwise damnified to the damage of the said plaintiffs of $1,000; and thereof the said John R. and Nancy, his wife, bring suit, etc.

§ 14. For Words Spoken of a Magistrate in His Office (2 Starkie, 388).—

(1) [*Title, etc.*]

(2) [*General inducement of good character.*]

(3) *Special inducement — Statement of extrinsic matter:* And whereas also the said plaintiff, before and at the time of the committing of the said grievances by the said defendant, was, and from thence hitherto hath been and still is, one of the justices of our lord the king assigned to keep the peace of our said lord the king in and for the county of ——, and also to hear and determine divers felonies and other misdemeanors committed in the said county, and during all that time governed and conducted himself in his said office with justice, uprightness and integrity, to wit, at, etc.

(4) *Statement of malicious intent, the colloquium, charge and innuendoes:* Yet the said defendant, well knowing the premises, but contriving and wrongfully and maliciously intending to injure, prejudice and aggrieve him, the said plaintiff, so being such justice as aforesaid, and to cause it to be suspected and believed that he, the said plaintiff, had acted unjustly and corruptly in his said office of justice of the peace, heretofore, to wit, on, etc., at, etc., in a certain discourse which he, the said defendant, then and there had in the presence and hearing of divers good and worthy subjects of the realm, of and concerning him, the said plaintiff, in his said office of justice, falsely and maliciously spoke and published of and concerning the said plaintiff in his said office the several false, scandalous, malicious and defamatory words following, that is to say: He [*set out the words with proper innuendoes*].

(5) *Averment of general damage:* By means whereof the said plaintiff hath been and is greatly injured, prejudiced and aggrieved in his said office, and in his good name, fame and reputation, and divers of the good and worthy subjects of the realm have suspected and believed, and still do suspect and believe, the said plaintiff to have been and to be a person guilty of the offenses and misconduct so as aforesaid mentioned to have been charged upon and imputed to the said plaintiff by the said defendant, and thereby and otherwise, by means of the premises, the said plaintiff hath been and is greatly injured and damnified, to wit, at, etc. [*venue*], aforesaid.

(6) [*Averment of special damage.*]

(7) [*Ad damnum and conclusion.*]

§ 15. **For an Imputation of Insolvency to a Tradesman** (2 Starkie, 380).—

(1) [*Title, etc.*]

(2) [*General inducement of good character.*]

(3) *Special inducement — Statement of extrinsic matter:* And whereas also the said plaintiff, before and at the time of the committing of the said grievances and from thence hitherto, hath used and exercised and still uses and exercises the trade or business of a *silversmith* [*according to the fact*], and has always used and exercised and still uses and exercises his said trade or business with integrity and punctuality, and hath always well and truly paid and discharged all his just debts and obligations, and hath not been, nor is, nor until the committing of the said grievances been suspected to be, either unable or unwilling duly and faithfully to pay and discharge all such debts and obligations, to wit, at, etc.

(4) *Averment of profits:* By means whereof the said plaintiff, before the committing of the said grievances, had not only deservedly obtained the good opinion, confidence and credit of all his neighbors and other good and worthy subjects of the realm to whom he was in any wise known, but had

acquired and was still continuing to acquire in his said trade or business divers large profits and emoluments, to wit, at, etc.

(5) *Statement of malicious intent — The colloquium — Charge and innuendoes:* Yet the said defendant, well knowing the premises, but contriving and wickedly and maliciously intending to injure the said plaintiff in his said good name, fame and credit, and to bring him into public scandal, infamy and disgrace, and to cause it to be suspected and believed that he (the said plaintiff) was in poor and indigent circumstances, and incapable of paying and discharging his just debts and obligations, and to oppress and ruin him (the said plaintiff), heretofore, to wit, on, etc., at, etc., in a certain discourse which he (the said defendant) then and there had of and concerning the said plaintiff in his said trade or business, falsely and maliciously spoke and published of and concerning the said plaintiff in his said trade or business the several false, scandalous, malicious and defamatory words following, that is to say: He (meaning the said plaintiff) owes more money than he is worth. He (meaning the said plaintiff) is run away. He (meaning the said plaintiff) is broke.

(6) *Averment of general damage:* By means whereof he, the said plaintiff, hath been and is greatly injured in his aforesaid good name and credit, and brought into public scandal, infamy and disgrace with and amongst all his neighbors and other good and worthy subjects of the realm, insomuch that divers of those neighbors and subjects have, by reason of the committing of the said grievances, from thence hitherto suspected and believed and still do suspect and believe the said plaintiff to be insolvent and incapable of paying and discharging his just debts, and have by reason thereof wholly refused to have any further dealings or transactions with the said plaintiff in the way of his trade or otherwise; and the said plaintiff hath been and is greatly injured and damnified in his said trade and business and otherwise, to wit, at, etc.

(7) [*Averment of special damage.*]

(8) [*Conclusion — Ad damnum.*]

§ 16. For an Imputation of a Want of Integrity to a Trader (2 Starkie, 379).—

(1) [*Title, etc.*]

(2) [*General inducement of good character.*]

(3) *Special inducement — Statement of extrinsic matter:* And whereas also the said plaintiff, before and at the time of the committing of the said grievances and from thence hitherto, hath used and exercised and still uses and exercises the trade and business of a tailor, and hath always conducted himself and still continues to conduct himself with honesty and integrity in his said trade or business, to wit, at, etc., and hath never been guilty, nor until the committing of the said grievances been suspected to have been guilty, of any cheating, fraud or dishonesty in his said trade or business or otherwise.

(4) *Averment of profits:* By means whereof the said plaintiff, before the committing of the said grievances, had not only deservedly obtained the good opinion, confidence and credit of all his neighbors, and other good and worthy subjects of the realm to whom he was in anywise known, but had acquired and was still continuing to acquire in his said trade or business

divers great profits and emoluments for his maintenance and support, to wit, at, etc.

(5) *Statement of malicious intent — The colloquium — Charge and innuendoes:* Yet the said defendant, well knowing the premises, but contriving and wickedly and maliciously intending to injure the said plaintiff in his said good name, fame and credit and in his said trade or business, and to bring him into public scandal, infamy and disgrace, and to cause it to be suspected and believed that he, the said plaintiff, was guilty of fraud and dishonesty and of cheating and imposing on his customers in his said trade or business, and to oppress and ruin him, the said plaintiff, heretofore, to wit, on, etc., at, etc., in a certain discourse which he, the said defendant, then and there had of and concerning the said plaintiff in his said trade or business, in the presence and hearing of divers good and worthy subjects of the realm, falsely and maliciously spoke and published of and concerning the said plaintiff, in his said trade or business, in the presence and hearing of the last-mentioned subjects, the several false, scandalous, malicious and defamatory words following, that is to say: He (meaning the said plaintiff) [*here set out the words according to the facts with the appropriate innuendoes*].

(6) *Averment of general damages:* By means whereof he, the said plaintiff, hath been and is greatly injured in his aforesaid good name and credit and brought into public scandal, infamy and disgrace with and amongst all his neighbors and other good and worthy subjects of this realm, insomuch that divers of those neighbors and subjects have by reason of the committing of the said grievances from thence hitherto suspected and believed and still do suspect and believe the said plaintiff to be guilty of fraud and dishonesty in his said trade or business, and have by reason thereof wholly refused to have any further dealings or transactions with the said plaintiff in the way of his said trade or business or otherwise; and the said plaintiff hath been and is greatly injured and damnified in his said trade and business and otherwise.

(7) *Averment of special damage:* And in particular by reason of the premises A. B., C. D. and E. F., who before the committing of the said grievances had been and were customers and employers of the said plaintiff in his said trade or business, not knowing the innocence of the said plaintiff in the premises, have by reason of the committing of the said grievances suspected the said plaintiff to have been guilty of fraud and dishonesty in his said trade or business, and have wholly refused further to retain or employ the said plaintiff or to have any further dealing with him in his said trade or business, as but for the committing of the said grievances they otherwise would have done, to wit, at, etc.

(8) [*The ad damnum — Conclusion.*]

§ 17. For Words Slandering Plaintiff in His Trade — Accusing Him of Keeping False Books (2 Chitty's Pleadings, 641).—

[*Title, etc.*]

For that whereas the said plaintiff now is a good, true, honest, just and faithful subject of this realm, and as such hath always behaved and conducted himself, and until the committing of the several grievances by the

said defendant, as hereinafter mentioned, was always reputed, esteemed and accepted by and amongst all his neighbors and other good and worthy subjects of this realm to whom he was in anywise known, to be a person of good name, fame and credit, to wit, at, etc. [*venue*]. And whereas also the said plaintiff was, before and at the time of the committing of the grievances by the said defendant, as hereinafter mentioned, and from thence hitherto hath been, and still is, a merchant, and has always exercised and carried on and still doth exercise and carry on the same trade and business with integrity, honesty and propriety of conduct, to wit, at, etc. [*venue*], aforesaid. And whereas also the said plaintiff hath not ever been guilty, or until the time of the committing of the said several grievances by the said defendant, as hereinafter mentioned, been suspected to have been guilty, of the offenses and misconduct as hereinafter stated to have been charged upon and imputed to him by the said defendant, or of keeping false books, or any other offenses or misconduct whatever. By means of which said premises the said plaintiff, before the committing of the said several grievances by the said defendant, as hereinafter mentioned, had deservedly obtained the good opinion and credit of all his neighbors and other good and worthy subjects of this realm to whom he was in anywise known; and had also thereby acquired, and was then daily and honestly acquiring great gains and profits in his trade and business, to the comfortable support of himself and family and the great increase of his riches, to wit, at, etc. [*venue*], aforesaid. [*Here insert a special inducement, if any be requisite, to explain the slanderous words.*] Yet the said defendant, well knowing the premises, but greatly envying the happy state and condition of the said plaintiff, and contriving and wickedly and maliciously intending to injure the said plaintiff in his said good name, fame and credit, and to bring him into public scandal, infamy and disgrace with and amongst all his neighbors and other good and worthy subjects of this kingdom, and to cause it to be suspected and believed by those neighbors and subjects that the said plaintiff had been and was guilty of the offenses and misconduct hereinafter stated to have been charged upon and imputed to him by the said defendant, and to vex, harass, oppress, impoverish and wholly ruin the said plaintiff in his said trade and business and otherwise, etc., heretofore, to wit, on, etc., at, etc. [*venue*], aforesaid, in a certain discourse which the said defendant then and there had of and concerning the said plaintiff, and of and concerning him in his trade and business [*and if the words refer to matter stated in a special inducement, say:* "and of and concerning the said," etc.], in the presence and hearing of divers good and worthy subjects of our lord the king, and then and there, in the presence and hearing of the said last-mentioned subjects, falsely and maliciously spoke and published of and concerning the said plaintiff, and of and concerning him in his said trade and business (and of and concerning the said, etc.), the false, scandalous, malicious and defamatory words following, that is to say: "He" (meaning the said plaintiff) "is a great rogue and keeps false books." [*Here set out the slanderous words with proper innuendoes.*]

And afterwards, to wit, on the day and year aforesaid, at, etc. [*venue*], aforesaid, in a certain other discourse which the said defendant then and

there had of and concerning the said plaintiff, and of and concerning him in his said trade and business, in the presence and hearing of divers other good and worthy subjects of this realm, the said defendant, further contriving and intending as aforesaid, then and there, in the presence and hearing of the said last-mentioned subjects, falsely and maliciously spoke and published of and concerning the said plaintiff, and of and concerning him in his said trade and business, the false, scandalous, malicious and defamatory words following, that is to say [*here set out the words with proper innuendoes, properly varying them from the first count*]. By means of the committing of which said several grievances by the said defendant as aforesaid the said plaintiff hath been and is greatly injured in his said good name, fame and credit, and brought into public scandal, infamy and disgrace with and amongst all his neighbors and other good and worthy subjects of this realm, insomuch that divers of those neighbors and subjects, to whom the innocence and integrity of the said plaintiff in the premises were unknown, have, on account of the committing of the said grievances by the said defendant as aforesaid, from thence hitherto suspected and believed and still do suspect and believe the said plaintiff to have been and to be a person guilty of the offenses and misconduct so as aforesaid charged upon and imputed to him by the said defendant, and have, by reason of the committing of the said grievances by the said defendant as aforesaid, from thence hitherto wholly refused and still do refuse to deal or have any transaction, acquaintance or discourse with the said plaintiff in his said trade and business, or otherwise, as they were before used and accustomed to have and otherwise would have had. [*Here insert any special damages the plaintiff may have sustained; and if such damages be the loss of customers it may be stated as follows:*] And also by means of the premises divers persons, to wit [*naming them*], who respectively before the times of the committing of the said grievances had been and were customers of and used and accustomed to deal with the said plaintiff in the way of his aforesaid trade and business, to the great profit and advantage of the said plaintiff, have from thence hitherto wholly neglected and refused and still do refuse and neglect to continue as such customers, or to deal with the said plaintiff; and also by means of the premises the said plaintiff has been and is otherwise greatly injured and damnified, to wit, at, etc. [*venue*], aforesaid, to the damage of the said plaintiff of ——; and therefore he brings suit, etc.

II. Libel.

§ 18. Declarations at Common Law — An Old English Precedent — Libel — Indirect Imputation of Perjury (2 Chitty's Pleadings, 629).—

First, the title:

Ellenborough: —— next after —— in —— term —— Will. 4.

—— (to wit): A. B. complains of C. D., being in the custody of the marshalsea of our lord the now king, before the king himself, of a plea of trespass on the case.

Second, general inducement of good character: For that whereas the

plaintiff now is a good, true, honest, just and faithful subject of this realm, and as such hath always behaved and conducted himself until the committing of the several grievances by the said defendant as hereinafter mentioned, was always reputed, esteemed and accepted amongst all his neighbors and other good and worthy subjects of this realm to whom he was in anywise known to be a person of good name, fame and credit, to wit, at, etc. [*venue*].

Third, inducement of innocence of the charge in question: And whereas, also, the said plaintiff hath not ever been guilty of committing the said several grievances by the said defendant as hereinafter mentioned, been suspected to have been guilty of *perjury* or any other such crime.

Fourth, inducement of the consequences of such character: By means of which said premises the said plaintiff, before the committing of the said several grievances by the said defendant as hereinafter mentioned, had deservedly obtained the good opinion and credit of all his neighbors and other good and worthy subjects of this realm to whom he was in anywise known, to wit, at, etc. [*venue*], aforesaid.

Fifth, the special inducement — Statement of extrinsic matter: And whereas, also, before the committing of the several grievances by the said defendant as hereinafter mentioned, a certain action had been depending in the said court of our lord the now king, before the king himself, at Westminster, in the county of Middlesex, wherein one E. F. was the plaintiff and one G. H. was the defendant, and which said action had been then lately tried at the assizes in and for the county of ——, and on such trial the said plaintiff had been and was examined on oath, and had given his evidence as a witness for and on behalf of the said E. F., to wit, at, etc. [*venue*], aforesaid.

Sixth, statement of malicious intent — The charge, with the colloquium and innuendoes: Yet the defendant, well knowing the premises, but greatly envying the happy state and condition of the said plaintiff, and contriving and wickedly and maliciously intending to injure the said plaintiff in his said good name, fame and credit, and to bring him into public scandal, infamy and disgrace with and amongst all his neighbors and other good and worthy subjects of this kingdom, and to cause it to be suspected and believed by those neighbors and subjects that he, the said plaintiff, had been guilty of *perjury*, and to subject him to the pains and penalties by the laws of this kingdom provided against and inflicted upon persons guilty thereof, and to vex, harass, oppress, impoverish and wholly ruin the said plaintiff, heretofore, to wit, on, etc., at, etc. [*venue*], aforesaid, falsely, wickedly and maliciously did compose and publish and cause and procure to be published of and concerning the plaintiff, and of and concerning the said action which had been so depending as aforesaid, and of and concerning the evidence by him, the said plaintiff, given on the said trial as such witness as aforesaid, a certain false, scandalous, malicious and defamatory libel containing, amongst other things, the false, scandalous, malicious, defamatory and libelous matter following, of and concerning the said plaintiff, and of and concerning the said action, and of and concerning the evidence by him, the said plaintiff, given on the trial as such witness as aforesaid; that is to say, he (meaning the said plaintiff) was forsworn on the trial (mean-

ing the said trial) and thereby then and there meaning that the said plaintiff, in giving his evidence as such witness on the said trial as aforesaid, had committed wilful and corrupt perjury.

Second count — Same imputation, varied statement: And the plaintiff further saith that the said defendant, further contriving and intending as aforesaid, heretofore, to wit, on the day and year aforesaid, at, etc. [*venue*], aforesaid, falsely, wickedly and maliciously did publish a certain other false, scandalous, malicious and defamatory libel of and concerning the said plaintiff, and of and concerning the said action which had been so depending as aforesaid, and of and concerning the evidence by him, the said plaintiff, given on the trial as such witness as aforesaid, containing, amongst other things, the false, scandalous, malicious, defamatory and libelous matter following of and concerning the said plaintiff, and of and concerning the said action, and of and concerning the said evidence given by him, the said plaintiff, on the said trial, as such witness as aforesaid, that is to say [*the statement of the imputation and innuendoes may be varied to suit the particular circumstances of the case*].

Third count — Direct imputation of perjury: And the plaintiff further saith that the said defendant, further contriving and intending as aforesaid, at, etc. [*venue*], aforesaid, falsely, wickedly, maliciously, wrongfully and unjustly did publish, and cause and procure to be published, a certain other false, scandalous, malicious and defamatory libel of and concerning the said plaintiff, containing, amongst other things, certain other false, scandalous, malicious, defamatory and libelous matter of and concerning the said plaintiff, as follows, that is to say: He (meaning the plaintiff) is perjured.

Seventh, averment of general damage: By means of the committing of which said several grievances by the said defendant as aforesaid the said plaintiff hath been and is greatly injured in his said good name, fame and credit and brought into public scandal, infamy and disgrace with and amongst all his neighbors and other good and worthy subjects of this realm, insomuch that divers of those neighbors and subjects to whom the innocence and integrity of the said plaintiff in the said premises were unknown, have, on account of the committing of the said grievances by the said defendant as aforesaid, from thence hitherto suspected and bolieved, and still do suspect and believe, the said plaintiff to have been and to be a person guilty of *perjury*, and have by reason of the committing of the said grievances by the said defendant as aforesaid, and from thence hitherto, wholly refused, and still do refuse, to have any transaction, acquaintance or discourse with the said plaintiff as they were before used and accustomed to have and otherwise would have had.

Eighth, averment of special damage — Loss of service: And also by reason thereof one J. K., who before and at the time of the committing of the said grievance was about to retain and employ, and otherwise would have retained and employed, the said plaintiff as his servant for certain wages and reward, to be therefor paid to the said plaintiff, afterwards, to wit, on the day and year aforesaid, at, etc. [*venue*], aforesaid, wholly refused to retain and employ the said plaintiff in the service and employment of the said J. K.; and the said plaintiff hath from thence hitherto remained

and continued and still is wholly out of employment, and the said plaintiff hath been and is, by reason of the premises, otherwise greatly injured, to wit, at, etc. [*venue*], aforesaid.

Ninth, the ad damnum and conclusion: To the damage of the plaintiff of £5,000; and therefore he brings his suit, etc.

By L. M., his Attorney.

§ 19. **A Modern English Precedent — Declaration under the Act Abolishing the Common-law System in England** (Odgers on L. & S., 619).—

In the High Court of Justice, Queen's Bench Division.

Writ issued on the 13th day of December, 1886.

Between SARAH JONES, Plaintiff, and HENRY ROBERTS, Defendant.

1. The plaintiff is a ——, residing at ——, in the county of ——.

2. The defendant on or about the 10th day of January, 1887, falsely and maliciously caused to be printed and published a certain libelous article referring to the plaintiff as follows: [*Here set out the article.*]

3. The defendant caused one of such libelous articles to be posted up opposite the plaintiff's shop, and several others in its immediate neighborhood.

4. The plaintiff has in consequence suffered much annoyance, and has been disgraced and subjected to loss of reputation and of business, and has suffered in his credit and good name, and has incurred public odium and contempt.

The plaintiff claims £1,000 damages.

[Signed] —— ——.

Delivered the —— day of ——, 18—.

§ 20. **For an Imputation of Perjury — A New York Precedent, "Before the Code"** (Yates' Pleadings, 388).—

(1) [*Title, etc.*]

(2) *Inducement of general good character:* For that whereas the said A. B. now is a good, true, honest, just and faithful citizen of this state, and as such hath always behaved and conducted himself, and, until the committing of the several grievances by the said C. D. as hereinafter mentioned, was always reputed, esteemed and accepted by and amongst all his neighbors and other good and worthy citizens of this state to whom he was in anywise known, to be a person of good name, fame and credit, to wit, at, etc.

(3) *Inducement of innocence — Exculpatory averments:* And whereas, also, the said A. B. hath not ever been guilty, or, until the time of the committing of the said several grievances by the said C. D. as hereinafter mentioned, been suspected to have been guilty of perjury or any other such crime.

(4) *Averment of the consequences of such good character:* By means of which said premises, he, the said A. B., before the committing of the said several grievances by the said C. D. as hereinafter mentioned, had deservedly obtained the good opinion and credit of all his neighbors and good and worthy citizens of this state, to whom he was in anywise known, to wit, at, etc.

(5) *Averment of extrinsic matters:* And whereas, also, before the committing of the several grievances by the said C. D. as in the first and second counts hereinafter mentioned, a certain action had been depending in the supreme court of judicature of the people of the state of New York, before the justices thereof, at the —— in the —— of ——, wherein one J. K. was the plaintiff and one L. M. was the defendant, and which said action had been then lately tried at the circuit court in and for the county of ——, and on such trial the said A. B. had been and was examined on oath and had given his evidence as a witness for and on the part and behalf of the said J. K., to wit, at, etc.

(6) *Statement of malicious intent — Colloquium — Charge and innuendoes:* Yet the said C. D., well knowing the premises, but greatly envying the happy state and condition of the said A. B., and contriving and wickedly and maliciously intending to injure the said A. B. in his said good name, fame and credit, and to bring him into public scandal, infamy and disgrace with and amongst all his neighbors and other good and worthy citizens of this state, and to cause it to be suspected and believed by those neighbors and citizens that he, the said A. B., had been and was guilty of perjury; and to subject him to the pains and penalties by the laws of this state made and provided against and inflicted upon persons guilty of perjury; and to vex, harass, oppress, impoverish and wholly ruin him, the said A. B., heretofore, to wit, on, etc., at, etc., falsely, wickedly and maliciously did compose and publish and cause and procure to be composed and published of and concerning the said A. B., and of and concerning the said action which had been so depending, and of and concerning the evidence by him, the said A. B., given on the said trial as such witness as aforesaid, a certain false, scandalous, malicious and defamatory libel, containing, amongst other things, the false, scandalous, malicious, defamatory and libelous matter following, of and concerning the said A. B., and of and concerning the said action, and of and concerning the evidence given by him, the said A. B., on said trial as such witness as aforesaid, that is to say, he (meaning the said A. B.) was forsworn on the trial, meaning the said trial, and thereby then and there meaning that he, the said A. B., in giving his evidence as such witness on the said trial as aforesaid, had committed wilful and corrupt perjury.

Second count: And the said A. B. further saith that the said C. D., further contriving and intending as aforesaid, heretofore, to wit, on, etc., at, etc., falsely, wickedly and maliciously did publish a certain other false, scandalous, malicious and defamatory libel of and concerning the said A. B., and of and concerning the said action which had been so depending as aforesaid, and of and concerning the evidence by him, the said A. B., given on the said trial as such witness as aforesaid, containing, amongst other things, the false, scandalous, malicious, defamatory and libelous matter following, of and concerning the said A. B., and of and concerning the said action, and of and concerning the evidence given by him, the said A. B., on the said trial as such witness as aforesaid, that is to say [*vary the statement of the words and innuendoes, as may be advisable, under the particular circumstances of each case*].

Third count — Direct imputation of perjury: And the said A. B. further

saith that the said C. D., further contriving and intending as aforesaid, afterwards, to wit, on etc., at, etc., falsely, wickedly, maliciously, wrongfully and unjustly did publish and cause and procure to be published a certain other false, scandalous, malicious and defamatory libel of and concerning the said A. B., containing, amongst other things, certain other false, scandalous, malicious, defamatory and libelous matters, of and concerning the said A. B. as follows, that is to say, he (meaning the said A. B.) is perjured.

(7) *Averment of general damages:* By means of the committing of which said several grievances by the said C. D. as aforesaid, he, the said A. B., hath been and is greatly injured in his said good name, fame and credit, and brought into public scandal, infamy and disgrace with and amongst all his neighbors and other good and worthy citizens of this state, insomuch that divers of those neighbors and citizens to whom the innocence and integrity of the said A. B. in the premises were unknown, have on occasion of the committing of the said grievances by the said C. D. as aforesaid, from thence hitherto suspected and believed and still do suspect and believe the said A. B. to have been and to be a person guilty of perjury, and have by reason of the committing of the said grievances by the said C. D. as aforesaid, from thence hitherto wholly refused and still do refuse to have any transaction, acquaintance or discourse with him, the said A. B., as they were before used and accustomed to have and otherwise would have had.

(8) *Averment of special damage:* And also by reason thereof one J. K., who before and at the time of the committing of the said grievances was about to retain and employ and would otherwise have retained and employed the said A. B. as his servant, for certain wages and reward to be therefor paid to him, the said A. B., afterward, to wit, on the day and year aforesaid, at, etc., wholly refused to retain and employ the said A. B. in the service and employ of him, the said J. K., and the said A. B. hath from thence hitherto remained and continued and still is wholly out of employ; and the said A. B. hath been and is by means of the premises otherwise greatly injured, to wit at, etc.

(9) [*The ad damnum and conclusion.*]

§ 21. Character of Servant — For an Imputation of Bad Temper and Laziness (2 Starkie, 385).—

(1) [*Title, etc.*]

(2) [*General inducement of good character.*]

(3) *Special inducement — Statement of extrinsic matter:* And for that whereas the said A. B., before the committing of the grievances hereinafter mentioned, had been retained and employed by and in the service of the said C. D. as his butler and servant, and in that capacity had behaved with due integrity, good temper, activity and civility, and never was, or until the time of the committing of such grievances suspected to have been, or to be, bad tempered, lazy or impertinent, by means of which said several premises he, the said A. B., before the committing of the said several grievances had not only deservedly obtained the good opinion of all his neighbors and divers other good and worthy subjects of this realm, but had also supported himself, and would thereafter have supported himself by his honest, faithful, diligent and attentive exertions in the service of his masters and

employers, had not such grievances been committed as hereinafter mentioned, to wit, at, etc. And whereas the said A. B., before and at the time of the committing of such grievances, had quitted and left the service of the said C. D., and had been recommended to and was likely to be retained and employed by and in the service of one E. F. as a footman, for certain wages to be therefor paid to him, the said A. B., to wit, at, etc.

(4) *Statement of malicious intent — The colloquium, charge and innuendoes:* Yet the said C. D., well knowing the premises, but contriving and maliciously intending to injure the said A. B. in his said character, and to bring him into public scandal, infamy and disgrace with and amongst all his neighbors and other good and worthy subjects of this realm, and particularly with the said E. F., and to cause it to be suspected and believed that the said A. B. was not fit to be employed as a servant, and that he was bad tempered and a lazy and impertinent fellow, and thereby to prevent the said E. F. from retaining and employing him, the said A. B., in his service as he otherwise might and would have done, and to vex, harass, oppress, impoverish and wholly ruin him, the said A. B., and to deprive him of the means of supporting himself by honesty and industrious means, heretofore, to wit, on, etc., at, etc., aforesaid, wrongfully and unjustly did compose and publish a certain false, scandalous, malicious and defamatory libel of and concerning the said A. B. as such servant, containing, amongst other things, the several false, scandalous, malicious and defamatory words and matters following of and concerning the said A. B., as such servant, that is to say: He (meaning the said A. B.) is a bad-tempered, lazy, impertinent fellow (thereby then and there meaning that the said A. B. was not a person fit to be retained and employed in the capacity of a servant).

Second count: And the said A. B. further says that the said C. D., further contriving and intending to injure and damnify the said A. B. as aforesaid, afterwards, to wit, on, etc., at, etc., falsely, wickedly, maliciously, wrongfully and unjustly did publish and cause and procure to be published a certain other false, scandalous, malicious and defamatory libel of and concerning the said A. B. as such servant as aforesaid, containing the several false, scandalous, malicious and defamatory words and matters following of and concerning the said A. B., as such servant as aforesaid, that is to say: He (meaning the said A. B.) is a bad-tempered, lazy and impertinent fellow.

(5) *Averment of general and special damage:* By means of the committing of which said grievances the said A. B. hath been and is greatly injured in his said good character, and brought into public scandal, infamy and disgrace with and amongst all his neighbors and other good and worthy subjects of the realm to whom he was in anywise known, insomuch that divers of those neighbors and subjects, and in particular the said E. F., to whom the good temper, fidelity, activity and civility of the said A. B. in the capacity of a servant or otherwise were unknown, have on occasion of the committing of said grievances, from thence hitherto suspected and believed and the said E. F. still doth suspect and believe the said A. B. to have been and to be a bad-tempered, lazy and impertinent person, and unfit to be retained or employed in the capacity of a servant, and also by reason thereof the said E. F. afterwards, to wit, on, etc., aforesaid, at, etc., afore-

said, refused and declined to retain and employ the said A. B. in his service as a footman or otherwise, as he otherwise might and would have done, and by reason thereof he, the said A. B., hath not only lost and been deprived of the support, sustenance, wages, gains and emoluments which might and would otherwise have arisen and accrued to him from and by reason of his being so retained and employed as last aforesaid, but hath from thence hitherto remained and continued and still is out of employ, deprived of the opportunity of supporting himself by honest and industrious means, and hath been and is, by means of the said several premises, otherwise greatly injured and damnified, to wit, at, etc., aforesaid.

(6) [*Ad damnum and conclusion.*]

Another Form (2 Chitty's Pleadings, 630).—

(1) [*Title, etc.*]

(2) [*General inducement of good character.*]

(3) *Special inducement — Statement of extrinsic matters:* For that whereas the said plaintiff, before the committing of the grievances by the said defendant as hereinafter mentioned, had been and was accustomed to employ himself as a servant and gain his living by that employment, and had been retained and employed by and in the service of the said defendant as his footman and servant, and in that capacity had conducted himself with good temper, activity and civility, and never was, or until the time of the committing such grievances was suspected to have been, or to be, bad tempered, lazy or impertinent, to wit, at, etc. [*venue*]. By means of which said several premises, the said plaintiff before the committing of such grievances by the said defendant, had not only deservedly gained the good opinion of all his neighbors and divers other good and other worthy subjects of this realm, but had also supported himself, and would thereafter have supported himself, by his honest, faithful, diligent and attentive exertions in the service of his masters and employers, had not such grievances been committed as hereinafter mentioned to wit, at, etc. [*venue*], aforesaid; and whereas, also, the said plaintiff, before and at the time of the committing of such grievances, had quitted and left the service of the said defendant, and had been recommended to, and was likely to be retained and employed by, and in the service of, one E. F. as a [footman] and servant, for certain wages, to be thereafter paid to the said plaintiff, to wit, at, etc. [*venue*]. Yet the said defendant, well knowing the premises, but contriving and maliciously intending to injure the said plaintiff in his said character, and to bring him into public scandal, infamy and disgrace with and amongst all his neighbors and other good and worthy subjects of this realm, and particularly with the said E. F., and to cause it to be suspected and believed that the said plaintiff was not fit to be employed as a servant, and that he was [bad tempered, and a lazy, impertinent fellow], and thereby to prevent the said E. F. from retaining and employing the said plaintiff in his service, as he otherwise might and would have done, and to vex, harass, oppress, impoverish and wholly ruin the said plaintiff, and to deprive him of the means of supporting himself by honest and industrious employment, heretofore, to wit, on, etc., at, etc. [*venue*], aforesaid, wrongfully and unjustly did compose and publish a certain false, scandalous, malicious and defamatory libel of and concerning the said plaintiff, and of and concerning him

in his said employment, and as such servant, containing therein the false, scandalous, malicious and defamatory and libelous matter following, of and concerning the said plaintiff, and of and concerning him in his said employment as such servant as aforesaid, that is to say [*here set out the libel with proper innuendoes, which in the case from which this form was drawn was as follows:* he (meaning the said plaintiff) is a bad-tempered, lazy impertinent fellow.] [*Add other counts as the case may suggest, and a count stating the libel to be of and concerning plaintiff, without reference to his character of servant.*]

By means of the committing of which grievances the said plaintiff hath been and is greatly injured in his said good character, and brought into public scandal, infamy and disgrace with and amongst all his neighbors and other good and worthy subjects of this realm, to whom he was in anywise known, insomuch that divers of those neighbors and subjects, and in particular the said E. F., to whom the [good temper, fidelity, activity and civility] of the said plaintiff, in the capacity of a servant and otherwise were unknown, have, on occasion of the committing of the said grievances, from thence hitherto suspected and believed and the said E. F. still doth suspect and believe the said plaintiff to have been and to be a bad-tempered, lazy and impertinent person, and unfit to be retained or employed in the capacity of a servant. And also by reason thereof the said E. F. afterwards, to wit, on the day and year aforesaid, at, etc. [*venue*], aforesaid, refused and declined to retain and employ the said plaintiff in his service as a [footman] or otherwise as he otherwise might and would have done; and by reason thereof he, the said plaintiff, hath not only lost and been deprived of the support, sustenance, wages, gains and emoluments which might and would otherwise have arisen and accrued to him from and by reason of his being so retained and employed as last aforesaid, but hath from thence hitherto remained and continued and still is out of employ, and deprived of the opportunity of supporting himself by honest and industrious means, and hath been and is by means of the said several premises otherwise greatly injured and damnified, to wit, at, etc. [*venue*], aforesaid, to the damage of the said plaintiff, of ——, etc.; and therefore he brings his suit, etc.

§ 22. **For a Libel by Letter Intimating Insolvency** (Oliver's Precedents, 406).—

[*Title, etc.*]

For that whereas the plaintiff, at the time of writing and publishing the several false, scandalous and defamatory words hereinafter mentioned, had been and was a merchant, and sought his living by buying and selling, and had always conducted himself with fairness and punctuality towards his creditors, and till then had never been suspected of bankruptcy, insolvency or any other fraudulent intention, and always had been and then was in good circumstances, credit and esteem, viz., at, etc.; yet the defendant, well knowing the premises, but envying the happy condition of the plaintiff, and maliciously contriving and intending to degrade and injure the plaintiff in his good name and credit in his business aforesaid, and to cause him to be reputed as worthy of no credit, and also to prejudice and injure the plaintiff with one E. F., a trader, at, etc., who for a long time had dealt

with and was then dealing with the plaintiff in the way of his trade, and to induce the said E. F. to leave off dealing with the plaintiff, on, etc., at, etc., did falsely and maliciously write and publish a certain scandalous and malicious libel of and concerning the plaintiff in his aforesaid business, in the form of a letter directed to the said E. F., containing therein this scandalous, malicious and defamatory matter following, of and concerning the plaintiff in his business aforesaid: "Sir, you (meaning the said E. F.) will be surprised to see a stranger write to you (meaning the said E. F.); but as I (meaning the defendant) have no other view but doing as I (meaning the defendant) would be done by, therefore as I (meaning the defendant) believe you (meaning the said E. F.) are a fair trader, therefore cannot see you (meaning the said E. F.) wronged without letting you (meaning the said E. F.) know it, for I (meaning the defendant) am told you (meaning the said E. F.) have large dealings with one A. B. (meaning the plaintiff), and he (meaning the plaintiff) was a bankrupt some years before (meaning before the writing and publishing of the said libel), and never could get his (meaning the plaintiff's certificate); so all that he (meaning the plaintiff) has or deals for is his (meaning the plaintiff's) former creditors' rights, and he (meaning the plaintiff) has not been in business above three-quarters of a year, and now is joined with his (meaning the plaintiff's) brother (meaning one O. D.), and they (meaning the plaintiff and said O. D.) get all the credit they (meaning the plaintiff and O. D.) can by one (meaning one of the two last-mentioned persons) recommending another (meaning one of the two last-mentioned persons), and they (meaning the plaintiff and the said O. D.) are arrested every day, etc., to bail one another and pay nobody; so now I (meaning the defendant) have done my (meaning his, the defendant's) part, and if you (meaning the said E. F.) are not the man it (meaning the said letter or libel) was designed for, pray burn it (meaning the said letter or libel); and if you (meaning the said E. F.) take hint, burn it (meaning the said letter or libel); for the writer (meaning the defendant) is neither to get nor lose by it, so farewell." And the defendant, on the same day, at, etc., aforesaid, wrongfully, falsely and maliciously sent the said libel in the form of a letter unto the said E. F., and the same was by reason thereof received and read by the said E. F., as thereby published by the defendant to the said E. F.; by means of the writing and publishing of which said false, scandalous, malicious and libelous matters the plaintiff is not only much hurt and prejudiced in his good name, credit and esteem in his aforesaid business, but has also fallen into great discredit among his creditors and other worthy persons with whom he had dealt and traded in his aforesaid business, and of whom the plaintiff was accustomed to buy goods and merchandise on credit, without ready money, and especially the said E. F., insomuch that those creditors and other persons, and especially the said E. F., on occasion of the writing and publishing of said libel, have altogether refused, and still do refuse, to buy or sell or have anything to do with the plaintiff in his business as aforesaid, to the damage of the plaintiff of —— dollars; wherefore he brings suit, etc.

§ 23. For a Libel on a Party in His Trade Imputing Insolvency (2 Chitty's Pleadings, 629).—

(1) [*Title, etc.*]

For that whereas the plaintiff now is a good, true, honest, just and faithful

subject of this realm, and as such hath always behaved and conducted himself, and until the committing of the several grievances by the said defendant, as hereinafter mentioned, was always reputed, esteemed and accepted by and amongst all his neighbors and other good and worthy subjects of this realm to whom he was in anywise known to be a person of good name, fame and credit, to wit, at, etc. [*venue*]. And whereas, also, the said plaintiff, before and at the time of the committing of the grievances by the said defendant as hereinafter mentioned, was a ——, and the trade and business of a —— then exercised and carried on and still doth exercise and carry on, to wit, at, etc. [*venue*], aforesaid. And whereas, also, the said plaintiff hath not ever been guilty, or, until the time of the committing of the said several grievances by the said defendant as hereinafter mentioned, been suspected to have been guilty of the offenses and misconduct as hereafter stated to have been charged upon and imputed to him by the said defendant, or of any other such offenses or misconduct [*or, if the libel do not charge the plaintiff with any misconduct, then omit the last averment, and in the case of a libel imputing insolvency, say,* "and the said plaintiff hath always exercised and carried on, and still doth exercise and carry on, the said trade and business with integrity and punctuality of dealing, and has always been able and willing to pay his just debts, and hath never been in insolvent or bad circumstances"]. By means of which said premises, the said plaintiff, before the committing of the said several grievances by the said defendant as hereinafter mentioned, had deservedly obtained the good opinion and credit of all his neighbors and other good and worthy subjects of this realm to whom he was in anywise known, and was daily and honestly acquiring great gains and profits in his aforesaid trade and business, to the comfortable support of himself and his family, to wit, at, etc. [*venue*], aforesaid. [*If there be any occasion for an inducement to explain the libel, here insert it.*].

Yet the said defendant, well knowing the premises, but greatly envying the happy state and condition of the said plaintiff, and contriving and wickedly and maliciously intending to injure the said plaintiff in his said good name, fame and credit, and to bring him into public scandal, infamy and disgrace with and amongst all his neighbors and other good and worthy subjects of this kingdom, and to cause it to be suspected and believed by those neighbors and subjects that the said plaintiff had been and was guilty of the offenses and misconduct hereafter stated to have been charged upon and imputed to him by the said defendant [*or, if the libel impute insolvency, say,* "had been and was in bad and insolvent circumstances and incapable of paying his just and true debts"]. and to vex, harass, oppress, impoverish and wholly ruin the said plaintiff in his aforesaid trade and business and otherwise, heretofore, to wit, on, etc. [*day of publication of the libel, or about it*], at, etc. [*venue*], aforesaid, falsely, wickedly and maliciously did compose and publish, and cause and procure to be composed and published, of and concerning the said plaintiff, and of and concerning him in his aforesaid trade and business [*if there be occasion to refer to a special inducement before stated, do so here, saying,* "and of and concerning the said ——"], a certain false, scandalous, malicious and defamatory libel, containing, among other things, the false, scandalous, malicious, defamatory and libelous matter, of and concerning the said plaintiff and of

and concerning him in his aforesaid trade and business, as follows, that is to say [*here set out the libelous matter complained of with proper innuendoes*].

By means of the committing of which said several grievances by the said defendant as aforesaid the said plaintiff hath been and is greatly injured in his good name, fame and credit, and brought into public scandal, infamy and disgrace with and among all his neighbors and other good and worthy subjects of this realm, insomuch that divers of those neighbors and subjects to whom the innocence and integrity of the said plaintiff in the premises were unknown, have, on account of the committing of the said grievances by the said defendant as aforesaid, from thence hitherto suspected and believed and still do suspect and believe the said plaintiff to have been and to be a person guilty of those offenses and misconduct so as aforesaid charged upon and imputed to him by the said defendant; and have, by reason of the committing of the said grievances by the said defendant as aforesaid, and from thence hitherto, wholly refused and still do refuse to deal with or have any transaction with the said plaintiff in his aforesaid trade or business or otherwise, as they were before used and accustomed to have and otherwise would have had, to wit, at, etc., to the damage of the said plaintiff of, etc.; and therefore he brings suit, etc.

§ 24. **For Libel against an Attorney** (2 Starkie, 382).—

(1) [*Title, etc.*]

(2) [*General inducement of good character.*]

(3) *Special inducement — Statement of extrinsic matter:* And for that whereas, also, the said A. B., for a long time before the composing and publishing of the false, scandalous, malicious and defamatory libel by the said C. D. hereinafter mentioned, had been and was and still is an attorney of the court of our said lord the king, before the king himself, and also a solicitor of the high court of chancery, and had used, exercised and carried on the profession and business of an attorney and solicitor with great credit and reputation, and had acquired and was still continuing to acquire divers large gains and profits in his said profession and business, to wit, at, etc.; and whereas, also, the said A. B. and one E. F., another of the attorneys of the court of our said lord the king, before the king himself, and also a solicitor of the said high court of chancery, had, as such attorneys and solicitors, been concerned in the prosecution of a certain commission of bankruptcy against the said C. D., and in divers proceedings and disputes concerning his estate and effects, and had always behaved and conducted themselves therein with skill, care, judgment and integrity, to wit, at, etc., aforesaid.

(4) *Statement of malicious intent — The colloquium, charge and innuendoes:* Yet the said C. D., well knowing the premises, but contriving and falsely and fraudulently intending to injure the said A. B. in his credit and reputation aforesaid, and also in his said profession and business of attorney and solicitor as aforesaid, and to cause it to be suspected and believed that he, the said A. B., had conducted himself dishonestly, injudiciously and improperly in relation to the said commission of bankruptcy, proceedings and disputes, and to vex, harass, oppress, impoverish and wholly ruin

him, the said A. B.. heretofore, to wit, on, etc., at, etc., wrongfully, maliciously and injuriously composed, wrote and published, and caused to be composed, written and published, a certain false, scandalous, malicious and defamatory libel of and concerning the said A. B. and E. F. in the way of and in respect to their profession and business of attorneys and solicitors, and of and concerning their prosecution of the said commission as such attorneys and solicitors, and their conduct as such attorneys and solicitors in such proceedings and disputes in which they were so concerned as aforesaid, under the said commission of bankruptcy, in the form of, and as a letter addressed to, etc., in which said letter was and is contained, amongst other things, the false, scandalous, defamatory and libelous words and matters following of and concerning the said A. B. and E. F. in the way of and in respect to their profession and business of attorneys and solicitors, and of and concerning their prosecution of the said commission as such attorneys and solicitors, and their conduct as such attorneys and solicitors in such proceedings and disputes in which they were so concerned as aforesaid, under the said commission of bankruptcy. [*Here set out the letter verbatim, with appropriate innuendoes.*]

(5) *Averment of general damages:* By means of the composing, writing and publishing of which said false, scandalous, malicious and defamatory libel by the said C. D. as aforesaid, the said A. B. hath been and is greatly prejudiced in his credit and reputation aforesaid, and brought into public scandal, infamy and disgrace, and hath been and is suspected to have acted dishonestly and unskilfully in the way of his said business and profession of an attorney and solicitor, and to have conducted himself dishonestly, injudiciously and improperly in relation to the said commission of bankruptcy, proceedings and disputes, and has been greatly vexed, harassed, oppressed and impoverished, and has also lost and been deprived of divers great gains and profits which would otherwise have arisen and accrued to him in his said profession and business, and hath been and is otherwise much injured and damnified therein, to wit, at, etc.

(6) [*The ad damnum and conclusion.*]

§ 25. **For a Libel by Caricature — Approved by Chief Justice Shaw** (Ellis v. Kimball, 33 Mass., 132).—

[*Title, etc.*]

Statement of good character: For that whereas the plaintiff is and from his youth up hitherto has been a good, true, honest and just citizen of this commonwealth, etc.

Statement of extraneous matter: And whereas, also, at the time of the committing of the several grievances by the said defendant as hereinafter mentioned, and long before, the said plaintiff was and still is a lieutenant-colonel of the fourth regiment in the first brigade in the first division of the militia of this commonwealth, and as such officer has ever been well esteemed, etc.; and whereas, also, before the committing, etc., a certain militia court-martial had been convened in Boston, etc., by order of his excellency the governor, to wit, on the 20th day of February last, for the trial of one Greenville T. Winthrop, then or late a lieutenant-colonel of the division corps of independent cadets, upon certain charges and specifications theretofore prepared and then pending against him, of which said

court-martial the said plaintiff was duly detailed and returned to constitute one to hear and try said case, and the said plaintiff did take his place and was sworn according to law, and did act as a component part of said court-martial during said trial as by the laws of the commonwealth he was bound to do, to wit, at, etc., on, etc.

Statement of malicious intent — Colloquium, charge and innuendoes: Yet the said defendant, well knowing the premises, but greatly envying the happy state of the said plaintiff, and wickedly and maliciously intending and contriving to injure the said plaintiff in his good name, etc., and to cause it to appear and be believed that the said plaintiff acted from low, mean and disgraceful motives, and especially while acting on said court-martial, did, on, etc., at, etc., falsely and maliciously contrive, compose, utter and publish, etc., of and concerning the said plaintiff, and of and concerning the said court-martial, and of and concerning the said plaintiff as a component part of the said court-martial, a certain false, scandalous, malicious and defamatory libel and caricature consisting of a lithograph picture and representation of said court-martial and of the said plaintiff as a member thereof, in which said libel, caricature and picture the said court-martial and the said plaintiff as a member thereof are clearly marked and pointed out by their position and certain grotesque resemblances, and are represented and exhibited in an awkward, ludicrous and contemptible light, posture and condition, and particularly the said plaintiff is therein and thereby represented as saying: "He" (meaning said Winthrop, the respondent before said court) "had ought to be rammed into a six-pounder and picked out at the touch-hole," thereby imputing to said plaintiff low and vulgar language, views and motives; and the said defendant did then and there cause the said libel, caricature and picture to be widely disseminated and placed at the shop windows in said Boston, to wit, at said Concord, whereby and by means of all of which the said plaintiff has been greatly injured, etc., and has suffered in his good name, reputation and character both as a man and an officer in said militia of the commonwealth, and is brought into public scandal and infamy and disgrace amongst the good citizens aforesaid, etc. [*ad damnum, etc.*].

§ 26. For a Libel in a Newspaper (Puterbaugh's Common Law, 485).—

[*Title, etc.*]

For that whereas the plaintiff, before and at the time of the committing by the defendant of the several grievances hereinafter mentioned, was a person of good name, credit and reputation, and deservedly enjoyed the esteem and good opinion of his neighbors and other worthy citizens of this state. Yet the defendant, well knowing the premises, but wickedly and maliciously intending to injure the plaintiff, and to bring him into public scandal and disgrace, on, etc., in, etc., wickedly and maliciously did compose and publish, and cause to be composed and published, of and concerning the plaintiff, in a certain newspaper called the ——, whereof the defendant was then and there the editor and proprietor, a certain false, scandalous, malicious and defamatory libel, containing (among other things) the false, scandalous, malicious, defamatory and libelous matters following, of and concerning the plaintiff, that is to say: "He (meaning the plaintiff),

etc. [*setting out the libelous matter in hæc verba, with proper innuendoes*].

Second count: And the defendant, further contriving and intending as aforesaid, afterwards, to wit, on, etc., aforesaid, in, etc., aforesaid, falsely, wickedly and maliciously did compose and publish, and cause to be composed and published, of and concerning the plaintiff, in the said newspaper called the ——, whereof the defendant was then and there the editor and proprietor, a certain other false, scandalous, malicious and defamatory libel, containing (among other things) the false, scandalous, malicious, defamatory and libelous matters following of and concerning the plaintiff, that is to say, etc. [*Here set out the article complained of, with proper innuendoes*]. By means of the committing of which said several grievances the plaintiff has been and is greatly injured in his good name, credit and reputation, and brought into public scandal and disgrace, and has been and is shunned and avoided by divers persons, and is otherwise injured, to the damage of the plaintiff of —— dollars; and therefore he brings suit, etc.

III. Libel and Slander.

STATEMENT OF THE CLAIM UNDER THE ENGLISH RULES.

§ 27. **The English Procedure Act** (15 and 16 Vict., ch. 76).—Sec. 61. In actions of libel and slander the plaintiff shall be at liberty to aver that the words or matter complained of were used in a defamatory sense, specifying such defamatory sense, without any prefatory averment to show how such words or matter were used in that sense; and such averment shall be put in issue by the denial of the alleged libel or slander; and where the words or matter set forth, with or without the alleged meaning, show a cause of action, the declaration shall be sufficient.

Under this act a rule of pleading requires that "every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies, but not the evidence by which they are to be proved." The only case in which an introductory averment is now essential is where the words are actionable only by reason of being spoken of the plaintiff in the way of his office, profession or trade. Here there must always be an averment that the plaintiff actually held the office or carried on the profession or trade at the time the words were spoken.[1] And there should also be an averment that the words were spoken of the plaintiff with reference to such office, profession or trade. This statute seems

[1] Gallwey v. Marshall, 9 Ex., 300; 23 L. J., Ex., 78; 2 C. L. R., 399.

to have been repealed by statute 46 and 47 Vict., ch. 49; but the rule established by it still remains in force.[1]

§ 28. Character of a Servant.—

(1) *Title:*

In the High Court of Justice, Queen's Bench Division.

Writ issued on the 13th day of December, 1886.

Between SARAH JONES, Plaintiff,
and
HENRY ROBERTS and ALICE, his wife, Defendant.

(2) *Statement of claim:*

1. *Extrinsic matter:* The male defendant is a gentleman residing at —— Hall, near Evesham, in the county of Worcester, and the female defendant is his wife. The plaintiff is a housemaid, and was formerly in the service of the defendants in that capacity.

2. *The imputation:* On the 15th day of September, 1886, the female defendant falsely and maliciously wrote and published of the plaintiff the words following, that is to say: "While she (meaning thereby the plaintiff) was with us she stole a quantity of our house-linen, and pawned it in the High street."

3. *The ad damnum and conclusion:* The plaintiff claims £200 damages.

Place of trial: Gloucester.

[Signed] ——.

Delivered the 15th day of January, 1887.

§ 29. Imputation in a Foreign Language.—

1. The plaintiff is a farmer residing at ——, in the county of Glamorgan.

2. On the —— day of ——, 1886, the defendant falsely and maliciously wrote [*or* spoke] and published of the plaintiff in the Welsh language the words following, that is to say: [*Here set out the libel verbatim in Welsh.*]

3. The said words mean in English, and were understood by those to whom they were published [*or* those who heard them] to mean: [*Here set out the translation.*]

Or if an innuendo is necessary as well as a translation:

3. The following is a literal translation of the said words: "He is a devil of a shaved pig." The defendant meant thereby, and those who read [*or* heard] the said words understood him to mean thereby, that the plaintiff was insolvent and had been stripped of his last penny and was unable to pay his just debts.

4. Whereby the plaintiff was much injured in his credit and reputation, etc. [*Add any special damage that may exist.*]

And the plaintiff claims £—— damages.

§ 30. On a Libel Contained in a Placard.—

1. The plaintiff is, etc.

2. The defendant, on or about the 10th day of January, 1887, falsely and maliciously caused to be printed and published a certain libelous placard referring to the plaintiff, as follows: [*Here set out the placard.*]

3. The defendant caused one of such placards to be posted up opposite the plaintiff's shop and several others in its immediate neighborhood.

[1] Odgers on L. & S., 531, 722.

4. The plaintiff has in consequence suffered much annoyance, and has been disgraced and subjected to loss of reputation and of business, and has suffered in his credit and good name, and has incurred public odium and contempt.

The plaintiff claims £1,000 damages.

§ 31. **For Reading a Libel Aloud** (M. and Wife v. N. and Wife, Odgers on Libel and Slander, 621).—

1. On the 8th day of November, 1886, the following anonymous letter appeared in the "Dover Express:"

[*The letter described a brutal assault on a child by a tipsy woman, who was not in any way identified.*]

2. Thereupon the female defendant called the attention of the plaintiff's mother to the said letter, and referring to the said letter falsely and maliciously spoke and published of the plaintiff, Mary, the words following, that is to say: "The woman referred to in that letter is Henry's wife."

3. The female defendant meant thereby that the plaintiff, Mary, had cruelly and brutally and with inhuman violence assaulted and ill-treated her own child, and that she had been guilty of an indictable offense.

4. Alternatively, the female defendant falsely and maliciously published of the plaintiff, Mary, the said libelous words set out in paragraph 1 above by showing them to the plaintiff's mother and reading them aloud to her, representing to her that the woman therein referred to was the plaintiff, Mary, meaning thereby the plaintiff, Mary, had been guilty of a brutal and inhuman assault upon her own child, and that she had been drunk in one of the public streets of Dover.

And the plaintiffs claim £1,000 damages.

§ 32. **For Showing an Anonymous Letter — Special Damage** (Robshaw v. Smith, 38 L. T., 423).—

"1. The defendant is the general manager of the London and Yorkshire Bank, and the plaintiff carries on business as a merchant at —— street, in the city of London.

"2. Prior to the 31st of May, 1877, the plaintiff had had considerable business transactions with one J. H., also a merchant, from which he had derived large profits, and several such transactions were then in progress between the plaintiff and the said J. H., and the said J. H. would have continued to have such transactions with the plaintiff hereinafter referred to, and the said J. H. had offered the plaintiff to take him into his employment as manager, upon terms which would have given the plaintiff a salary of from £3,000 to £4,500 per annum for his services.

"3. On the 31st of May the said J. H. called upon the defendant, and the defendant then falsely and maliciously published to the said J. H. the following letter of and concerning the plaintiff: [*Here copy letter.*]

"4. Owing to the conduct of the defendant set forth in the preceding paragraph, the said J. H. refused to have any further transaction with the plaintiff, and the plaintiff lost the profits he would otherwise have made thereby, and the said J. H. also refused to take the plaintiff into his employment as he would otherwise have done, and the plaintiff has lost the benefit of such employment and the emoluments thereof, and has been

much injured in his credit, reputation and business, and has been otherwise damnified.

"The plaintiff claims £2,000 damages."

§ 33. **For a Libel on a Town Clerk.**—

"1. The plaintiff has been for thirty-three years, and was at the time of the writing and publication of the libel hereinafter complained of, town clerk of the parliamentary and municipal borough of —— in the county of ——, and has for many years practiced as a solicitor within the said borough, and held various appointments therein.

"2. The defendant is a member of the town council of the said borough.

"3. On the 12th October, 1886, the defendant falsely and maliciously wrote and caused to be printed and published of the plaintiff in respect of his said office of town clerk in a newspaper called the '—— Gazette,' which has a wide circulation in the said borough, the words following, that is to say [*here set out the libel verbatim*]; meaning thereby that the plaintiff had been guilty of gross misconduct in the discharge of his official duties, and had acted as such town clerk in a manner which was unjustifiable and discreditable to him, and had not been neutral, impartial and without respect of person or party in the discharge of his said duties, but had been actuated by improper, partial and corrupt motives therein, and had lost and was losing the respect, confidence and support of his fellow-townsmen.

"4. By reason of the premises the plaintiff has been injured in his character and reputation, and has suffered damage.

"The plaintiff claims £1,000 damages."

§ 34. **For a Libel on a Solicitor** (Odgers on Libel and Slander, 622).—

"1. The plaintiff is a solicitor and the senior partner in the firm of W., G & T., which carries on an extensive practice in the counties of ——. The plaintiff holds many public appointments; he is election agent for ——, etc.

"2. On January 9, 1886, the defendant falsely and maliciously spoke and published of the plaintiff, as such solicitor and election agent as aforesaid, and of and concerning his practice and profession and his mode of conducting the said recent election, and caused to be widely circulated throughout the said counties, the words following, that is to say: [*Here set out the alleged slander, adding any innuendoes which may be necessary.*]

"3. Subsequently the defendant falsely and maliciously, and with intent still further to wound and annoy the plaintiff and to injure him in his said profession, caused a report of his speech, set out in paragraph 2 above, to be reprinted from a newspaper called 'The —— Post,' and published of the plaintiff as aforesaid, and with the meaning aforesaid, in the shape of a leaflet or sheet for distribution. This report was (omitting for the sake of brevity certain words appearing in the original at the place marked with asterisks) as follows:

"'Those gentlemen' (meaning the plaintiff amongst others) 'who had worked against him' (meaning thereby the defendant), and unfairly worked against him, had worked not so much against him as against their own cause. * * * It was his fervent hope and prayer, etc. * * *'

"4. The defendant has caused the said leaflet to be very widely circu-

lated in the said counties on the 21st and 22d days of January, 1886, and still continues to circulate and distribute the same.

"Whereby the plaintiff has been injured in his credit and reputation, and in his said practice or profession, and has otherwise been much injured and damnified.

"And the plaintiff claims:

"(1) Damages, £2,000."

§ 35. For a Libel on Architects in the Way of Their Profession (Botterill et al. v. Whytehead, 41 L. T., 588).—

"1. The plaintiffs are brothers carrying on in partnership at —— the profession and business of architects.

"2. At or about the time of the writing and publishing of the libels hereinafter complained of, the plaintiffs were, as the defendant well knew, employed by a committee formed for the restoration of a church at South Skirlaugh, near Hull, to superintend and carry out the restoration of the said church, and were appointed by the said committee as architects for that purpose.

"3. On the 8th of April, 1878, after the appointment of the plaintiffs as such architects as aforesaid, the defendant in a letter written and sent to Mr. Bethel, a member of the said committee, falsely and maliciously wrote and published of the plaintiffs, in relation to their profession and business of architects, and the carrying on and conducting thereof by them, the words following, that is to say:

"'I see in the "Hull News" of Saturday that the restoration of Skirlaugh Church has fallen into the hands of an architect who is a Wesleyan, and can show no experience in church work. Can you not do something to avert the irreparable loss which must be caused if any of the masonry of this ancient gem of art be ignorantly tampered with? Your great influence would surely have much weight in the matter.'

"Meaning thereby that the plaintiffs were incompetent to superintend and carry out the restoration of the said church, and that, if the restoration were left in the hands of the plaintiffs, the old masonry of the church would be ignorantly tampered with and would not be treated with proper spirit and feeling, and would suffer from their incompetence and want of skill.

"4. On or about the 16th of April, 1878, and after the appointment of the plaintiffs as such architects as aforesaid, the defendant, in a letter addressed to Mr. Barnes, the incumbent of Skirlaugh Church, falsely and maliciously wrote and published of the plaintiffs, in relation to their profession and business of architects, and the carrying on and conducting thereof by them, the words following, that is to say:

"'I am annoyed to see that you and your committee have engaged Messrs. B. as architects for the restoration of your church. Are you aware that they are Wesleyans, and cannot have any religious acquaintance with such work?'

"Meaning thereby that the plaintiffs were incompetent to undertake and superintend the restoration of the said church, and were unable to carry it out with adequate spirit and feeling.

"5. By reason of the premises and the publication of the said libels the

plaintiffs have been and are injured in their said profession and business, and have suffered in their credit and reputation as architects.

"The plaintiffs claim," etc.

§ 36. For Words Imputing a Crime.—

The plaintiff has suffered damage by the defendant falsely and maliciously speaking and publishing of the plaintiff on May 8, 1886, the words following, that is to say: "He is a regular smasher," meaning thereby that the plaintiff had uttered and was in the habit of uttering counterfeit coin, with the knowledge that such coin was counterfeit, and had been guilty of an indictable offense.[1]

And the plaintiff claims £——.

§ 37. For Words Imputing a Contagious Disorder — Special Damage.—

"1. At the time of the speaking and publishing by the defendant of the words hereinafter set out the plaintiff was a tailor carrying on business at ——, and was a married man.

"2. The defendant falsely and maliciously spoke and published of the plaintiff the words following, that is to say: 'I' (meaning the defendant) 'hear L.' (meaning the plaintiff) 'has,' etc., thereby meaning that the plaintiff was suffering from a loathsome contagious disorder, and had communicated the same to his wife, and was unfit by reason of such disorder to be admitted into society.

"3. By reason of the premises the plaintiff was injured in his credit and reputation, *and brought into disgrace among his neighbors and friends, and has been deprived of and ceased to receive their hospitality.*[2]

"4. The defendant falsely and maliciously spoke and published of the plaintiff in relation to his said business the words following, that is to say: 'I' (meaning the defendant), 'etc.,' thereby meaning that the plaintiff was in embarrassed pecuniary circumstances and unable to meet his liabilities.

"5. By reason of the matters in the preceding paragraph mentioned the plaintiff was injured in his credit and reputation as a tailor, and in his business,[2] *and many persons who had theretofore dealt with the plaintiff in his said business ceased to deal with him.*

"The plaintiff claims £—— damages."

§ 38. For Slander of a Clergyman.—

"1. The plaintiff is and at all times hereinafter mentioned was a clergyman of the church of England, a doctor of divinity and vicar of the parish of ——.

"2. It is and was the custom and the duty of the plaintiff as such vicar as aforesaid to constantly visit the parochial school in his said parish and

[1] This very compendious form can only be used in the simplest cases. Odgers on Libel and Slander, 624.

[2] The plaintiff was ordered to give particulars of the names of the "neighbors and friends" and of the "many persons" referred to in paragraphs 3 and 5, but was unable to do so; thereupon the words in italics were struck out of his statement of claims. Odgers on Libel and Slander, 626.

to superintend the management thereof. Miss E. B. was and is the mistress of the said school.

"3. Thereupon the defendant, on the 25th day of April, 1880, well knowing the premises, and intending to injure the plaintiff in his good name and credit as a clergyman of the church of England, and to cause it to be believed that the plaintiff had misconducted himself as such vicar as aforesaid, falsely and maliciously spoke and published of the plaintiff in relation to his profession as a clergyman of the church of England, and to his office as such vicar as aforesaid, and to the plaintiff's conduct therein the words following, that is to say: "Miss E. B. (meaning thereby the said school-mistress), etc. . . . " Meaning thereby that the plaintiff had been guilty of undue familiarity with the said Miss E. B., and had habitually been guilty of conduct unbecoming a clergyman of the church of England, and had misconducted himself in his office as such vicar as aforesaid, and was unfit to continue in the same, or to hold any other preferment.

"4. The plaintiff has thereby been greatly injured in his credit and reputation, and in his said profession as a clergyman of the church of England, and in his office as such vicar as aforesaid, and brought into public scandal, ridicule and contempt.

"And the plaintiff claims £—— damages."

§ 39. **For Slander of a Medical Man** (Edsall v. Russell, 4 M. & Gr., 1090; 12 L. J., C. P., 4).—

1. The plaintiff is a M. R. C. S. of London and Edinburgh, and carries on the profession and business of a surgeon and general medical practitioner in the city of —— and its neighborhood.

2. On the 9th day of January, 1880, the plaintiff was called in by the defendant to attend to his infant daughter, who was then lying dangerously ill. On the 14th day of January the said daughter died, through no negligence or default of the plaintiff.

3. Thereupon the defendant falsely and maliciously spoke and published of the plaintiff in relation to his said profession and business, and his conduct therein, the words following, that is to say: "Mr. E. (meaning the plaintiff) killed my child."

4. The defendant meant thereby that the plaintiff had been guilty of feloniously killing his said daughter by treating her improperly and with gross ignorance, and with gross and culpable want of caution and skill, and thus causing or accelerating her death.

5. In the alternative, the plaintiff says that the defendant meant thereby that the plaintiff had been guilty of misconduct and negligence in his said profession and business, and had acted in his said profession and business negligently, injudiciously, indiscreetly and improperly, and had not done his duty by his patient, and was unfit to be employed as a medical man.

6. In consequence of the defendant's words the plaintiff has been and is greatly prejudiced and injured in his credit and reputation, and in his said profession and business of surgeon and general medical practitioner.

The plaintiff claims, etc.

§ 40. **For Slander of a Solicitor.**—

1. The plaintiff is a solicitor carrying on business at ——. He had before the utterance of the slander hereinafter mentioned been retained and em-

ployed by the defendant to act for him as his solicitor in an action which the defendant lost.

2. On the 1st day of April, 1884, the defendant falsely and maliciously spoke and published of and concerning the plaintiff in relation to his profession as a solicitor the words following: . . . meaning thereby that the plaintiff had been guilty of dishonorable and unprofessional conduct in his practice as a solicitor, and that the said action had been lost through the culpable negligence or fraudulent malpractice of the plaintiff, and that the plaintiff had cheated and defrauded his client, the defendant, and would similarly cheat and defraud other clients.

3. Whereby the plaintiff has been greatly injured in his credit and reputation and in his profession as a solicitor.

And the plaintiff claims:

(1) £500 damages.

§ 41. For Slander of a Trader in the Way of His Trade — Special Damage.—

1. The plaintiff is and at the times hereinafter mentioned was a baker, carrying on business at ——, in the county of ——.

2. On and about the —— day of ——, 1886, the defendant falsely and maliciously spoke and published of the plaintiff in the way of his trade and in relation to his conduct therein the words following, that is to say [*here set out the slander verbatim*]; meaning thereby that the plaintiff cheated or was guilty of fraudulent, corrupt and dishonest practices in his said business.

3. In consequence of the said words the plaintiff was injured in his credit and reputation as a baker and in his said business and trade, and X., Y. and Z., who had heretofore dealt with the plaintiff in his said trade, ceased to deal with him.

The plaintiff claims £——.

Another Form (Odgers on Libel and Slander, 629).—

1. The plaintiff is a grocer carrying on business at Coventry, and has suffered damage by the defendant falsely and maliciously speaking and publishing of him in relation to his said business the following words, that is to say:

(*a*) "The big grocer has failed." These words were spoken by the defendant to Mrs. E. B., of C—— street, Leamington, on or about the 30th of May, 1883. Mrs. B. asked, "Whom do you mean by 'the big grocer?'" The defendant replied, "I mean Mr. L., of Coventry (the plaintiff); a commercial traveler told me in my office that he had failed."

(*b*) "Mr. L. is in Queer street, and everybody knows it." These words were spoken by the defendant to Mr. C. B., of Coventry, accountant, on June 7, 1883, and to several commercial travelers, and especially to Mr. John Brown, who travels for the wholesale house of Candy & Co.

2. The defendant thereby meant and was understood to mean that the plaintiff was insolvent and was unable to meet his liabilities, and had filed a petition in the bankruptcy court for liquidation of his affairs by arrangement or composition with his creditors.

Particulars of special damages:

(*a*) In consequence of the defendant's above-mentioned statement to Mr.

John Brown, Messrs. Candy & Co., who had previously supplied the plaintiff with goods on credit, refused to sell any more goods to the plaintiff on credit, as they otherwise would have done.

(*b*) Since the said slanders were uttered, and in consequence thereof, there has been a general decline in the plaintiff's business and a considerable loss of profit to him.

The plaintiff claims £—— damages.

§ 42. For Words Imputing Insolvency — Special Damage.

"1. The plaintiff is a private gentleman owning lands in Shropshire; the defendant is a solicitor carrying on business at Shrewsbury.

"2. Between the 13th of November, 1886, and the 31st of January, 1887, the defendant has repeatedly spoken and published of the plaintiff falsely and maliciously, and with the deliberate intention of injuring and annoying the plaintiff, and causing his creditors to press for immediate payment of their debts, the words following: 'Mr. X. (meaning the plaintiff) is insolvent. He owes money right and left. He cannot face his creditors. He is leaving the county deeply in debt. Does he owe you any money? You must look sharp after it. He cannot pay. You had better let me issue a writ against him for the amount.'

"3. The plaintiff has thereby been greatly injured in his credit and reputation, and has also suffered special damage, whereof the following are the particulars:

"(*a*) In consequence of what the defendant said to him, one George Morris pressed the plaintiff for payment of the sum of £40 before the agreed period of credit had expired, and has issued a writ against the plaintiff for that amount, which he would not otherwise have done.

"(*b*) In consequence of what the defendant said to them, the directors of the Shropshire Banking Company applied to the plaintiff for the sum of £250 for which he was a surety to them for one A. B., and required the immediate payment thereof, which they would not otherwise have done.

"(*c*) Mrs. Ann Graham was induced by what the defendant said to call in the sum of £350 secured to her by an indenture of mortgage dated the 18th day of July, 1884, and made between her and the plaintiff, and to threaten in default of payment to exercise the power of sale contained in the said indenture, which she otherwise would not have done.

"And the plaintiff claims £500 damages."

§ 43. For Words Not Actionable without Proof of Special Damage.—

"1. In the month of May last the plaintiff and his brother, Mr. W. C., were candidates for membership of the Reform Club. The defendant was a member of the said club.

"2. Upon a ballot of the members of the said club the plaintiff and his brother were not elected to membership.

"3. Subsequently to the said ballot a meeting of the members of the said club was called to consider a proposed alteration of the rules regulating the election of members, and the defendant took an active and personal interest in the matter.

"4. With a view to retain the regulations as they then existed, and to secure the exclusion of the plaintiff from membership of the said club, the

defendant falsely and maliciously spoke and published of the plaintiff, together with his said brother, the words following, that is to say [*words not actionable per se*], meaning thereby that the plaintiff had been guilty of conduct which unfitted him for membership of the Reform or any similar club.

"5. By reason of the said defamatory publications the defendant induced or contributed to inducing a majority of the members of the said club to retain the regulations under which the plaintiff had been rejected, and thereby prevented the plaintiff from again seeking to be elected to the said club. The plaintiff thus lost the advantage which he would have derived from again becoming a candidate with the chance of being elected. and the plaintiff suffered in his reputation and credit.

"The plaintiff claims £5,000 damages."[1]

§ 44. Statement of Claim by Husband and Wife for Slander of the Wife.—

"1. The plaintiff George is a licensed victualer, and keeps the 'White Horse Inn' at ——; the plaintiff Elizabeth is his wife, and assists him in the business of said inn.

"2. On the 15th day of January last the plaintiff Elizabeth was, in the absence of her husband, managing and superintending the said business at the said inn, when the defendant came into the said inn and asked her to serve him with drink, which she refused to do on the ground that he had already had enough.

"3. Thereupon the defendant falsely and maliciously spoke and published of the plaintiff Elizabeth, and in relation to her as managing and superintending the said business as aforesaid, and in the hearing of several customers of the said inn, the words following, that is to say:

* * * * * * * * * * *

Meaning thereby that the plaintiff Elizabeth was an immoral character, and was living in adultery, and was unfit to have the management and superintendence of the said business.

"4. By reason of the premises the plaintiff George was injured in his said business, and the plaintiff Elizabeth was injured in her character and reputation.

Particulars of special damage suffered by the plaintiff George.

"Each of the plaintiffs claims £50 damages."

IV. Slander of Property.

§ 45. Declaration for Words Spoken to a Person about to Hire Plaintiff's Ship, that She was Broken and Unfit to Proceed (2 Chitty's Pleadings, 641).—

(1) [*Title, etc.*]

For that whereas the said plaintiff, before and at the time of the said defendant's committing the grievances hereinafter mentioned, at, etc. [*venue*],

[1] The special damage here alleged was held too remote in the court of appeal. Q. B., 277; 31 W. R., 572; 48 L. T., 328; 47 J. P., 372. 11 Q. B. D., 407; 52 L. J.,

was possessed, as of his own property, of a certain ship or vessel called [*name*], and which said ship or vessel one J. S., before and at the time of the committing of the grievances hereafter mentioned, was about to hire, and would, had not such grievances been committed, have hired of the said plaintiff to go upon a certain voyage for certain freight and reward, to be therefor paid to the said plaintiff; nevertheless, the said defendant, well knowing the premises, but contriving and wrongfully and maliciously intending to injure the said plaintiff, and to induce the said J. S. not to hire the said ship or vessel as aforesaid, and thereby to deprive the said plaintiff of all the profits, emoluments, rewards and advantages he would have derived from the said ship or vessel being hired as aforesaid, heretofore, to wit, on, etc. [*venue*], in a certain discourse which the said defendant then and there had with the said J. S. of and concerning the said ship and vessel in the presence and hearing of the said J. S., falsely and maliciously spoke and published, of and concerning the said ship or vessel, the false, scandalous and malicious words following, that is to say, etc.; thereby then and there meaning that the keel and floor of the said ship or vessel were broken at the time when he and the said defendant had seen the same, whereas in truth and in fact at no time when he, the said defendant, saw the said ship or vessel, nor when he spoke and published the said slander as aforesaid, her keel was in any place hove up eighteen inches in a straight line, nor the splice or scaff of the said keelson as aforesaid, nor was the said ship or vessel in any manner so imperfect as the said defendant so asserted and alleged as aforesaid. By means of the speaking and publishing of which said several false, scandalous and malicious words as aforesaid, the said defendant giving credit to and believing that the said representations and assertions were true, afterwards, to wit, etc., aforesaid, at, etc. [*venue*], aforesaid, wholly refused to hire the said ship or vessel as aforesaid, and thereby the said plaintiff lost and was deprived of all the profits, emoluments, rewards and advantages he would have derived of and from the said ship or vessel having been so hired as aforesaid; and the said plaintiff hath been also, by means of the speaking and publishing the said several words as aforesaid, otherwise greatly injured and damnified, to wit, at, etc. [*venue*], aforesaid.

[*Ad damnum and conclusion.*]

§ 46. For a Libel on Goods Manufactured and Sold by Another—Precedent under the Modern English Rules (Western Counties Manure Co. v. Lawes Chemical Manure Co., L. R., 9 Ex., 218; 43 L. J., Ex., 171; 23 W. R., 5; Odgers on Libel and Slander, 662).—

DECLARATION.

"In the Exchequer of Pleas.

"The 3d day of February, A. D. 1874.

"*Devonshire, to wit:*

"The Western Counties and General Manure Co., Limited, by William Harris, their attorney, sue the Lawes Chemical Manure Co., Limited, for that at the time of the committing of the grievances hereinafter mentioned the plaintiffs carried on business and still do carry on business as, amongst

other things, manufacturers of and sellers of artificial manures, and had and still have upon sale certain artificial manures, and the plaintiffs say that the defendants, well knowing that the plaintiffs were carrying on the aforesaid business and selling the said artificial manures, and contriving and intending to injure the plaintiffs in their said business, falsely and maliciously printed and published, and caused to be printed and published of and concerning the plaintiffs, and of and concerning them as such manufacturers and sellers of artificial manures, and of and concerning them in the way of their said business, the words following, that is to say [*for the words of the libel, see the report of the case*]; meaning thereby that the said artificial manures so manufactured, sold and traded in by the plaintiffs were artificial manures of an inferior quality to the said other artificial manures, and especially were of an inferior quality to the said artificial manures of the defendants; whereas in truth and in fact the said artificial manures so manufactured, sold and traded in by the plaintiffs were not of an inferior quality, and especially were not inferior in quality to the said artificial manures of the defendants, as the defendants well knew; and by reason of the premises certain persons, and particularly George Snell and A. Rowe, who before and at the time of the committing of the grievances hereinbefore mentioned had been used to buy the said artificial manures so manufactured, sold and traded in by the plaintiffs, ceased to do so, and certain other persons, and particularly Geo. May and Samuel Harvey, who would have bought the said artificial manures of the plaintiffs, were induced to refrain from buying the same, whereby the plaintiffs have been prejudiced and injured in their said trade and business, and the reputation of the said artificial manures so manufactured by the plaintiffs has been injured, and the sale thereof has been much diminished and fallen off, and the plaintiffs have been greatly injured in their credit, reputation and circumstances, and have been and are thereby prevented from acquiring divers great gains which they might and otherwise would have acquired.

"And the plaintiffs claim £2,000."

PLEAS.

"In the Exchequer of Pleas.

"The 23d of February, 1874.

"1. The defendants by Arthur P. Power, their attorney, say that they are not guilty.

"2. And for a second plea the defendants say that the alleged words are true in substance and in fact.

"3. And for a third plea the defendants deny the allegations in the declaration contained that the said artificial manures manufactured, sold and traded in by the plaintiffs were not inferior in quality to the said artificial manures to the defendants' knowledge, as alleged."

REPLICATION.

"February 27, 1874.

"The plaintiffs join issue upon all the defendants' pleas.

"And the plaintiffs say that the defendants' third plea is bad in substance.

[*In margin.*]

"A matter of law intended to be argued is that the defendants' knowledge that the plaintiffs' manures were not inferior to their own is immaterial, and that the plea is therefore no answer to the action."

[*Lawes, etc., Co.* ats. *Western, etc., Co.*]

JOINDER IN DEMURRER.

"February 28, 1874.

"The defendants say that the said third plea is good in substance."

INTERROGATORIES.

"Interrogatories to be answered by the secretary or manager or some other person on behalf of the defendants, by affidavit in writing, to be sworn and filed in the ordinary way pursuant to the order of the Hon. —— ——, dated the —— day of ——, A. D. 1874.

"1. Was one W. M. W. an agent or servant or in the employ of the defendants in or about the month of February, 1873, for the sale of their manures, or for any other purpose, in Plymouth or elsewhere in the county of Devon, or in the county of Cornwall?

"2. Was any, and what, inquiry made by the said W. M. W. of J. M., then the secretary of the Devon and Cornwall Chambers of Agriculture, in or about the month of February, 1873, respecting certain manures sent by the said J. M. for analysis to Professor A.? Was the said inquiry, if any, made by the express authority of the defendants, or would it have been within the general authority of the said W. M. W. to make such inquiry? Did the said J. M., either then or at any time, give any, and what, accounts to the defendants or the said W. M. W., or any of their agents or servants, of the circumstances under which, the time when, the place where and the person or persons from whom he had procured the said manures or samples of manures?

"3. Were the said manures, or samples of manures, forwarded to Professor A. by the authority of the defendants, or their agents or servants, or which of them?

"4. Was the said J. M., in or about the month of February, 1873, or at any other and what time, and for how long, and where, an agent or servant of, or in any way as a shareholder, customer or otherwise connected with the defendants?

"5. Did the defendants receive, in or about the month of February, 1873, or at any other and what time, from the said J. M., an analysis, or copy of an analysis, made or purporting to be made by Professor A. of certain manures or samples of manures? Did the said J. M. give to the defendants, their agents or servants, any and what account of the time when, the place where and the person or persons from whom he received, or became possessed of the said analysis?

"6. Were the manures sold or manufactured by the plaintiff among the manures so analyzed or purported to be analyzed? Did the defendants print or circulate the said analysis?

"7. Did the defendants send a copy of the said analysis to each or any

or either of their agents, and to which of them? Give the names and addresses of the said agents.

"8. Was one E. E., in or about the month of February, 1873, or at any other and what time, an agent of or in any way as a shareholder or customer or otherwise connected with the defendants? Did he, by the authority or with the sanction of the defendants, procure from the plaintiffs, in or about the month of December, 1872, or when, any and what samples of their manures? What was done with the samples, if any, so obtained?

"9. Have the defendants in their possession or power any of the manures or samples, or portions of the manures or samples, submitted for analysis to Professor A.?"

10. [*Formal interrogatory as to books, letters, documents, etc.*]

V. Slander of Title.

§ 47. Declaration at Common Law for Procuring a Third Person to Attend a Public Auction Room and Slander Plaintiff's Title (2 Chitty's Pleadings, 641).—

[*Title, etc.*]

For that whereas the said plaintiff, before and at the time of the committing of the grievances by the said defendant hereinafter mentioned, was seized as of fee of and in the reversion of and in certain land with the appurtenances, situate, lying and being in the parish of —— in the county of ——, immediately expectant upon the death of one E. F., who was then seized of the same premises in her demesne as of freehold for the term of her natural life, to wit, at, etc. [*venue*]. And whereas the said plaintiff, before and at the time of the committing of the grievances hereinafter mentioned, was desirous of selling his said estate and interest by public auction, and for that purpose he, the said plaintiff, before and at the time of the committing of the said grievances, to wit, on, etc., at, etc. [*venue*], caused his said estate and interest to be, and the same then and there were, put up and exposed to sale by public auction by one G. H., as the auctioneer and agent of the said plaintiff, in order that the same might be then and there sold for the said plaintiff, yet the said defendant, well knowing the premises, but contriving and falsely and fraudulently intending to injure the said plaintiff, and to cause it to be suspected and believed that he, the said plaintiff, had no title, estate or interest of, in or to the said land with the appurtenances, and to hinder and prevent the said plaintiff from selling or disposing of his said estate or interest in the same, and to cause and procure the said plaintiff to sustain and be put to divers great expenses attending the said exposure to sale, and to vex, harass, oppress, impoverish and wholly ruin the said plaintiff, heretofore, to wit, on, etc., aforesaid, at, etc. [*venue*], aforesaid, wrongfully and injuriously, falsely and maliciously caused and procured a certain person, to wit, one W. M., to attend and be present at and upon such exposure to sale of his, the said plaintiff's, estate and interest as aforesaid, and then and there upon such exposure to sale, and before the said estate and interest had been sold and disposed of, falsely and maliciously caused and procured the said W. M. to assert and represent, and the said

W. M. did then and there accordingly, in the presence and hearing of divers liege subjects of our said lord the king, then and there present at and upon such exposure to sale as aforesaid, of and concerning the said plaintiff and of and concerning the said G. H., so being such auctioneer as aforesaid, and of and concerning the said land with the appurtenances, and the said plaintiff's estate and interest therein, that, etc. [*here set out the words*].

Second count: And whereas, also, the said defendant afterwards, to wit, on, etc., aforesaid, at, etc. [*venue*], aforesaid, further intending and contriving as aforesaid, then and there falsely and maliciously caused and procured a certain person, to wit, the said W. M., to attend and be present at and upon the said exposure to sale of the said plaintiff's estate and interest, and then and there, at and upon such exposure to sale, and before the said estate and interest had been sold or disposed of, falsely and maliciously caused and procured the said W. M. to assert and represent, and the said W. M. did then and there represent and assert in the presence and hearing of divers other subjects of our said lord the king, then and there present, at and upon such exposure to sale as aforesaid, of and concerning the said plaintiff and the said G. H., and of and concerning the said land and the estate and interest of the said plaintiff therein, that [*here state the words and proper innuendoes*]. By means of the committing of which said several grievances by the said defendant as aforesaid, divers of the liege subjects of our said lord the king, who were so present at and upon the said exposure to sale as aforesaid, and who were then and there about to be and become purchasers of the said estate and interest of the said plaintiff, and who might and otherwise would have bid for and purchased the same, and especially J. K., who was then and there about to bid for and who would otherwise have purchased the same, were then and there deterred and prevented from bidding for and becoming the purchaser of the said estate and interest of the said plaintiff, and then and there, and from thence hitherto, have respectively and wholly declined to purchase the same, and thereby the said plaintiff was then and there hindered and prevented from selling and disposing of his said estate and interest, and hath thereby not only lost and been deprived of all the advantages and emoluments which he might and would have derived and acquired from the sale thereof, but hath been forced and obliged to pay, lay out and expend divers large sums of money, amounting in the whole to a large sum of money, to wit, the sum of ——, in and about the said exposure to sale, and expenses incidental thereto, to wit, at, etc. [*venue*], aforesaid.[1]

[*Ad damnum and conclusion.*]

§ 48. Slander of Title to Goods under the English Rules.—

STATEMENT OF CLAIM.

1. The plaintiff, at all the times hereinafter mentioned, was a stone-mason and contractor carrying on business at ——, in the county of ——.

[1] See other forms and law, 8 Wentw., 297; 3 Taunt., 246; 1 M. & S., 304, 639; 4 Burr., 2421; 1 Rep., 177, b; Vin. Abr., Sland. of Title, pl. 16; 1 Stark. on Slander, 2d ed., 192, 3.

2. On or about the —— day of ——, 1880, the plaintiff in the ordinary course of his business advertised certain goods of his for sale. The following is a copy of the advertisement: "To be sold by auction, by Mr. F. S., on Friday and Saturday, January 30 and 31, 1880, at the above works, the whole of the working plant, the property of Mr. E. C., consisting of, etc. [*The advertisement then described a variety of articles, wagons, carts, sleepers, planks and materials.*] The sale to commence each day at 12 o'clock. Cotsgate Hill, Ripon, January 19, 1880."

3. Thereupon the defendant, on the 25th day of January, 1880, falsely and maliciously caused to be printed and published of the plaintiff and in relation to the said intended sale the following "Notice," that is to say [*here set out the words verbatim*], thereby meaning and intending to cause it to be believed that the goods named in the said advertisement were the property of the defendant and not of the plaintiff, and that no person could safely purchase any goods to be exposed for sale at the said advertised sale.

4. By means of the publication of the said "Notice" X., Y. and Z., all of ——, in the said county, who were desirous of purchasing the said goods or some of them, and who would otherwise have attended at the said sale, and would have bidden for and purchased the said goods or the greater part of them, were prevented from attending at the time and place appointed for the sale, and were deterred from bidding at such sale, and declined to purchase the said goods or any part thereof; and the plaintiff was then prevented from putting up the said goods for sale, and was unable to procure a fair and reasonable price for the same, and the said intended sale failed altogether; and the expenses incurred by the plaintiff in advertising and otherwise preparing for the said intended sale were thrown away, and the plaintiff lost the profits he would have made by the sale of his said goods, and was otherwise much injured and damnified.

And the plaintiff claims, etc.

The Defense.

1. The defendant admits that the plaintiff caused to be printed the advertisement set out in paragraph 2 of the Statement of Claim; but denies that the goods mentioned in such advertisement were the property of the plaintiff, and that the intended sale by auction was in the ordinary course of the plaintiff's trade and business.

2. The defendant admits that he caused to be printed and published the "Notice" set out in paragraph 3 of the Statement of Claim; but denies that he did so with the meaning in such paragraph alleged.

3. Before and at the time of the publication complained of, the plaintiff unlawfully detained from the defendant certain timber, carts, rails, plant and materials, the property of the defendant. The defendant was informed and believed that the plaintiff intended to dispose of the same (among other things) at the said intended sale by auction. The defendant accordingly printed and published the said "Notice" for the purpose of warning all persons from purchasing the said goods and chattels so unlawfully detained by the plaintiff as aforesaid and in the *bona fide* belief that such warning was necessary for the protection of the defendant's own property, and with-

out any malice towards the plaintiff. (Carr v. Duckett, 5 H. & N., 783; 29 L. J., Ex., 468.)

§ 49. **Libel in the Nature of Slander of Title** (Hart et al. v. Wall, 2 C. P. D., 146; 46 L. J., C. P., 227; 25 W. R., 373.)—

STATEMENT OF CLAIM.

"1. The plaintiffs were at the times hereinafter mentioned, and still are, vocalists, and had been and were engaged to sing at the 'Sun Music Hall,' Knightsbridge, and also at the 'London Pavilion Music Hall,' for reward payable to the plaintiffs for their services, and they appeared and sang in public under the name of 'The Sisters Hartridge.'

"2. On the 15th January, 1876, the defendant falsely and maliciously wrote and published of the plaintiffs, in the form of a letter addressed to E. Williams, Esq., the proprietor of the 'Sun Music Hall,' of the plaintiffs and of them as such vocalists, and of their engagement at the 'Sun Music Hall,' the words following, that is to say: 'January 15, 1876. E. Williams, Esq.—My dear Sir: Although I know it is quite unintentional on the part of the lady advertisers (meaning the plaintiffs), the advertisement attached at foot, if relied upon in every particular by proprietors engaging them, is calculated to lead such proprietors to incur the penalties under the copyright act in certain cases, as I hold the power of attorney over the performing rights of certain musical publications belonging to two houses therein named, who only have the copyrights vested in them, and a separate and distinct property never held by them. If all proprietors knew this, it would be best; but I have not time to apprise them. I remain, yours truly, H. Wall,' meaning that the plaintiffs had no right to sing certain songs which they advertised themselves as about to sing at the said music hall.

"3. In consequence thereof, and by the publication of the said words, E. Williams dismissed the plaintiffs from his service and terminated the said engagement at the 'Sun Music Hall.'

"4. On the 19th day of January, 1876, the defendant falsely and maliciously wrote and published of the plaintiffs, in the form of a letter addressed to E. Loibl, Esq., the proprietor of the 'Pavilion Music Hall,' of the plaintiffs, and of them as such vocalists, and their engagements at the said music hall, the words following, that is to say: 'January 19, 1876. E. Loibl, Esq.—Dear Sir: That you may not be misled, I beg to state that, with reference to an advertisement in the last 'Era,' where the Misses Hartridge [meaning the plaintiffs] give notice that they have received unhesitating permission to perform any *morceaux* from any publication of certain publishers therein mentioned, it would be as well for you to know that, if two of the firms really had pretended to have given such unqualified sanction, that I hold powers of attorney over certain publications issued by them as to the sole liberty of public performance, which right they never possessed. But Messrs. Chappell & Co.'s representative to-day informed me that they only granted permission for two songs in particular [which were named], and they were not aware it was for music-hall singing, as they have a poor opinion of such creating any demand for their publica-

tions; and moreover that they require the advertisement to be altered. And Messrs. Metzler & Co.'s representative, in the presence and hearing of Mr. Brown (the head man of Mr. Cunningham-Boosey) yesterday stated to me that he had granted no permission whatever, but on the contrary that they had informed the ladies [meaning the plaintiffs] that their charge for such permission would be 7*s.* per night (£2 2*s.* per week), as much again as Messrs. Boosey named' (meaning that the plaintiffs had advertised themselves to sing at the said music hall songs which they had no right to sing).

"5. In consequence of the publication of these words E. Loibl dismissed the plaintiffs from his service, and dispensed with their services and refused to employ them to sing at the said music hall; and the plaintiffs were and are by means of the premises otherwise injured.

"And the plaintiffs claim £100 damages."

VI. Statement of Defenses — Pleas at Common Law.

§ 50. The General Issue — Non Cul., Not Guilty.—

And the defendant C. D., by —— ——, his attorney, comes and defends the wrong and injury, when, etc., and says that he is not guilty of the said supposed grievances laid to his charge, in manner and form as the plaintiff has in his said declaration complained against him; and of this he puts himself upon the country, etc.

§ 51. Plea of Justification at Common Law — Imputation of Larceny.—

And for further plea in this behalf the defendant says *actio non:* Because he says that the plaintiff, before the speaking and publishing of the said several words of and concerning the plaintiff as in the said declaration mentioned, to wit, on, etc., at, etc., did feloniously steal, take and carry away certain goods and chattels, to wit [*here describe the property stolen*], the property of one E. F., of great value, to wit, of the value of —— dollars, against the form of the statute in such case made and provided; wherefore he, the defendant, afterwards, to wit, at the said several times when, etc., in the said declaration mentioned, at, etc., did speak and publish the said words of and concerning the plaintiff in the said declaration mentioned, as he lawfully might for the cause aforesaid; and this he is ready to verify; wherefore he prays judgment, etc.

Another Form (Yates' Pleadings, 429).—

And for a further plea in this behalf [*if the plea is intended to justify the words in some particular count or counts only, here allege,* "as to the speaking and publishing of the said several words of and concerning the said plaintiff, as in the —— counts mentioned"] the said defendant by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, says that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says that the said plaintiff, before the speaking and publishing of the said several words of and concerning the plaintiff, as in the said —— counts of the said declaration mentioned, to wit, on, etc., at, etc., did feloniously steal, take and carry away certain goods and chattels,

to wit, ——, of one E. F. of great value, to wit, of the value of $100; wherefore he, the said defendant, afterwards, to wit, at the said several times when, etc., in the said —— counts mentioned, at, etc. [*venue*], did speak and publish the said words of and concerning the said plaintiff, as in the said —— counts of the said declaration mentioned, as he lawfully might for the cause aforesaid. And this he is ready to verify, etc.

§ 52. **Justification of Charge of Perjury** (Yates' Pleadings, 430).—

And for further plea in this behalf the defendant says *actio non:* Because he says that before the speaking and publishing the said words of and concerning the said plaintiff (in the said —— counts mentioned), to wit, on, etc., at, etc. [*venue*], at the [*state what court*] then and there holden before the judges of the same court, according to the form of the statute in such case made and provided, a certain issue before then joined in an action brought and prosecuted in the court [*state court*] by and at the suit of one E. F. as the plaintiff, against one G. H. as the defendant, for the supposed breach of certain promises and undertakings alleged by the said E. F. to have been made to him by the said G. H. and not performed, came on to be tried in due form of law, and was then and there tried by a jury of the country in that behalf, duly taken and sworn between the parties aforesaid, and upon such trial of the said issue the said plaintiff appeared as a witness for and on behalf of the said E. F., the plaintiff in the said action, and the said plaintiff was then and there in open court holden as aforesaid, before the said judges thereof, duly sworn, and took his corporal oath upon the Holy Gospel of God to speak the truth, the whole truth, and nothing but the truth, touching and concerning the matters in question in the said issue (the said court then and there having sufficient and competent power and authority to administer the said oath to the said plaintiff in that behalf); and upon the said trial of the said issue it then and there became and was material to ascertain the truth of the matters hereafter stated to have been sworn to by the said plaintiff. And the said defendant further says that the said plaintiff, being so sworn as aforesaid, upon his oath aforesaid, then and there, to wit, on, etc., at, etc. [*venue*], falsely, wickedly, wilfully, maliciously and corruptly, and by his own act and consent, did say, depose, swear and give evidence, amongst other things, at and upon the said trial, to and before the said jurors so sworn to try the said issue as aforesaid, and the justices aforesaid, that, etc. [*Here state that part of the plaintiff's evidence in which he committed perjury.*] Whereas in truth and in fact, etc. [*Here negative the plaintiff's evidence as in an indictment for perjury.*] And the said plaintiff did thereby in the said court so holden as aforesaid, upon his said oath upon the trial of the said issue, falsely, wickedly, wilfully and corruptly commit wilful and corrupt perjury; wherefore the said defendant, at the said several times when, etc., in the said —— counts mentioned, at, etc. [*venue*], spoke and published of and concerning the said plaintiff the said several words in the said —— counts mentioned to have been spoken and published by the said defendant of and concerning the said plaintiff, as it was lawful for him to do for the cause aforesaid. And this, etc. [*Conclude with a verification.*]

§ 53. **Justification of Charge of Insolvency** (Yates' Pleadings, 430).—

And for a further plea in this behalf the defendant says *actio non:* Because he says that the said plaintiff at the times when, etc, in the said —— counts mentioned, and at, etc. [*venue*], was in bad and indigent circumstances and incapable of paying his just dues, to wit, a certain just debt amounting to a large sum of money, to wit, the sum of $10,000, which he then and there owed to one E. F., for, etc. [*here state generally the subject-matter of the debt*], and a certain other just debt amounting to a large sum of money, to wit, the sum of $5,000, which he, the plaintiff, then and there owed to one D. H., for, etc. [*enumerating as many as can be proved to have been long in arrears*], and which said several debts the said plaintiff was then and there unable to pay. And this he is ready to verify, etc.

§ 54. **Justification Charging Third Person with the Authorship of the Slander — Repetition by Defendant, Giving Name of the Author — Under the Old English Rule — Not Supported by Later Authorities.—**

And the defendant for a further plea in this behalf says *actio non:* Because he says that before the speaking and publishing of the said several words in the said —— count mentioned, therein supposed to have been spoken and published by the said defendant of and concerning the said plaintiff to wit, on the said several days in the said —— counts mentioned, at, etc. [*venue*], one E. F., of No. —— street, in the town of ——, in the county of ——, falsely and maliciously spoke and published the following words, to and in the presence and hearing of the said defendant, of and concerning the said plaintiff, that is to say, etc. [*Here repeat the words precisely as they were used, with the innuendoes corresponding with those stated in the declaration, though it will be sufficient to prove some material part of them.*] And the said defendant further saith that at the time of his speaking and publishing the said several words in the said declaration as therein mentioned he, the said defendant, believed the same to be true in fact; and being then and there interrogated and asked by the said plaintiff that the said E. F. had so falsely and maliciously spoken and published as aforesaid, he, the said defendant, then and there answered and declared, in the presence and hearing of the same persons in whose presence and hearing the said words were so spoken by the said defendant as aforesaid, that he had heard and been told the same from and by the said E. F., of, etc. Wherefore he, the said defendant, at the said several times when, etc., in the said —— counts mentioned, did speak and publish of and concerning the said plaintiff and the said several words in the said —— counts mentioned, as he lawfully might for the cause aforesaid. Verification.

§ 55. **Justification of the Truth of a Libel on an Attorney** (Yates' Pleadings, 431).—

And for further plea in this behalf the defendant saith that, as to the publishing and causing to be published so much of the said supposed libelous matter as imputes or charges to or against the plaintiff that he, before the said several times when, etc., had been suspended in his aforesaid pro-

fession and business of attorney above supposed to have been done by the said defendant, the said defendant by leave, etc.. saith that the said plaintiff ought not, etc., because he saith that the said plaintiff, before the said times when, etc., in the said declaration mentioned, to wit, on the 10th of January, in the year last aforesaid, had been employed in the way of his aforesaid profession and business of attorney by one T. G., and afterwards and before the said several times when, etc., to wit, on the day and year last aforesaid, fraudulently and extortionately demanded of and from the said T. G. as and for the sum of money justly due to him, the said plaintiff, from the said T. G. for the work and labor of him, the said plaintiff, as such attorney done, performed and bestowed in and about the business of the said T. G. in pursuance of the last aforesaid employment and for the fees and disbursements due and made to and by him as such attorney in respect thereof a certain large sum of money, to wit, the sum of $261; whereas in truth and in fact the sum of money then and there justly due to him, the said plaintiff, in that behalf, then and there amounted to a much less sum of money, to wit, the sum of $72. And the said defendant further saith that afterwards and before the said several times when, etc., to wit, on the 13th day of February in the year last aforesaid, J. N., etc., then being judge of the court [*here name the court*], caused the aforesaid false, fraudulent and extortionate demand to be taxed by the proper officer of the said court in that behalf, to wit, G. M., Esq., clerk of the said court, and that the said officer did afterwards and before the said several times when, etc., to wit, on the 20th day of February in the year last aforesaid, report in the said court to the said J. N., as and being such judge as aforesaid, according to the forms and practice of the said court, that upon such taxation of the aforesaid false, fraudulent and extortionate demand a small part thereof, to wit, the sum of $72 only, had been justly found due to the said plaintiff from the said T. G. And the said defendant further saith that thereupon by reason of the premises, afterwards and before the said several times when, etc., to wit, on the 19th day of March in the year aforesaid, the said J. N., as and being judge of the said court, did order, direct and adjudge to be suspended and did suspend the said plaintiff from exercising the business of attorney of the said court for and during the space of one year then next following; and did then and there direct that at the expiration of the space of one year the said plaintiff should be further suspended until he should appear and publicly make faithful promise to abstain from all malpractices in the future exercise of his business as attorney of the said court. And the said defendant further saith that the said J. N. in that plea mentioned and J. N. in the said supposed libels named are one and the same person; wherefore the said defendant afterwards, at the said several times when, etc., did publish and cause and procure to be published so much of the said supposed libelous matters in the said declaration mentioned as imputes or charges to or against the said plaintiff that he, the said plaintiff, before the said several times when, etc., had been once suspended in his aforesaid profession and business of attorney as he, the said defendant, lawfully might for the cause last aforesaid, which are the same publishing and causing to be published the said supposed libelous matters as are in the introductory part of this plea mentioned; and this, etc. [*Conclude with verification.*]

§ 56. Justification to an Action for Libel that Defendant as Commanding Officer Sent the Letter to the Commander-in-chief in Order that Plaintiff Might be Brought to a Court-martial (Yates' Pleadings, 432).—

And for further plea in this behalf the defendant says *actio non:* Because he says that, before and at the time of the said supposed grievances, to wit, etc. [*venue*], the said defendant was colonel and commanding officer of the said regiment in the said declaration mentioned, called, etc., and being such colonel and commanding officer of the said plaintiff, the said plaintiff being, as averred in the said declaration, captain, lieutenant and paymaster of the said regiment, the said several charges stated and alluded to in the said declaration as contained in the said supposed libel in the said declaration mentioned, were charges and accusations made and exhibited to him, the said defendant, as such commanding officer of the said regiment as aforesaid, by the lieutenant and acting adjutant in the said regiment, E. F., in the said declaration also mentioned officially, and in order that he, the said defendant, might also officially and as in duty bound as such colonel and commanding officer of the said regiment transfer the said charges to the then commander-in-chief, the Hon. Gen. D. H., and which said charges he, the said defendant, did accordingly transfer to the said commander-in-chief in order that the said plaintiff might be brought to a court-martial for the said alleged offenses in the said charges contained, as it was lawful for the said defendant to do for the causes aforesaid, which is the same publishing, etc. [*Verification.*]

§ 57. Justification of an Imputation that Defendant Had Been Guilty of Opening Letters, etc. (Yates' Pleadings, 430).

And for a further plea in this behalf, as to the composing and publishing the said supposed libel in the said [*first*] count of the said declaration mentioned, and also as to the speaking and publishing so many of the supposed words in the [*last*] count of the said declaration mentioned as impute to the said plaintiff the unlawful opening of letters received by him, as such deputy postmaster as aforesaid, before the delivery thereof to the persons to whom the same were directed, or for their uses, the said defendant by leave, etc. [*actio non*]: Because he saith that before the composing and publishing of the said supposed libel, and also before the speaking and publishing of the said supposed words in the introductory part of this plea mentioned, and whilst the said plaintiff was such deputy postmaster as in the said declaration mentioned, to wit, on, etc., at, etc. [*venue*], as well a certain letter directed to one G. A. (by the name and description of Mr. A. Billericay) as certain other letters, had been severally delivered into the postoffice there; and that after such delivery of the said letters respectively into the said postoffice, and before they were delivered to the said persons to whom the same were directed, or to their use respectively, and also before the composing and publishing of such supposed libel, or the speaking and publishing of such words as aforesaid, to wit, on, etc., last aforesaid, at, etc. [*venue*], the said letters had been unlawfully opened, contrary to the form of the act of congress in such case made and provided; and the said defendant further says that he, before and at the said times when, etc., in the said first and

last counts mentioned, to wit, on the day and year therein specified, at etc., had reasonable and probable cause to suspect and did then and there actually suspect that the said plaintiff, whilst such deputy postmaster as aforesaid, had unlawfully opened the said letters, and had been in the habit of opening letters delivered into the said postoffice, at, etc., as in those counts mentioned, and that the said supposed libel was directed and sent by the said defendant to the said B. I. B., in the said declaration mentioned, and the said words were spoken and published by the said defendant to persons who, as well the said B. I. B., at the said times when, etc., in the said first and last counts mentioned, were severally employed in and relating to the postoffice, in stations superior to that of the said plaintiff as such deputy postmaster, and were respectively published to them by way of complaint against the said plaintiff; the said B. I. B. and the said other persons then and there being parties to whom the complaint on the occasion aforesaid might be fitly and properly made, to wit, at, etc. [*venue*]; and the said defendant further says that, before the time of the composing and publishing of the said supposed libel, to wit, on, etc., he, the said defendant, being such attorney as aforesaid, had commenced an action at the suit of one T. D. against the plaintiff, in the court [*name of court*], for the recovery of several penalties which were alleged to have been incurred by the said plaintiff by reason of his opening, causing and procuring and permitting and suffering to be opened the aforesaid letters directed to the aforesaid G. A., contrary to the form of the same statute, which are the same composing and publishing of the said supposed libel and the speaking and publishing of the same words in the introductory part of his plea mentioned, and whereof the said plaintiff hath, in and by his said first and third counts in that behalf, complained against him, the said defendant; and this he is ready to verify. Wherefore, etc.

§ 58. **Justification of a Libel for an Imputation of Perjury in an Answer in Chancery** (Yates' Pleadings, 431).—

And for further plea in this behalf the defendant says *actio non:* Because he says that the said defendant, before the committing of the said several supposed grievances in the said declaration mentioned, or any of them, to wit, on, etc., did exhibit his bill of complaint in writing in the court of chancery against the said plaintiff, directed to the chancellor, alleging that he had from time to time accommodated the said plaintiff with divers loans, bills of exchange and drafts in the said bill mentioned, and praying (among other things) for a discovery, and that an account might be taken of the several transactions, drafts or bills of exchange, matters and things in the said bill of complaint mentioned, and of divers acts between the said defendant and the said plaintiff, and that the said plaintiff might, in the meantime, be restrained by the injunction of the said court of chancery from suing out any execution in a certain action at law before then commenced by the said plaintiff against the said defendant in the court [*state what court*] in a certain plea of trespass on the case, in the said bill of complaint more particularly mentioned, as in and by the said bill of complaint of the said defendant, remaining duly affiled in the said court of chancery in the —— more fully appears; and the said defendant further says that the said plaintiff afterwards, to wit, on, etc., at, etc., came before [*state whom and*

the office he held], and then and there before the said —— —— exhibited and produced the answer in writing of him, the said plaintiff, and was then and there, in due form of law, sworn upon the Holy Gospel of God before the said —— ——, and then and there having sufficient and competent power and authority to administer an oath to the said plaintiff in that behalf, touching and concerning the said matters and things contained in the said answer; and that the said plaintiff not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, and minding and intending unjustly to aggrieve the said defendant, did then and there, at, etc., aforesaid, upon his oath aforesaid, in his answer aforesaid, before the said —— ——, and then and there having such sufficient and competent power and authority as aforesaid, knowingly, falsely, wickedly, maliciously, wilfully and corruptly, by his own act and consent, did (amongst other things) answer, swear and affirm in writing, in substance and to the effect following, to wit, etc. [*set out the answer fully, with the necessary innuendoes*], as by the said answer of the said plaintiff remaining duly filed in the said court of chancery more fully appears; whereas in truth and in fact the said plaintiff had been and was, etc. [*denying and contradicting all the positions in the answer, as in the bill is mentioned*], to wit, at, etc., in the county aforesaid; and the said plaintiff, when he so deposed and swore to the truth of the said answer as aforesaid, then and there, to wit, at, etc., in the said county of ——, well knew the said several matters and things aforesaid, so sworn by him as aforesaid, to be false and untrue; and whereas in truth and in fact the said defendant did give, etc. [*denying the answer as in the said answer is alleged*], and the said plaintiff, when he so deposed and swore in that behalf as aforesaid, then and there, to wit, at, etc., well knew and believed that the said bill was given as a loan or accommodation to him as aforesaid; and whereas in truth and in fact the said plaintiff did, etc. [*denying answer and asserting that plaintiff perjured himself throughout all the positions of the answer*]; and the said defendant further says that on the occasion of the said plaintiff so swearing and deposing as aforesaid, it became and was material for the purposes of the said suit to ascertain the truth of the matter so by him sworn and deposed to as aforesaid; and the said defendant says that the said plaintiff on, etc., at, etc. [*venue*], before the said —— —— (then and there being one of the [*state the office*], and then and there having competent power and authority to administer the said oath to the said plaintiff), did knowingly, falsely, wickedly and maliciously, wilfully and corruptly, in manner and form aforesaid, commit wilful and corrupt perjury, to the great displeasure of Almighty God and to the great damage of him, the defendant, to the evil example of others and against the peace, etc. Wherefore the said defendant at the several times when, etc., the same and every one of them being after the commission of the said perjury by the said plaintiff as aforesaid, published the said supposed libel and spoke and published the said several words in the said declaration mentioned, as it was lawful for him to do, for the cause aforesaid, with this, that the said defendant doth aver that the said bill and answer hereinbefore mentioned are respectively one and the same bill and answer, and not other and different, and which said

answer was sworn to before the said —— —— in manner and form as aforesaid and not at —— aforesaid, or elsewhere, out of the county of —— as aforesaid; and this the defendant is ready to verify, etc. Wherefore, etc.

§ 59. **Justification of Slander of Property** (Yates' Pleadings, 436).—

And for a further plea in this behalf, as to the speaking and publishing of the words following, parcel of the words in the said first count of the said declaration mentioned, to wit, "I saw the ship, and the splice or scaff of the keelson was open so that I could put my four fingers in edgeways;" and also as to the speaking and publishing the words in the second count of the said declaration mentioned, to wit, "the ship's back is broke;" and also as to speaking and publishing the said words in the third count of the said declaration mentioned, he, the said defendant, by leave, etc., says *actio non:* Because he says that, before the time when the said words were by him spoken as aforesaid, he, the said defendant, had seen the said ship, and the splice of the keelson of the said ship was open so that he, the said defendant, could put his four fingers in edgeways, and that the said ship's back was broke, to wit, at, etc. [*venue*], aforesaid. By reason whereof the said defendant, at the time in the said declaration mentioned, spoke and published the said words in the introductory part of this plea mentioned, as it was lawful for him to do; and this the defendant is ready to verify. Wherefore, etc.

§ 60. **General Replication De Injuria, etc., to Pleas of Justification** (2 Starkie, 405).—

And as to the said pleas of the said defendant by him secondly and thirdly above pleaded, the said plaintiff saith that he, by reason of anything by the said defendant in those pleas above alleged, ought not to be barred from having and maintaining his aforesaid action against the said defendant, in respect of the said grievance in the said declaration mentioned [*or* in the said first and second counts mentioned; *or* in the introductory parts of the said second and third pleas mentioned], because he saith that the said defendant, at the said times when, etc., in the said declaration [*or* in the said first and second counts, or either of them; *or* in the introductory parts of the said second and third pleas, or either of them] mentioned, of his own wrong, and without the cause by him, the said defendant, in his said second and third pleas, or either of them, mentioned, did commit the said grievances in the said declaration [*or* first and second counts, *or* introductory parts of the said second and third pleas] mentioned, in manner and form as the said plaintiff hath above thereof complained against him, the said defendant, to wit, at, etc. And this he, the said plaintiff, prays may be inquired of by the country, etc.

Another Form (Puterbaugh's Common Law, 488).—

And the plaintiff, as to the plea of the defendant by him secondly above pleaded, says that he, the said plaintiff, by reason of anything in the plea alleged, ought not to be barred from having his aforesaid action, because he says that the defendant at the time when, etc., in the said declaration mentioned, of his own wrong and without the cause by him in that plea

mentioned, did commit the said several grievances in the said plea mentioned, in manner and form as the plaintiff has in his said declaration above thereof complained against him, the defendant. And this the plaintiff prays may be inquired of by the country, etc.

VII. Statements of Defenses under the English Rules.

§ 61. A Traverse.

(Odgers on Libel and Slander, 634).–

1. The defendant never spoke or published the words set out in paragraph 2 of the statement of claim or any of them.

2. The defendant never spoke or published the words set out in paragraph 2 of the statement of claim with the meaning therein alleged.

3. The defendant denies that his words in any way referred to the plaintiff. They were not so understood by those who heard them uttered.

4. The plaintiff did not, on the —— day of ——, 1887 [*date of the publication*] carry on the business of a —— as alleged in paragraph 1 of the statement of claim.

5. The defendant denies that he spoke or published the said words of the plaintiff in the way of his said business.

Another Form.—

1. In answer to paragraphs 3, 4 and 5 of the statement of claim, the defendants deny that they printed or published[1] the words therein set forth of or concerning plaintiffs or any of them, as is alleged.

2. In further answer to the said paragraphs the defendants deny that the words therein set forth bear the sense therein given to them.

Objection in Point of Law.—

"The defendant says that:

"1. The defendant did not speak or publish the words.

"2. The words did not refer to the plaintiff.

"3. The defendant will object that the special damage stated is not sufficient in point of law to sustain action."

§ 62. No Libel — Bona Fide Comment on Matters of Public Interest.—

"The defendant's words did not bear or convey the meaning alleged in paragraph 2 of the statement of claim, or any defamatory meaning; they were fair comment on two matters then of great public interest in the said boroughs, viz.: the result of the recent general election of 1885, and the strong probability of another general election at a very early date."

§ 63. No Libel — Action against a Newspaper Proprietor.

1. The defendant is, and at the time of the alleged grievances was, the proprietor of the "Times" newspaper.

2. On the evening of the 12th of February, 1867, the plaintiff had presented to the house of lords a petition, making a serious charge against one

[1] The words "falsely and maliciously" must not be traversed, unless pleas of justification and privilege follow; and even then such a traverse is superfluous. Belt v. Lawes, 51 L. J., Q. B., 359.

of her majesty's judges; a debate ensued on the presentation of the said petition, and the said charge was utterly refuted.

3. The words set out in paragraph 3 of the statement of claim are a portion of the parliamentary report published in the "Times" for the 13th of February, 1867. They are a fair and accurate report of the proceedings of the house of lords on the preceding evening, and were published by the defendant *bona fide*, and without any malice toward the plaintiff.

4. The said petition, the charge it contained and the said debate were and are all matters of general public interest and concern.

5. The words set out in paragraph 5 of the statement of claim are a portion of a leading article which appeared in the "Times" for the 13th of February, 1867. The said article was a fair and impartial comment on the matters above referred to, and was published by the defendant *bona fide* for the benefit of the public and without any malice towards the plaintiff.[1]

§ 64. Bill of Particulars.[2]—

Delivered pursuant to the order of Master Walton, made herein and dated the 21st day of March, 1887.

The following are the best particulars the plaintiff can give of the times, places and persons when, where and to whom the alleged libels and slanders were published, and of the damages sustained by him:

1. The said libel was written by the defendant and published by him to A. B. of ——, at ——, on or about December 29, 1886, and to C. D. of ——, at ——, on or about January 2, 1887.

The plaintiff is unable at present to name any one else to whom the said libel was published, but believes that the defendant kept a copy of the said libel and showed it to several other persons, and will deliver further particulars of their names as soon as they are ascertained.

2. The said slanders were uttered in the month of December, 1886, in the presence of G. R., of 20 High street, in the said city, and his manager, W. K., at 20 High street, aforesaid.

3. The following persons who used formerly to deal with the plaintiff ceased to do so in consequence of the defendant's conduct:

M. M. of ——.

O. P. of ——, etc.

The profits of the plaintiff's business must have fallen from £730 to £420 per annum.

Dated this 29th day of March, 1887.

R. & F., Solicitors for the Plaintiff.

To the defendant, or Messrs. S. & P., his solicitors.

[1] Wason v. Walter, L. R., 4 Q. B., 73; 8 B. & S., 671; 38 L. J., Q. B., 34; 17 W. R., 169; L. T., 409.

[2] A bill of particulars may be required of a defendant justifying in an action for libel. A statement of all the necessary facts may be demanded, but not a statement of evidence (Ball v. Evening Post Pub. Co., 38 Hun (N. Y.), 11); but it cannot be required as to matters pleaded only in mitigation of damages. Newell v. Butler, 38 Hun (N. Y.), 104. When the slanderous words are alleged to have been spoken in the hearing of divers persons, it is enough to compel the plaintiff, by bill of particulars, to furnish the names of one of those persons. Dempewolf v. Hills, 53 N. Y. Super. Ct., 105; McLain v. Warring, 13 So. Rep., 236.

§ 65. No Libel — Comment on Matter of Public Interest.

Before the publication of the said alleged libel the plaintiff was the general commanding the cavalry division of our army in the Crimea, and the Earl of Cardigan was the general commanding the light cavalry brigade, part of such division; and during the war disputes arose and complaints were made by each of them of the conduct of the other in their respective commands, in consequence of which disputes great disasters happened, and great losses of men and horses were sustained. These disputes between the plaintiff and the Earl of Cardigan were injurious to the service, and were matter of public notoriety and of discussion and complaint amongst her majesty's subjects; the plaintiff was consequently recalled to England, and her majesty issued a commission to Sir J. MacNeil and Colonel Tulloch to inquire into the causes of such disasters. The said commissioners made a report, animadverting upon the conduct of plaintiff. A second commission afterwards issued to the board of general officers at Chelsea, who also made a report with reference to the matters above mentioned. And the defendant says that the said reports and all the said matters became and were matters of public notoriety, discussion and interest, and the words complained of are part of an article printed and published in the said newspaper which was a fair and *bona fide* comment upon the several matters aforesaid and in reference thereto, and were printed and published by the defendant as and for such comment and without any malicious interest or motive whatever.[1]

The Same Defense.—

"1. The defendant admits that he printed and published the words set out in the statement of claim, but denies that he did so maliciously or with the meaning therein alleged or with any other defamatory meaning. The said words without the alleged meaning are not libelous, but are a *bona fide* comment on matter of public interest, namely, the conduct of certain persons at a public meeting called to oppose the London municipal reform bill, at which meeting the plaintiff was a prominent speaker.

"2. As to the words 'the great Mr. —— presiding with much dignity over the Comus rout,' the defendant in the next issue of his paper published the following correction: [*Here set out the correction.*]

"3. The rest of the alleged libel in no way refers to the plaintiff. The 'fugleman' therein mentioned was not the plaintiff, but another gentleman."

The Reply.—

"1. The plaintiff joins issue with the defendant upon the defense herein.

"2. The plaintiff will object at the trial that paragraph 2 of the defense affords no answer in point of law to the plaintiff's claim."

§ 66. No Sufficient Publication — No Slander.—

"1. The defendant denies that the plaintiff was or had at any time been retained or employed by him to act as his solicitor.

[1] Earl of Lucan v. Smith, 1 H. & L. R. App., 43; Hort v. Reade, Ir. R., N., pp. 482, 483; 26 L. J., Ex., 96, 7 C. L., 551. n.; Clinton v. Henderson, 13 Ir. C.

"2. The defendant denies that he spoke or published the words alleged or any of them.

"3. The defendant denies that he spoke the said words of or concerning the plaintiff in the way of his profession, or that the said words bore or were intended to bear the meaning alleged.

"4. If the defendant did speak the said words (which he denies), he says that no person other than the plaintiff was present or heard the same.

"5. The defendant will contend that the words which he spoke, if any, were only abuse and did not amount to defamatory matter."

§ 67. **Innocent Publication of a Libelous Novel.**—

1. The defendants admit that they printed and published the book or novel in the statement of claim mentioned, but deny that they did so maliciously. The defendants printed and published the said book or novel for the writer thereof, reasonably and *bona fide* believing the same to be a work of pure fiction. The defendants were not then aware and do not now admit that the said book or novel alluded to the plaintiffs or to any other living person.[1]

§ 68. **No Conscious Publication** (Emmens v. Pottle & Son (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; 1 C. & E., 553).—

"1. The defendants deny that they published the alleged libels.

"2. Further and alternatively the defendants say that they are news-venders carrying on a large business at 14 and 15, Royal Exchange in the city of London, and as such news-venders and not otherwise sold copies of the said periodical called 'Money' in the ordinary course of their business and without any knowledge of its contents; which are the alleged publications."

Reply.—

"1. The plaintiff joins issue on the first paragraph of the defense.

"2. As to the second paragraph of the defense the plaintiff says that the allegations therein contained are bad in substance and in law, on the ground that even if the defendants sold copies of the said periodical without any knowledge of their contents and in the ordinary course of their business as alleged in their defense, still, inasmuch as the defendants sold the said copies as news-venders for reward in that behalf, the said allegations disclose no answer to the claim of the plaintiff."

Madness.—

"1. The defendant does not admit that he ever spoke or published the words complained of in paragraphs 3 and 4 of the statement of claim.

"2. Throughout the month of April and the early part of May, 1879, the defendant was suffering from acute mania, brought on by overwork; he has no recollection of having spoken any such words as alleged, either then or at any other time. If, however, the defendant did in fact utter any such words (which he does not admit), they were not spoken intentionally

[1] It may be doubted whether this is a defense to the action or only a plea in mitigation of damages. R.

v. Knell, 1 Barnard, 305; Smith v. Ashley, 52 Mass. (11 Met.), 367.

or maliciously, but solely in consequence and under the influence of the said mania, as all who heard the said words then well knew. There is and was no foundation whatever for any such charge; and the defendant unreservedly withdraws all imputation on the plaintiff's character, and exceedingly regrets that he ever spoke the said words (if in fact he did speak them, which he does not admit)." [1]

§ 69. Words Spoken in Jest.—

1. The defendant admits that he spoke and published the words set out in paragraph 2 of the statement of claim, but denies that he spoke them with the meaning in that paragraph alleged.

2. The defendant is, and at all times hereinafter mentioned was, clerk to Mr. N., a wholesale baker. The plaintiff is one of Mr. N.'s retail customers. It is and was one of the duties of the defendant as such clerk to call on Mr. N.'s retail customers every Saturday morning and receive the money due for the bread delivered to them in the course of the week.

3. On the morning of Saturday, March 27, 1886, the defendant called upon the plaintiff and took the money for the bread delivered to him during the week. Among the change then given by the plaintiff to the defendant was a counterfeit florin. Neither the plaintiff nor the defendant knew or observed at the time that the florin was counterfeit.

4. Later in the day, when the defendant was paying the money over at the office, his employer, Mr. N., discovered that the said florin was counterfeit. The defendant thereupon took the said florin back to the plaintiff's shop, and the plaintiff gave him without demur two good shillings in exchange therefor.

5. On the morning of Saturday, May the 8th, 1886, when the defendant called on the plaintiff as usual, the plaintiff again gave the defendant a counterfeit florin amongst the money for the bread. And again neither the plaintiff nor the defendant knew or observed at the time that the florin was counterfeit.

6. Again, when the defendant was paying the money over to his employer at the office, Mr. N. discovered that the florin was counterfeit. Thereupon the defendant, recollecting the similar occurrence mentioned in paragraphs 3 and 4 above, exclaimed: "Why, that's the second bad florin Mr. H. has passed to me within the last six weeks! He's a regular 'smasher!'"

7. The defendant spoke these words as a joke, and never intended seriously to impute to the plaintiff any criminal offense.

8. The only persons who were present at the time or who heard the said words were the defendant's employer, Mr. N., and a fellow-clerk of his, one David Griggs. Both Mr. N. and David Griggs were aware of the circumstances detailed above and knew to what the defendant was referring, and understood that he spoke in joke, and did not intend to make any serious charge against the plaintiff.

[1] It may be doubted whether this is a good defense, or only a pleading in mitigation of damages. A somewhat similar plea of drunkenness will be found further on. Odgers on Libel and Slander, 406.

§ 70. **Justification.**—

1. The defendant does not admit that he spoke or published the words set out in the statement of claim.

2. The said words are true in substance and in fact. On March 27, 1880, the plaintiff uttered and passed to the defendant a counterfeit florin, well knowing the same to be counterfeit. On May 8, 1880, the plaintiff uttered and passed to the defendant another counterfeit florin, well knowing the same to be counterfeit. [*State any other instances in which the plaintiff passed bad coin to the defendant or others.*] Wherefore the defendant says that the plaintiff is a regular "smasher," and has uttered and has been in the habit of uttering counterfeit coin, well knowing the same to be counterfeit, and has been guilty of divers misdemeanors.

§ 71. **Justification of the Words without the Alleged Meaning.**—

"3. The defendant denies that he spoke or published the words set out in paragraph 5 of the statement of claim with the meaning therein alleged or at all with reference to the plaintiff's trade of a builder or his mode of conducting the same, or in any defamatory sense. The said words without the said meaning and according to their natural and ordinary signification are true in substance and in fact. Particulars are delivered herewith. They exceed three folios."

§ 72. **Justification of a Portion of a Libel** (Leyman v. Latimer and others, 3 Ex. D., 15, 352; 47 L. J., Ex., 470; 25 W. R., 751; 26 W. R., 305; 37 L. T., 360, 819).—

1. The defendants do not admit that the plaintiff is the proprietor and editor of the Dartmouth "Advertiser" newspaper.

2. As to such portion of the said words as alleges that the plaintiff is a felon editor, the defendants say that the same is true in substance and in fact. The plaintiff has been convicted of felony, and was sentenced to twelve months' hard labor for stealing feathers.

3. As to the residue of the said words the defendants say that the same were parts of certain articles printed and published in the defendants' said newspaper, each of which was a fair and *bona fide* comment upon the conduct of the plaintiff in his public character as the nominal editor of the Dartmouth "Advertiser," a public newspaper, and was printed and published by the defendants as and for such comment, and without any malicious motive or intent whatever.

Reply to above Defense.—

"1. The plaintiff joins issue upon the first and third paragraphs of the defense.

"2. As to the second paragraph of the defense, the plaintiff (so that such admission be not in any way extended or taken to mean that he ever was, in fact, guilty of the offense referred to) admits the allegation therein contained. But the plaintiff further says that he has never been convicted of felony save on that one occasion mentioned in the said paragraph. On that occasion he was convicted of the supposed felony by a court duly having jurisdiction in that behalf—the court of quarter sessions for the county of

Cornwall; and the said court in the exercise of such jurisdiction adjudged that, as a punishment for the said supposed felony, the plaintiff should be imprisoned and kept to hard labor for twelve calendar months. The said conviction took place several years ago; and the plaintiff, as the defendants well knew, duly endured the punishment to which he was so adjudged as aforesaid for the said supposed felony, and thereby became and was and has ever since been and is in the same situation as if a pardon under the great seal had been granted to him as to the said supposed felony whereof he was convicted as aforesaid."

§ 73. Justification and Privilege.—

1. The defendants admit that the defendant Alice wrote and published the words set out in paragraph 2 of the statement of claim.

2. The said words are true in substance and in fact. While the plaintiff was in the service of the defendants, to wit, on the 18th day of March, 1886, she stole two pair of sheets and one counterpane, of goods and chattels of the defendant Henry, and pawned them at the shop of John Smith, No. 28 High street, Evesham; wherefore the defendants, as they lawfully might, discharged the plaintiff from their service.

3. Subsequently the plaintiff was desirous of entering into the service of Mrs. M., of ——, in the county of Warwick; and Mrs. M. wrote a letter to the defendant Alice inquiring as to the plaintiff's character, and asking especially why she left the defendants' service.

4. Thereupon it became and was the duty of the defendant Alice to write to Mrs. M., telling what she knew as to the plaintiff's character, and stating the reason of her dismissal. In accordance with such duty the defendant Alice wrote to Mrs. M. a letter containing the words complained of. The said words were written in answer to Mrs. M.'s inquiries, under a sense of duty and without malice and in the *bona fide* belief that the charge therein made was true; wherefore the defendants say that the said letter is privileged by reason of the occasion on which it was written.

§ 74. Absolute Privilege.—

(1) Litigant in Person.

"Before the alleged slander was spoken the plaintiff had issued a writ against the defendant claiming an account, and had taken out a summons in the said action for an account, which on November 12, 1885, came on for hearing before Mr. E. A., the district registrar for ——. The defendant, who is a solicitor, appeared in person before the said registrar to oppose the said summons, and the said words were spoken, if at all, to the said registrar in the course of argument during the hearing of the said summons, and are therefore absolutely privileged."

(2) Witness — Under the English Law.

The said words were spoken by the defendant whilst in the witness-box during his examination on oath as a witness in the course of a judicial proceeding before an alderman at Guildhall.[1]

[1] Seaman v. Netherclift, 2 C. P. D., 53; 46 L. J., C. P., 128; 25 W. R., 159; 35 L. T., 784.

(3) MILITARY DUTY.

The said words are part of an official report written by the defendant in accordance with his military duty for the information of his military superiors, and published by him in the discharge of his said duty to such military superiors and not otherwise.[1]

§ 75. Qualified Privilege.—

(1) CHARACTER OF SERVANT.

1. The defendants admit that the defendant Alice wrote and published the words set out in paragraph 2 of the statement of claim.

2. The said words are true in substance and in fact. While the plaintiff was in the service of the defendants, to wit, on the 18th day of March, 1886, she stole two pair of sheets and one counterpane, of goods and chattels of the defendant Henry, and pawned them at the shop of John Smith, No. 28 High street, Evesham; wherefore the defendants, as they lawfully might, discharged the plaintiff from their service.

3. Subsequently the plaintiff was desirous of entering into the service of Mrs. M., of ——, in the county of Warwick; and Mrs. M. wrote a letter to the defendant Alice, inquiring as to the plaintiff's character, and asking especially why she left the defendants' service.

4. Thereupon it became and was the duty of the defendant Alice to write to Mrs. M., telling what she knew as to the plaintiff's character, and stating the reason of her dismissal. In accordance with such duty the defendant Alice wrote to Mrs. M. a letter containing the words complained of. The said words were written in answer to Mrs. M.'s inquiries under a sense of duty and without malice, and in the *bona fide* belief that the charge therein made was true; wherefore the defendants say that the said letter is privileged by reason of the occasion on which it was written.

(2) ANSWER TO CONFIDENTIAL INQUIRIES.

"1. The statements contained in the said letter are true in substance and in fact, according to the fair and ordinary meaning of the words used in the said letter.

"2. The publication of the said letter to H., if made, was privileged, and was made *bona fide* and without malice. H., having an interest in certain business transactions in which the plaintiff and the defendant's bank were concerned, made inquiries of the defendant as to the plaintiff, and it was in answer to such inquiries that the publication, if any, of the said letter took place."

(3) MASTER AND SERVANT.

"The plaintiffs at the times mentioned in the fourth paragraph of the statement of claim were employed as laborers by a certain Mr. M., who made certain inquiries of the defendant as to the conduct of the plaintiffs and as to certain facts that were within the knowledge of the defendant and were not within the knowledge of the said Mr. M. And it thereupon

[1] Dawkins v. Lord Paulet, L. R., 5 Q. B., 94; 39 L. J., Q. B., 53; 18 W. R., 336; 21 L. T., 584.

became and was the duty of the defendant to state the said facts to the said Mr. M. Such statements are the alleged slanders; but they were made *bona fide* in the discharge of the said duty and in answer to the said inquiries, and in the honest belief that the facts so stated were true and without any malice towards the plaintiffs or either of them; wherefore the defendant says that they were privileged by reason of the occasion on which they were made."

(4) ADVICE TO ONE ABOUT TO MARRY.

Before and at the time of the alleged grievances the defendant was the son-in-law of the Mrs. Hawkins mentioned in paragraph 3 of the statement of claim. She informed the defendant, as the fact was, that she was about to marry the plaintiff. Thereupon the defendant spoke the said words confidentially to the said Mrs. Hawkins, without malice, and in the honest desire to protect her private interests and his own. The defendant at the time *bona fide* believed in the truth of what he said.[1]

(5) COMMUNICATION VOLUNTEERED.

2. The defendant was employed by the plaintiff to work at the house of Mrs. M., mentioned in the statement of claim, during her absence from home. Whilst he was so employed, it came to his knowledge that the plaintiff had, in collusion with the servants of the said Mrs. M., removed certain goods of hers from the premises and sold them. It thereupon became the duty of the defendant to communicate these facts to the said Mrs. M., and he did so on her return, honestly believing that every word he said was true. And the defendant says that these communications are the alleged slanders, if any, and that the same were made *bona fide* in the discharge of the said duty, and not maliciously nor with intent to injure the plaintiff, and were and are therefore privileged.

(6) OFFER OF REWARD FOR DISCOVERY OF OFFENDER.

"The defendant admits the publication of the placard referred to in paragraph 2 of the statement of claim, but denies that the same was false or malicious; the defendant also denies the alleged meaning, and says that the several matters stated in the said placard are true in substance and in fact, and were published by the defendant for the purpose of endeavoring to discover the person who committed the assault referred to in the said placard, and with the *bona fide* object and intention of bringing such person to justice and of prosecuting him to conviction, and not otherwise."

(7) COMPLAINT OF PLAINTIFF'S MISCONDUCT.

"The plaintiff is the nephew of one of the defendant's tenants, Mrs. B., and at the date of the alleged slander was lodging with her in the house she rented of the defendant. On June 3, 1886, the defendant, from the hill above his house, saw a young man, whom he then believed to be the plaintiff, jump out of the kitchen window of Mrs. B.'s house and enter an or-

[1] Todd v. Hawkins, 8 C. & P., 88; 2 Moo. & Rob., 20.

chard of the defendant's, and commence to steal the defendant's apples. As soon as the defendant approached the young man ran away. Thereupon the defendant, as he lawfully might do, went to Mrs. B., told her what he had seen, and complained to her of the plaintiff's conduct. This communication and complaint is the alleged slander; and the defendant says that it was privileged by reason of the occasion on which it was uttered. The defendant bore the plaintiff no malice, and honestly believed at the time that what he said was true.

(8) CLAIM OF RIGHT.

"5. The defendant's husband died in November, 1883, having appointed the plaintiff executor and trustee of his last will. And the plaintiff, as such executor and trustee, took possession of and was proceeding to sell by auction not only the furniture, which was the property of his testator at the time of his death, but also certain other furniture which was the separate property of the defendant. Thereupon the defendant, as she lawfully might do, attended the said auction for the purpose of asserting her claim to her separate property, and of disputing the plaintiff's right to sell the same. And the defendant then spoke and published the said words, if at all, *bona fide*, and in the honest belief that they were true, and without any malice towards the plaintiff; wherefore the defendant says that the said words were privileged by reason of the occasion on which they were uttered."

REPLY.

"1. The plaintiff joins issue on the defense.

"2. The plaintiff will object that the occasion set forth in paragraph 5 was not and is not shown to have been privileged."

(9) SELF-DEFENSE.

"The plaintiff in May, 1886, published and widely distributed a pamphlet entitled 'The case of Salem Chapel ——.' This pamphlet contained serious charges against the defendant, both personally and as secretary and one of the deacons of the said chapel. Therefore the defendant, as he lawfully might do, published the words set out in paragraph 5 of the statement of claim in reply to the said pamphlet published by the plaintiff, and *bona fide* for the purpose of vindicating his character against the plaintiff's attack, and in order to prevent the plaintiff's said charges from operating to his prejudice, and in reasonable and necessary self-defense, and without any malice towards the plaintiff. The said words are therefore privileged."

(10) COMMON INTEREST — CHURCH MEMBERS.

1. The words set out in paragraph 2 of the statement of claim were part of a requisition summoning a meeting of the members of the English Baptist Church at ——, which was signed by one hundred and twenty-two of such members. This requisition was addressed and sent solely to members of the said church, who had a common interest in the matters therein referred to, and was published *bona fide* and without malice, and under a sense of duty, and was therefore privileged.

2. The plaintiff subsequently, on Friday, December 7, 1883, wrote and published in the said newspaper a long letter attacking the conduct of those who had signed the said requisition, and containing erroneous statements as to their object in convening the said meeting; wherefore the defendant, as he lawfully might do, wrote and published the words set out in paragraph 3 of the statement of claim in answer to the said letter written by the plaintiff, and with the *bona fide* intention of explaining the true object of the said meeting, and of correcting the said erroneous statements, and not otherwise. The said words are strictly an answer to the charges made by the plaintiff against the defendant and the other conveners of the said meeting, and were published without malice and in reasonable and necessary self-defense, and were and are therefore privileged.

(11) MEMBERS OF THE SAME COMMITTEE.

"The defendant is a vice-president of the said association, and the said A. B., to whom alone the defendant published the said letter, was at the date of such publication the honorary secretary of the said association. The defendant learnt for the first time in the month of January, 1886, from the fly-leaf of one of the pamphlets published by the said association, that the plaintiff had been elected a member of the executive committee of the said association. The defendant *bona fide* believed that the plaintiff was not a fit person to occupy that position. Both he and the said A. B. had a common interest in securing that no unfit person should serve on the executive committee of the said association. The defendant also had a right to object to his own name and the plaintiff's appearing together on the said fly-leaf as fellow-officers of the same association. It thereupon became and was his duty to write the said letter to the said A. B., and he wrote it in the honest discharge of said duty and in the *bona fide* belief that the statements therein contained were true, and without any malice towards the plaintiff."

(12) COMPETITORS AT A POULTRY SHOW.

The plaintiff and defendant are both members of the "Hemel Hempstead Poultry Club," and were competitors at the annual show of the club in 1886. Complaints were made during the show of the plaintiff's conduct as such competitor, and eventually several other members lodged a written protest against the plaintiff being allowed to compete. By the rules of the club it was the duty of the committee to investigate this dispute. The said committee wrote to the defendant, who had not signed the protest, and requested him to state to them all he knew or had heard as to the said complaints and as to the other matters referred to in the said protest. Thereupon the defendant in compliance with such request wrote the letter which is the alleged libel. Such letter was written by the defendant without any malice towards the plaintiff and with the sole object of guiding and assisting the said committee in their inquiries and in the honest belief that every statement therein contained was true, and was a communication made *bona fide* on a matter in which the defendant had an interest and in reference to which he had a duty to perform, and was published only to the said committee, who had a corresponding interest and duty in that behalf.

(13) VENDOR AND PURCHASER.

Before the publication of the alleged slander the defendant had entered into a written contract to purchase a field from a friend of his, Mr. K. Mr. K. employed the plaintiff as his solicitor to act for him in the matter. The plaintiff unnecessarily delayed the completion of the said purchase and omitted to answer the defendant's requisitions for an unreasonably long time, though both Mr. K. and the defendant were anxious for a speedy settlement. In consequence of the plaintiff's delay, the date originally fixed for completion passed; and then the plaintiff persuaded Mr. K. to claim from the defendant interest on the purchase money, which the defendant refused to pay, on the ground that his money had for months been lying idle at the bank, and that the matter would have been completed on the day originally fixed had the plaintiff used reasonable dispatch. This dispute still further delayed the completion of the said purchase, and also greatly increased the amount of the costs which both Mr. K. and the defendant would have to pay their respective solicitors. Both Mr. K. and the defendant had a common interest in keeping down the amounts of the said costs, and in effecting a prompt and amicable settlement of the said dispute, and in the speedy completion of the said purchase. Thereupon Mr. K. wrote a letter to the defendant inquiring as to these matters, and asking especially as to the cause of the unusual delay. It thereupon became and was the duty of the defendant in answering the said letter to state confidentially to Mr. K. his opinion as to the way in which the plaintiff was conducting his business; and in discharge of such duty the defendant wrote and published the letter set out in paragraph 2 of the statement of claim. This letter was published by the defendant to the said Mr. K. alone, and related solely to the said matters in which the defendant and Mr. K. had such common interest as aforesaid, and was written in furtherance of such common interest, and in answer to the said letter from Mr. K., and under a sense of duty, and without malice, and in the *bona fide* belief that every word contained in the said letter was true, and not otherwise, and is therefore privileged.

(14) REPORT OF A JUDICIAL PROCEEDING.

1. The defendant is the proprietor of the "—— County Gazette."

2. On the —— day of ——, 1886, the plaintiff applied to the —— bench of magistrates for the —— division of the said county, at a special licensing sessions, for a spirit license. This application the magistrates refused.

3. On the —— day of ——, 1886, the defendant published as usual, in the said Gazette, a report of the proceedings before the said magistrates on the preceding day, including an accurate and impartial account of the plaintiff's application and the reasons stated by the bench for their refusal, which is the alleged libel.

4. Such account was published by the defendant *bona fide*, and without malice, and for the public benefit, and in the usual course of the defendant's business and duty as a public journalist, and was and is a correct, fair and honest report of the said proceedings.

A SHORTER FORM.

"The said words formed part of a fair and accurate report of certain proceedings in the Westminster police court upon a charge of theft brought against the plaintiff, and were published *bona fide* and without malice in the course of the defendant's business as journalist, and are therefore privileged."

15. REPORT OF A JUDGMENT PUBLISHED AS A PAMPHLET.[1]

"1. The defendants admit that they published of the plaintiff a pamphlet which is a verbatim report of the judgment of the Honorable Mr. Justice North, given on the 30th day of June, 1884, in the action of MacDougall v. Knight & Son, and which really gives all the information necessary to be known by any one feeling an interest in the matter. But the defendants deny that they did so falsely or maliciously, or that they distributed the said pamphlet broadcast in the city of Bath, or the counties of Somerset and Gloucester, or elsewhere, or at all.

"2. The said pamphlet contained the words set out in paragraph 2 of the statement of claim. The said words were in fact spoken by the Honorable Mr. Justice North in delivering judgment in the said action; but the defendants do not admit that he or they published the said words with the meanings alleged in the said paragraph.

"3. The defendants are auctioneers and upholsterers carrying on business at Bath, and having a large number of customers resident in Bath and the neighborhood. The plaintiff brought the said action against the defendants in the chancery division of the high court of justice, charging the defendants with breach of contract, misrepresentation and breach of faith. The said action was assigned for trial to the Honorable Mr. Justice North, who, after a trial which lasted five days, gave judgment in favor of the defendants. The said pamphlet is a fair, accurate and honest report of the said judgment of the Honorable Mr. Justice North, and was published by the defendants *bona fide*, and with the honest intention of making known the true facts of the case, and in order to protect their reputation and their said business, and in reasonable self-defense, and without any malice towards the plaintiff."

(16) REPORT OF A PUBLIC MEETING PRIVILEGED BY VIRTUE OF SECTION 2 OF THE NEWSPAPER LIBEL AND REGISTRATION ACT, 1881.

The words set out in paragraph 4 of the statement of claim were printed and published in a newspaper, and were part of a report of the proceedings of a public meeting which was lawfully convened for a lawful purpose and open to the public, and such report was fair and accurate and was published without malice, and the publication of the said words was for the public benefit.[2]

[1] MacDougall v. Knight & Son, 17 Q. B. D., 636; 55 L. J., Q. B., 464; 34 W. R., 727; 55 L. T., 274.

[2] It is not sufficient to allege that the publication of the said report was for the public benefit. Pankhurst v. Sowler, 3 Times L. R., 193.

REPLY.

The defendant has refused to insert in the newspaper in which the report containing the said words appeared a reasonable letter or statement of explanation or contradiction by or on behalf of the plaintiff.

§ 76. **Statute of Limitations.**—

The alleged cause of action did not accrue within six years before this suit.

Or in the case of slander actionable per se:

The words complained of were not spoken within two years before this suit.

Or,

The defendant will rely upon the statute of limitations.

Another Form (Puterbaugh's Common Law).—

And for further plea in this behalf defendant says that the plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says that the cause of action in the said counts mentioned, and each and every one of them, did not, at any time within [*five*] years next before the commencement of this suit, accrue to the plaintiff; and this he, the defendant, is ready to verify; wherefore he prays judgment if the plaintiff, his action aforesaid, thereof against him, ought to have or maintain.

By —— ——, his Attorney.

Replications (Puterbaugh's Common Law, 143).—

(1) THE CAUSE OF ACTION DID ACCRUE WITHIN FIVE YEARS.

And the plaintiff, as to the plea of the defendant, secondly above pleaded in bar, says that he ought not to be barred of his action aforesaid, because he says (*) that the said several causes of action in the said several counts of said declaration mentioned, and each of them, did accrue to the plaintiff within [*five*] years before the commencement of this suit, in manner and form as the plaintiff hath thereof above complained against the defendant; and this he prays may be inquired of by the country, etc.

By —— ——, Attorney for Plaintiff.

And the defendant doth the like.

By —— ——, his Attorney.

(2) DEFENDANT OUT OF THE STATE DURING PART OF THE TIME.

[*Proceed as in the preceding replication to the* *] that the defendant, at the time the said cause of action accrued, was out of the state of——, to wit, at, etc., and there resided until he afterwards, to wit, on, etc., returned to this state, and that the plaintiff within the [*five*] years of the residence of the defendant in this state, after the said causes of action in the said counts mentioned accrued, commenced his action against the defendant in due manner and form as aforesaid; and this the plaintiff is ready to verify. Wherefore he prays judgment, and his damages and cost to be adjudged to him.

By —— ——, Attorney for Plaintiff.

(3) REJOINDER TO THE LAST REPLICATION.

And the defendant says that the plaintiff did not within [*five*] years of the residence of the defendant in said state, after said causes of action accrued, commence his action aforesaid against him, the defendant, in manner and form as the plaintiff hath in his said replication thereof alleged; and of this the defendant puts himself upon the country, etc.

By —— ——, his Attorney.

And the plaintiff doth the like.

By —— ——, his Attorney.

§ 77. Previous Action.—

The plaintiff heretofore, to wit, on the —— day of ——, 1887 [*date of writ*], sued the defendant in the —— division of this honorable court for the same cause of action as is alleged in the statement of claim herein; and such proceedings were thereupon had in that action that the plaintiff afterwards by the judgment of the said court recovered against the defendant £—— for the said cause of action and his costs of suit in that behalf, and the said judgment still remains in force. [*State in the margin of the plea the date when such judgment was signed, and the number of the roll in which such proceedings are entered.* Reg. Gen. Hilary Term, 1853, r. 10.]

[*A plea that judgment was recovered against a joint publisher will also be a bar to an action against the others for the same publication.* See form of plea in Duke of Brunswick v. Pepper. 2 C. & K., 683, n.]

[*A plea that in a former action judgment was given against the plaintiff is really a plea in estoppel, Commence as above.*]

And such proceedings were thereupon had in that action that afterwards and before this suit it was adjudged that the plaintiff should recover nothing against the defendant and that the defendant should recover against the plaintiff £—— for his costs of defense. The said judgment was signed on the —— day of ——, 1887, and still remains in force. [The proceedings are entered on roll No. ——.] Wherefore the defendant says that the plaintiff is estopped, and ought not to be admitted to bring the present action against the defendant.

§ 78. Accord and Satisfaction.—

The plaintiff was the proprietor and publisher of a certain weekly journal called the "Musical Review," and the defendant was the proprietor and publisher of another weekly journal called the "Orchestra." And after the publication, if any, of the said words the plaintiff and defendant agreed together to accept certain mutual apologies, to be published by the plaintiff and defendant respectively in their said weekly journals in full satisfaction and discharge of all the causes and rights of action in the declaration mentioned and all damages and costs sustained by the plaintiff in respect thereof. And thereupon, in pursuance of the said agreement, the defendant did on the 14th of May, 1864, print and publish his part of the said mutual apologies in the form agreed on, in his weekly journal, the "Orchestra," of which the plaintiff had notice. And the plaintiff did also, after the making of the said agreement and in pursuance thereof, to wit, on the 14th of May, 1864, print and publish his part of the said apologies in the

form agreed on, in his said weekly journal, the "Musical Review." And such apologies so published as aforesaid the plaintiff accepted and received in full satisfaction and discharge of the causes of action set out in the statement of claim.[1]

Another Form (Marks v. Conservative Newspaper Co., Limited, 3 Times L. R., 244).—

"2. On the 18th day of June, 1886, and before the commencement of this action, the plaintiff agreed with the defendants that if the defendants would publish in the said "Evening News" a letter written by the plaintiff and contradicting the statements made in the alleged libel, he (the plaintiff) would accept the publication of such letter in full satisfaction and discharge of any claim which he might have against the defendants.

"3. The defendants, in pursuance of such agreement, did, on the said 18th day of June, 1886, publish such letter as aforesaid, and the plaintiff accepted such publication in full satisfaction and discharge of the alleged cause of action."

§ 79. **Payment into Court.**—

"Defendants admit that they are liable in damages to plaintiff in respect of the matter in question, and pay into court the sum of £26 5s. in full satisfaction of plaintiff's claim, but they do not admit that the words published are capable of bearing the innuendoes put upon them by plaintiff in her statement of claim."

§ 80. **Words Spoken by the Defendant when Drunk—Payment into Court and Apology.**—

"The defendant brings into court the sum of £5, and says that the same is sufficient to satisfy the plaintiffs' claim in this action.

Particulars.

The defendant proposes to give evidence at the trial of the following matters, with a view to mitigation of damages:

The defendant was a total stranger to both plaintiffs, and bore no malice to either. He was drunk when he uttered the said words, and the fact that he was drunk was obvious to all who heard them. He has no recollection of having ever uttered any such words, but does not dispute that he did so. Every one who heard what the defendant said was fully aware that he was not speaking deliberately, and that he did not seriously mean to make any charge against either plaintiff, but was talking wildly in consequence of drink. The said words are wholly untrue. There is and was no foundation whatever for any such statement. The defendant exceedingly regrets that he should ever have uttered any such words; he unreservedly withdraws all imputation on the plaintiffs' character, and apologizes for the abusive language which he uttered without any reason while under the influence of liquor.

[Signed] —— ——.

"Delivered," etc.

[1] Boosey v. Wood, 3 H. & C., 484; 34 L. J., Ex., 65.

§ 81. Payment into Court and Particulars.—

1. The defendants admit that they sold and circulated the book called "——," and that the same contained the words set out in paragraph 8 of the statement of claim. They deny that the said words are capable of the meanings alleged in the innuendoes contained in the said paragraph, but they admit that the said words are libelous, and that they refer to the plaintiff.

2. The defendants bring into court the sum of £——, and say that the same is sufficient to satisfy the plaintiff's claim in this action.

[Signed] —— ——.

Particulars — Delivered pursuant to order.

Take notice that at the trial of this action the defendants intend to give the following matters in evidence with a view to mitigation of damages: [*Here state the particulars to be relied upon.*]

§ 82. Pleading an Apology.—

"1. The defendant, by the words set out in the statement of claim, did not mean or imply that the plaintiff had in any way been guilty of fraudulent or dishonest practices, nor was he so understood by any one who heard him. The said words do not bear any such meaning as is alleged in paragraph 8 of the statement of claim.

"The defendant has paid into court the sum of fifteen guineas, and says that the same is sufficient to satisfy the plaintiff's claim in this action.

"3. At the earliest opportunity after the commencement of this action the defendant made and offered an apology to the plaintiff for the said words, by means of a letter written by the defendant's solicitors to the plaintiff's solicitor, in the following words: [*Here set out letter, with date.*]

"4. On the 31st day of October, 1882, the defendant caused to be printed in the —— 'Journal' the following apology to the plaintiff for the said words:

"APOLOGY.

"I, —— ——, of ——, desire to express my sincere regret that I incautiously repeated a statement made to me by one of my father's clerks concerning Mr. K., of ——. Such statement now proves to have been wholly unfounded, and I beg to withdraw and contradict the same, and to apologize to Mr. K. for having made it.

"An action having been commenced against me by Mr. K. for slander, I have this day paid into court the sum of £15 15*s.*; and I trust that Mr. K. will accept that sum, together with this apology, as the best amends it is in my power to make for the injury or annoyance which I have inadvertently caused him.

"Dated this 25th day of October, 1882.

"[Signed] —— ——,

"Witness: [*Defendant.*]

A. B., Solicitor.

"This apology also appeared in the issue of the said journal for November 7th, and will appear in the next four consecutive issues thereof.

"5. Take notice that the defendant intends on the trial of this action to

give in evidence, in mitigation of damages, the matters alleged in paragraphs 3 and 4 above."

REPLY.

"1. The plaintiff joins issue upon the defense, except so far as it admits any part of the statement of claim.

"2. The plaintiff, as to paragraph 2 of the defense, says that the said sum alleged as paid into court by the defendant is not enough to satisfy the claim of the plaintiff.

"3. In answer to paragraph 4 of the defense the plaintiff says that he never agreed to accept the apology set out in the said paragraph; but the same was inserted in the —— 'Journal' without his knowledge or consent, and on the 31st of October, 1882, being three months after the plaintiff had complained to the defendant of the slanderous words mentioned in the statement of claim. The so-called apology is evasive, indefinite, insufficient and useless, and is not in fact any compensation or amends whatever for the slanderous words complained of."

§ 83. **Notice.**—

1886.— B.— No. 782.

In the High Court of Justice, Queen's Bench Division.

Between A. B., Plaintiff,
and
E. F., Defendant.

Take notice that the defendant intends on the trial of this cause to give in evidence in mitigation of damages, if any shall be found to be due, that he made [*or* offered] an apology to the plaintiff for the defamation complained of in the statement of claim herein, before the commencement of this action [*or* as soon after the commencement of this action as there was an opportunity of making or offering such apology, the action having been commenced before there was an opportunity of making or offering such apology]. Such apology was published by the defendant in the —— "News" for the —— day of ——, 18—.

Yours, etc.,

G. H., defendant's solicitor [*or* agent].

To Mr. C. D., plaintiff's solicitor or agent.

§ 84. **Absence of Malice and Negligence** (Plea under sec. 2 of 6 and 7 Vict., ch. 96).—

The alleged libel was contained in a public daily newspaper called the —— "Daily Press," and was inserted in such newspaper without actual malice and without gross negligence. Before [*or* at the earliest opportunity after] the commencement of this action the defendant inserted in several issues of the said newspaper a full apology for the said libel according to the statute in such case made and provided; and the defendant immediately after the commencement of this action paid the sum of 40*s.* into court in the said action by way of amends for the injury sustained by the plaintiff for the publication of the said libel, and gave notice of such payment into court to the plaintiff. And the defendant says that the said sum is enough to satisfy the claim of the plaintiff in respect of the said libel.

§ 85. Interrogatories and Answers.—

Interrogatories in an action against a newspaper proprietor (allowed in Lefroy v. Burnside, 4 L. R., Ir., 340; 41 L. T., 199; 14 Cox, C. C., 260).

"Interrogatories on behalf of the above-named plaintiff for the examination of the above-named defendant:

"1. Is it not the fact that in the said newspaper published on the 6th day of July, 1878, or some other and what date, an article appeared in the words and figures set forth in the sixth paragraph of the statement of claim in this action? If not, how otherwise?

"2. Were not you, the defendant William Burnside, upon and before the said 6th day of July, 1887, or some other and what date, the proprietor, either alone or jointly with some other and what person or persons, of the said newspaper?

"NOTE.—The defendant must answer the above interrogatories on oath within ten days.

"Delivered the —— day of ——, by," etc.

"*Interrogatories on behalf of the plaintiff to be answered by an officer of the Leeds Daily News Company (Limited), and by the defendant William Lauries Jackson.*

"1. Is the defendant William Lauries Jackson the *editor or* publisher of the 'Leeds Daily News,' *and what position does he occupy in respect of the said newspaper?*

"2. Is the said William Lauries Jackson a shareholder in the said company?

"3. Is it the duty of the said William Lauries Jackson to exercise a supervision over paragraphs of the nature of those set out in the statement of claim?

"4. *Did the said William Lauries Jackson write, or have anything to do with the writing of, any and which of the paragraphs mentioned in the statement of claim; and if not, who was the writer of such paragraphs, and of each of them?*

"5. *Did the said William Lauries Jackson see any and which of the said paragraphs before they were inserted in the newspaper or before the newspaper was published or circulated, and did he sanction the publication of the said paragraphs, or of any and which of them?*

"6. By whom, and in what way, were the said paragraphs brought to the office of the newspaper company; or were they received by any one else, and whom, on their account, at one time; and, if not, when were they received?

"7. Were the numbers of the 'Leeds Daily News' of the 13th August, 1875, 19th August, 1875, 10th September, 1875, and the numbers of the 'Leeds Daily News' containing the paragraph commencing with the word 'Query,' printed and published by the Leeds Daily News Company (Limited) or by the defendant William Lauries Jackson or by both of them?"

NOTE.—The words in italics were struck out by Archibald, J., at chambers, and the rest allowed, on January 8, 1876. See Weekly Notes for 1876, p. 11; 1 Charley, 101; Bitt., 91; 20 Sol. J., 218; 60 L. T. Notes, 196.

Interrogatories.

"1. Did you write or cause to be written the letter to the editor dated 23d November, 1881, published in the 'Hereford Times' of 26th November, 1881, under the heading of 'The distraint for rent case at Leominster,' and signed by your name, T. A. Colt?

"2. By your allegation in that letter that one of the holders of the bill of sale mentioned in your letter had affirmed sometime since in a court of law that he did not possess a £5-note, did you intend to refer to the plaintiff or to Mr. George Bedford, the proprietor of the Royal Oak Hotel in Leominster?"

Answer.

'In answer to the first and second of the said interrogatories, I say that I object to answer the same, on the ground that the same cannot legally be asked by way of interrogatories, and also upon the grounds that they seek discovery of evidence which relates exclusively to my case, and that such discovery is not sufficiently material at this stage of the action."

NOTE.— This answer was held insufficient by the divisional court, Grove and Lopes, JJ., on the authority of Allhusen v. Labouchere (C. A.), 3 Q. B. D., 654; 47 L. J., Ch., 819; 48 L. J., Q. B., 34; 27 W. R., 12; 39 L. T., 207, and the defendant was ordered to file further and better answers (May 4, 1882); Odgers on L. & S., 661.

Interrogatories (Jones v. Richards, 15 Q. B. D., 439).

"1. Did you, on or about the 16th of February, 1885, or at some other and what date, write and send or cause to be sent to Colonel Pryse, of. etc., a letter, of which a copy is annexed hereto, marked A., of which the original will, if you require it, be shown to you before swearing your affidavit in answer to these interrogatories, on your giving reasonable notice in that behalf?

"2. Did you, on or about the 26th of January, 1885, or at some other and what date, write and send or cause to be sent a letter, of which a copy is annexed, marked B [the latter containing the alleged libel], of which the original will, if you require it, be shown to you before swearing your affidavit in answer to these interrogatories, on your giving reasonable notice in that behalf?"

Answers thereto.

"1. I object to answer the interrogatory numbered 1, on the ground that the same is irrelevant for the purposes of this action.

"2. I object to answer the interrogatory numbered 2, on the ground that I am advised and believe that my answer thereto might tend to criminate me."

CHAPTER XXIII.

BILLS OF PARTICULARS.

§ 1. **A Bill of Particulars Defined.**— A bill of particulars is a written statement of the details of the plaintiff's claim, or of the defense in an action at law, expressed informally, but with greater particularity than is usual in pleadings and furnished by one party to the other in compliance with a statute or some rule or special order of the court in which the action is pending.[1]

§ 2. **Power of the Court to Order the Bill.**— Under the practice in some of the states the bill must be furnished with the pleading, or upon motion for it in certain actions. But aside from such provisions the court has a discretionary power to order such a bill in all cases, and this power may be exercised as well in behalf of the plaintiff as the defendant.[2]

§ 3. **When Ordered on Defendant's Motion.**— The bill will be ordered on the motion of the defendant whenever the statement of the facts constituting the plaintiff's cause of action is too general and not stated with sufficient particularity to enable him to prepare his defense.[3]

[1] 2 Am. & Eng. Ency., 244.

[2] 2 Am. & Eng. Ency., 245; Com. v. Giles, 1 Gray (Mass.), 466; Butler v. Man, 9 Abb. N. C. (N. Y.), 49; McDonald v. Bornhill, 58 Iowa, 669; Wolf v. Scofield, 38 Ind., 175; Claflin v. Smith, 66 How., 168; Tilton v. Beecher, 59 N. Y., 176.

[3] 2 Am. & Eng. Ency., 246; McCarney v. McCann, 2 Bro. (Penn.), 40; Brown v. Calvert, 4 Dana (Ky.), 219; Mayor v. Marcenor, 49 How. (N. Y.), 36; Williams v. Com., 91 Penn., 493; Stokes v. Stokes, 72 Hun, 372; McLain v. Warring, 13 So. Rep., 230.

§ 4. **When Ordered on Plaintiff's Motion.**— Where the defense set up in the pleadings is indefinite the plaintiff will be entitled to the bill on his motion;[1] but when his means for ascertaining the information sought is as good as the defendant's, it seems no bill will be allowed.[2]

§ 5. **When it Will Not be Ordered.**— When the means of the party who applies for the bill of particulars for ascertaining the information sought are equal to the means of the adverse party to furnish it, no bill of particulars will be ordered. The purpose of the bill is to furnish information peculiarly in the power of the adverse party to furnish.[3]

§ 6. **Its Form and Contents.**— The bill must be sufficiently explicit so as fairly to inform the opposite party of the nature of the claim or the defense to be made, as its purpose is to amplify the pleading. All those matters which tend to this end must be stated.[4]

§ 7. **A Precedent in Actions for Special Damages — Loss of Profits.**—

Delivered pursuant to the order of Master Walton, made herein and dated the 21st day of March, 1887.

The following are the best particulars the plaintiff can give of the times, places and persons when, where and to whom the alleged libels and slanders were published, and of the damages sustained by him:

1. The said libel was written by the defendant and published by him to A. B., of ——, at ——, on or about December 29, 1886, and to C. D., of ——, at ——, on or about January 2, 1887.

The plaintiff is unable at present to name any one else to whom the said libel was published, but believes that the defendant kept a copy of the said libel and showed it to several other persons, and will deliver further particulars of their names as soon as they are ascertained.

2. The said slanders were uttered in the month of December, 1886, in the presence of G. R., of 20 High street, in the said city, and his manager, W. K., at 20 High street aforesaid.

3. The following persons who used formerly to deal with the plaintiff ceased to do so in consequence of the defendant's conduct:

M. M., of ——,
O. P., of ——, etc.

[1] Diossy v. Rust, 46 N. Y. Super. Ct., 374.

[2] Butler v. Mann, 9 Abb. N. C. (N. Y.), 49; United States v. Tilden, 10 Ben. (U. S. D. C.), 547; Heft v. Jones, 9 Weekly Notes (Pa.), 541.

[3] United States v. Tilden, 10 Ben. (U. S. D. C.), 547; Beecher v. Mann, 9 Abb. N. C. (N. Y.), 49; Young v. De Mott, 1 Barb. (N. Y.), 30; Powers v. Hughs, 39 N. Y. Super. Ct., 482; Depew v. Leal, 5 Duer (N. Y.), 663; 2 Am. & Eng. Ency., 247; Bradstreet Co. v. Oswald, 96 Ga., 396.

[4] 2 Am. & Eng. Ency., 243.

The profits of the plaintiff's business must have fallen from £730 to £420 per annum.

Dated this 29th day of March, 1887.

R. & F., Solicitors for the Plaintiff.

To the defendant or Messrs. S. & P., his solicitors.[1]

§ 8. Illustrations — Digest of American Cases.—

1. The practice of requiring a bill of particulars was a thing unknown to the early common law. Demster v. Purnell, 3 Man. & Gr., 375.

2. It first became common in actions of debt and *assumpsit* where the common counts were relied upon, but it is now extended to all descriptions of actions where the circumstances are such that justice demands that a party should be apprised of the matters for which he is to be put upon trial with greater particularity than is required by the rules of pleading. Tilton v. Beecher, 59 N. Y., 175; 3 Chitty's Gen. Practice, 612; 2 Am. & Eng. Ency., 245.

3. Whenever the form of the declaration is so general as not to apprise the defendant of the nature, character and extent of the claim set up against him he may demand a bill of particulars. Such a bill is not only proper by way of limiting the plaintiff in his proof to the specific demands made by him, but is essential to enable the defendant to prepare fully his defense and to guard against surprise. The right is not only sanctioned by authority but by reason and propriety. Brown v. Calvert, 4 Dana (Ky.), 219.

4. In an action for slander or libel the plaintiff may be required to furnish particulars of the facts constituting his right of action (Clark v. Munsell, 6 Metc. (Mass.), 373), and of the persons to whom the defendant had communicated, and the occasions when he had uttered the slander. Wood v. Jones, 1 Fost. & Fin., 301; Slater v. Slater, 8 L. Times (N. S.), 856.

5. So if justification is pleaded, particulars of the facts on which the defendant relies may be ordered. Wren v. Weild, L. R., 4 Q. B., 213; Jones v. Bewicke, L. R., 5 C. P., 32; Commonwealth v. Snelling, 15 Pick. (Mass.), 321. But in these and like cases special ground for the motion must be shown. Horlock v. Lediard, 10 Mee. & Well., 677; Lagan v. Gibson, 9 Ir. R., C. L., 507.

6. The complaint in a slander suit alleged words spoken at the "town of W. and elsewhere," and at divers and "various other times and places," etc. An order for a bill of particulars was granted, and the bill, after specifying a few times and places, concluded with a repetition of the language above quoted and an allegation of inability to more fully specify. Upon application for a further bill, which should specify also the names of the persons in whose presence the slanderous words were spoken, *held*, that the clauses above quoted should be struck out, or that a particular statement of times and places should be made, but the plaintiff should not be compelled to give the names of the persons in whose presence the words were spoken. Jones v. Platt, 60 How. (N. Y.) Pr., 277.

7. Where the plaintiff in an action of slander counts generally, alleging that the defendant has charged him with a certain offense, the court has

[1] Odgers on L. & S., 633.

authority to order him to file a specification or bill of particulars of the ground of his action. Where a count alleges that the defendant charged the plaintiff with the crime of fornication, a specification stating that the defendant declared that the plaintiff was a strumpet is allowable, as it includes the charge of fornication; and proof of the charge in the specification is proof of the charge in the declaration. A specification or bill of particulars in an action of slander in which the plaintiff files only the general counts is not to be treated in all respects like a special declaration, and slight variances between the proof and the allegations in the specification will not defeat the action. The action is maintained if actionable words which necessarily import the charge alleged in the specification are proved, though other words alleged therein are not proved. Clark v. Munsell, 6 Metc. (Mass.), 373.

8. A charitable corporation brought an action for libel, and alleged that by reason of the libel persons had refused to make donations to it. *Held*, that a bill of particulars stating the names of such persons was properly ordered. New York Infant Asylum v. Roosevelt, 35 Hun (N. Y.), 501.

9. When a plaintiff demands a bill of particulars he cannot have an action for a libel upon anything contained in it. Perzell v. Tausey, 52 N. Y. Super. Ct., 79.

10. By the New York code of 1877, section 531, the items of an account alleged in a pleading need not be set out therein, but within ten days after the written demand by the other party a verified copy of the account must be furnished him, otherwise the account cannot be given in evidence. This form of a bill of particulars is obtained as of course only in cases of an account in the strict sense of the term, *i. e.*, an entry of debits and credits in a book, or upon paper, of things bought and sold, or services performed, with date and price or value. Dowdney v. Volkening, 37 N. Y. Super. Ct., 313.

11. In Pennsylvania a rule for a bill of particulars under the common counts is of course, but in all cases it requires a special *allocatur* (Mitchell on Motions and Rules, 17, 40), except that the respondent in divorce can always have a rule on the libelant to furnish a bill of the particulars of the cause of action, in default of which a judgment of *non pros.* will be entered thirty days after service of notice of the rule. Act of May 25, 1878; 1 Purd. Dig., 615, pl. 14.

12. In a criminal case a bill of particulars is required when the indictment fails to give notice of the special matter intended to be proved (Williams v. Commonwealth, 91 Pa., 493), as in a general indictment for embezzlement. People v. McKinney, 10 Mich., 54.

13. The information sought must be necessary; hence, if the claim be fairly described in the pleadings, no bill of particulars will be ordered. Vila v. Weston, 33 Conn., 42; Bangs v. Ocean Bank, 53 How. (N. Y.), 51; Nevitt v. Rabe, 6 Miss., 653; Tierney v. Duffy, 59 Miss., 364.

14. The particulars required are those of the matter in dispute only, and not of collateral matters. Hence, in a suit on an agreement, the consideration for which was stated to be sums of money, pieces of property and accounts, no particulars of these could be ordered. Crane v. Crane, 83 Ind., 459.

CHAPTER XXIV.

EVIDENCE.

PLAINTIFF'S PROOFS — PLEA OF THE GENERAL ISSUE FILED.

PLAINTIFF'S PROOFS — PLEA OF THE GENERAL ISSUE FILED.

§ 1. **The Natural Order of the Proofs** in actions for defamation on the part of the plaintiff, where the general issue has been pleaded, is —

(1) Plaintiff's special character and extrinsic matter.
(2) Publication of the defamatory matter.
(3) The colloquium and innuendoes.
(4) Malice.
(5) Damage.

§ 2. **First, Proof of the Plaintiff's Special Character and Extrinsic Matter.**— Where the words are actionable only by reason of the plaintiff's holding an office or exercising a profession or trade, the plaintiff must prove that he held such office or exercised such profession or trade at the date of publication, and that the words complained of were spoken of him in that capacity. Sometimes the words themselves admit the plaintiff's special character, or it may be admitted in the pleadings; if so, it is of course unnecessary to give any evidence on the point.[1]

Where the special character is essential to the action it is alleged either generally or particularly in the complaint.

(1) *When it is generally alleged* it is usually sufficient to prove by general evidence that the plaintiff is in the actual possession of the office or situation in which he has been defamed, without strict proof of any legal inception or investment. And therefore, where a plaintiff avers generally that he filled any particular office, or that he exercised any particular profession or business, in which he has been defamed, it is sufficient to give general evidence of his having acted in that office, of his having exercised that particular profession, or carried on that trade or business.[2] If the allegation is that the plaintiff was, at the time of the alleged injury, a magistrate or peace officer,[3] it is sufficient to show that he previously acted as such; and if it allege that the plaintiff was an attorney of a court, it is sufficient to show that he was

[1] Yrissarri v. Clement, 3 Bing., 433; 4 L. J. (O. S.), C. P., 128; 11 Moore, 308; 2 C. & P., 223; Odgers on L. & S., 558; Boehmer v. Detroit Free Press, 94 Mich., 7; 53 N. W. Rep., 822.

[2] Greenleaf's Evidence, § 412; 2 Starkie on Slander, 2.

[3] Berryman v. Wise, 4 T. R., 366.

before and at the time practicing as an attorney of that court.[1] And the law now seems to be the same with physicians.[2]

(2) *When it is specially alleged*, that is, when the plaintiff himself specifies the particular mode in which he was invested with the particular character in which he has been injured, he must, it seems, prove such a descriptive allegation, with its circumstances, although a more general allegation would have been sufficient. For though a totally irrelevant allegation may be rejected as surplusage, one which is material to the cause of action and which is descriptive of the legal injury must be proved as stated.[3]

The rule in principle seems to be if the plaintiff, instead of averring his special character generally, merely alleges the mode of appointment or investment, he must prove the fact; for, being material to the right of action, it cannot be rejected. If it were rejected no sufficient cause of action would be alleged. But where the plaintiff alleges his appointment cumulatively — as, if he allege that he is an attorney and has been duly admitted, etc., or that he is a physician and has taken his degree, etc.— it may well be doubted whether, in principle, strict proof of his admission or diploma be necessary. For such allegations may be regarded as cumulative rather than descriptive; and there seems to be no reason why in such a case the legal investment, by admission or otherwise, should not be presumed from evidence that the party has acted in the particular character. If it is to be presumed from such evidence that the party is an attorney, why is it not also to be presumed that he has been admitted an attorney? The latter presumption, indeed, necessarily involves the former. A presumption of a particular fact necessarily includes the presumption of everything which is essential to that fact, and without which it could not have been.[4]

§ 3. **When Proof is Unnecessary.**— Where the defamatory matter complained of assumes that the plaintiff possesses the

[1] Jones v. Stevens, 11 Price, 235; Pearce v. Whale, 5 B. & C., 38; Sellers v. Till, 4 B. & C., 655; 3 Greenleaf's Evidence, § 412.

[2] McPherson v. Cheadeall, 24 Wend., 24; Finch v. Gridley, 25 Wend., 469; 2 Starkie on Slander, 8; 3 Greenleaf's Evidence, § 412.

[3] 3 Greenleaf's Evidence, § 412; 2 Starkie on Slander, 8.

[4] 2 Starkie on Slander, 9.

special character in question, as where a person is slanderously spoken of in his character of attorney, clergyman or other functionary, proof of the publication of the words referring to him as such is sufficient evidence that he held the office, practiced the profession or carried on the trade.[1]

§ 4. **Strict Proof of the Plaintiff's Special Character is Not, as a Rule, Required.**— Thus, to prove that a person holds a public office, it is not necessary to produce his written or sealed appointment thereto.[2] It is sufficient to show that he acted in that office, and it will be presumed that he acted legally. So, where the libel imputes to the plaintiff misconduct in his practice as a physician, surgeon or solicitor, and does not call in question or deny his qualification to practice, he need only prove that he was acting in the particular professional capacity imputed to him at the time of the publication of the libel.[3] But when the libel or slander imputes to a medical or legal practitioner that he is not properly qualified, and the professional qualification is again denied on the pleadings, the plaintiff should always be prepared to prove it by producing his diploma or certificate duly sealed and signed.[4]

§ 5. **Proof of Other Extrinsic Matters.**— Allegations of other extrinsic matters, when material to sustain the action, must be strictly proved as stated in the complaint. If, however, the allegations of extrinsic matters are in their nature divisible and independent, it will be sufficient to prove so much of them as if alleged alone would have been sufficient in law to maintain the action.[5] There is an important difference between matters of mere allegation and matters of description. In respect to the former, a variance in proof as to number, quantity or time does not affect the right of recovery; but in respect to the latter the variance is fatal.[6]

[1] 3 Greenleaf's Evidence, § 412; Cummen v. Smith, 2 S. & R., 440; Yrissarri v. Clement, 3 Bing., 432; Bagnall v. Underwood, 11 Price, 621.

[2] Berryman v. Wise, 4 T. R., 366; Cannell v. Curtis, 2 Bing. N. C., 228; 2 Scott, 379.

[3] Smith v. Taylor, 1 B. & P., N. R., 196, 204; Rutherford v. Evans, 6 Bing., 451; 8 L. J. (O. S.), C. P., 86.

[4] Moises v. Thornton, 8 T. R., 303; Collins v. Carnegie, 1 A. & E., 695; 3 N. & M., 703; Sparling v. Haddon, 9 Bing., 11; 2 Moo. & Scott, 14; Odgers on L. & S., 558.

[5] 2 Starkie on Slander, 12; 2 Greenleaf's Evidence, § 413; Yrissarri v. Clement, 3 Bing., 432; Frank v. Kaminski, 109 Ill., 26; Binford v. Young, 115 Ind., 174.

[6] Cates v. Bowker, 18 Vt., 23.

§ 6. **Words Spoken of a Person in the Way of His Office, Profession or Trade.**— It is not enough for the plaintiff to prove his special character, and that the words refer to himself; he must further prove that the words refer to himself in that special character, if they are not otherwise actionable. It is a question for the jury whether the words were spoken of the plaintiff in the way of his office, profession or trade. It is not necessary that the defendant should expressly name the office, profession or trade at the time he spoke, if his words must necessarily affect the plaintiff's credit and reputation therein.[1] But often words may be spoken of a professional man which, though defamatory, in no way affect his profession—as an imputation that an attorney had been horsewhipped off the course at Doncaster,[2] or that a physician had committed adultery.[3] But any imputation on the solvency of a trader, any suggestion that he had been bankrupt years ago, is clearly a reflection on him in the way of his trade.

§ 7. **Illustrations — Digest of American Cases.**—

1. Where the defendant in imputing a crime to the plaintiff spoke of him as the Reverend A. B., it was held that the words used were equivalent to an admission that the plaintiff was a clergyman. Cummen v. Smith, 2 Serg. & R., 440.

2. In an action brought by a physician for medical attendance rendered by him, proof of the seal of a medical institution and of the signatures of the officers thereof to a diploma produced at the trial of the action, by comparison with the seal and signatures attached to a diploma received by the witness from the same institution, is competent evidence of the genuineness of the instrument, although the witness never saw the officers write their names. Finch v. Gridley's Ex'rs, 25 Wend. (N. Y.), 469; 1 Phil. Ev., 486; Cow. & Hill Notes, 1324. n., 914.

§ 8. **Digest of English Cases.**—

1. The plaintiff averred that he was an attorney of the court of king's bench, and having been employed in a particular cause had received a certain sum of money, which the defendant charged him with swindling, adding a threat that he would move the court to have him "struck off the roll of attorneys." Upon the trial before Thomson, Baron, at the York assizes, the plaintiff proved the words, and his having been employed as an attorney in that and other suits. It was objected that the plaintiff had not proved the first allegation in his declaration, viz., that he was an attorney of the court of king's bench, which could only be proved by his admission, or by

[1] Jones v. Littler, 7 M. & W., 423; 10 L. J., Ex., 171.

[2] Doyley v. Roberts, 3 Bing. N. C., 835; 5 Scott, 40; 3 Hodges, 154.

[3] Ayre v. Craven, 2 A. & E., 2; 4 N. & M., 220.

a copy of the roll of attorneys; but the objection was overruled, the learned judge reserving the point with liberty to move to enter a nonsuit. Upon motion made to that effect, the court were of opinion that the evidence was sufficient, for the defendant's threat imputed that the plaintiff was an attorney. And Buller, J., said, in the case of all peace officers, justices of the peace, constables, etc., it is sufficient to prove that they acted in those characters, without proving their appointments; and that even in case of murder. Excise and custom-house officers, indeed, fall under a different consideration; but even in their case evidence was admitted, both in civil and criminal suits, to show that the party was a reputed officer prior to the 11th Geo. 1, ch. 10, sec. 12. Berryman v. Wise, 4 T. R., 366; Starkie on Evidence, part IV, 372.

2. In the case of Pickford v. Gutch, Cor. Buller, J., Dorchester assizes, 1787, the action was brought for calling the plaintiff a quack. The declaration alleged that the plaintiff had used and exercised the profession, etc., of a physician, etc. To prove this a person who was a surgeon and apothecary was called, who would have proved that the plaintiff for several years had prescribed, etc., as a physician, and that the witness had acted under him. But Buller, J., was of opinion that the evidence was insufficient, and that it was necessary to produce the plaintiff's diploma; on which it was produced in court, and the plaintiff recovered. Smith v. Taylor, 1 N. R., 196; Pickford v. Gutch, 2 Starkie on Slander, 4, n.

3. It was held in that case that an attorney might recover for a libel upon him in his professional character, even although evidence was given on the part of the defendant that no certificate had been taken out by the plaintiff from November, 1813, to November, 1814; or from November, 1812, to February, 1822, when the last certificate was obtained, and that the plaintiff had, during those periods, practiced as an attorney. Notwithstanding this evidence, the court held that, although the plaintiff might be disabled by the statute 37 Geo. 3, ch. 90, from maintaining any action for fees, yet that he did not by the omission entirely lose his character of an attorney, and was not to be subjected, in addition to the penalty and disability imposed by the statute, to be aspersed and reviled in that character. But note that no negative evidence was given to show that the plaintiff had not been re-admitted. Jones v. Stevens, 11 Price, 235; Pearce v. Whale, 5 B. & C., 38.

4. The defendant said of the plaintiff, "He is a quack, and if he shows you a diploma it is a forgery." The declaration averred that the plaintiff "was a physician, and had regularly taken his degree of doctor of physic." In support of this averment he produced a diploma, purporting, on the face of it, to have been granted by the university of St. Andrew's, in Scotland, and to have the university seal appendant to it. To authenticate this a witness was offered to prove that the rector and professors of the university of St. Andrew's had acknowledged, in his presence, their signatures, subscribed to the diploma. The same witness was ready to prove a certificate, by the master and professors, of the due taking of the degree, and an acknowledgment by the seal-keeper of the university that the seal appendant to the diploma was the seal of the university. Lord Kenyon, C. J., deeming this evidence to be insufficient, the plaintiff was nonsuited. A motion for a new trial was afterwards refused on the ground that the plaintiff,

having averred that he had duly taken the degree of doctor of physic, was bound to prove it; and it was observed by Lawrence, J., "even if it be not necessary in general for the party to show that he has taken his degree, in this case it is necessary on account of the plaintiff's allegation." Dr. Moises v. Dr. Thornton, 8 T. R., 303.

5. Lord Kenyon, C. J., observed that the best evidence to prove the taking of a degree is by the production of the books containing the act of the corporation by which the degree is conferred. But, in general, if the slander or libel assume that the plaintiff possesses the character, or fills the situation or office, in which he is defamed, or assumes the truth of facts to which the slander or libel relates, and which are averred in the declaration, it operates by way of admission, and no further evidence of the fact is necessary. Thus, where the plaintiff, being an attorney, brought his action for words used by the defendant, by which he threatened that he would have the plaintiff struck off the roll of attorneys, it was held that proof of the plaintiff's being an attorney was unnecessary, for the words imported the fact. 2 Starkie on Slander, 10; Smith v. Taylor, 1 N. R., 196.

6. The plaintiff alleged that he had been appointed by certain persons exercising the powers of government in a certain republic or state in parts beyond seas, to wit, in the republic or state of Chili, in South America, to the office or station of envoy extraordinary and minister plenipotentiary to and at the courts of Europe, etc. It was objected at the trial that the plaintiff had not proved that there was such a state as Chili; but the defendant having asserted in the alleged libel that the plaintiff had colluded with J. H. fraudulently to obtain money in the matter of a loan for the republic or state of Chili, etc., it was held to be sufficient proof of the existence of such a state. Yrissarri v. Clement, 3 Bing., 432; 2 Starkie on Slander, 11.

§ 9. **Second, Proof of Publication** (see *Publication*).— The plaintiff must next prove that the defendant published the libel or spoke the slanderous words to some third person. The sale of each copy is a distinct publication.[1] Causing a libel to be printed may be a *prima facie* publication.[2] But if the libel never reaches the hands of any one except the printers and compositors, this would perhaps in the present day be deemed insufficient.[3]

As to the fact of publication, where the action is for words spoken, evidence of the speaking before any third person will be sufficient, though the declaration allege them to have been spoken before A. B. and others.[4] And where the words are in

[1] R. v. Richard Carlile, 1 Chitty, 451; Duke of Brunswick v. Harmer, 14 Q. B., 185; R. v. Stanger, L. R., 6 Q. B., 352; 40 L. J., Q. B., 96; 19 W. R., 640.

[2] Baldwin v. Elphinston, 2 W. Bl., 1037.

[3] Watts v. Fraser, 7 A. & E., 223; Lawless v. Anglo-Egyptian Cotton and Oil Co., L. R., 4 Q. B., 262; 10 B. & S., 226; 38 L. J., Q. B., 129; 17 W. R., 498. See chap. 12.

[4] B. N. P., 5.

themselves actionable it is sufficient to prove some of them which are actionable, provided they be proved as laid.[1]

If the words be spoken or libel published in a foreign language, or in characters not understood by those who hear or see them, there is no publication, since there is no communication prejudicial to the plaintiff.[2]

Where a witness who has heard scandalous words spoken has committed them immediately to writing, he may afterwards read the paper in evidence if he swear that the words contained in it are the very words;[3] and if the words have not been written immediately the witness may refer to his minutes to refresh his memory.[4]

If the defendant write a libel which is in some way subsequently published, this is *prima facie* a publication by the defendant.[5] A letter is published as soon as it is posted, provided it reaches the party to whom it is addressed; and this will be presumed if there be no evidence to the contrary. Thus, if a letter in the handwriting of the defendant be produced in court with the seal broken and the proper post-marks outside, that is sufficient evidence of publication.[6] So where a libel has appeared in print, and the manuscript from which it was printed is proved to be in the defendant's handwriting, this is *prima facie* a publication by the defendant. It is not necessary to prove expressly that he directed or authorized the printing.[7]

If the defamatory words be spoken or the libel addressed to the plaintiff only without further publication, no civil action is maintainable, since no temporal damage can have accrued from the defendant's act;[8] but a publication to the prosecutor

[1] 2 East, 434; 8 T. R., 150.

[2] 2 Starkie on Slander, 18.

[3] Per Holt, C. J., Sandwell v. Sandwell, Holt's R., 295; 2 Starkie on Slander, 14.

[4] Holt's R., 295; R. v. Wegener, 2 Starkie's C., 245.

[5] Per Holt, C. J., in R. v. Beere, 12 Mod., 221; 1 Ld. Raym., 414.

[6] Warren v. Warren, 1 C., M. & R., 250; 4 Tyr., 850; Ward v. Smith, 6 Bing., 749; 4 M. & P., 595; 4 C. & P., 302; Shipley v. Todhunter, 7 C. & P., 680.

[7] Per Lord Erskine in Burdett v. Abbot, 5 Dow, H. L., 201; Bond v. Douglas, 7 C. & P., 626; Tarpley v. Blabey, 2 Bing. N. C., 437; 7 C. & P., 395; R. v. Lovett, 9 C. & P., 462; Adams v. Kelly, Ry. & M., 157; Odgers on L. & S., 560; 2 Greenleaf's Evidence, § 416.

[8] 1 Will. Saun., 132, n. 2; Phillips v. Jansen, 2 Esp. C., 226. And see

only would be sufficient to sustain an indictment on the ground of its tendency to produce a breach of the peace.

The publication of a libel may be directly proved by evidence that the defendant, with his own hand, distributed it or exposed its contents, or painted an ignominious sign over the door of another, or took part in a procession carrying a representation of the plaintiff in effigy for the purpose of exposing him to contempt and ridicule, or by evidence of his maliciously reading or singing the contents of the libel in the presence of others — all of which facts are direct proof of the averment that the defendant published the alleged libel. But it frequently happens that no direct proof can be given of the defendant's agency in the publication of the libel, and resort must be had to indirect evidence in order to connect him with the libel and fix him with its publication. The most usual and important piece of evidence for this purpose consists in proving that the libel published is in the handwriting of the defendant; when the plaintiff has proved this he has made out such a *prima facie* case as entitles him to have the contents read in evidence.[1]

§ 10. **Evidence of Defendant's Handwriting.**— Proof that a libel is in the handwriting of the defendant, though not of itself proof of publication by him, is admissible in evidence; and from it, if not explained, a publication may be inferred by the jury.[2]

Any one who has ever seen the defendant write, even though once only,[3] can be called to prove his handwriting. So can any one who has corresponded with the defendant or seen letters which have arrived in answer to letters addressed to the defendant. A clerk in a merchant's office who has corresponded with the defendant on his master's behalf may be called to prove the handwriting.[4] The usual course is for the plaintiff's counsel merely to ask the witness, "Are you acquainted with the defendant's handwriting?" leaving it to the defendant's counsel to cross-examine as to the extent of his acquaintance.

Hick's Case, Hob., 215; R. v. Wegener, 2 Starkie's C., 245; 2 Starkie on Slander, 13.

[1] 2 Greenleaf's Evidence, § 415; 2 Starkie on Slander, 15; Burr., 2689.

[2] 2 Greenleaf's Evidence, § 416.

[3] Garrels v. Alexander, 4 Esp., 37.

[4] R. v. Slaney, 5 C. & P., 213.

Such cross-examination will only weaken the force of his evidence, not destroy its admissibility.[1] Comparison of a disputed writing with any writing proved to be genuine is in some states permitted to be made by the witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted as evidence of the genuineness or otherwise of the writing in dispute. But the evidence of experts must always be received with caution. In a recent English case an expert in handwriting swore positively that the libel was in the handwriting of the lord mayor-elect; but subsequently a young man came forward and acknowledged that he wrote it, and that the mayor never had anything to do with the matter.[2] If the defendant be present in court he may, it seems, be then and there required to write something, which the court and jury may compare with the document in dispute.[3] So, too, letters not otherwise evidence in the case, written by the defendant, and in which the plaintiff's name was spelled in a peculiar manner, were held admissible as evidence that the libel which contained the plaintiff's name spelled with the same peculiarity was written by the defendant.[4]

§ 11. **Slander — Proof of Publication.**— In cases of slander the proof of publication is usually made by calling witnesses who heard the words spoken. It is not, in strictness, sufficient to prove that the defendant spoke words equivalent to those set out in the complaint.[5] Where the declaration alleged that the defendant stated as a fact that "A. could not pay his laborers," and the evidence was that he had asked a question, "Have you heard A. cannot pay his laborers?" the plaintiff was nonsuited.[6] But if the words proved convey practically the same meaning as the words laid the variance will be held immaterial, or else the complaint may be amended as a mere matter of practice.

[1] Eagleton v. Kingston, 8 Ves., 473; Doe d. Mudd v. Suckermore, 5 A. & E., 730.

[2] Seaman v. Netherclift, 1 C. P. D., 540; 45 L. J., C. P., 798; 24 W. R., 884; 34 L. T., 878; (C. A.) 2 C. P. D., 53; 46 L. J., C. P., 128; 25 W. R., 159; 35 L. T., 784. See chap. 12.

[3] Doe d. Devine v. Wilson, 10 Moo. P. C., p. 530.

[4] Brookes v. Tichborne, 5 Ex., 929; 20 L. J., Ex., 69; 14 Jur., 1123.

[5] Armitage v. Dunster, 4 Dougl., 291; Maitland v. Goldney, 2 East, 426.

[6] Barnes v. Holloway, 8 T. R., 150; Odgers on L. & S., 565.

It was never necessary, however, to prove all the words laid in the declaration, if such of them as are proved are intelligible and actionable by themselves. This question, however, is more especially examined under the head of "Variance."

If the words spoken are in a foreign language, witnesses must be called to prove their meaning, and it must be further proved that those who heard them understood that language; otherwise there is no publication. But it will be presumed they were understood where the words are spoken in the language of the locality.[1]

If the witness committed the words to writing shortly after the defendant uttered them, he may refer to such writing to refresh his memory; but it must be the original memorandum that is referred to and not a copy.[2] And so where the action is for procuring a libel to be published by making a verbal statement to the reporter of a newspaper, who took it down in writing, the original writing taken down by the reporter and handed by him to the editor must be produced in court; otherwise it will not appear that it was the same or substantially the same as the libel which appeared in the newspaper.[3]

§ 12. **Libel — Proof of Publication.**— The libel itself should be produced at the trial; the jury are entitled in all cases to see it,[4] and the defendant is entitled to have the whole of it read.[5] The original must be carefully traced where it has passed through many hands,[6] and the identical one published must be produced or accounted for.[7] But where a large number of copies are printed from the same type, or lithographed at the same time by the same process, none of them are copies in the legal sense of the word. They are all counterpart originals, and each is primary evidence of the contents of the rest.[8]

[1] Mielenz v. Quasdorf, 68 Iowa, 726; 28 N. W. Rep., 41; Kimm v. Steketee, 48 Mich., 322; 12 N. W. Rep., 177.

[2] 2 Starkie on Slander, 14; Burton v. Plummer, 2 A. & E., 343.

[3] Odgers on L. & S., 565; Adams v. Kelly, Ry. & Moo., 157.

[4] Wright v. Woodgate, 2 C., M. & R., 573; Gilpin v. Fowler, 9 Ex., 615; 23 L. J., Ex., 156.

[5] Cooke v. Hughes, R. & M., 112.

[6] Fryer v. Gathercole, 4 Ex., 262; 18 L. J., Ex., 389; Adams v. Kelly, Ry. & Moo., 157.

[7] R. v. Rosenstein, 2 C. & P., 414.

[8] R. v. Watson, 2 Stark., 129; Johnson v. Hudson and Morgan, 7 A. & E., 233, n.

§ 13. **Secondary Evidence.**— In cases where the original libel cannot be produced secondary evidence may be given of it,[1] except where the libel is contained in an official document which is privileged from production on the ground of public policy, in which case the same public policy requires that no secondary evidence of its contents shall be given.[2] The plaintiff is also entitled to give secondary evidence of the contents of the libel if the original is in the defendant's possession and is not produced after notice to produce it has been served on the defendant or his attorneys a reasonable time before the trial.[3] So where the libel is in possession of some one beyond the jurisdiction of the court who refuses to produce it on request, although informed of the purpose for which it is required.[4] Where the libel is written or placarded on the wall, so that it cannot conveniently be brought into court, secondary evidence may be given of its contents.[5]

§ 14. **Illustrations — Digest of American Cases.**—

1. Quasdorf wrote and mailed to the husband of the plaintiff a letter in the German language, saying: "Your wife has stolen all my bedding and my calico sheeting, ticking, toweling, gloves, shirts and girls' dresses. I lay my damages at $30." There was no direct evidence that the letter was received by the person to whom it was written; but it came in some way into the hands of his brother, and was by him delivered to the plaintiff. Whether the husband or the brother could read the German language does not appear; nor is there any evidence that the letter, prior to the time when it came into the plaintiff's possession, was seen by any one who could read it. If it was in fact not read by any one, it is manifest that the plaintiff's character was not injured by it. The court held that the evidence failed to show a publication. There must be evidence that a letter written in a foreign language was understood by the receiver before a publication can be established. Mielenz v. Quasdorf, 68 Iowa, 726; 28 N. W. Rep., 41.

2. The plaintiff, a druggist of Grand Rapids, sued defendants for a libel published in the Dutch language in a newspaper having a large circulation in that part of the state and recovered damages. It was objected that, as

[1] Rainy v. Bravo, L. R., 4 P. C., 287; 20 W. R., 873; Gathercole v. Miall, 45 M. & W., 319.

[2] Home v. Bentinck, 2 Brod. & B., 130; Anderson v. Hamilton, id., 156, n.; Stace v. Griffith, L. R., 2 P. C., 428; 6 Moore, P. C. C. (N. S.), 18; 20 L. T., 197; Dawkins v. Lord Rokeby (Ex. Ch.), L. R., 8 Q. B., 255.

[3] R. v. Boucher, 1 F. & F., 486.

[4] Boyle v. Wiseman, 10 Ex., 647; 24 L. J., Ex., 160; Newton v. Chaplin, 10 C. B., 56; R. v. Llanfaethly, 2 E. & B., 940; 23 L. J., M. C., 83; R. v. Aickles, 1 Leach, 330.

[5] Mortimer v. M'Callan, 6 M. & W., p. 68; Bruce v. Nicolopulo, 11 Ex., p. 133; 24 L. J., Ex., 324; Odgers on L. & S., 564.

the article was not in English but in Dutch, and that not being the current language of the country, there was no presumption that it was read by people who understood it, and that this must be shown; but it was held that where a libelous article is circulated in a foreign language it is not necessary to show it was understood, nor that those conversant with that language were citizens. Kimm v. Steketee, 48 Mich., 322; 12 N. W. Rep., 177.

3. Giving a writing to a witness to copy, the copy being immediately sent to a foreign country and the original retained afterwards in the defendant's possession, is a publication upon which an action will lie here. Keene v. Ruff, 1 Iowa, 482.

4. Every sale of a copy of a libel is a fresh publication, for which a civil action lies against the seller; and the *onus* is on him to prove that he was ignorant of its contents. Malice is implied until he shows the charges to be true. Staub v. Van Benthuysen, 36 La. Ann., 467. But throwing a sealed letter, addressed to the plaintiff or a third person, into the inclosure of another, who delivers it to the plaintiff himself, is not such a publication as will render the defendant liable for damages. It would be otherwise if such third person had read the letter, or on hearing of it required the plaintiff to do so. Fonville v. Nease, Dudley (S. C.), 303.

5. Where a railroad company supplied its agents, twenty-nine in number, with a tabulated list of discharged employees and the reasons for the discharge, and the false reason given for the discharge of one was "stealing," it was held a publication of a libelous statement. Bacon v. Mich. Cent. R. R. Co., 56 Mich., 224; 54 Am. Rep., 372.

6. Where a libel is printed in an edition of many copies for general circulation, the extent of the circulation procured or caused by the publisher may be shown against him as evidence of the injury to the person libeled. Bigelow v. Sprague, 140 Mass., 425.

7. It is just as important to prove the publication of the slanderous words — that is, that they were spoken in the presence and hearing of others than the plaintiff — as it is to prove their speaking. Frank v. Kaminsky, 109 Ill., 26.

§ 15. Digest of English Cases.—

1. It is a question for the jury, in doubtful cases, whether there has in fact been any publication of the libel to a third person; but, where the facts are clear, the question of publication is one of law for the decision of the court. If (in an action for damages) the facts were that the defendant had posted up a libel in a public place, but had taken it down again before any one had read it, there would in point of law be no publication; but if it were doubtful whether, before it was taken down, some one had not read it, that would be a question of fact for the jury. Baldwin v. Elphinstone, Bl. R., 1037. See Starkie on Evidence, tit. Law and Fact; Delacroix v. Thevenot, 2 Starkie's C., 63; Clutterbuck v. Chaffers, 1 Starkie's C., 471.

2. The best evidence to prove the handwriting in question is that of a witness who actually saw the party write it. Such direct evidence can however, seldom be procured; and, in general, to prove the handwriting of a person, any witness may be called who has by sufficient means acquired such a knowledge of the general character of the handwriting of the party

as will enable him to swear to his belief that the handwriting in question is the handwriting of that person. B. N. P., 236; Lord Ferrers v. Shirley, Fitzg., 195.

3. It is not material whether the person who disperses libels is acquainted with their contents or otherwise; for nothing would be more easy than to publish the most virulent papers with the greatest security, if the concealing the purport of them from an illiterate publisher would make him safe in dispersing them. And that, on this foundation, it has been constantly ruled of late that the buying of a book or paper containing libelous matter at a bookseller's shop is sufficient evidence to charge the master with the publication, though it does not appear that he knew of any such book being there, or what the contents thereof were, and that it will not be presumed that they were brought there by a stranger; but the master, if he suggests anything of this kind in his excuse, must prove it. Bac. Abr., tit. Libel, 458; Wood's Inst., 431; Moore, 627.

4. The defendant was tried on an information for publishing a treasonable libel. It appeared in evidence that the defendant kept a pamphlet shop, and that this libel was sold in the shop by the defendant's servant, for the defendant's use and account, in her absence, and that she did not known the contents of it, nor of its coming in or going out; and per Raymond, L. C. J., notwithstanding the defendant is guilty of publishing this libel, the shop being kept under her authority and direction, it would be a very dangerous thing that the law was otherwise, and it has been so ruled in a great many instances. But the jury being unable to agree in a general verdict, and thinking it a hard case upon the defendant, refused to find a general verdict, and were desirous of finding the facts specially, and ultimately the attorney-general agreed to withdraw a juror, which was done. According to the report of the same case in Barnardiston, 306, the lord chief justice observed that if a servant carries a libel for his master he certainly is answerable for what he does, though he cannot so much as write or read. It is impossible not to dissent from this doctrine so expressed, without the qualification added that the servant had some reason to know that he was discharging an illegal mission. Elizabeth Nutt's Case, Fitz., 47.

5. On the trial of an information for selling and publishing a libel against Chambers, it was insisted upon for the defendant that she was sick, and that the libel was taken into her house without her knowledge. But, by the court, this is no excuse, and the law presumes her to be acquainted with what her servant does. Mr. J. Fortescue said that it had been ruled that the finding a libel on a bookseller's shelf was a publication of it by the bookseller. And L. C. J. Raymond said it hath been ruled that where a master being out of town, his trade is carried on by his servant, the master shall be chargeable with the servant's publishing a libel in his absence. King v. Dodd, 2 Sess., 33.

6. In an English case the liability of booksellers was much discussed, and the court expressed an opinion that the sale of a libel in a bookseller's shop was *prima facie* evidence of a publication, though not so conclusive but that it might be rebutted by circumstances. It does not indeed appear what would have been deemed by the court to be sufficient to rebut such *prima facie* evidence, and to excuse the owner; but it seems to be clear,

from the general context of the decisions on this subject, that a bookseller is considered as standing in a situation of peculiar responsibility, and that he is liable criminally as well as civilly for libels sold in his shop in the usual course of business, though without his particular knowledge. The defendant had been convicted of publishing a libel (one of Junius' letters) in one of the magazines, called the London "Museum," which was bought at his shop, and purported to be printed for him. The defendant was found guilty on proof that the libel in question had been sold in his shop. A motion was afterwards made for a new trial, on an affidavit, the principal bearing of which was that the libel had been sent to his shop and sold there by a boy without his knowledge, privity or approbation. But the court were of opinion that none of the matters on behalf of the defendant, nor all of them added together, were reasons for granting a new trial, whatever weight they might have in extenuation of his offense, and in consequence lessening his punishment; for they were extremely clear and unanimous in opinion that this libel, being bought in the shop of a common-known bookseller and publisher, importing by its title-page to be printed for him, was a sufficient *prima facie* evidence of its being published by him; not indeed conclusive, because he might have contradicted it if the facts would have borne it by contrary evidence.

In the above case Lord Mansfield observed: "A libel cannot be read against a defendant before it has been proved upon him. This must, however, be understood of such *prima facie* proof of publication as would be sufficient to be left to a jury; for no evidence on the part of the plaintiff or in support of a prosecution can in strictness amount to proof, since the evidence of any witnesses is always liable to be rebutted by opposite testimony, and must after all depend for its effect upon the credit given by the jury to the character of the witnesses, and the circumstances under which such evidence is given." Aston, J., observed that the evidence of his publishing that which was bought in his shop must stand till the contrary appears. There may, indeed (he said), be circumstances of extenuation, or even of exculpation; and if it were a surprise upon him the court would have regard to such circumstances as far as they merited their regard, and he cited Harris' case, 5 St. Tr., 1037; Hudson's case, Hil., 8 G. I., and R. v. Nutt, Fitzg., 47. Harris' case, it is observable, is little to the point; there was evidence that the defendant gave directions for printing the libel; that it was afterwards sold in his shop, and that he had acknowledged the publication. King v. Almon, 5 Burr., 2689.

7. Lord Kenyon held that the proprietor of a newspaper was answerable criminally as well as civilly for the acts of his servants or agents in misconducting a newspaper; he said that this was not his opinion only, but that of Lord Hale, Justice Powell and Justice Foster, all high law authorities, and to which he subscribed. King v. Walter, 3 Esp. C., 21; King v. Cuthel, K. B., 1799; Lord Ellenborough, C. J., in R. v. White, Guildh., 1811; Holt's Law of Libel, 287; R. v. Carlile, 1 Chitty, 453; R. v. Almon, 5 Burr., 2689; R. v. Dodd, 2724; 2 Esp. C., 33; Dig. L. L., 27; Wood's Ins., 443; 2 Sess. C., 33; 12 Vin. Abr., 229; Plunkett v. Corbett, 5 Esp. C., 186; Hawk. P. C., ch. 73, sec. 10; Barnard., K. B., 208.

8. In the case of Rex v. Gutch, on an information against proprietors of

a newspaper for publishing a libel, Lord Tenterden, C. J., in summing up said: "On the part of Mr. Gutch it is contended that the proprietor of a newspaper who is not shown to take, or who can show that he took no part in the publication of the newspaper and of the libel in question, is not criminally responsible. Now, whether it is so shown in this case is a fact for you to consider; but I am bound to state the law as I have received it from my predecessors. I cannot propose to you a different rule from what I find adopted by those who have filled my situation before me. Now, it is conceded that it has been held in several cases that a proprietor so situated is criminally answerable. But it is said that this is a different principle from that which prevails in all other criminal cases; but this does not appear to me to be so; the rule seems to me to be conformable to principle and to common sense. Surely a person who derives profit from, and who furnishes means for carrying on, the concern, and intrusts the conduct of the publication to one whom he selects and in 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." Rex v. Gutch, 1 M. & M., 433.

9. The defendant, the Honorable Robert Johnson, was indicted in the county of Middlesex for having published a libel in "Cobbett's Weekly Register." Mr. Cobbett, the publisher of the "Register," proved that he had received an anonymous letter (the original of which he believed to be destroyed) in the same handwriting as the libels which he afterwards received, in which letter (parol evidence of which was admitted to be given for this purpose) the writer inquired whether it would be agreeable to Mr. Cobbett to receive for publication in his "Register" certain information of public affairs in Ireland, and if it were, he was desired to say to whom such information was to be directed. In consequence of the receipt of this letter, which was published in the "Register," Mr. Cobbett, through the medium of the same "Register," requested the promised information to be directed to Mr. Budd, No. 100, Pall Mall, whose shop was at that time used by Mr. Cobbett for the publication of his "Register," where letters of communication were addressed to him, and from whence he received them, his own house being in Duke street, Westminster. After this intimation, Mr. Cobbett received in due time two several letters containing different parts of the libels in question, both in the same handwriting with the letter previously received. Both the letters came under cover; but the covers were believed either to be destroyed or lost, having been thrown aside as useless, and therefore parol evidence was admitted to prove that they had the Irish postmark upon them and were directed in the manner pointed out in the "Register." The first of the letters, dated 29th October, 1803, was received, and the cover opened by Mr. Budd, who thereupon sent it, together with the cover opened, to Mr. Cobbett in Duke street, by a person in the office whom the witness did not recollect. But in consequence of his desiring Mr. Budd not to open any other letters so directed, Mr. Cobbett

received the next letter, which came to Mr. Budd by a subsequent post, unopened. Several witnesses were then called, who, upon examination of the letters so received by Mr. Cobbett, swore to their belief of their being the handwriting of the defendant, who, at the period in question, was an Irish judge. It was then proposed by the attorney-general that the letters containing the libels should be read, which he said contained internal evidence that they were written and sent by the writer to Mr. Cobbett for the purpose of being published in his "Register." But the reading was objected to upon the ground that there was no evidence to go to the jury of a publication by the defendant in Middlesex. That, admitting the libels to be in the handwriting of the defendant, there was no evidence to show that he had sent them into Middlesex to be there published, nor any privity established between himself and Cobbett. The case of the Seven Bishops was quoted as in point; and it was contended that, if any publication proved to have taken place in Middlesex was sufficient ground for the reading of the libel there, it ought to have been read in that case, since the petition, which had been acknowledged to have been signed by them, was found in the king's hands in Middlesex, and that the only link there wanting was that it came there by the agency of the bishops, which was holden not to be supplied by the evidence of their acknowledgment of their handwriting in that county. The trial was at bar, before Lord Ellenborough, C. J., and Grose, Lawrence and Le Blanc, Justices. But it was answered by the court that the case of the Seven Bishops was irrelevant; that it had been soundly ruled in their case that the confession of their signatures, extorted from them, as it was, did not amount to evidence of a publication in Middlesex; that, in the present case, a publication in Middlesex had been proved by Mr. Cobbett, and that the notification by letter to him, that he should receive certain papers for the purpose of publication, the public answer in the "Register" appointing the mode of sending, and the consequent receipt of papers by Cobbett through that channel, answering the description of those proposed to be sent, and proved to have been written by the defendant, afforded evidence to go to a jury decide whether the publication in Middlesex had not been made through the defendant's procurement. The jury found the defendant guilty. King v. The Honorable Robert Johnson, 7 East, 65.

10. Sir Francis Burdett's Case. The judges delivered their opinions *seriatim*. Best, J., was of opinion that there was presumptive evidence of an actual publication in Leicestershire, and that the sending the libel by the post from that county amounted to a publication. R. v. Watson, 1 Camp., 215; R. v. Williams, 2 Camp., 505; Codex Lib., 9, tit. 36; and see Girdwood's Case, East's P. C., 1116, 1120. Holroyd, J., was of opinion that the composing and writing a libel in the county of L., and afterwards publishing it, although the publication was not within the county of L., was an offense sufficiently charged as a substantive offense in the information, and which gave jurisdiction to a jury of the county of L. (see R. v. Beere, 2 Salk., 417; Carth., 409; Holt's R., 422; R. v. Knell, Barnard., K. B., 305; R. v. Carter, 9 St. Tr.), and that the composing and writing, with the intent afterwards to publish, also amounted to a misdemeanor; and that a jury of the county of L. might inquire as to the publishing in another

county, in order to prove the defendant's intention in composing and writing in the county of L. And that, in the case of an aggregate charge, part of which, being in itself a substantive misdemeanor, is committed within a particular county, the jury may inquire into the remainder, although done elsewhere; that there was reasonable evidence of a publication in L., and that a delivery of a libel within the county, although it be sealed, is a publication in law. Bayley, J., was of opinion that there was not sufficient evidence to support a presumption that there had been an open delivery of the libel in L., considering that positive proof might have been given by calling B. as a witness. He gave no opinion on the question whether a close delivery amounted to a publication. He held that the whole *corpus delicti* must be proved within one county; and that there was no distinction in this respect between felonies and misdemeanors. He gave no opinion on the question whether the composing a writing with intent to publish constituted an offense. Abbott, L. C. J., intimated his opinion that mere delivery constituted a publication. He held that the facts warranted the conclusion that the paper had been delivered by the defendant in L. to B. in the state in which it had been delivered by the latter to A. That, even supposing the libel to have been delivered by the defendant in a different county, yet as the whole was a misdemeanor, compounded of distinct parts, each of which was an act done in the prosecution of the same criminal intention, the whole might be tried in the county of L., where one of those acts had been done. Rex v. Sir Francis Burdett, 4 B. & A., 717.

§ 16. **Third, Proof that the Defamatory Matter Refers to the Plaintiff** (see *Colloquium*).— In cases where the name of the person defamed is not mentioned, there will be need of some evidence to show who was meant. As a rule the plaintiff may give in evidence any of the attending circumstances, the cause and occasion of the publication, subsequent statements, if any, by the defendant, and all other extraneous matters which will tend to explain the allusion or point out the person in question. But witnesses cannot be called upon to state to whom they understood the defamatory matter to refer. A witness may testify to the publication of defamatory matter, the speaking of slanderous words or the publishing of a libel, together with all the surrounding circumstances, the existing facts connected with the transaction, and from this testimony it is for the jury to say who was meant.[1]

It is not necessary that all the world should understand the

[1] Gribble v. Pioneer Press Co., 37 Minn., 277; 34 N. W. Rep., 30; Van Vetchen v. Hopkins, 5 Johns. (N. Y.), 211; Gibson v. Williams, 4 Wend. (N. Y.), 320; Wright v. Paige, 42 N. Y., 581; Snell v. Snow, 54 Mass., 258; White v. Sayward, 33 Me., 326; Rangler v. Hummell, 37 Penn. St., 130; McCue v. Ferguson, 73 Penn. St., 333; Daines v. Hartley, 3 Exch., 200; Nidever v. Hall, 67 Cal., 79; Nelson v. Borchenius, 52 Ill., 236; Knapp v. Fuller, 55 Vt., 311.

defamatory matter; it is sufficient if those who know the plaintiff can make out that he is the person meant.[1] Willes, J., would not allow a witness to be asked, "To whom did you understand the words to apply?" on the ground that that was the question for the jury.[2] Evidence that the plaintiff was jeered at at a public meeting is admissible to show that his neighbors understood the libel as referring to him.[3] Lord Ellenborough held that the declarations made by spectators while they were looking at a libelous caricature were admissible in evidence to show whom the figures were intended to represent.

The rule is that words must be construed in the sense which hearers of common and reasonable understanding would ascribe to them; even though particular individuals, better informed on the matter alluded to, might form a different judgment on the subject.[4] But in cases where the defamatory matter is published in relation to some extrinsic matters, in respect of which alone they are actionable, it is not necessary to prove that the hearers knew the truth of the extrinsic matters at the time. And when defamatory words themselves assume the existence of such matters proof of their existence is wholly unnecessary.[5]

§ 17. **Proof of the Meaning of the Defamatory Matter.**— When the words are not intelligible English, but are foreign, local, technical, provincial or obsolete expressions, parol evidence is admissible to explain their meaning, provided such meaning has been properly alleged in the statement of the claim by an innuendo. The rule is the same where words which have a meaning in ordinary English are yet, in the particular instance before the court, clearly used not in that ordinary meaning, but in some peculiar sense; as in the case of many slang expressions. But where the words are well known and perfectly intelligible English, evidence cannot be given to explain that meaning away, unless it is first in some way shown that that meaning is for once inapplicable. This may appear from the words themselves; to give them their ordinary English meaning may make nonsense of them. But if with their ordinary meaning the words are perfectly good sense as they

[1] Bourke v. Warren, 2 C. & P., 310. Bing, 412. So in Du Bost v. Beresford, 2 Camp., 511.

[2] Eastwood v. Holmes, 1 F. & F., 349.

[3] Cook v. Ward, 4 M. & P., 99; 6

[4] 2 Greenleaf on Evidence, § 417.

[5] 2 Greenleaf's Evidence, § 417.

stand, facts must be given in evidence to show that they may have conveyed a special meaning on this particular occasion. After that has been done, a by-stander may be asked, "What did you understand by the expression used?" But without such a foundation being laid the question is not admissible.[1] Figurative or allegorical terms of a defamatory character, if of well-known import, need no evidence to explain their meaning.[2] Nor do historical allusions or comparisons to odious, notorious or disreputable persons; thus, where the conduct of the plaintiff, in a case which he conducted as attorney for one of the parties, was compared to that of Messrs. Quirk, Gammon and Snap, the novel "Ten Thousand a Year" was put in and taken as read.[3]

§ 18. **Words Susceptible of Two Meanings.**— Wherever the words sued on are susceptible both of a harmless and an injurious meaning it will be a question for the jury to decide which meaning was in fact conveyed to the hearers or readers at the time of publication. It will be of no avail for the defendant to urge, except perhaps in mitigation of damages, that he intended the words to convey the innocent meaning, if the jury are satisfied that ordinary by-standers or readers would certainly have understood them in the other sense.[4] Every man must be taken to have intended the natural and probable consequences of his act. The plaintiff may give evidence of surrounding circumstances from which a defamatory meaning can be inferred.[5]

He may also show that the words, though apparently commendatory, were spoken ironically. But if the words are in their primary sense not actionable, and there is no evidence of any facts known both to the writer and the person to whom he wrote which could reasonably induce the latter to put upon

[1] Odgers on L. & S., 565; Daines v. Hartley, 3 Exch., 200; 18 L. J., Ex., 81; 12 Jur., 1093; Barnett v. Allen, 2 H. & N., 376; 27 L. J., Ex., 415; Humphreys v. Miller, 4 C. & P., 7; Duke of Brunswick v. Harmer, 3 C. & K., 10; Simmons v. Mitchell, 6 App. Cas., 156; 50 L. J., P. C., 11; 29 W. R., 401; 43 L. & T., 710; Homer v. Taunton, 5 H. & N., 661.

[2] Hoare v. Silverlock, 12 Q. B., 624; 17 L. J., Q. B., 306.

[3] Woodgate v. Ridout, 4 F. & F., 202.

[4] Fisher v. Clement, 10 B. & C., 472.

[5] Pearce v. Ornsby, 1 M. & Rob., 455. See, also, Anderson v. Hart, 68 Iowa, 400; Snell v. Snow, 54 Mass., 278; McCue v. Ferguson, 73 Pa. St., 333; Edwards v. Chandler, 14 Mich., 471; White v. Sayward, 33 Me., 326.

them any actionable, secondary meaning, the suit must fail.[1] And so, too, if the words are not reasonably susceptible of the defamatory meaning put upon them by the innuendo.[2] If, however, the words are capable of the meaning ascribed to them by the innuendo, and there is any evidence to go to the jury that they were used with that meaning, then it will be for the jury to decide whether in fact the words were understood in that sense by those who heard or read them.

§ 19. **Fourth, Proof of Malicious Intent** (see *Malice*).— In cases where the defamatory words are actionable in themselves, malicious intent in publishing them is always inferred by law, and therefore no proof is necessary. But the occasion and circumstances of the publication may be such as to repel this inference and any liability on the part of the defendant unless there is proof of actual malice. And the rule of law is, where it is shown that the communication is privileged, the burden of proof is on the plaintiff to show actual malice or malice in fact.[3]

It is for the court to decide whether the occasion is or is not privileged, and also whether such privilege is absolute or qualified. If the occasion was one of absolute privilege, the defendant is entitled to judgment, however maliciously and treacherously the plaintiff may have acted. If, however, the privilege was only qualified, the burden is on the plaintiff of proving actual malice.[4] And this he may do either by extrinsic evidence of personal ill-feeling or by intrinsic evidence, such as the exaggerated language of the libel, the mode and extent of publication, and other matters in excess of the privilege. Any other words written or spoken by the defendant of the plaintiff, and indeed all previous transactions or communications between the parties, are evidence on this issue.[5]

[1] Odgers on L. & S., 566; Capital and Co. Bank v. Henty (C. A.), 5 C. P. D., 514; 49 L. J., C. P., 830; 28 W. R., 851; 43 L. T., 651; (H. L.), 7 App. Cas., 741; 52 L. J., Q. B., 232; 31 W. R., 157; 47 L. T., 662; 47 J. P., 214; Ruel v. Tatnell, 29 W. R., 172; 43 L. T., 507.

[2] Mulligan v. Cole, L. R., 10 Q. B., 549; 44 L. J., Q. B., 153; 33 L. T., 12.

[3] Lewis v. Chapman, 16 N. Y., 369; 2 Greenleaf's Evidence, § 418; True v. Plumley, 36 Me., 466; Sanderson v. Caldwell, 45 N. Y., 398; Bodwell v. Osgood, 3 Pick., 379; Weaver v. Hendrick, 30 Mo., 502; McKee v. Ingalls, 4 Scam., 30.

[4] Clark v. Molyneux (C. A.), 3 Q. B. D., 237; 47 L. J., Q. B., 230; 26 W. R., 104; 37 L. T., 694.

[5] Odgers on L. & S., 558; 2 Greenleaf's Evidence, § 418.

A plea of justification is no evidence of malice.[1] But persisting in it may be, if there are any other circumstances in the case suggesting malice, but not otherwise.[2]

〈 Proof that the defendant at the time of publication knew that what he was saying or writing was false is proof positive of malice.〉 Proof that in fact the words are untrue is no evidence of malice; the falsity of the words is indeed always presumed in the plaintiff's favor.[3]

§ 20. **Evidence of Plaintiff's Good Character.**— The plaintiff cannot, in the first instance, as a rule, give any evidence of his own good character. But where the parties have been living in the same house for a long time as master and servant, and the master must have known the true character of his servant, and yet has given a false one, there the plaintiff is allowed to give general evidence of his good character, and to call other servants of the defendant to show that no complaints of misconduct were made against the plaintiff while he was in defendant's service; for such evidence tends to show that defendant, at the time he gave plaintiff a bad character, knew that what he was writing was untrue, which would be proof positive of malice.[4] But in any other case, if no justification be pleaded, and yet the plaintiff's counsel gives evidence of the falsity of the libel, this will let in evidence on the other side of the truth of the statement.[5]

§ 21. **Under the General Issue.**— Under the general issue filed the plaintiff will not in ordinary cases be permitted to prove the falsity of the defamatory matter, either for the purpose of showing malice or of enhancing his damages; but where the defendant seeks to protect himself on the ground of a privileged communication the plaintiff may show that the matter was false, and that the defendant knew it to be so when

[1] Wilson v. Robinson, 7 Q. B., 68; 14 L. J., Q. B., 196; 9 Jur., 726; Caulfield v. Whitworth, 16 W. R., 936; 18 L. T., 527.

[2] Warwick v. Foulkes, 12 M. & W., 508.

[3] Browne v. Croome, 2 Stark., 297; Cornwall v. Richardson, R. & M., 305; Guy v. Gregory, 9 C. & P., 584; Brine v. Bazalgette, 3 Exch., 692; 18 L. J., Ex., 348.

[4] Odgers on L. & S., 570; Fountain v. Boodle, 3 Q. B., 5; 2 G. & D., 455; Rogers v. Sir Gervas Clifton, 3 B. & P., 587.

[5] Browne v. Croome, 2 Stark., 298. See, also, Morey v. Morning Journal, 123 N. Y., 207; 25 N. E. Rep., 161; Halley v. Gregg, 82 Iowa, 622; Howland v. Manufacturing Co., 156 Mass., 543; 31 N. E. Rep., 656; Lotto v. Davenport, 50 Minn., 99.

he published it.[1] Proof that the defendant was aware of its falsity is sufficient proof of malice.[2]

§ 22. Illustrations — Digest of American Cases.—

Evidence of Malice.

1. The charge of crime implies malice. Estes v. Antrobus, 1 Mo., 197; Trabue v. Mays, 3 Dana (Ky.), 138; Park v. Blackiston, 3 Harr. (Del.), 373; McKee v. Ingalls, 4 Scam. (Ill.), 30; Yeates v. Reed, 4 Blackf. (Ind.), 463.

2. In an action for damages on account of slanderous words not actionable in themselves, malice is an essential fact and should always be proved. Harry v. Constantin, 14 La. Ann., 782.

3. In an action for libel, under a plea of not guilty, evidence is admissible, in mitigation of damages, that there was a general suspicion and belief of the truth of the charge; and, under a plea of privileged publication, such evidence is admissible as pertinent to the question of express malice. Montgomery v. Knox 23 Fla. 595, 3 S. Rep., 211.

4. The plaintiff may give evidence of the speaking of other words to prove the malicious intent of the defendant. Stearns v. Cox, 17 Ohio, 590; Bartow v. Brands, 15 N. J. L. (3 Green), 248; Brittain v. Allen, 2 Dev. (N. C.) L., 120; Carter v. McDowell, Wright (Ohio), 100; Elliott v. Boyles, 31 Pa. St., 65; Miller v. Kerr, 2 McCord (S. C.), 285.

5. In an action for words charging the plaintiff with perjury the words charged were laid to have been spoken in reference to testimony given by the defendant in a cause between him and one A. *Held* that, malice being essential, it was a question for the jury whether the words were spoken with a defamatory intention. Smith v. Youmans, Riley (S. C.), 88.

6. In an action for slander which charges that words were spoken importing a certain larceny, evidence of the speaking of words importing another and a different larceny is inadmissible to prove malice in the defendant. Medaugh v. Wright, 27 Ind., 137.

7. Evidence of the repetition of the slanderous words after the commencement of the suit is admissible to show malice, but not to enhance the damages. Beardsley v. Bridgman, 17 Iowa, 290; Scott v. Martsinger, 2 Blackf. (Ind.), 454; Burson v. Edwards, 1 Ind., 164; Schrimper v. Hielman, 24 Iowa, 505; McAlmont v. McClelland, 14 Serg. & R. (Pa.), 359.

8. A charge of stealing hogs implies malice in the speaker, notwithstanding there is proof that the charge was currently reported and believed in the neighborhood in which the parties resided. Shelton v. Simmons, 12 Ala., 466.

9. Repetition of the slanderous or similar words after suit brought is admissible proof of malice; otherwise of other words amounting to a distinct slander. Parmer v. Anderson, 33 Ala., 78; Williams v. Miner, 18 Conn., 464; McIntire v. Young, 6 Blackf. (Ind.), 496; Roberts v. Ward, 8 id., 333;

[1] 2 Greenleaf's Evidence, § 419; 2 Starkie on Slander, 59; Chubb v. Gsell, 34 Penn. St., 114.

[2] Bromage v. Prosser, 4 B. & C., 256; Hargrave v. LeBreton, 4 Burr., 2425; Weatherston v. Hawkins, 1 T. R., 110.

Smith v. Wyman, 16 Me., 13; Dowall v. Griffith, 2 Har. & J. (Md.), 30; Bodwell v. Swan, 3 Pick. (Mass.), 376; Baldwin v. Soule, 6 Gray (Mass.), 321; Thompson v. Bowers, 1 Dougl. (Mich.), 321.

10. Where language is actionable and does not appear to be privileged it is presumed to be both false and malicious; and no other evidence of malice is necessary than the publication itself to establish a *prima facie* case for the plaintiff. Dixon v. Allen, 69 Cal., 527.

11. If, upon a trial for libel, plaintiff, on the issue of malice, offers in evidence other articles of similar import published subsequently to the one specially complained of, defendant may prove the truth of such subsequent libels and show the circumstances attendant upon their publication; while, on the other hand, the plaintiff may show their publication to have been instigated by malice. Negley v. Farrow, 60 Md., 158.

12. Evidence of words spoken some days before those charged in the declaration as slanderous is admissible to show *quo animo* the latter were spoken. Adkins v. Williams, 23 Ga., 222.

13. Bills of indictment preferred by the defendant against the plaintiff, and ignored by the grand jury, are admissible in evidence to show malice. Tolleson v. Posey, 32 Ga., 372.

14. The plaintiff, in order to show malice, may prove words spoken by the defendant, to an action upon which the statute of limitations would be a bar. Throgmorton v. Davis, 4 Blackf. (Ind.), 174; Flamingham v. Boucher, Wright (Ohio), 746.

15. Until some of the actionable words laid have been proved, evidence of the *quo animo* of the defendant is inadmissible. The following instruction asked for by the plaintiff was rightly refused, as the report might not have been slanderous: "If the defendant gave circulation to a report maliciously against the plaintiff, it will not justify him, even if he gave his author at the time." Abrams v. Smith, 8 Blackf. (Ind.), 95.

16. It is not competent for the defendant, with a view to show that the words were not spoken maliciously, to prove circumstances which excited suspicion and furnished reasonable cause for belief on his part that the words spoken were true. Watson v. Moore, 2 Cush. (Mass.), 133.

17. In an action for charging an infant with larceny, evidence of a previous quarrel between the defendant and the plaintiff's father and next friend is inadmissible to prove malice in the defendant towards the plaintiff. York v. Pease, 2 Gray (Mass.), 282.

18. In an action against a justice of the peace for slanderous words in an official certificate by him to the grand jury, the plaintiff must not only prove the slanderous words, but express malice in using them; and the occasion of using them will be *prima facie* excuse for them. In such case it is not evidence of express malice that the defendant once exacted of the plaintiff the payment of a debt in specie. Sands v. Robinson, 20 Miss. (2 Smed. & M.), 704.

19. The plaintiff may, in order to disclose the extent of the malice, give evidence of other declarations made by the defendant, even although made more than one year before the institution of the suit. The defendant in such action may also, in mitigation of damages, give proof that the plaintiff has been in the practice of vilifying him, and that he was influenced to

use the language with which he is charged by the abuse of the plaintiff, and they may be shown by the defendant's declaration. The jury is to determine whether the language which the defendant used was used because of such provocation received from the plaintiff. Botelar v. Bell, 1 Md., 173.

20. If the general issue and also a plea of the truth in justification are pleaded to an action of slander, the plea in justification, if unsupported by the proof, is evidence of malice. Jackson v. Stetson, 15 Mass., 48; Alderman v. French, 1 Pick. (Mass.), 1; Doss v. Jones, 6 Miss. (5 How.), 158.

21. Y. and wife sued L. and wife for the slander of Mrs. Y. by Mrs. L., and introduced evidence to prove the slanderous words, and that they were similar to those contained in an anonymous letter said to have been written and sent by Mrs. L. to Mrs. Y. The letter which the plaintiffs offered in evidence contained libelous statements against both Mrs. Y. and her daughter. It was held admissible for the purpose of showing malice, but not to affect the damages, provided the jury were cautioned by the court upon this latter point; that portion, however, relating to the daughter being evidence for no purpose whatsoever. Litton v. Young, 2 Metc. (Ky.), 558.

22. In an action for charging the plaintiff with stealing two beds it is not competent for the plaintiff, for the purpose of showing malice, to prove that the defendant subsequently entered a complaint against him before a magistrate for stealing a lot of wood and old iron: first, because the words used in the complaint do not relate to the charge which is the subject of the action; and, second, because such using of the words is a proceeding in a court of justice before a magistrate having jurisdiction of the supposed offense. Watson v. Moore, 2 Cush. (Mass.), 133.

23. To show actual malice, publications of the slander made more than six months before, and after the action was commenced, may be proved. Testimony tending to show that the defendant was actuated by a mercenary and selfish purpose, as that he coveted the plaintiff's land, and hoped by defaming him to compel him to remove, may be introduced to show actual malice. Morgan v. Livingston, 2 Rich. (S. C.), 573.

24. Words spoken before suit brought may be given in evidence, though not declared on, to show the intent; but words spoken afterwards cannot. Howell v. Cheatem, Cooke (Tenn.), 247.

25. In an action in which the pleas were "not guilty," and "not guilty within one year," the plaintiff, after proving that the words in the declaration mentioned were spoken by the defendant within a year prior to the institution of the suit, offered evidence to prove the speaking by the defendant of the same and like words more than a year before the suit was instituted and on some occasions several years prior thereto. *Held*, that such evidence was inadmissible for the purpose of showing the defendant's malice towards the plaintiff. Lincoln v. Chrisman, 10 Leigh (Va.), 338.

26. Evidence of the repetition of the words laid in the declaration at other times than those charged, as well as of the speaking of other words, if spoken so near the time of the words declared upon or otherwise so connected with them as to have a legitimate bearing upon the disposition of the defendant's mind at the time of uttering the slander complained of, is admissible to show the malice of the defendant; and it is immaterial whether the other words proved are themselves actionable or not. Severance v. Hilton, 32 N. H., 289; Symonds v. Carter, 32 N. H., 458.

27. In an action for words imputing perjury an affidavit of the defendant on which an indictment had been preferred, and which had been made so long before as to be barred by the statute of limitations, charging the plaintiff with the same perjury set out in the declaration, is admissible in evidence as proof of the repetition of the same words in a different form, and with more deliberation, and to show the *quo animo*. Randall v. Holsenbake, 3 Hill (S. C.), 175.

28. Complaints against an individual for alleged offenses, honestly preferred before a judicial officer, will not render the complainant liable for slander; and every such complaint is to be deemed *prima facie* honest and to have been made upon good motives. But the question of malice in such cases is always an open question, and may be proved either by express evidence or attending circumstances. Evidence of the sense in which the words were understood must be of the sense in which they were understood at the time they were uttered. Briggs v. Byrd, 12 Ired. (N. C.) L., 377.

29. In the case of privileged communications slight evidence of malice may be left to the jury. Fowles v. Bowen, 30 N. Y., 20; Lathrop v. Hyde, 25 Wend. (N. Y.), 148.

30. The wife of A. before her death requested the wife of B. to advise her daughters. A. married a second wife, and B.'s wife told the daughters of A. by his first wife that their step-mother was a loose woman, and that they ought on that account to leave their home. In an action of slander by A. against B. and wife, *held*, that the words were *prima facie* actionable, but that the evidence of the relation between A.'s daughters and B.'s wife ought to have been left to the jury to find whether there was from the whole evidence any malice. Adcock v. Marsh, 8 Ired. (N. C.) L., 360.

31. Where the plaintiff avers that the words as set forth were meant to be understood as charging him with the crime, it is for the jury to determine upon the evidence whether such was the intention of the defendant. Gibson v. Williams, 4 Wend. (N. Y.), 320; Beardsley v. Maynard, id., 336.

32. Evidence cannot be given of words spoken on another occasion and of a different import from those charged in the declaration, although such evidence is offered only for the purpose of showing that the words charged were spoken with a malicious intent. Howard v. Sexton, 4 N. Y. (4 Comst.), 157; Taylor v. Kneeland, 1 Dougl. (Mich.), 67.

§ 23. Digest of English Cases.—

1. The defendant on being applied to for the character of the plaintiff, who had been his saleswoman, charged her with theft. He had never made such a charge against her till then; he told her that he would say nothing about it if she resumed her employment at his house; subsequently, he said that if she would acknowledge the theft he would give her a character. *Held*, that there was abundant evidence that the charge of theft was made *mala fide*, with the intention of compelling plaintiff to return to defendant's service. Damages, £60. Jackson v. Hopperton, 16 C. B. (N. S.), 829; 12 W. R., 913; 10 L. T., 529; Rogers v. Clifton, 3 B. & P., 587.

2. It is usual for a former master to give the character of a servant on application and not before. Hence if a master hears a discharged servant is applying for a place at M.'s house, and writes at once to M. to give the servant a bad character, the fact that the communication was uncalled for

will be apt to tell against the master. M. would almost certainly have applied to the defendant for the information sooner or later, and the eagerness displayed in thus imparting it unasked will be commented on as a proof of malice, and if there be any other evidence of malice, however slight, may materially influence the verdict. But if there be no other evidence of malice, the communication is still privileged. Pattison v. Jones, 8 B. & C., 578; 3 M. & R., 101.

3. Defendant wrote to his wife's uncle, telling him that his son and heir was leading a fast, wild life, and was longing for his father's death, and that all his inheritance would not be sufficient to satisfy his debts. The court of star chamber were satisfied that this letter was written with the intention of alienating the father from the son and inducing the father to leave his lands and money to the defendant or his wife, and not from an honest desire that the son should reform his life; and they fined defendant £200. Peacock v. Reynal, 2 Brownl. & Gold., 151.

4. Where a master has given a servant a bad character, the circumstances under which they parted, any expressions of ill-will uttered by the master then or subsequently, the fact that the master never complained of the plaintiff's misconduct whilst she was in his service, or when dismissing her would not specify the reason for her dismissal and give her an opportunity of defending herself, together with the circumstances under which the character was given and its exaggerated language, are each and all evidence of malice. Kelly v. Partington, 4 B. & Adol., 700; 2 N. & M., 460; Jackson v. Hopperton, 16 C. B. (N. S.), 829; 12 W. R., 913; 10 L. T., 529. And in such a case plaintiff is permitted to give general evidence of his or her good character in order to show that the defendant must have known she did not deserve the bad character he was writing. Fountain v. Boodle, 3 Q. B., 5; 2 G. & D., 455; Rogers v. Sir Gervas Clifton, 3 B. & P., 587.

5. The rector dismissed the parish school-master for refusing to teach in the Sunday school. The school-master opened another school on his own account in the parish. The rector published a pastoral letter warning all parishioners not to support "a schismatical school," and not to be partakers with the plaintiff "in his evil deeds," which tended "to produce disunion and schism," and "a spirit of opposition to authority." *Held*, that there was some evidence to go to the jury that the rector cherished anger and malice against the school-master. Gilpin v. Fowler, 9 Ex., 615; 23 L. J., Ex., 152; 18 Jur., 293.

6. Where the defendant verbally accused plaintiff of perjury, evidence that subsequently to the slander defendant preferred an indictment against the plaintiff for perjury, which was ignored by the grand jury, was received as evidence that the slander was deliberate and malicious, although it was a fit subject for an action for malicious prosecution. Tate v. Humphrey, 2 Camp., 73, n.; Finden v. Westlake, Moo. & Malkin, 461.

7. A near relative may warn a lady not to marry a particular suitor and assign his reasons for thus cautioning her, provided this be done from a conscientious desire for her welfare and in the *bona fide* belief that the charges made are true. Todd v. Hawkins, 2 M. & Rob., 20; 8 C. & P., 888; per De Grey, C. J., in a case cited 2 Smith, 4. But if a rival thus endeavored to oust the plaintiff from the lady's affections, there would be evidence of malice to go to the jury. Adams v. Coleridge, 1 Times L. R., 84.

8. The defendant was a customer at the plaintiff's shop and had occasion to complain of what he considered fraud and dishonesty in the plaintiff's conduct of his business; but instead of remonstrating quietly with him, the defendant stood outside the shop-door and spoke so loud as to be heard by every one passing down the street. The language he employed also was stronger than the occasion warranted. *Held*, that there was evidence of malice to go to the jury. Oddy v. Lord George Paulet, 4 F. & F., 1009. And see Wilson v. Collins, 5 C. & P., 373.

9. That defendant caused the libel to be industriously circulated is evidence of malice. Gathercole v. Miall, 15 M. & W., 319; 15 L. J., Ex., 179; 10 Jur., 337.

10. Plaintiff assaulted the defendant on the highway; the defendant met a constable and asked him to arrest the plaintiff. The constable refused to arrest the plaintiff unless he was charged with a felony. The defendant, knowing full well that the plaintiff had committed a misdemeanor only, viz., the assault, charged him with felony in order to get him locked up for the night. *Held*, that the charge of felony was malicious, as being made from an indirect and improper motive. Smith v. Hodgeskins, Cro. Car., 276.

11. There had been a dispute between plaintiff and defendant prior to the slander about a sum of £20 which the plaintiff claimed from the defendant. At the trial, also, the plaintiff offered to accept an apology and a verdict for nominal damages if defendant would withdraw his plea of justification. The defendant refused to withdraw the plea, yet did not attempt to prove it. *Held*, ample evidence of malice. Simpson v. Robinson, 12 Q. B., 511; 18 L. J., Q. B., 73; 13 Jur., 187.

12. Plaintiff brought an action against defendant, and applied for an injunction. Defendant applied at the same time for a receiver, which was refused. Thereupon the defendant said that he would "make it d—d hot for Dodson," and inserted in a newspaper he owned a report of the application, setting out all his own counsel had said against plaintiff's solvency, etc., at full length, but omitting all mention of plaintiff's affidavit. *Held* ample evidence of malice. Dodson v. Owen, 2 Times L. R., 111. Even though a report of judicial proceedings be correct and accurate, still if it be published from a malicious motive, whether by a newspaper reporter or any one else, the privilege is lost. Stevens v. Sampson, 5 Ex. D., 53; 49 L. J., Q. B., 120; 28 W. R., 87; 41 L. T., 782.

13. Plaintiff was town clerk and clerk to the borough justices. Defendant said that he should feel great pleasure in ridding the borough of men like the plaintiff. So he sent a petition charging plaintiff with corruption in his office, and praying for an inquiry, to an official who had no jurisdiction over the matter. Verdict for the plaintiff. Damages £100. Blagg v. Sturt, 10 Q. B., 899; 16 L. J., Q. B., 39; 11 Jur., 101; 8 L. T. (O. S.), 135.

14. A long practice by the defendant of libeling the plaintiff is cogent evidence of malice; therefore other libels of various dates, some more than six years old, some published shortly before that sued on, are all admissible to show that the publication of the culminating libel sued on was malicious and not inadvertent. Barrett v. Long, 3 H. L. C., 395; 7 Ir. L. R., 439; 8 Ir. L. R., 331.

15. A libel having appeared in a newspaper, subsequent articles in later numbers of the same newspaper, alluding to the action and affirming the truth of the prior libel, are admissible as evidence of malice. Chubb v. Westley, 6 C. & P., 436; Barwell v. Adkins, 1 M. & Gr., 807; 2 Sc. N. R., 11; Mead v. Daubigny, Peake, 168. So, if there be subsequent insertions of substantially the same libel in other newspapers. Delegal v. Highley, 8 C. & P., 444; 5 Scott, 154; 3 Bing. N. C., 950; 3 Hodges, 158.

16. The defendant, the tenant of a farm, required some repairs to be done at his house; the landlord's agent sent up two workmen, one of whom was the plaintiff. They made a bad job of it; the plaintiff undoubtedly got drunk while on the premises, and the defendant was convinced from what he heard that the plaintiff had broken open his cellar door and drunk his cider. Two days afterwards the defendant met the plaintiff and a mason called Taylor, and charged the plaintiff with breaking open the cellar door, getting drunk and spoiling the job. He repeated this charge later in the same day to Taylor alone in the absence of the plaintiff and also to the landlord's agent. *Held*, that the communication to the landlord's agent was clearly privileged, as he was the plaintiff's employer; that the statement made to the plaintiff in Taylor's presence was also privileged, if made honestly and *bona fide;* and that the circumstance of its being made in the presence of a third person did not of itself make it unauthorized; and that it was a question to be left to the jury to determine from the circumstances, including the style and character of the language used, whether the defendant acted *bona fide* or was influenced by malicious motives. But that the statement to Taylor in the absence of the plaintiff was unauthorized and officious and therefore not protected, although made in the belief of its truth, if it were in point of fact false. Defendant had, in fact, repeated the charge once too often. Toogood v. Spyring, 1 Cr., M. & R., 181; 4 Tyr., 582.

17. So, if the defendant persists in repeating the slander or disseminating the libel pending action. In Pearson v. Lemaitre, 5 M. & Gr., 700; 6 Scott, N. R., 607; 12 L. J., Q. B., 253; 7 Jur., 748, a letter was admitted which had been written subsequently to the commencement of the action and fourteen months after the libel complained of. In Macleod v. Wakley, 3 C. & P., 311, Lord Tenterden admitted a paragraph published only two days before the trial. Defendant was director of a company of which plaintiff was auditor. Defendant made a charge against plaintiff in his absence at a meeting of the board. At the next meeting of the board plaintiff attended with his solicitor, having in the meantime written to defendant threatening an action. Defendant in consequence refused to make any charge or produce any evidence against the plaintiff in the presence of his solicitor. *Held* no evidence of malice. Harris v. Thompson, 13 C. B., 333.

18. In an action for libel and slander on privileged occasions the only evidence of malice was some vague abuse of the plaintiff uttered by the defendant on the Saturday before the trial in a public house at Rye. Such abuse had no reference to the slander or the libel or to the action. *Held*, that this evidence was admissible; but that the judge should have called the attention of the jury to the vagueness of the defendant's remarks in

the public house, to the fact that they were uttered many months after the alleged slander and libel, and that therefore they were but very faint evidence that the defendant bore the plaintiff malice at the time of the publication of the alleged slander and libel. A new trial was ordered. Costs to abide the event. Hemmings v. Gasson, E., B. & E., 346; 27 L. J., Q. B., 252; 4 Jur. (N. S.), 834.

19. A colonel was dismissed from his command in consequence of charges made by the defendant. A member of parliament gave notice that he would ask a question in the house of commons relative to this dismissal. Defendant thereupon called on the member, whom he knew, to explain matters. The conversation that ensued was held to be *prima facie* privileged; but on proof that the charges were made, not from a sense of duty but from personal resentment on account of other matters, and that the object of the conversation was to prejudice the plaintiff by reason of such personal resentment, *held*, that there was actual malice, taking away the privilege. Dickson v. The Earl of Wilton, 1 F. & F., 419.

§ 24. **Fifth, Evidence of Damages** (see *Damages*).—

(1) *General damages:* Damages which are the necessary result of the wrongful act are called general damages. A very important line of demarkation exists in actions for defamation between defamatory words which are actionable in themselves and those which are actionable only as they cause some special damage to the person defamed.

In actions for words actionable in themselves damage is presumed by law; it need not be specially set out in the complaint nor proved upon the trial. It is a question for the jury to answer, taking into consideration all the circumstances of the case, how much the plaintiff ought to recover.[1]

(2) *Special damages:* Where special damage is essential to the action it must be proved as stated in the complaint, and it must be shown to be the natural and immediate consequence of the slander. The general rule, as stated by Starkie, is that no evidence of special damage is admissible, unless it be averred in the declaration whether the special damage be the gist of the action or be used as matter of aggravation, the words being in themselves actionable.[2] But it has been said that greater certainty is requisite where the special damage is the gist of

[1] Sedgwick on Damages, 626; 2 Greenleaf's Evidence, § 420; Republican Pub. Co. v. Mosman, 15 Colo., 399; 24 Pac. Rep., 1051; Smith v. Sun Printing & Pub. Ass'n, 55 Fed. Rep., 240; Republican Pub. Co. v. Conroy, 5 Colo. App., 262.

[2] Bostwick v. Nicholson, Kirby (Conn.), 65; Shipman v. Burrows, 1 Hall (N. Y.), 399; Dicken v. Shepherd, 23 Md., 399; Herrick v. Lapham, 10 Johns. (N. Y.), 281; 2 Starkie on Slander, 64; 2 Greenleaf's Evidence, § 420; B. N. P., 7; 1 Will. Saund., 243, n. 5.

the action than where it is merely laid by way of aggravation.[1]

§ 25. **Proof that the Damage Was the Result of the Defendant's Act.**— It is a rule of law that the special damage must be the natural and immediate consequence of the wrongful act; and no damages can, in any case, be recovered except those which are the natural and proximate consequences of the defamation complained of.[2] The doctrine of special damages is more fully examined in the chapter upon damages. (See Special Damages.)

§ 26. **Loss of Customers.**— When the special damage claimed is a loss of customers, the plaintiff cannot give in evidence the loss of any whose names are not specified in the declaration. But where it is alleged as special damage that the plaintiff was prevented from selling his estate, and that the bidding was prevented by the act of the defendant, the fact may be proved, although the names of particular bidders are not specified; for the loss is the preventing of the sale, and proof that persons would have purchased is evidence of such prevention.[3]

§ 27. **Loss of Marriage.**— Where the loss of marriage is claimed as special damage the plaintiff cannot, without specifying the individual with whom the marriage would otherwise have been contracted, give evidence of the loss; and if he allege loss of marriage with one person, he cannot give in evidence loss of marriage with any other person.[4]

§ 28. **Desertion of Places of Amusement, etc.**— Where the special damage was alleged to be the loss of the profits of several performances at a place of public amusement, it was held that the witnesses might be examined generally as to the diminution in the receipts, but that they could not be asked whether particular persons had not given up their boxes.[5]

[1] 2 Greenleaf's Evidence, § 420; Wetherell v. Clarkson, 12 Mod., 597; 1 Starkie on Slander, 239.

[2] Beach v. Ranney, 2 Hill (N. Y.), 309; 2 Greenleaf's Evidence, § 420; 2 Starkie on Slander, 64; Terwilliger v. Wands, 17 N. Y., 54.

[3] 2 Greenleaf's Evidence, § 420; 2 Starkie on Slander, 63; Snead v. Bodley, Cro. Jac., 397; Reusch v. Roanoke Cold Storage Co., 91 Va., 534.

[4] 2 Greenleaf's Evidence, § 420; 2 Starkie on Slander, 62; Barnes v. Prudling, 1 Sid., 396; 2 Vent., 4; Hunt v. Jones, Cro. Jac., 499; 12 Mod., 597; Lord Raym., 1007.

[5] 2 Greenleaf's Evidence, § 420;

Where the plaintiff alleged that he had been employed from time to time to preach to a congregation of dissenters, and that, by reason of the words, the persons frequenting the chapel had wholly refused to permit him to preach there, and had discontinued to give him the gains and profits which they otherwise would have given, the court, after a verdict for the plaintiff, on motion in arrest of judgment held that the allegation of damages was sufficient; for he could not have stated the names of all his congregation. In such a case, therefore, it seems that general evidence of the loss of emolument is admissible.[1]

As a general rule, it seems that where the damage consists in the desertion of places of amusement, churches and the like by people who were in the habit of frequenting the same, a general statement and proof of the diminution of receipts is sufficient.[2]

§ 29. Illustrations — Digest of American Cases.—

EVIDENCE OF SPECIAL DAMAGES (see *Special Damages*).

1. Evidence of special damages cannot be given unless it is alleged in the declaration. Herrick v. Lapham, 10 Johns. (N. Y.), 281.

2. In an action for slander contained in letters written to a lady to whom the plaintiff was engaged in marriage, it is competent to show by the declarations of the lady that the engagement had been broken off on account of the charges contained in the letters. Walker v. Meetze, 2 Rich. (S. C.), 570.

3. The refusal of civil entertainment at a public house was held sufficient special damage. Olmsted v. Miller, 1 Wend., 506. So was the fact that the plaintiff was turned away from the house of her uncle, where she had previously been a welcome visitor, and charged not to return till she had cleared up her character. Williams v. Hill, 19 Wend., 305. So was the circumstance that persons who had been in the habit of so doing refused any longer to provide food and clothing for the plaintiff. Beach v. Ranney, 2 Hill (N. Y.), 309.

4. A plaintiff who participates in the risks of a mercantile concern, but does not share in the profits, cannot recover for an injury to his character as a merchant without showing special damages. Davis v. Ruff, Cheeves (S. C.), 17.

5. Special damage must be of a pecuniary nature; for example, feed, clothing, and the like, withheld. It must be the immediate and not remote consequence of the slander. The pain of body and mind suffered by

Hartley v. Herring, 8 T. R., 130; Ashley v. Harrison, 1 Esp. C., 48; 2 Starkie on Slander, 64.

[1] 2 Starkie on Slander, 63; 2 Greenleaf's Evidence, § 420.

[2] 2 Greenleaf's Evidence, § 420.

a female on being charged with a want of chastity are not sufficient grounds (at common law) for special damages. Beach v. Ranney, 2 Hill (N. Y.), 309.

6. A husband cannot maintain an action for the loss of his wife's services caused by illness or mental depression resulting from defamatory words, not actionable *per se*, being spoken of her by the defendant. For the wife, if *sole*, could have maintained no action. "The facility with which a right to damages could be established by pretended illness where none exists constitutes a serious objection to such an action as this." Wilson v. Goit, 3 Smith (17 N. Y.), 445.

7. In an action for words not actionable in themselves, but alleging special damages, the plaintiff can only show such injuries as accrued to his reputation, and therein affecting the conduct of others to him. His own sickness of body or of mind, caused by the speaking of the words, are not of such special damages as to be a foundation for the action. Terwilliger v. Wands, 17 N. Y., 54.

8. The defendant told Neiper that the plaintiff committed adultery with Mrs. Fuller. Neiper had married Mrs. Fuller's sister, and was an intimate friend of the plaintiff. Neiper thought it his duty to tell the plaintiff what people were saying of him. Plaintiff, who was hoeing at the time, turned pale, felt bad, flung down his hoe, and left the field; lost his appetite, turned melancholy, could not work as he used to do, and had to hire more help. *Held*, that such mental distress and physical illness were not sufficient to constitute special damage; for they did not result from any injury to the plaintiff's reputation, which had affected the conduct of others towards him. The court said, in giving judgment: "It would be highly impolitic to hold all language wounding the feelings and affecting unfavorably the health and ability to labor of another a ground of action; for that would be to make the right of action depend often upon whether the sensibilities of a person spoken of are easily excited or otherwise; his strength of mind to disregard abusive, insulting remarks concerning him, and his physical strength and ability to bear them. Words which would make hardly an impression on most persons, and would be thought by them and should be by all undeserving of notice, might be exceedingly painful to some, occasioning sickness and an interruption of ability to attend to their ordinary avocations." Terwilliger v. Wands, 3 Smith (17 N. Y.), 54, overruling Bradt v. Towsley, 13 Wend., 253, and Fuller v. Fenner, 16 Barb., 333.

9. To show special damage the plaintiff may give in evidence the contents of a letter written by a person to whom the slander was uttered, to his partner, advising him to discharge the plaintiff from their employ, and stating the substance of the writer's conversation with the defendant, although the letter did not cause the discharge of the plaintiff, but only an examination of his trunks. Fowles v. Bowen, 30 N. Y., 20.

10. Where a plaintiff sets forth in one count the words which he alleges were spoken by the defendant charging him with a certain offense, and adds a count which only alleges that the defendant charged him with the same offense, and files a bill of particulars of his cause of action on the second count, in which he gives notice that he shall rely, in support of that

count, on the words set forth in the first count, he cannot give evidence of any words spoken by the defendant other than those which are thus set forth; and where the words are not actionable in themselves, he will not be allowed to show that he has sustained special damage by means of the repetition by a third person of the defendant's words. Stevens v. Hortwell, 11 Met. (Mass.), 542.

§ 30. Digest of English Cases.—

1. Anthony Elcock, citizen and mercer of London, of the substance and value of £3,000, sought Anne Davis in marriage; but the defendant, *præmissorum haud ignarus*, accused her of incontinency, wherefore the said Anthony wholly refused to marry the said Anne. *Held*, sufficient special damage. Verdict for the plaintiff for two hundred marks. Davis v. Gardiner, 4 Rep., 16; 2 Salk., 294; 1 Roll. Abr., 38; Holwood v. Hopkins, Cro. Eliz., 787; Odgers on L. & S., 299. So if a man lose a marriage. Matthew v. Crass, Cro. Jac., 323; Nelson v. Staff, Cro. Jac., 422. And the loss of the *consortium* of a husband is special damage. Lynch v. Knight and wife, 9 H. L. C., 589.

2. Loss of a situation will constitute special damage. Martin v. Strong, 5 A. & E., 535; 1 N. & P., 29; 2 H. & W., 336; Rumsey v. Webb et ux., 11 L. J., C. P., 129; Car. & M., 104. Or of a chaplaincy. Payne v. Beuwmorris, 1 Lev., 248.

3. The loss of the hospitality of friends gratuitously afforded is sufficient special damage. Moore v. Meagher, 1 Taunt., 39; 3 Smith, 135; Davies and wife v. Solomon, L. R., 7 Q. B., 112; 41 L. J., Q. B., 10; 20 W. R., 167; 25 L. T., 799. So is the loss of any gratuity or present, if it be clear that the slander alone prevented its receipt. Bracebridge v. Watson, Lilly, Entr., 61; Hartley v. Herring, 8 T. R., 130.

4. In consequence of defendant's words, a friend who had previously voluntarily promised to give the plaintiff, a married woman, money to enable her to join her husband in Australia, whither he had immigrated three years before, refused to do so. *Held*, sufficient special damage. Corcoran and wife v. Corcoran, 7 Ir. C. L. R., 272.

5. If a man be refused employment through defendant's slander this is sufficient special damage. Sterry v. Foreman, 2 C. & P., 592. So, if a person who formerly had dealt with the plaintiff on credit refuses, in consequence of defendant's words, to deliver to the plaintiff certain goods he had ordered until plaintiff has paid for them. Brown v. Smith, 13 C. B., 596; 22 L. J., C. P., 151; 17 Jur., 807; 1 C. L. R., 4; King v. Watts, 8 C. & P., 614. So, if the agent of a certain firm going to deal with the plaintiff be stopped and dissuaded by the defendant; and this although such firm subsequently became bankrupt, and paid but 12*s.* 6*d.* in the pound, so that had plaintiff obtained the order he would have lost money by it. Storey v. Challands, 8 C. & P., 234.

6. Dawes intended to employ the plaintiff, a surgeon and accoucheur, at his wife's approaching confinement; but the defendant told Dawes that the plaintiff's female servant had had a child by the plaintiff; Dawes consequently decided not to employ the plaintiff. Dawes told his mother and his wife's sister what defendant had said, and consequently the plaintiff's practice fell off considerably among Dawes' friends and acquaintances and

others. The fee for one confinement was a guinea. *Held*, that the plaintiff was entitled to more than the one guinea; the jury should give him such a sum as they considered Dawes' custom was worth to him; but that the plaintiff clearly could not recover anything for the general decline of his business which was caused by the gossip of Dawes' mother and sister-in-law. Dixon v. Smith, 5 H. & N., 450; 29 L. J., Ex., 125.

7. But where the plaintiff was a candidate for membership of the Reform club, and upon a ballot of the members was not elected: subsequently a meeting of the members was called to consider an alteration of the rules regarding the election of members; before the day fixed for the meeting the defendant spoke certain words concerning the plaintiff, which "induced or contributed to inducing a majority of the members of the club to retain the regulations under which the plaintiff had been rejected, and thereby prevented the plaintiff from again seeking to be elected to the club,"— *held*, that the damage alleged was not pecuniary or capable of being estimated in money, and was not the natural and probable consequence of the defendant's words. Chamberlain v. Boyd (C. A.), 11 Q. B. D., 407; 52 L. J., Q. B., 277; 31 W. R., 572; 48 L. T., 328; 47 J. P., 372. So where the words are not actionable *per se*, and no pecuniary damage has followed, no compensation can be given for outraged feelings, nor for sickness induced by such mental distress, even though followed by a doctor's bill. Allsop v. Allsop, 5 H. & N., 534; 29 L. J., Ex., 315; 6 Jur. (N. S.), 433; 8 W. R., 449; 36 L. T. (O. S.), 290: Lynch v. Knight and wife, 9 H. L. C., 577; 8 Jur. (N. S.), 724; 5 L. T., 291.

8. The plaintiff in a recent case alleged that in consequence of defendant's words "she had suffered considerable annoyance, trouble, disgrace, loss of friends, credit and reputation." *Held*, that this was no special damage. Weldon v. De Bathe, 33 W. R., 328; 14 Q. B. D., 339: 54 L. J., Q. B., 113; 53 L. T., 520.

9. Plaintiff alleged that she had been a novice in a convent, and left in order to nurse a sick relative; defendant said of her that she had left her home because she was pregnant; whereby the plaintiff alleged she was prevented from returning to the convent and becoming a nun, when she would have been maintained and supported by the society; and had also been brought into disgrace among her neighbors and friends, and had been deprived of and ceased to receive their hospitality. *Held*, that no action lay, as the plaintiff was neither a nun nor a novice at the time the words were spoken, and there was no evidence of special damage sufficient in law to maintain the action. Dwyer v. Meehan, 18 L. R., Ir., 138.

10. Merely the loss of the society of friends and neighbors is not sufficient special damage. Medhurst v. Balam, cited in 1 Siderfin, 397; Barnes v. Prudlin or Brudel, 1 Lev., 261; 1 Sid., 396; 1 Ventr., 4; 2 Keb., 451. Hence even the fact that the plaintiff has been expelled from a religious society of which she was a member will not constitute special damage. Roberts et ux. v. Roberts, 5 B. & S., 384; 33 L. J., Q. B., 249; 10 Jur. (N. S.), 1027; 12 W. R., 909; 10 L. T., 602.

11. The defendant said of a married man that he had had two bastards: "by reason of which words discord arose between him and his wife, and they were likely to have been divorced." *Held*, that this constituted no special damage. Barmund's Case, Cro. Jac., 473.

12. Where the dismissal from service be colorable only, the master intending to take the plaintiff back again as soon as the action is over, and having dismissed him solely in order that he might show special damage at the trial, this is no evidence that the plaintiff's reputation has been impaired, but rather the contrary. If, therefore, no other special damage can be proved, the plaintiff should be nonsuited. Coward v. Wellington, 7 C. & P., 531.

§ 31. **Evidence in Aggravation of Damages.**— The violence of the language, the nature of the imputation conveyed and the fact that the defamation was deliberate and malicious will aggravate the damages. All the circumstances attending the publication may, therefore, be given in evidence, and any previous transaction between the plaintiff and the defendant which has any direct bearing on the subject-matter of the action, or is a necessary part of the history of the case; the rank or position in society of the parties; that the attack was entirely unprovoked; that the defendant could easily have ascertained that the charge he made was false; and evidence may be given to show that the defendant was culpably reckless or grossly negligent in the matter; the mode, the extent and the long continuance of publication. Such evidence is admissible with a view to damages, although the publication has been admitted in the pleadings.[1] The defendant's subsequent conduct may aggravate the damages, as if he has refused to listen to any explanation or to retract the charge he had made.

§ 32. **Illustrations — Digest of American Cases.**—

WHAT IS ADMISSIBLE IN AGGRAVATION OF DAMAGES.

1. If the defendant offers no evidence to sustain his plea of justification he cannot, after the evidence is closed, withdraw his plea, but it will go to aggravate the damages. Lee v. Robinson, 1 Stewart (Ala.), 138; Gorman v. Sutton, 32 Penn. St., 247; Ferro v. Roscoe, 4 N. Y. (Comst.), 162.

2. The plaintiff may prove the repetition of the slanderous words after the commencement of the action in aggravation of damages. Root v. Loundes, 6 Hill (N. Y.), 518; Williams v. Harrison, 3 Mo., 411; Kean v. McLaughlin, 2 S. & R. (Penn.), 469; Hatch v. Potter, 2 Gil. (Ill.), 725. But see, to the contrary, McGlenery v. Keller, 3 Blackf. (Ind.), 488.

3. The plaintiff may give in evidence his rank and condition of life to aggravate the damages, and the defendant may show the same where it will have a legal tendency to mitigate them; and this may be done either on the general issue or on a traverse of the justification. Larned v. Buffington, 3 Mass., 546. See Bodwell v. Swan, 3 Pick. (Mass.), 376; Howe v. Perry, 15 id., 506.

[1] Odgers on L. & S., 310; Vines v. Serell, 7 C. & P., 163; Buckley v. Knapp, 48 Mo., 152; Rosewater v. Hoffman, 24 Neb., 222; Shilling v. Carson, 27 Md., 175; Dixon v. Allen, 69 Cal., 727; Bowden v. Bailes, 101 N. C., 612; Knapp v. Fuller, 55 Vt., 311.

4. The distinction between malice in fact in actions for slander and malice in law is that the first implies a desire and intention to injure, while the second may exist in connection with an honest and laudable purpose. The second is sufficient to support the action; the first may be further shown in aggravation of the charge and to enhance the damages. Jellison v. Goodwin, 43 Me., 287.

5. Although the defendant pleads a special justification admitting the speaking of the words and averring their truth without pleading the general issue, the plaintiff may give evidence other than what is furnished by the plea itself of the extent and degree of malice actuating the defendant in traducing the plaintiff to affect the question of damages. Sawyer v. Hopkins, 22 Me., 268.

6. Words spoken by the defendant which are not actionable may be proved in aggravation or corroboration; but the witness cannot be permitted to state who or what he was induced by current rumor or the conversations of others to think the defendant meant when he used the words. Allinsworth v. Coleman, 5 Dana (Ky.), 315. See, also, Chipman v. Cook, 2 Tyler (Vt.), 456.

7. The plaintiff may prove the amount of defendant's property to aggravate the damages. Bennett v. Hyde, 6 Conn., 24; Barber v. Barber, 33 Conn., 335; Karney v. Parsley, 13 Iowa, 89.

8. Evidence of good character is admissible in aggravation of damages. Williams v. Greenwade, 3 Dana (Ky.), 432; Scott v. Peebles, 10 Miss. (3 Smed. & M.), 546.

9. The defendant may be shown to be an influential member in the community to assist the jury in estimating damages. Justice v. Kirlin, 17 Ind., 588.

10. Where it appeared that the plaintiff, a minister of the gospel, had been tried before a conference upon a charge of having made alterations in certain charges of immoral conduct, signed by others, against one of his brethren in the ministry, for the purpose of procuring an investigation thereof, and the present defendant, on such trial of the present plaintiff, had been active against him, and in connection with which the charge of forgery had been made by the present defendant against the present plaintiff, and the truth of which had been set up as a special justification on the present trial, *held*, that the plaintiff might give in evidence the proceedings at the trial before the conference in aggravation of damages. Sawyer v. Hopkins, 22 Me., 269.

What is Not Admissible in Aggravation of Damages.

11. A failure to sustain a plea of justification by proof should not be considered in aggravation of damages. Swails v. Butcher, 2 Ind., 84.

12. Evidence showing that the defendant, after having spoken the words complained of, repeated them at various times, is not admissible in aggravation of damages. Forbes v. Meyers, 8 Blackf. (Ind.), 74.

13. Slanderous words not laid in the declaration cannot be shown by the plaintiff in aggravation of damages. Schenck v. Schenck, 20 N. J. L. 208.

14. Evidence in aggravation of damages cannot be admitted until some testimony has been given tending to prove some one of the matters charged. Winter v. Donovan, 8 Gill (Md.), 370.

15. Where the defendant pleads the general issue and a justification, upon which the plaintiff takes issue, and afterwards, by leave of court and consent of the parties, withdraws such plea during the progress of the trial, such plea cannot be considered by the jury in aggravation of damages or as evidence to sustain the character of impeached witnesses. Shirley v. Keatley, 4 Coldw. (Tenn.), 29.

16. The plaintiff cannot show, in order to enhance his damages, that it was currently reported in the neighborhood that the defendant had charged him with the crime stated in the declaration. Leonard v. Allen, 11 Cush. (Mass.), 241.

§ 33. Digest of English Cases.—

AGGRAVATION OF DAMAGES.

1. If the libel has appeared in a newspaper, proof that the particular number containing the libel was gratuitously circulated in the plaintiff's neighborhood, or that its sale was in any way especially pushed, will enhance the damages. Gathercole v. Miall, 15 M. & W., 319; 15 L. J., Ex., 179; 10 Jur., 337.

2. If the libel was sold to the public indiscriminately, heavy damages should be given; for the defendant has put it out of his power to recall or contradict his statements, should he desire to do so. Lord Denman, 9 A. & E., 149; Best, C. J., 5 Bing., 402. And where there is no malice, gross negligence on the part of the proprietor of a newspaper in allowing the libel to appear in its columns may be proved to enhance the damages. Smith v. Harrison, 1 F. & F., 565.

3. If other words, injurious and abusive, though not actionable *per se*, were uttered on the same occasion as the words complained of, these other words may be given in evidence as an aggravation of the actionable words. "Where a wrongful act is accompanied by words of contumely and abuse, the jury are warranted in taking that into consideration, and giving retributory damages." Per Byles, J., in Bell v. Midland Rail. Co., 10 C. B. (N. S.), 308; Dodson v. Owen, 4 Times L. R., 262; Blagg v. Sturt, 10 Q. B., 899; 16 L. J., Q. B., 39; 11 Jur., 101; 8 L. T. (O. S.), 135; Merest v. Harvey, 5 Taunt., 432.

4. The defendant's conduct of his case, even the language used by his counsel at the trial, may aggravate the damages. Darby v. Ouseley, 25 L. J., Ex., 230, 233; Blake v. Stevens, 4 F. & F., 235; 11 L. T., 543; Risk Allah Bey v. Whitehurst, 18 L. T., 615. So a plea of justification, if persisted in but not proved, will enhance the damages. Warwick v. Foulks, 12 M. & W., 508; Wilson v. Robinson, 7 Q. B., 68; 14 L. J., Q. B., 196; 9 Jur., 726; Simpson v. Robinson, 12 Q. B., 511; 18 L. J., Q. B., 73; 13 Jur., 187.

DEFENDANT'S PROOFS — PLEA OF THE GENERAL ISSUE FILED.

§ 34. The Burden of Proof.— Under this plea the burden is on the plaintiff to establish his cause of action as alleged in the complaint; but where he has once established a *prima facie* case by proof of the speaking or publishing matter which, un-

explained, is injurious and actionable, it lies on the defendant to explain it, and to show by reference to circumstances that the supposed slander or libel was not in fact used in an injurious and actionable sense, or that it was used under circumstances which afforded either an absolute or qualified justification.[1]

Under the common-law system of pleading many matters of defense might be given in evidence under this plea, which, under statutory enactments, are now required to be specially pleaded.

§ 35. **Defendant's Evidence under this Plea.**— Under this plea the defendant may give in evidence any matters tending to deny or disprove any material allegation of the complaint. Matters tending to disprove the publication of the defamatory matter, the speaking of the words, the malicious intent or the injurious consequences of the act complained of, are all competent under this plea.

§ 36. **Falsity Relied on as Proof of Malice.**— Where the plaintiff relies upon evidence of the falsity of the charge as proof of malice, the defendant may rebut the inference by showing the truth under this plea.[2]

§ 37. **Privileged Communications.**— In cases where the occasion renders the communication privileged, so as to require of the plaintiff some proof of actual malice, the defendant may prove the occasion and circumstances rendering the defamatory matter privileged under this plea.[3]

In cases where the occasion and circumstances of the speaking the words or publishing the libel cast the burden on the plaintiff to prove a dishonest and malicious intention in fact, such proof becomes an essential part of his case; and therefore the evidence offered to rebut it is properly admissible under the plea of the general issue. The defendant may accordingly, under the general issue, show that the alleged defamation consisted in a communication to the appointing power of the state, in reference to the conduct of the plaintiff as public officer, or to officers, judicatories or individuals authorized by law to redress grievances;[4] or in communications on mat-

[1] 2 Starkie on Slander, 84.

[2] 2 Greenleaf's Evidence, § 421.

[3] 2 Greenleaf's Evidence, § 421; Somerville v. Hawkins, 15 Jur., 450.

[4] Thorn v. Blanchard, 5 Johns. R., 508; Howard v. Thompson, 21 Wend., 319; Vanderzee v. McGregor, 13 Wend., 545; O'Donaghue v. McGov-

ters of business made by or to persons interested in the subject-matter of the communications, although they affect the character or credit of the plaintiff;[1] or in giving the character of a servant.[2]

The defendant may show that the act complained of was done by him as a judge, a juror, a witness or party in the course of a judicial proceeding, whether civil or criminal,[3] or as a member of a military court-martial or court of inquiry.[4]

So the defendant may, under the general issue, show that the publication was a petition to the legislature for redress of grievances;[5] that the words alleged to be libelous were spoken by him as a member of the legislature on the floor of the house;[6] or upon an application in the usual course to a magistrate or peace officer for process;[7] or that the publication took place in the usual course of a civil or criminal proceeding in courts of justice.[8]

So the defendant may, under the general issue, show that the words were spoken by him as an advocate or counsel on the trial of a cause, and that they were relevant to the matter in issue.[9]

ern, 23 Wend., 26; 1 Tyler's R., 164; 2 id., 129; 2 S. & R., 23; 4 id., 420; 3 Pick., 379; Woodward v. Lander, 6 C. & P., 548; Blake v. Pifford, 1 M. & R., 198.

[1] Spike v. Cleyson, Cro. Eliz., 541; Prosser v. Bromage, 4 B. & C., 247; Delany v. Jones, 4 Esp. C., 191; McDougall v. Claridge, 1 Camp. C., 267; Dunman v. Bigg, 3 Camp. C., 260; Brown v. Croome, 2 Starkie's C., 297; Todd v. Hawkins, 8 C. & P., 88; Knight v. Gibbs, 3 N. & M., 467; Shipley v. Todhunter, 7 C. & P., 680; Cockayne v. Hodgkinson, 5 C. & P., 543; Godson v. Flower, 2 B. & B., 7; Bradley v. Heath, 12 Pick., 163.

[2] Weatherstone v. Hawkins, 1 T. R., 110; Rogers v. Clifton, 3 Bos. & Pul., 587; Edmonson v. Stevenson, Bull. N. P., 8; Hodgson v. Scarlett, 1 Barn. & A., 240.

[3] 2 Inst., 228; 2 Roll. R., 198; Palm., 144; 1 Viner's Abr., 387; Cro. Eliz., 280; Lake v. King, 1 Saund., 131.

[4] Jedel v. Sir John Moore, 2 N. R., 241; Home v. Bentinck, 8 Price, 226.

[5] Hare v. Mellen, 3 Lev., 169; 4 Co., 14; and the resolution of the house of commons in England in Kemp v. Gee, 9 Feb., 8 Will. III., 245.

[6] 1 Black. Comm., 164; King v. Lord Abingdon, 1 Esp. R., 226; Rex v. Creevy, 1 Maule & Sel., 273; Hastings v. Lusk, 22 Wend., 417, per Chancellor Walworth; 4 Mass. R., 1; 3 Pick., 314.

[7] Ram v. Lamley, Hutt., 133. See, also, Barbaud v. Hookham, 5 Esp. C., 109; Johnson v. Evans, 3 Esp. C., 32; Burton v. Worley, 4 Bibb, 38; Shock v. McChesney, 4 Yeates, 507.

[8] 1 Roll., 33; 4 Coke, 14; 2 Burr., 817; Cro. Jac., 432; 3 Black. Comm., 126; 10 Mod., 210, 219, 300; Str., 691; Dyer, 285.

[9] Brooke v. Sir Henry Montague, Cro. Jac., 90; Hodgson v. Scarlett, 1 Barn. & A., 232.

§ 38. **Generally under this Plea the Defendant May Show,** upon the question of damages, that the charge was occasioned by the plaintiff, either in attempting to commit the crime or in leading the defendant to believe him guilty;[1] or in contemporaneously assailing the defendant with opprobrious language; that he was an insane person at the time of speaking the words;[2] or, being the proprietor of a newspaper, he copied the libelous article from another paper, giving his authority;[3] and all other matters tending to disprove the material allegations of the complaint.

§ 39. **Truth under the Plea of the General Issue.**—It is well settled that under this plea the defendant cannot be permitted to give in evidence any matters tending to establish the truth of the defamatory matter, either in bar of the action or in mitigation of damages.[4] But it has been held that matters which fall short of a justification and do not tend to it may be shown in mitigation of damages under this plea.[5] Whether for the purpose of mitigating the damages the defendant may show that the plaintiff was generally suspected to be guilty of the particular offense imputed to him does not seem to be so well settled; but the weight of authority seems to be that general evidence to show that the plaintiff, previously to the alleged slander, labored under a general suspicion of having been guilty of similar practices, is in principle admissible, as immediately and necessarily connected with the question of damages. He complains of loss of reputation, and that he has been deprived of his character by the act of the defendant. Is not the defendant, then, to be permitted to show that the plaintiff's character was previously tainted with suspicion, or that he had in fact little character or reputation to lose? To

[1] 2 Greenleaf's Evidence, § 424; Bradley v. Heath, 12 Pick., 163; King v. Warring, 5 Esp. C., 13.

[2] Dickinson v. Barber, 9 Mass., 225.

[3] Sanders v. Mills, 6 Bing., 213; 2 Greenleaf's Evidence, § 424.

[4] 2 Greenleaf's Evidence, § 424; Douge v. Pierce, 13 Ala., 127; Waggstaff v. Ashton, 1 Harr. (Del.), 503; Ashire v. Cline, 3 Ind., 115; Taylor v. Robinson, 29 Me., 323; Bodwell v. Swan, 3 Pick. (Mass.), 376; Knight v. Foster, 39 N. H., 576; Kay v. Fredrigal, 3 Penn. St., 221; Egan v. Gantt, 1 McMull. (S. C.), 468; Shirley v. Keathy, 4 Coldw. (Tenn.), 29; Burns v. Webb, 1 Tyler (Vt.), 17; 2 Starkie on Slander, 87; Underwood v. Parkes, Str., 1200; Mullett v. Hutton, 4 Esp. C., 248.

[5] Snyder v. Andrews, 6 Barb. (N. Y.), 43; Tollett v. Jewett, 1 Am. Law Reg., 600; 2 Greenleaf's Evidence, § 424, n.

deny this would be to decide that a man of the worst character was entitled to the same measure of damages with one of unsullied and unblemished reputation; a reputed thief would be placed on the same footing with the most honorable merchant; a virtuous woman, with the most abandoned prostitute.[1]

§ 40. Illustrations — Digest of American Cases.—

What is Admissible under the Plea of the General Issue.

1. Under the general issue the defendant cannot give evidence of the truth of the charge. Bodwell v. Swan, 3 Pick. (Mass.), 376; Taylor v. Robinson, 29 Me., 323; Knight v. Foster, 39 N. H., 576; Else v. Ferris, Anth. N. P. (N. Y.), 23; Updegrove v. Zimmerman, 13 Penn. St., 619; Eagan v. Gantt, 1 McMull. (S. C.), 468; McCampbell v. Thornburgh, 3 Head (Tenn.), 109; Shirley v. Keathey, 4 Coldw. (Tenn.), 29; Burns v. Webb, 1 Tyler (Vt.), 17; Douge v. Pierce, 13 Ala., 127; Waggstaff v. Ashton, 1 Harr. (Del.), 503; Burke v. Miller, 6 Blackf. (Ind.), 155; Ashire v. Cline, 3 Ind., 115.

2. But though the truth cannot be shown in mitigation of damages, yet any facts or circumstances which will rebut or repel the presumption of malice are properly admissible under this plea. Hutchinson v. Wheeler, 35 Vt., 330; Kennedy v. Derr, 6 Port. (Ala.), 90; Arrington v. Jones, 9 Port. (Ala.), 189; Stees v. Kemble, 27 Penn. St., 112; Smith v. Smith, 39 Penn. St., 441.

3. In an action for saying of the plaintiff, who was a postmaster, "that he never sent from his office a treasury note, but had stolen it," the defendant, under the general issue, offered to prove that, before the speaking of the words, the plaintiff said "that the treasury note never left his office," and after the speaking of the words he had said "that his brother was the author and first promulgator of the story." It was held that this evidence was inadmissible. Hyde v. Bailey, 3 Conn., 463.

4. In an action for charging the plaintiff with fornication the defendant offered to prove, under the general issue, without notice, evidence which amounted to a justification of the charge; but it was held to be inadmissible. Treat v. Browning, 4 Conn., 408.

5. Under the plea of the general issue the defendant may show previous reports of the plaintiff's guilt to reduce the damages and disprove malice. Morris v. Baker, 4 Harr. (Del.), 520.

6. Or he may prove, either in excuse or mitigation of damages, according to circumstances, that he was insane when the words were spoken; but such insanity must be shown by direct proof and not by reputation. Yeates v. Read, 4 Blackf. (Ind.), 403.

7. And if the plaintiff proves the speaking of words not laid in the declaration the defendant may, under the general issue, prove those words to be true. Burke v. Miller, 6 Blackf. (Ind.), 155.

8. But the plaintiff does not, by proving a repetition after the commencement of the suit, give the defendant a right to prove them true under the

[1] 2 Greenleaf's Evidence, § 424; 2 Starkie on Slander, 88.

general issue in mitigation of damages. Teagle v. Deboy, 8 Blackf. (Ind.), 134.

9. Under a plea of "not guilty," evidence to prove a justification is inadmissible either in chief, in mitigation of damages, or by the way of repelling illegal evidence introduced by the plaintiff. Samuel v. Bond, Litt. (Ky.) Sel. Cas., 158.

10. In an action for saying the plaintiff "took a false oath before" referees, the general issue was pleaded, and evidence offered in support of the special plea that the words were true; but it was held that the jury had a right, under the general issue, to consider whether this evidence showed that the words had relation to the plaintiff's testimony on immaterial points, and so did not import a charge of perjury. Sibley v. Marsh, 7 Pick. (Mass.), 88.

11. In an action against a selectman for accusing a voter of putting in two votes, the selectman acting in the discharge of his official duty, it was held that the defendant under the general issue might show the occasion of uttering the words and that the plaintiff's own conduct was such as to induce him to believe that the charge was true. Bradley v. Heath, 12 Pick. (Mass.), 163.

12. Where the defendant offered a notice proposing to give in evidence under the general issue facts proving or tending to prove the truth of the words spoken, and proposing to apply those facts either in justification or in mitigation of damages, and setting forth the facts relied upon, which, though proper to submit to a jury in connection with the evidence to show a justification, did not yet prove the truth of the slander, it was held that the facts stated were not admissible in evidence under the plea with such notice or without any notice, either in justification or in mitigation of damages. Brickett v. Davis, 21 Pick. (Mass.), 404.

13. So where the defendant in the same case pleaded the general issue and gave notice that he should prove the truth in justification, and on the trial gave evidence tending to prove the truth, it was held that instructions to the jury that, if they were satisfied that the defendant made the charge against the plaintiff which was alleged in the declaration, they should find a verdict for the plaintiff, unless upon the whole evidence they were satisfied that the charge was true; that the burden of proof was on the defendant to establish that fact, and that if the jury doubted as to that fact they should find for the plaintiff, were correct. Sperry v. Wilcox, 1 Metc. (Mass.), 267.

14. To a declaration alleging that the defendant had charged the plaintiff with swearing falsely the defendant pleaded the general issue, and gave notice that he would prove on the trial that the plaintiff was guilty of the fact charged upon and imputed to him by the defendant in the several conversations in the declaration mentioned; and that, if the words were published as charged in the declaration mentioned, the defendant had good reason for uttering and publishing and did it from good motives and justifiable ends. But it was held that the notice was fatally defective, especially in omitting the averment that the plaintiff wilfully and deliberately swore falsely, and that the defendant could not upon the trial introduce any evidence under it. Thompson v. Bowers, 1 Doug. (Mich.), 321.

15. In an action for speaking words imputing perjury, the defendant pleaded the general issue, and also pleaded in justification the truth of the words spoken; and after having given evidence tending to prove the allegations of his pleas in justification, it was held that he might prove under his plea of the general issue in mitigation of damages that the general character of the plaintiff in respect to being a perjured man was bad, and that his general character was that he was a dangerous witness and his statements under oath not to be relied upon. Bowen v. Hall, 12 Metc. (Mass.), 232.

16. In an action for charging the plaintiff with perjury in a judicial proceeding, the defendant under the plea of not guilty may show what the words sworn by the plaintiff were in mitigation of damages, though he cannot be permitted to prove the falsity of them. Grant v. Hover, 6 Munf. (Va.), 13.

17. If the defendant pleads not guilty he may show that he only repeated what another had said without any injurious motive or intention as regards the plaintiff, and such evidence will go to support the defense of not guilty; but if he publishes slanderous words, and at the same time declares the author of the slander — with a slanderous intention — or can prove that the slander was first published by another, and that he only repeated or republished the same, this evidence will be admitted in mitigation. Easterwood v. Quinn, 2 Brev. (S. C.), 64.

18. Where the general issue alone is pleaded, the plaintiff cannot, in the first instance, give evidence tending to prove the defendant's knowledge of the falsity of the words spoken. He cannot give such evidence of the defendant's knowledge except for the purpose of rebutting the defense. Harttranft v. Hesser, 34 Penn. St., 117.

19. The words being in substance that the plaintiff burnt the defendant's mill and he could prove it, the defendant cannot, under the general issue, give evidence of a threat by the plaintiff "that he would ruin him and drive him out of town," and that the threat was made known to the defendant before the speaking of the words set forth. Moyer v. Hine, 4 Mich., 409.

20. In an action for words actionable in themselves, claiming general damages only, it was held that under this plea evidence that, during the six years prior to the trial, inveterate feelings of hostility had existed between the defendant and plaintiff, and that plaintiff had taken every opportunity to irritate the defendant, was inadmissible. Porter v. Henderson, 11 Mich., 20.

21. The defendant cannot, under this, plea with notice filed by him that he will "prove the truth of the words" of which the plaintiff complains in his declaration, give in evidence any matter of justification, such notice not stating the precise charges upon which the defendant relies as justification of the words spoken. Powers v. Presgroves, 38 Miss., 227.

22. Evidence that slanderous words were spoken by others, and that the charge was a current report, cannot, under this plea, be admitted in mitigation of damages. Anthony v. Stephens, 1 Mo., 254; Young v. Bennett, 5 Ill. (4 Scam.), 43.

23. The defendant may prove that the plaintiff himself procured the pub-

lication of the words charged with a view to an action. Sutton v. Smith, 13 Mo., 120.

24. In an action for words spoken against the chastity of the plaintiff's wife, it is competent for the defendant under this plea, in mitigation of damages, to prove that the wife and an unmarried man had lived together alone in one house, where a knowledge of such mode of living had come to the defendant before the speaking of the words. Reynolds v. Tucker, 6 Ohio St., 516.

25. The defendant may give in evidence in mitigation of damages any circumstances tending to show that he spoke the words under a mistaken construction placed upon conduct which was, in fact, no justification. Haywood v. Foster, 16 Ohio, 88.

26. In a civil action the truth of the charge is a justification, but it cannot be given in evidence unless it is pleaded or notice thereof is given with the general issue. Under the general issue any matter may be given in evidence in mitigation which does not tend to a justification and which falls short of it. Snyder v. Andrews, 6 Barb. (N. Y.), 43.

27. The defendant may give in evidence under this plea a former recovery as to the whole or a part of the actionable words contained in the declaration. Campbell v. Butts, 3 N. Y. (3 Comst.), 173.

28. The defendant cannot give in evidence under this plea matter which might be pleaded in bar; nor can he give evidence of any other crime than the one charged, either in bar or in mitigation of damages. Andrews v. Vanduser, 11 Johns. (N. Y.), 38; Randall v. Holsenbake, 3 Hill (S. C.), 175.

29. In an action for slander it was stipulated that defendant under the plea of not guilty might introduce evidence with the same force and effect as under a plea of justification. *Held*, that for the court to refuse to give instructions in accordance with the stipulation was error. Woddrop v. Thacher, 17 Pa. St., 340.

PLEA OF JUSTIFICATION FILED (see *Pleadings; Justification*).

§ 41. **The Plea with the General Issue.**— When a plea of justification is filed with the general issue the better course is for the plaintiff to make proof of the publication of the defamatory matter, and leave it to the defendant to make out his justification. When in time the plaintiff can offer all his evidence in rebuttal, though the plaintiff may, if he elect to do so in the opening of his case, offer evidence to repel the justification; and in such case he is ordinarily required to offer it all before he closes his evidence in chief, and is not allowed to give any further evidence in reply. But these matters rest mostly in the discretion of the court under the peculiar circumstances of each case.[1]

[1] 2 Greenleaf's Evidence, § 429; Brown v. Murray, Ry. & M., 254.

§ 42. **Justification — The Truth a Defense — The Rule in Civil Cases.**— In civil actions, and against a party coming into a court of justice on a claim for damages, it has long been held, as a rule of the common law, that the truth of the facts imputed constituting the slanderous or libelous charge may be pleaded by way of justification, and if proved constitute a good bar to the action. In such case, of course, the motive and purpose are immaterial, and cannot be the subject of inquiry. The rule proceeds upon the principle that whatever is the motive, if the charge against the individual suing is true, if he is in fact guilty of the crime or disgraceful conduct imputed to him, he has sustained no damage for which he can claim redress in a court of justice. But in such case it is a fixed rule that the defendant must plead the truth in bar, and must detail the facts in his special plea with legal formality and precision, and sustain it by strict proof of the facts thus charged. Civil and criminal prosecutions are obviously different in their purpose and end. In the former an individual seeks redress for a supposed wrong done to himself; in the other the public seek to restrain and prohibit acts which would destroy the peace and harmony of society.[1]

§ 43. **Degree of Proof Required.**— In England there was a substantial reason for requiring a more conclusive degree of certainty of the truth of the charge in a civil action for defamation which does not apply in this country. There, if the plea of justification, where a felony had been charged, was sustained by the verdict of a jury, the verdict stood as an indictment. Lord Kenyon said: "Where the defendant justifies words which amount to a charge of felony, and proves his justification, the plaintiff might have been put upon his trial by that verdict without the intervention of a grand jury."[2] In the United States no such result follows, and the reason for the rule ceases to exist. Neither life nor liberty is in any degree imperiled by such a verdict. No other consequences follow it than follow a verdict in any other civil cause. It does not take the place of an indictment. If the truth of the words published is, by a preponderance of evidence, proved to the satisfaction of the jury, the plea is sustained. The adoption

[1] Com. v. Snelling, 82 Mass., 337. [2] Cook v. Field, 3 Esp., 133.

of this rule does not change or modify the presumption of innocence which the law raises in favor of the plaintiff; nor does it waive the necessity of proving every element that enters into the crime charged by evidence of a kind and quantity that, in the minds of the jury, overthrows the case made by the plaintiff.[1] Again, it is logically impossible to say that one rule should obtain when an action is brought to recover damages caused by the commission of a crime and another in an action brought to recover damages for a slander charging the commission of such a crime, when the defendant pleads a justification. The same rule must apply when the same party asserts and relies on the same facts in any other civil action where the right of recovery or defense is asserted.[2]

§ 44. **Imputation of Perjury.**— Where perjury is charged the evidence of two witnesses, or one witness and corroborating circumstances, is necessary to sustain a plea of justification; but the requisite evidence being adduced, however it may conflict with other testimony, as in any other civil case, the jury must weigh it, and will be warranted in finding a verdict in support of the plea, although they may not be satisfied of the truth beyond a reasonable doubt.[3]

§ 45. **The Justification Must be as Broad as the Charge.**— The plea of justification must be direct and explicit. It must in every respect correspond with and be as extensive as the charge in the declaration. It must be as broad as that charge is; if it go beside it or fall short of it, it is nought; it must be, in point of law, identical with it. A plea is bad which falls short of a justification of the slanderous words in the sense imputed to them by the declaration; for the plea necessarily confesses that such sense is correctly imputed; and if the defendant disputes this, he must do so under the general issue.[4]

[1] McBee v. Fulton, 47 Ind., 403; Bell v. McGinness, 40 Ohio St., 204; 48 Am. Rep., 673; Riley v. Norton, 65 Iowa, 306; 21 N. W. Rep., 649; Peoples v. Evening News, 51 Mich., 11; 16 N. W. Rep., 185; Downing v. Brown, 3 Colo., 571; Ellis v. Buzzell, 60 Me., 210; 11 Am. Rep., 204; Folsom v. Brown, 5 Foster, 114; Spruill v. Cooper, 16 Ala., 791; Matthews v. Huntley, 9 N. H., 147; Kincaid v. Bradshaw, 3 Hawks' Law R. (N. C.), 63; Fowler v. Wallace, 131 Ind., 347; 31 N. E. Rep., 53.

[2] Kidd v. Fleck, 47 Wis., 433.

[3] Spruill v. Cooper, 16 Ala., 791; Downing v. Brown, 3 Colo., 593; Woodbeck v. Keller, 6 Cow. (N. Y.), 118; Ransone v. Christian, 56 Ga., 351.

[4] Jones v. Townsend, 21 Fla., 431;

The whole libel must be proved true, not a part merely. The justification must justify the precise charge. If any material part be not proved true, the plaintiff is entitled to damages in respect of such part.[1] Thus, where a libelous paragraph in a newspaper is introduced by a libelous heading, it is not enough to prove the truth of the facts stated in the paragraph; defendant must also prove the truth of the heading.[2]

§ 46. **The Rule in Criminal Prosecutions — Truth — Justification for Libel.**— At the time of the foundation of our government and for some years afterwards, it was a question of great consideration among both jurists and statesmen whether it would be most expedient to allow the truth to be given in evidence in defense in a criminal prosecution for libel. By the common law it was not admissible, and the rule with the rest of the common law had been introduced and adopted in this country. To a certain extent and on considerations of policy the rule has been, however, much relaxed in this country.[3] Statutes have been passed in nearly if not all of the states providing that in any criminal prosecution for libel the person charged with the publication may in his defense give in evidence the truth of the matter charged as libelous; but such evidence is not in general a justification unless it is further made to satisfactorily appear that the alleged libelous matter was published with good motives and for justifiable ends.

§ 47. **Illustrations — Digest of American Cases.**—

EVIDENCE ADMISSIBLE UNDER THE PLEA OF JUSTIFICATION.

1. Under a plea of justification in an action for words charging larceny the defendant may offer evidence tending to prove a particular larceny of

57 Am. Rep., 171; Skinner v. Powers, 1 Wend. (N. Y.). 451; Whittemore v. Weiss, 33 Mich., 348; Stillwell v. Barter, 19 Wend. (N. Y.), 487; Downey v. Dillon, 52 Ind., 442; Stowe v. Converse. 4 Conn., 17; Palmer v. Smith, 21 Minn., 419; Roberts v. Miller, 2 G. Greene, 122; Spruill v. Cooper, 16 Ala., 791; Watcher v. Quenzer, 29 N. Y., 547; Morrison v. Harmer, 3 Bing. (N. S.), 759; Weaver v. Lloyd, 2 Barn. & C., 678; Smith v. Parker, 13 M. & W., 459; Smith v. Tribune .Co., 4 Biss., 477; Jones v. Cecil, 10 Ark., 592; Brickett v. Davis, 21 Pick., 404; Ames v. Hazzard, 6 R. I., 835.

[1] Weaver v. Lloyd, 1 C. & P., 295; 2 B. & C., 678; 4 D. & R., 230; Ingram v. Lawson, 5 Bing. N. C., 66; 6 Scott, 775; 7 Dowl., 125; 1 Arn., 387; 3 Jur., 73; 6 Bing. N. C., 212; 8 Scott, 471; 4 Jur., 151; 9 C. & P., 326.

[2] Mountney v. Watton, 72 B. & A. D., 673; Chalmers v. Shackell, 6 C. & P., 475.

[3] Comm. v. Snelling, 32 Mass., 337.

the same description as charged in the declaration. **Adams v. Ward**, 1 Stew. (Ala.), 42.

2. Where a slanderous charge of forgery is justified the defendant will be held to a strict proof. Seely v. Blair, Wright (Ohio), 683.

3. If the proof substantially supports a plea of justification it will be sufficient. Willson v. Watrous, 5 Yerg. (Tenn.), 211.

4. In an action for alleging a want of chastity in the female plaintiff the defendant will be permitted to prove, under the plea of justification, the language used by the female plaintiff in a dispute with her husband in reference to imputations of unchaste conduct made by a third person against her. Bullard v. Lambert, 40 Ala., 204.

5. A suit for slander charged that the defendant had accused the plaintiff of stealing hogs, etc. Evidence was offered that the hogs belonged to the defendant; that they were known to the plaintiff; that many of them were marked with plaintiff's mark. One witness testified that the same change had been made in the mark of his calf, etc.; also testimony as to defendant's general bad character was given. It was held that an instruction to the jury that the evidence constituted no defense to the action was improper. Scott v. Harber, 18 Cal., 704.

6. Under a plea that the plaintiff was guilty of perjury the defendant must prove technical perjury, though the slander only charged false swearing not amounting to perjury. Hicks v. Rising, 24 Ill., 516.

7. Where, in an action for charging the plaintiff with altering and forging the records of a religious society, the defendant specified the truth of charge in his defense, and set forth in his specification the entries alleged to be forged, it was held that he might prove the forgery by first introducing the book of records of the society, showing therein the entries alleged to be forged, and then proving by the testimony of the person who acted as chairman, and who also made minutes of the proceedings, what actually took place at the meeting. Watters v. Gilbert, 2 Cush. (Mass.), 37.

8. Where words charged to have been spoken impute to the plaintiff the crime of perjury, without any qualification or explanation, the defendant, in justification, must prove that plaintiff deliberately and wilfully swore false; it is not sufficient to prove that the facts sworn to were not true, though it proceeded from mistake. McKinly v. Rob, 20 Johns. (N. Y.), 351.

9. In slander, for charging the plaintiff with having sworn false, if the defendant intends to justify under a notice subjoined to his plea, he must give notice that he will prove not only that the plaintiff swore false, but that he swore wilfully or corruptly false. Mitchell v. Borden, 8 Wend. (N. Y.), 570.

10. Where a person was charged with having stolen several years before, it was held that the defendant might show that the crime was committed by the plaintiff, and that he had been pardoned. Baum v. Clause, 5 Hill (N. Y.), 196.

11. The words, "I have lost your chain; I think T. picked it up; he is in the habit of picking up things; he would steal anything he could get hold of; he stole wool of L.," charge a habit of stealing as well as a specific theft, and the defendant may show various instances of larceny by the plaintiff T. Talmadge v. Baker, 22 Wis., 625.

12. In an action for saying of the plaintiff that "he had taken the defendant's slave, and that the defendant would have him sent to the penitentiary for it," the plea was a justification, "because the plaintiff did take a certain female slave, the property of the defendant, out of his possession, in such manner and with such intentions as would subject him to such punishment." The plaintiff replied generally, and issue was joined. It was held that it was sufficient for the defendant, to support his plea of justification, to show that such slave had been a long time in his possession as his slave, and was purchased by him as such, notwithstanding the pendency of a suit at that time for her freedom. Hook v. Hancock, 5 Munf. (Va.), 546.

13. A defendant may justify slanderous words, if, at the time of speaking them, he names him from whom he heard them, and if in truth he did hear them from another. But this is a justification only so far as it is evidence of the want of malice. Miller v. Kerr, 2 McCord (S. C.), 285.

14. In an action for charging the plaintiff with perjury, and a plea of justification, the court should instruct the jury to support the plea; there must be two concurring witnesses to the falsity of every material fact of the testimony of the plaintiff alleged to be false, or one witness and corroborating circumstances equivalent to one witness. Steinman v. McWilliams, 6 Penn. St., 170.

15. In an action for charging the plaintiff with having sworn falsely as to the residence of an individual, declarations made by that individual, as to his residence, not in the presence of the plaintiff, are admissible as evidence against him. Cherry v. Slade, 2 Hawks (N. C.), 400.

16. An alleged libel charged a justice of the peace with an act of malfeasance in office done "according to his usual style of dispensing justice." Under a plea of truth in justification, evidence of other abuses of authority for private gain was held properly admissible. Davis v. Lyon, 91 N. C., 444.

17. Where the libel complained of is in a petition to the legislature the truth may be given in evidence in justification. It is not necessary to plead the truth. Commonwealth v. Morris, 1 Va. Cas., 176.

18. When the plea of justification set up the fact that the plaintiff had been guilty of fornication, it was error to instruct the jury that to maintain the plea the defendant must prove the words charged were true, on the grounds that plaintiff, although an unmarried woman, was guilty of fornication, and had been delivered of a child, and it was necessary that such alleged fact, constituting the justification, should be proved by clear and satisfactory evidence, and if not so proved the defendant would fail. Nothing being in the plea in regard to the plaintiff's having been delivered of a child, the instruction was too broad, and should not have been given. Such an instruction was well calculated to mislead the jury. Stowell v. Beagle, 57 Ill., 97.

19. Where defendant in his plea sets up the truth of the words, he must justify them in the sense in which the innuendoes explain them — if it explains them fairly. An allegation that defendant "did publish the said words of and concerning the said plaintiff as in said declaration mentioned" is insufficient. Royce v. Maloney, 57 Vt., 325.

THE MEASURE OF PROOF.

(1) *By a Preponderance of the Evidence.*

1. Although in an action for charging the plaintiff with perjury it is necessary for the defendant, if he pleads justification, to support his plea with such proof as would be sufficient to convict the plaintiff on an indictment for that offense, yet it is not necessary, as in a criminal prosecution, that it should be of that degree of certainty requisite to remove all reasonable doubt from the minds of the jury. A mere preponderance of the evidence is sufficient. Spruill v. Cooper, 16 Ala., 791; Kincaid v. Bradshaw, 3 Hawks (N. C.), 63.

(2) *Beyond a Reasonable Doubt.*

1. In an action for charging the plaintiff with larceny the plea was not guilty, and the justification alleged the words to be true. On the trial the court instructed the jury: "The testimony to sustain that plea — the justification — should be as certain and conclusive as would be required to justify a conviction for larceny, if the plaintiff were indicted for the offense, such as leaves no rational doubt in the minds of the jury of the truth of the charge." The defendant objected to the instruction, but the court on appeal sustained it. Wanderly v. Nokes, 3 Blackf. (Ind.), 589.

2. In slander for charging the plaintiff with perjury, a defendant, to support a justification, is bound to give as conclusive proof as would be necessary to convict the plaintiff on an indictment for such offense. Clark v. Dibble, 16 Wend. (N. Y.), 601; Lanter v. McEwen, 8 Blackf. (Ind.), 495; Woodback v. Keller, 6 Cow. (N. Y.), 118; Gorman v. Sutton, 32 Pa. St., 247; Dwinells v. Aiken, 2 Tyler (Vt.), 75; Fowler v. Wallace, 131 Ind., 347; 31 N. E. Rep., 53.

EVIDENCE NOT ADMISSIBLE UNDER THE PLEA OF JUSTIFICATION.

1. A subsequent explanation and qualification of slanderous words, by the person using such words, is not competent evidence for such person under a plea of justification. Luthan v. Berry, 1 Port. (Ala.), 110.

2. Evidence tending to show that the plaintiff was suspected of being guilty of the offense imputed to him by the words charged is not admissible under the plea to show the truth of the words. Commons v. Walters, 1 Port. (Ala.), 323.

3. It is no justification of libel that the author names his informant, or that the libelous matter was the subject of general rumor. Johnston v. Laud, 7 Ired. (N. C.) L., 448; Skinner v. Powers, 1 Wend. (N. Y.), 451.

4. It is no justification in an action for libel that the libelous matter was previously published by a third person, and that the defendant at the time of his publication disclosed the name of that person and believed all the statements contained in the libel to be true. Sans v. Joerris, 14 Wis., 663.

5. It is no justification that the defendant signed the libelous paper as chairman of a public meeting of citizens, convened for the purpose of deciding on a proper candidate for the office of governor at an approaching election, and that it was published by order of such meeting. Lewis v. Few, 5 Johns. (N. Y.), 1.

6. It was charged that defendant had falsely stated that the plaintiff had

set his house on fire in order to get the insurance. The defendant asked a witness whether, after the burning of the house and before the speaking of the words, the plaintiff was generally suspected of setting his house on fire. It was held that the question was inadmissible. Leaning v. Hewett, 45 Ill., 23.

7. In an action of slander for making a positive charge of theft against the plaintiff, the defendant cannot justify the charge by proving that the defendant had just ground for believing the plaintiff to be a very dishonest man. Woodruff v. Richardson, 20 Conn., 238.

8. For a charge of fornication, evidence that the plaintiff's child was reputed to be a bastard, and also as to whom its father was reported to be, is inadmissible. Richardson v. Roberts, 23 Ga., 215.

9. For calling the plaintiff a whore, evidence that the plaintiff committed acts of prostitution two months after the words were spoken is inadmissible. Beggerly v. Craft, 31 Ga., 309.

10. The defendant for having charged the plaintiff with stealing a dollar from A. will not be permitted to prove that the plaintiff had stolen a dollar from B. Self v. Gardner, 15 Mo., 480.

11. Where the charge is felony, and the defendant has neither pleaded nor given notice of justification, evidence that the charge related to a transaction which it by no means followed was not felony is inadmissible. Lane v. Wells, 7 Wend. (N. Y.), 175.

12. For charging the plaintiff with committing perjury before the grand jury the defendant cannot, under a plea of justification, prove the perjury of the plaintiff on an application for a search-warrant, although the same evidence which would justify in one case would justify in the other. Palmer v. Haight, 2 Barb. (N. Y.), 210.

13. For a charge of perjury, under a plea of justification, one witness is not sufficient to prove the perjury, without other corroborative circumstances; but two witnesses are not absolutely necessary. Hopkins v. Smith, 3 Barb. (N. Y.), 599.

14. The defendant charged the plaintiff with keeping a house of ill-fame, and offered evidence of the misconduct of the plaintiff and his family, falling far short of sustaining the charge. It was *held* that the evidence was not admissible, either as a justification or in mitigation of damages. Bush v. Prosser, 13 Barb. (N. Y.), 221.

15. And so where the defendant charged the plaintiff with being a thief and with having stolen his corn it was held that evidence that the plaintiff planted corn on the defendant's land on shares, the crop to be equally divided in the ear; that the plaintiff fraudulently secreted and carried away, with intent to convert the same to his own use, a considerable quantity of said corn, without the knowledge of the defendant, was not admissible either in justification or in mitigation. Bisby v. Shaw, 15 Barb. (N. Y.), 578.

16. Where the defendant in an action for charging the plaintiff with adultery with C. after pleading the general issue, with notice that he would justify the charge by proving its truth, introduced first some direct evidence of the crime charged and then circumstantial proof tending to show grossly familiar, indecent and wanton conduct between the plaintiff and C., after which he offered a witness to prove that the plaintiff, during such

conduct, declared to the witness that he preferred married women because if any consequences followed from his connection with them their husbands would be responsible,—it was held that proof of such declaration was not admissible either in support of the justification or in mitigation of damages. Gillis v. Peck, 20 Conn., 228.

17. Evidence of common reports in circulation, or that third persons told the defendant of such reports before he spoke the words complained of, is not admissible in support of the plea of justification. Moberly v. Preston, 8 Mo., 462; Lewis v. Niles, 1 Root (Conn.), 346; Dane v. Kenney, 25 N. H. (5 Fost.), 318; Mapes v. Weeks, 4 Wend. (N. Y.), 659; Austin v. Hanchett, 2 Root (Conn.), 148; Kennedy v. Gifford, 19 Wend. (N. Y.), 286; Hampton v. Wilson, 4 Dev. (N. C.) L., 468.

18. In an action accusing the plaintiff of a crime of buying and selling by unsealed weights and measures, and also of the crime of gross fraud and cheating at common law, a justification of the words spoken on the ground that they were true cannot be supported by evidence that the plaintiff applied to a person to take some damaged meat and sell it without letting it be known that the plaintiff was concerned in the transaction. Chapman v. Ordway, 5 Allen (Mass.), 593.

19. The defendant cannot give in evidence any other crime than the one charged, either in bar of the action or mitigation of damages. Ridley v. Perry, 16 Me., 21; Pallett v. Sargent, 36 N. H., 496; Whittaker v. Carter, 4 Ired. (N. C.) L., 461.

20. For accusing the plaintiff with perjury the defendant cannot give evidence that the plaintiff, when not on oath, made statements repugnant to those which he made on oath without first proving otherwise that the latter were false. Eastburn v. Stevens, Litt. (Ky.) Sel. Cas., 82.

21. The defendant cannot, in order to support his plea of justification, give evidence of transactions or conversations between himself and others to which the plaintiff was not privy. Jenkins v. Cockerham, 1 Ired. (N. C.) L., 309.

22. In an action brought by the eldest son for slander, which consisted in speaking the words, "Your boys have stolen my corn," evidence that the two youngest boys had stolen the defendant's corn is not admissible if there is no offer to show that those who heard it spoken knew or ever heard that said two boys had stolen such corn, or to prove any accompanying explanation of the slanderous words, made to the knowledge of those who heard them. Maybee v. Fisk, 42 Barb. (N. Y.), 326.

23. The declaration charged the defendant with having said that the plaintiff, as a witness before a court of record, was guilty of perjury, "for which he would have his ears." *Held*, on the plea of justification, that the defendant could not give parol evidence of what the plaintiff swore to without producing a copy of the record of the trial to show that the testimony given by the plaintiff was material to the matter in question. Kirtley v. Deck, 3 Hen. & M. (Va.), 388.

24. It is not competent for the defendant to prove by a witness present that another person had imputed to the plaintiff the offense alleged in the words which were the cause of action. Poppenheim v. Wilkes, 1 Strobh. (S. C.), 275; Fuller v. Dean, 31 Ala., 654.

25. The defendant imputed to the plaintiff, who was a clergyman, these words: "Mr. S. said the blood of Christ had nothing to do with our salvation more than the blood of a hog." *Held*, that testimony tending to prove that the plaintiff denied the divinity of Christ and the doctrine of his atonement, and said he was a created being, a good man and perfect, his death that of a martyr, but that there was no more virtue in his blood than that of any creature, was not admissible, either in justification or mitigation. Skinner v. Grant, 12 Vt., 456.

26. For calling a woman a strumpet, a witness cannot be asked if he had never heard of anything derogatory to the reputation of the plaintiff. Freeman v. Price, 2 Bailey (S. C.), 115.

27. In an action by husband and wife for slander imputing want of chastity to the wife, evidence that they lived unhappily together is not admissible. Anonymous, 1 Hill (S. C.), 251.

28. The defendant cannot prove that the plaintiff had admitted himself guilty of a similar crime to the one charged several years before; nor that it was generally admitted, for many years, that the plaintiff was guilty of the crime charged. Long v. Brougher, 5 Watts (Pa.), 439.

29. If the defendant pleads a justification, his proof must be as broad as the charge against the plaintiff. Where the defendant charged that the plaintiff had gone nine miles from home one night to four different colliers' shanties, and that she "had gone to bed to them," proof that she had committed fornication with one collier elsewhere than at the shanties was held no justification. Burford v. Wible, 32 Pa. St., 95.

30. In an action for charging the plaintiff with the murder of A., what A. said, though near death and under the full impression that he would not recover, is not admissible under the plea of justification. Barfield v. Britt, 2 Jones (N. C.), L., 241.

31. Under a charge of being a "whore," the defendant cannot show that the plaintiff is a "reputed thief," nor that the plaintiff was reported by her own sister to be a whore. Smith v. Buckecker, 4 Rawle (Pa.), 285.

32. In an action of slander, under the statute of North Carolina, for charging that the plaintiff had criminal intercourse with one A. at a particular time and place, the defendant cannot justify by showing that the plaintiff had such intercourse with A. at another time and place. In such action the defendant, in a plea of justification, must aver and prove the identical offense; and when any circumstance is stated which is descriptive of and identifies the offense, it must be averred and proved for the purpose of showing that it is the same offense. But though the plea is not favored, yet when other descriptive circumstances are proven so as to show clearly that it is the offense charged, a slight variation in some of the other circumstances which may be ascribed to mistake will not be fatal — as if it was on Saturday instead of Sunday, and the like. Sharpe v. Stephenson, 12 Ired. (N. C.) L., 248.

33. A. accused B. of theft to certain members of a lodge of Odd Fellows of which both were members, and in an action for slander by A., B. attempted to justify what he said by showing that it was the duty of Odd Fellows to keep their lodge pure. The justification was held to be insufficient. Holmes v. Johnson, 11 Ired. (N. C.) L., 55.

84. Where one was prosecuted for saying that a woman had criminal intercourse with A., and on the trial attempted to justify by proving intercourse with B., *held*, that it was no justification. Waters v. Smoot, 11 Ired. (N. C.) L., 315.

§ 48. **Variances — A Variance Defined.**—" A disagreement or difference between two parts of the same legal proceeding which ought to agree together." [1] Variances are between the writ and the declaration and between the declaration and the evidence.

A variance by disagreement in some particular point or points only between the allegations of the declaration and the evidence when upon a material point is fatal to the plaintiff, the party on whom the proof lies, as a failure of evidence. The rule is that a party cannot make one case by his pleadings and another by his proofs. Variances of this kind most frequently occur in actions for oral defamation. The variance between the pleadings and the proofs will be deemed immaterial if the gravamen of the charge be proved as laid.[2]

§ 49. **What Constitutes a Variance.**— In actions for defamation the material and actionable words must be proved strictly as they are alleged in the declaration. It is not sufficient to prove equivalent words. But in relation to unimportant, connecting or descriptive words some latitude is allowed. The rule is that material words — those which are essential to the charge made — must be proved substantially as made. When all the words constitute one entire charge they must all be proved; but it is not necessary to prove the whole of a continuous sentence alleged in the declaration, provided the meaning of the words proved is not varied by the omission of the others.[3]

§ 50. **The Law Stated.**— In an action for slander the plaintiff need not prove all the words laid in the declaration, unless it takes all of them to constitute the cause of action; nor will

[1] 2 Bouvier's Law Dictionary, 626.

[2] Dufresne et al. v. Weise, 40 Wis., 290; 1 N. W. Rep., 43; Hersh v. Ringwalt, 3 Yeates, 508; Wilson v. Watrous, 5 Yerg., 211; Cheadle v. Buell, 6 Ham., 67; Pursell v. Archer, Peck, 317; Miller v. Miller, 8 Johns., 74; Cooper v. Marlow, 3 Mis., 188; Barr v. Gaines, 3 Dana, 258; McClintock v. Crick, 4 Iowa, 453; Baldwin v. Soule, 6 Gray, 321; Scott v. McKinnish, 15 Ala., 662; Bassett v. Spofford, 11 N. H., 127; Merrill v. Peaslee, 17 N. H., 540.

[3] Whiting v. Smith, 13 Pick. (Mass.), 364.

the proof of additional words defeat his right of recovery, unless they so qualify the meaning as to remove the slander; but he must prove enough of the words laid to amount to the substance of the charge, and this must be done by proof of the identical words laid. Equivalent words, or words of the same import, will not do.[1]

§ 51. **The General Rule.**— In actions for libel and slander, as well as in other cases, there is an important difference between matters of mere allegation and matters of description. And in respect to matters of mere allegation, such as number, quantity or time, a variance in proof does not affect the plaintiff's right of recovery; but in respect to matters of essential description, the rule is different — a variance is fatal.[2]

§ 52. **Illustrations — Digest of American Cases.—**

(1) VARIANCE FATAL.

1. It is not necessary to prove all of the slanderous words declared upon, unless it takes them all to make out the plaintiff's case. And where the words proved qualify or limit the meaning of the words declared upon the recovery will be defeated. Baker v. Young, 44 Ill., 42.

2. To authorize a recovery the plaintiff must establish by proof the speaking of the words complained of, or enough of them to prove the slander. Equivalent words, or other words of like import and meaning, will not answer. Wilborn v. Odell, 29 Ill., 456; Fox v. Vanderbeck, 5 Cow. (N. Y.), 513.

3. In a suit against the author and those procuring the publication of a libelous communication in a newspaper, it appeared that the article as published contained some slight verbal alteration from the manuscript, but not such as to alter the sense. The court refused to instruct the jury that, unless the phraseology of the two were the same, there could be no recovery. *Held*, no error, as a mere verbal alteration, not affecting the sense, would not exonerate the defendant. To have that effect the alterations must be material. The materiality of the manuscript as evidence was only upon the question of the agency of the defendant in procuring the publication. Strader et al. v. Snyder, 67 Ill., 404.

4. In a suit for slander in saying, "A. killed my hogs and I can prove it, and he is the biggest thief on this creek; and I can prove it by X. and his boys that he has stolen my hogs," *held*, that proof of the words ending with "creek" and omitting the rest showed no variance and were sufficient. Lewis v. McDaniel, 82 Md., 577.

5. Where the declaration averred that the defendant had said of the plaintiff that "he had stolen or might as well have stolen said bale of cotton" and that "he was a damned rascal," it was held that evidence that

[1] Albin v. Parks, 2 Brad. (Ill.), 576; Comerford v. West End St. Ry. Co., 164 Mass., 13; Roberts v. Lamb, 93 Tenn., 343; Fritz v. Williams, 16 So. Rep., 359; Irish American Bank v. Bader, 59 Minn., 329.

[2] Cates v. Bowker, 18 Vt., 23; 2 Greenleaf's Evidence, § 413.

the defendant had said that the plaintiff "was a poor scamp and that he had taken his rent cotton and carried it off and sold it without leave, and when the grand jury met he would show him whose cotton it was," was inadmissible. Jones v. Edwards, 57 Miss., 28.

6. That the words spoken were of similar import to those alleged to have been spoken is not sufficient. The proof must follow the allegation. Sword v. Martin, 23 Ill. App., 304.

7. Where the slanderous words charged to have been spoken were, "He stole $200 from me when I was drunk," proof of these words except the words "when I was drunk," was sufficient, as the words not proven did not qualify the other words so as to free them from their slanderous quality. Crotty v. Morissey, 40 Ill., 477.

8. The defendant was charged with saying of the plaintiff, "She slept with a man not her husband." The proof showed the statement to be that such person was in bed with her. It was held under the Ohio Civil Code, section 133, that the want of correspondence between the allegation and the proof raised a mere question of variance, and not a failure of proof. Barnett v. Ward, 36 Ohio St., 107.

9. A count in slander alleging that the defendant charged the plaintiff, who was an unmarried woman, with having had a child, is not sustained by proof of words spoken by the defendant expressing the opinion that, at the time of speaking them, she was pregnant with child. Payson v. Macomber, 3 Allen (Mass.), 69.

10. And a count alleging that the defendant charged upon the plaintiff the act of fornication, witnessed by a particular person, is not sustained by proof of words charging an act of fornication witnessed by another person, or by proof of words implying a charge of habitual fornication and lewdness with the persons named in the declaration. Payson v. Macomber, 3 Allen (Mass.), 69.

11. A declaration alleging that the words were spoken to the trustees of a corporation for the purpose of preventing the plaintiff's re-election as their secretary is not sustained by proof of words spoken to the person who is one of the trustees, in the absence of evidence that they were spoken to him as a trustee or for such purpose. Perry v. Porter, 124 Mass., 338.

12. A declaration for charging the plaintiff with being "a whore and a common prostitute" is not supported by proof of other words amounting to a general charge of unchastity. Doherty v. Brown, 10 Gray (Mass.), 250.

13. The allegation, "It is my opinion he steals a part of the money he collects at the Catholic church at Seneca," is not proved by the words "he stole part of the money he collected in the Catholic church." Crotty v. Morissey, 40 Ill., 477.

14. A declaration alleged that the defendant published or caused to be published in a certain pamphlet a libel concerning the plaintiff. From the evidence it appears that the defendants were instrumental in procuring the vote of a medical society expelling the plaintiff therefrom for gross immorality. The vote was published among the transactions of the society by the regular committee of publication of which the defendants were not members. *Held*, that the allegation in the declaration was not supported. Barrow v. Carpenter, 11 Cush., 456.

15. A declaration alleging that the defendant accused the plaintiff of the crime of larceny is not sustained by proof of words accusing the plaintiff merely of deception and fraud. Perry v. Porter, 124 Mass., 338.

16. Under a declaration alleging that the defamatory words were spoken in the presence and hearing of "divers citizens of the commonwealth," proof of speaking in the presence and hearing of only one third person not a citizen of the commonwealth is a fatal variance. The fact of the publication of the words by the defendant must be alleged and substantially proved. If alleged generally the fact may be proved by any person who heard them. But if the pleader adds any allegation which narrows and limits that which is essential, it becomes descriptive and must be proved as alleged. It identifies the slander. Chapin v. White, 102 Mass., 139.

17. Where the complaint alleges that defendant called plaintiff a thief, testimony that defendant said plaintiff had been robbing him is not literally or substantially the same; and, not being shown to have been spoken at the same time with the words alleged, should have been stricken out; and the error is not cured by subsequently striking it out on plaintiff's motion. Stern v. Lowenthal 77 Cal. 340, 19 Pac. Rep., 579.

18. In an action for slander proof of the substance of the words charged is sufficient, but proof of equivalent words is not. The declaration contained three counts: 1st, for the words "the miller stole my wheat, and he was no other man than John C. Slocumb." 2d. "He stole my wheat;" and 3d. "John C. Slocumb is a thief; he stole my wheat." The proof as shown by the bill of exceptions was by one witness. "He heard the defendant say that he had heard Slocumb had taken too much toll from others, and that charges had been made against Slocumb to Mr. Graves, the owner of the mill; he saw Slocumb go to the hopper and take out two half-bushels of wheat and put it away, and put one of them in a dark corner. He asked him (Slocumb) what he was doing. Slocumb said he was taking toll; that Slocumb, when taking the wheat, looked over his shoulder as if to see if any one saw him. Defendant was talking about his wheat being lost at the mill when Slocumb had taken his wheat. Defendant had taken thirty-two bushels of wheat to mill on this occasion." The other witness testified to a conversation with the defendant at another time, and says that when Slocumb's name was mentioned defendant asked if it was John Slocumb who had attended the mill at New Haven. Witness replied it was, but that he wrote his name John C. Slocumb. Defendant then said: "Well, he is the man who took my wheat. There was too much toll took from the quantity of wheat I took to mill and the flour I got. I saw him take two half-bushels out of the hopper and put it away. I asked him what he was doing. He said he was taking toll. This was in the night." Defendant said "he would not swear he (Slocumb) stole my wheat; but if I had to swear I would swear I believe he stole my wheat." *Held*, that the proof established the speaking of equivalent words, but not the substance of the words as laid. Slocumb v. Kuykendall, 1 Scam. (Ill.), 187.

19. The plaintiff need not prove all the words, yet he must prove so much of them as is sufficient to sustain his cause of action; and it is not enough for him to prove equivalent words of slander. Olmstead v. Miller, 1 Wend. (N. Y.), 510; Slocumb v. Kuykendall, 1 Scam. (Ill.), 187.

20. Although the words proved are equivalent to the words charged in the declaration, yet not being the same in substance, and though the same idea is conveyed in the words charged and those proved, yet if they contain substantially the same charge but in a different phraseology, the plaintiff is not entitled to recover. Norton v. Gordon, 16 Ill., 38. The plaintiff must prove the speaking of the words laid in the declaration, or so many of them as will establish the cause of action. It is not enough to prove the speaking of equivalent words. Proof of the speaking of different words, though of the same import with those alleged, is not sufficient to sustain the action. Sanford v. Gaddis, 15 Ill., 228.

21. In an action of slander proof of equivalent words to those laid in the declaration is not admissible, but it is not essential that every word alleged shall be true and that none be proved except those alleged. Schmisseur v. Kreilich, 92 Ill., 347.

22. A difference in the tense of the verb laid and that proved constitutes such a variance as to defeat a recovery (Wilborn v. Odell, 29 Ill., 456); as, "You swore false," will not be sustained by proof that the words uttered were, "You have sworn false." Sanford v. Gaddis, 15 Ill., 228.

23. Where all the words constitute one entire charge they must all be proved as alleged; but it is not necessary to prove the whole of a continuous sentence as alleged, provided the meaning of the words proved is not varied by the omission of the others. Schmisseur v. Kreilich, 92 Ill., 347.

24. A declaration alleging that the defendant charged upon the plaintiff an act of fornication, witnessed by a particular person, is not sustained by proof of words charging an act of fornication witnessed by another person, or by proof of words implying a charge of habitual fornication and lewdness with the person named in the declaration. Nor is an allegation that the defendant charged the plaintiff, who was an unmarried woman, with having had a child, sustained by proof of words spoken by the defendant expressing the opinion that at the time of speaking them she was pregnant with child. Payson v. Macomber, 85 Mass., 69.

25. There is a fatal variance where an indictment for criminal slander alleges that the slanderous words were spoken in English, while the proofs show that they were spoken in German. Stichtd v. State (Tex.), 8 S. W. Rep., 477.

26. Testimony that defendant in an action for slander said that he would break plaintiff up in business, which statement is not literally or substantially alleged in the complaint, cannot be allowed. In an action for slander evidence cannot be given of utterances other than those alleged in the complaint. Stern v. Lowenthal 77 Cal. 340, 19 Pac. Rep., 579.

(2) Variance Immaterial.

1. In an action for slander of A. by accusing her of fornication in these words: "A. has had a baby," the words proved were, "We hear bad reports about some of your girls. A. has had a baby. What was Mr. D.'s child crying in the room for when he and A. were there, and Mrs. D. was away?" *Held*, no variance. Robbins v. Fletcher, 101 Mass., 115.

2. The allegation, "He stole two hundred dollars from me when I was

drunk" is sustained by the proof of the words, "He stole two hundred dollars from me," but is not proved by the words, "Morissey stole two hundred dollars" or "Morissey is a thief." Crotty v. Morissey, 40 Ill., 477.

8. Where the words laid in the declaration were, "He has perjured himself; he swore lies before the court at Madison," and it appeared in proof that the words spoken were: "He has perjured himself; he swore lies before the court at Madison, according to the church book," it was held not to be a variance by reason of the additional words, "according to the church book." Brown v. Hanson, 53 Ga., 632.

4. It cannot be said as a matter of law in an action for slander that there is any substantial difference between the words charged, "public whore," and the words proved, "whorish bitch." Zimmerman v. McMakin, 22 S. C., 372; 53 Am. Rep., 720.

5. Although a libel read in evidence contained matter in addition to that set out in the declaration, there is no variance if the additional parts do not alter the sense of that which is set out. M'Coombs v. Tuttle, 5 Blackf. (Ind)., 431.

6. It is not material that more words are proved than are laid in the declaration, if the additional words do not change the meaning or do away with the charge. Sanford v. Gaddis, 15 Ill., 228; Norton v. Gordon, 16 Ill., 38; Wilborn v. Odell, 29 Ill., 456.

7. The omission in an indictment for a libel of the date and signature at the end of the libel, not affecting the meaning, is not a variance. Com. v. Harmon, 2 Gray (68 Mass.), 289.

8. A declaration which alleges, in the form prescribed by statutes of 1852, chapter 312, that the defendant charged the plaintiff with a certain crime, "by words spoken of the plaintiff substantially as follows," is supported by proof that the defendant spoke words substantially though not precisely like those set out in the declaration. Baldwin v. Soule, 6 Gray, 321. So under General Statutes. Chace v. Sherman, 119 Mass., 387.

9. A declaration alleged that the defendant charged the plaintiff with burning his own mill, with the intent to defraud the insurers thereof "by words spoken of the plaintiff substantially as follows: He (meaning the plaintiff) burned it (meaning the said mill) because he was poor and wanted the money." At the trial there was evidence that the defendant charged the plaintiff with burning his own mill "to get his insurance." *Held*, that the words were proved "substantially" as alleged under General Statutes, chapter 129. Chace v. Sherman, 119 Mass., 387.

10. The allegation that the plaintiff was a single and unmarried woman is substantially proved by showing that her name was Mary Mict, that she was the daughter of John Mict, and was only thirteen years old. Peltier v. Mict, 50 Ill., 511.

11. Where the words charged in the declaration imputed lewdness and adultery to the plaintiff, and the words proved established that and no more or less, not by proof of equivalent words, but by proving the substance of the words spoken, it was held to be sufficient though the words were not proved precisely as charged in the declaration. Thomas v. Fischer, 71 Ill., 576.

12. Where the words charged as having been spoken by the defendant were: "She is a whore," "You are a whore," and the words proved were, "She was a damned whore," "You are a damned whore," it was held that the words charged were substantially proved. Crotty v. Morissey, 40 Ill., 477; Baker v. Young, 44 Ill., 42.

13. The allegation "Old Dykeman Shook swore" is substantially proved by the words "Old man Shook swore." Harbison v. Shook, 41 Ill., 141.

§ 53. **Digest of English Cases.**—

1. It was formerly holden that the plaintiff must prove the words precisely as laid; but that strictness is now laid aside and it is sufficient for the plaintiff to prove the substance of them. However, if the words be laid in the third person, *e. g.*: "He deserves to be hanged for a note he forged on A.," proof of words spoken in the second person, *e. g.*: "You deserve," etc., will not support the declaration; for there is a great difference between words spoken in a passion to a man's face and words spoken deliberately behind his back. 2 Roll. Abr., 718; Avarillo v. Rogers, Bull. N. P., 5; Rex v. Barry, 4 Term R., 217.

2. If the words are laid as spoken affirmatively, the count is not supported by proof that the words were spoken by way of interrogation. Barnes v. Halloway, 8 Term R., 150.

3. And in an action for saying of the plaintiff, "This is my umbrella; he stole it from my back door," and the words proved were, "It is my umbrella," etc., it was held that the variance was fatal, inasmuch as the words laid applied to a thing present, and the words in evidence were spoken of a thing not present. Walters v. Mace, 2 Barn. & Ald., 756.

4. So in an action for slander of the plaintiff's wife the words in the declaration were, 'H.'s wife is a great thief, and ought to have been transported seven years ago." The words proved were, "She is a d—d bad one, and ought to have been transported seven years ago." The proof was held not to support the declaration. Hancock et ux. v. Winter, 2 Marsh., 502.

5. So where the plaintiff in declaring for slander averred by way of inducement that he was a carpenter and appraiser, and that the defendant, intending to injure him in his several trades, spoke the words of and concerning the plaintiff in his trade of a carpenter, and the plaintiff failed in proving himself an appraiser, it was held that the allegation was divisible, and that the plaintiff might recover on proof of his being a carpenter only. Figgins v. Cogswell, 3 Maule & S., 369.

§ 54. **Right to Open and Close.**— Where an answer in justification only has been pleaded to an action of slander or libel, the defendant has the burden of proof and is entitled to open and close at the trial. It is in most of the states a well-settled rule of practice that where the defendant confesses and avoids only in his defense, he is entitled to the opening and close — the burden of the issue being upon him. It is upon the principle that the plea of justification is a plea of confession and avoidance that accords the defendant this right. And

the rule has been held the same where the answer is in mitigation.[1]

§ 55. **The General Rule.**— Upon the settlement of the pleadings, and under the issues as joined, the party who would be defeated if no evidence were given on either side must first produce his evidence. In other words, the party holding the affirmative of the issue is entitled to the opening and close. If under the pleadings anything remains to be proven affirmatively by the plaintiff in the first instance, he is entitled to begin first and close the case; but if nothing remains for the plaintiff to prove in the first instance to entitle him to judgment under the pleading, then the opening and close are for the defendant.[2]

§ 56. **Illustrations — Digest of American Cases.**—

1. In an action for slander the complaint imputed to the plaintiff the crime of larceny. The defendant answered in mitigation a series of facts and circumstances by which she was surrounded at the time of speaking the words charged, and which she alleged induced her to believe that the words as spoken were true; also averring that the words were spoken for the sole purpose of aiding in restitution of a sum of money which she had lost under circumstances indicating that it had been stolen, and this was the only answer filed in the cause. The defendant, insisting that she had the burden of the issue, claimed the right to open and close, both in the introduction of the evidence and in the argument before the jury; but the court denied the claim, and accorded the plaintiff the right to open and close in both instances. The trial proceeding, the plaintiff obtained a judgment for $150. An appeal being taken it was held that under the statute providing that the defendant may allege the truth of the matter charged as defamatory and mitigating circumstances to reduce the damages and give either or both in evidence, the defendant having so filed her answer was entitled to the opening and close. The judgment was reversed. "It follows that both of these defenses are affirmative in their character, and imply an assumption of the burden of the proof to be adduced. Our conclusion necessarily is that the circuit court erred in refusing to permit the defendant to open and close both in the introduction of the evidence and in the argument before the jury." McCoy v. McCoy, 106 Ind., 492; 7 N. E. Rep., 188.

2. In Nebraska an action was brought to recover damages for a libelous publication in the "Daily State Democrat," the principal portion of which was as follows: "Sometime last winter a young girl came to this city from some other part of the state for the purpose of attending the university course. Being poor and unable to pay her board, she engaged to work in

[1] McCoy v. McCoy, 106 Ind., 492; 7 N. E. Rep., 188.

[2] Lexington Ins. Co. v. Paver, 16 Ohio, 324; Vifquain v. Finch, 15 Neb., 305; 19 N. W. Rep., 706.

the family of J. B. F., doing house-work mornings and evenings, and attending the school during the day. She was young and pretty and modest, and any man with a spark of manhood about him would naturally suppose she would have been safe from insult and lascivious approaches. But it was not the case, it seems. The lecherous nature of this man F., who was in a measure her protector, could not leave her in peace. Almost from the first hour of her stoppage in his house, he began a systematic attempt to gratify his unholy and shameful desires. By words and deeds and actions he followed up the poor girl, until one evening his conduct became so unbearable that she left the house and went to a neighboring boarding-house." The defendants in their answer admit the publication of the alleged libelous words set out in the petition, and allege that such words are true, and that he was "guilty of all that was charged against him in said publication." They also pleaded in justification public rumor and a want of malice. On the trial of the case a verdict was rendered in favor of F. for the sum of $500, upon which judgment was rendered. The case having been taken to the supreme court on error, the court in their opinion say: "The first error assigned in this court is that the defendant below, having admitted the publication of the alleged libel and claimed that the words so published were true, that therefore they were entitled to open and close the case. Section 283 of the code [Nebraska] provides that the party who would be defeated if no evidence were given on either side must first produce his evidence. In other words, the party holding the affirmative of the issue is entitled to open and close. If, therefore, anything remains to be proven affirmatively by the plaintiff, he is entitled to open and close. In the fourth paragraph of the answer we find a plea of general rumor as to the matter published, and that the publication was without malice. The answers in this regard must be construed together. The question of malice was put in issue by the pleadings, and entitled the plaintiff below to open and close." Vifquain v. Finch, 15 Neb., 305; 19 N. W. Rep., 706.

§ 57. **Defendant's Tongue No Slander — Not Admissible.**— In actions for slander the plaintiff may introduce evidence of the defendant's standing in point of property and respectability for the purpose of enhancing the damages. But the defendant is never permitted to give evidence of his own want of influence in order to show that what he asserted was not believed, and in consequence thereof the plaintiff has sustained no injury. The tendency of such evidence, if admitted, would be to impeach the defendant's own character, which the policy of the law does not allow. "No one shall be allowed to allege and prove his own infamy."[1]

§ 58. **Proof of Surrounding Circumstances for the Purpose of Rendering Words Not Actionable — Incompetent, when.**— In an action for slanderous words uttered without

[1] Howe v. Perry, 32 Mass., 506.

any allusion to surrounding circumstances, the mention of which at the time would have prevented them from being actionable in themselves, it is not competent for the defendant to give such circumstances in evidence in explanation of his words. A person may at the time of speaking words which, in their ordinary signification, would be slanderous by imputing a crime, so qualify them by other words as to show that he uses them in a different sense. Thus, if a man should say of another that on such a trial he testified to things that were false, adding, true they were immaterial and had no bearing on the case, though he thereby manifested great disregard of the truth it would not impute perjury. It goes upon the principle that all the words spoken at one time must be taken together; and though one part detached from another would be slanderous, yet if taken altogether they do not impute an indictable offense, they are not actionable in themselves — that is, without special damage averred and proved. A familiar instance is where one says of another, 'He is a thief; he has stolen the apples from my trees." Taking the latter part of the sentence as qualifying the former it imputes a trespass and not a felony, and is therefore not actionable. In a Massachusetts case, where the defendant accused the plaintiff of taking a false oath on a judicial trial without any explanatory words, it was held that it was not competent for him to prove that he meant to impute falsehood only as to immaterial matters; nor to go into evidence of what was testified to at the trial in order to show that they were immaterial.[1]

§ 59. **Evidence of Slander Uttered by the Defendant against Third Persons,** in no way connected with the suit, is inadmissible for the reason that it is contrary to the established rule of the common law that one cannot be proved guilty of an offense for which he is on trial by showing that at another time he committed a similar offense.[2]

§ 60. **Illustrations — Digest of American Cases.—**

1. On the trial of an action for slander the plaintiff introduced evidence tending to show that the defendant uttered in the presence of by-standers the defamatory words complained of. The defendant in his own behalf

[1] Stone v. Clark, 21 Pick. (38 Mass.), 322; 15 N. E. Rep., 775; Best on Ev., 51. 487, note; 1 Greenl. Ev., § 52.

[2] Sullivan v. O'Learey, 146 Mass.,

testified denying that he uttered the words in question. Plaintiff's counsel, in cross-examining the defendant, asked him certain questions, subject to his objection, the answers to which tended to show that two or three years previously the defendant had slandered another person. The jury found for the plaintiff; the defendant excepted. It was held that the exception was well taken. If the testimony is to be considered in reference to the contradiction of the defendant it was not lawful, for it had no tendency to disprove his denial of the charge. It had no legitimate relation to any of the issues on trial, and may have led the jury to believe that the defendant was accustomed to slander people, and that he probably slandered the plaintiff. Sullivan v. O'Learey, 146 Mass., 322; 15 N. E. Rep., 775.

§ 61. General Illustrations — Digest of American Cases.—

(1) What Evidence is Admissible Generally in Actions for Defamation.

1. Where it is important to show that the charge proved by a witness for the plaintiff had reference to a trial, it is not indispensable for the witness to give the exact words showing such reference; but if this is desired they should be elicited on cross-examination. Douge v. Pierce, 13 Ala., 127.

2. If the plaintiff answered the slanderous words at the time, what he said is admissible. Bradley v. Gardner, 10 Cal., 371.

3. In an action for slander, evidence is admissible showing a repetition, to other persons than those mentioned in the complaint, of words of the general import of those counted upon to establish express malice and to prove the extent of the injury. Evidence of a witness who testified to one of the slanderous utterances, that after commencement of the action defendant offered him $1,000 to go to Canada to avoid testifying on the trial, is admissible, as it was virtually an admission of the speaking of the slanderous words. Cruikshank v. Gorden, 1 N. Y. S., 443, 118 N. Y., 178.

4. A plaintiff having first proved that the defendant had spoken to third persons the words laid in the declaration may prove, in support of the declaration, that the defendant had spoken the words in answer to the plaintiff's interrogatories. Gordon v. Spencer, 2 Blackf. (Ind.), 286.

5. In an action for slander for charging plaintiff with connection with one S. in the theft of certain cattle, it is admissible for defendant to introduce the testimony of S. as to agreements with plaintiff in regard to the theft of other cattle. Barkly v. Copeland, 74 Cal., 1, 15 Pac. Rep., 307.

6. Where a slanderous charge assumes the existence of a fact, proof of the charge itself is a sufficient proof of the assumed fact. Rodebaugh v. Hollingsworth, 6 Ind., 339.

7. In an action against a commercial agency for making false report of plaintiff's business standing, witnesses in possession of a key to defendant's report may testify as to the meaning of a report in blank, but not as to the general effect it would have upon the business standing of the person so rated; that being a matter of special damage which must be proven. Bradstreet Co. v. Gill, 72 Tex., 115, 9 S. W. Rep., 753.

8. Where a woman sues for slanderous words uttered concerning her she

may show her occupation, but she may not go into details thereof in a manner having no special relevancy, but which would tend to rouse the sympathies of the jury in her behalf and possibly enhance her damages. Perrine v. Winter, 73 Iowa, 645.

9. It is proper to permit the defendant to introduce in evidence the papers and entries of record in a former suit by him as administrator of his father's estate against the plaintiff for the purpose of showing that, if the words charged were spoken, they were spoken when the defendant was engaged in his duties as administrator in trying to get the property of which the deceased was the owner, for the purpose of mitigating the damages and to rebut the presumption of malice in the defendant and to show malice on the part of the plaintiff. Hutts v. Hutts, 51 Ind., 581.

10. In an action for libel against a newspaper, the publication of similar libels upon other persons may be shown, as the recklessness which might be inferred therefrom would be a ground for increased damages. Gibson v. Cincinnati Enquirer, 2 Flip. C. Ct., 121.

11. Upon the trial of an action for slander, evidence of everything that was said and done upon the occasion when the slanderous words were spoken is competent. Dalton v. Gill, 25 Hun (N. Y.), 120.

12. On the trial of an action for slander in charging the plaintiff with burglary, it may be shown that defendant caused plaintiff's arrest and then refused to prosecute. Plummer v. Johnson, 70 Wis., 131.

13. In the absence of an allegation of any local or provincial meaning in the words spoken, the speaking and attendant circumstances should be detailed to the jury, and they should be allowed to judge of the meaning. A question to a witness, as to the state of feeling between the parties, must refer to the time of the slanderous speaking. Justice v. Kirlin, 17 Ind., 588.

14. Statements similar to those complained of, made by defendant about the same time, may be shown in evidence. Hanners v. McClelland 74 Ia. 318, 37 N. W. Rep., 389.

15. A complaint alleged the commission of a certain larceny, and that defendant said of the plaintiff: "He is the man that took the money; I know it." A witness to the speaking was further asked what the defendant meant, and answered: "I suppose he meant that A. was the man who stole the money." *Held*, that the admission of this evidence, if not strictly correct, yet did not prejudice the defendant. Justice v. Kirlin, 17 Ind., 588.

16. In an action for publishing statements that plaintiff was suffering from overwork, that his mental condition was not good, and that there had been trouble in the affairs of the bank (of which plaintiff was teller), occasioned by plaintiff's mental derangement, and that plaintiff's statements, when he was probably not responsible for them, had caused bad rumors, evidence of the existence of rumors of statements of the bank's solvency, made by plaintiff, is admissible, as it does not tend to justify the publication, but tends to prove the truth of a part of it. Moore v. Francis, 3 N. Y. S., 162, 50 Hun, 604.

17. A plaintiff charged that defendant's language accused him of a larceny. The defendant pleaded justification, and showed by a witness that he had received one of the stolen bills from the plaintiff, who had taken it

back on request. *Held*, that the plaintiff might prove that this witness, when first asked where he got the bill, named another person than the plaintiff. Justice v. Kirlin, 17 Ind., 588.

18. Evidence that there had been a "run" on the bank, and that defendants, who were publishers of a newspaper, on making inquiries on the subject, as one of public interest, received from the bank officers statements on the strength of which the publication was made, with the object of allaying public excitement in regard to the condition of the bank, is admissible in mitigation of damages. Evidence of plaintiff's actions four weeks after the publication is admissible on the question of his condition at the time. Moore v. Francis, 3 N. Y. S., 162, 50 Hun, 604.

19. Evidence is admissible to show in what sense the slanderous words were understood by a witness who heard them. Burton v. Holmes, 16 Iowa, 252.

20. Confidence between the witness and the defendant, an injunction of secrecy, etc., are no objection to the proof of the publication of the slander. McGowen v. Manifee, 7 T. B. Mon. (Ky.), 314.

21. In an action of slander it appeared that the defamatory words consisted in a charge of burglary, and were spoken to an officer with the order to arrest plaintiff; that defendant afterwards refused to make complaint, but requested the officer to prefer a charge of vagrancy. The plaintiff introduced evidence to show how long he was kept in jail by reason of the charges. *Held*, that the evidence was admissible as tending to show malice on the part of the defendant. Plummer v. Johnsen, 70 Wis., 131, 35 N. W. Rep., 334.

22. The testimony of a senator of the United States that the plaintiff's nomination had been rejected by the senate was held admissible evidence in an action of slander by the plaintiff for words spoken by which such nomination was rejected, the plaintiff having applied to the senate for the removal of the injunction of secrecy and having failed in his application. Law v. Scott, 5 Har. & J. (Md.), 438.

23. Under a count alleging generally that the defendant charged the plaintiff with the crime of theft, it is competent for the plaintiff to give in evidence any words which, although in their ordinary sense doubtful or even innocent, can be shown by the aid of averments and innuendoes, under the circumstances, to be equivocal or ironical, and to be intended by the defendant and understood by the hearer to impute such crime to the plaintiff. Pond v. Hartwell, 17 Pick. (Mass.), 269.

24. Whatever may have occurred at or near the time as a provocation for the speaking of words claimed to constitute slander may be given in evidence in mitigation of damages. Ritchie v. Stenius, 73 Mich., 563, 41 N. W. Rep., 687.

25. A bill of particulars was filed by a plaintiff in an action of slander, in which the declaration contained three counts, alleging that the defendant, on three different days, charged the plaintiff with a certain offense. The defendant gave notice that he should hold the plaintiff to rely, as the substantive ground of action, upon the first three conversations of the defendant which might be proved, and which might impute to the plaintiff the offense alleged in the counts to have been charged upon the plaintiff. The

first witness called by the plaintiff stated a conversation with the defendant in which he imputed to the plaintiff such offense. The plaintiff's counsel immediately stated that they did not rely upon that conversation to prove either of the counts, but that they relied upon a subsequent conversation of the defendant in the hearing of the witness. *Held*, that the plaintiff might waive the testimony which the witness had given, and was entitled to his testimony as to a subsequent conversation of the defendant. Clark v. Munsell, 6 Metc. (Mass.), 373.

26. In an action for slander, not by direct terms, but by expressions, gestures and intonations of the voice, it is competent for witnesses who heard the expressions to state what they understood the defendant to mean by them, and to whom he intended to apply them. Leonard v. Allen, 11 Cush. (Mass.), 241.

27. Section 272 of the Kansas act regulating crimes and punishments, which places upon the defendant in a prosecution for libel the burden of showing that the publication of the alleged libel was made with good motives before there can be an acquittal, violates section 11 of the bill of rights, which provides that in actions for libel the truth may be given in evidence, and the accused shall be acquitted if it was published for justifiable ends. State v. Verry, 36 Kan., 416, 13 Pac. Rep., 838.

28. In an action for accusing another of the crime of false swearing, the evidence to sustain the suit must be sufficient, from the words spoken, to show that the crime of perjury was charged. Butterfield v. Buffum, 9 N. H., 156.

29. A witness in possession of a key to the reports of a mercantile agency may be allowed, in an action for libel, to explain what was indicated by reporting a merchant's standing "in blank," which constitutes the alleged libel. Bradstreet Co. v. Gill, 72 Tex., 115, 9 S. W. Rep., 753.

30. Where false testimony is charged as to any particular matter testified to in a suit, and nothing appears at the time to show but it may have been material to the issue in which it was so understood and received by him, the testimony will be regarded as material, and the words will be sufficient to show a charge of the crime of perjury. Nor can such a charge be subsequently avoided in the action for damages by showing that the evidence in the particular complained of was immaterial. Butterfield v. Buffum, 9 N. H., 156.

31. In an action for libel the defendant, under Conn. R. S. 1888, § 1116, may give evidence of his intent in making the publication, for the purpose of showing that it was without malice; and this includes the right to show that the libelous language charged was rendered so by a mistake in punctuation. Arnott v. Standard Ass'n, 3 L. R. A., 69; 57 Conn., 86.

32. All the circumstances connected with the words spoken must go to the jury, such circumstances going in aggravation or mitigation of damages. Cook v. Barkley, 2 N. J. L. (1 Pen.), 169.

33. In an action for slander evidence of the financial standing of the defendant is admissible on behalf of the plaintiff. Barkly v. Copeland, 74 Cal., 1.

34. The words spoken are to be taken in their natural meaning and ac-

cording to common acceptation. Carroll v. White, 33 Barb. (N. Y.), 615; Fallenstein v. Boothe, 13 Mo., 427.

35. In an action for slander for charging plaintiff with perjury in giving testimony in a certain action, evidence that plaintiff was sworn in such action and gave testimony, and that defendant charged him with having committed perjury therein, is material. Davis v. Davis, 3 Pick. (Tenn.), 200, 10 S. W. Rep., 363.

36. In a suit for accusing the plaintiff of altering a policy of insurance issued to him by the officers of the insurance company, at the trial he produced the policy and proved the signature of the secretary, and also produced a receipt, signed by the defendant as agent of the company, admitting the payment to him by the plaintiff of a sum of money for an assessment on account of the policy, referring to it by its number; but he was unable to prove the signature of the president to the policy. *Held*, that the policy was sufficiently proved to be admissible. Van Alen v. Bliven, 4 Den. (N. Y.), 455.

37. In an action for slander for charging the plaintiff with being interested with an alleged confederate in stealing cattle, evidence of an attempt made by the plaintiff to induce his confederate to steal other cattle, in fulfillment of a general understanding between them for the theft of cattle, is admissible in support of a plea of justification, as tending to show the relation existing between them. Barkly v. Copeland, 74 Cal., 1.

38. Other slanderous words besides those laid in the accusation, which were used in the same conversation, may be given in evidence, not to affect the damages, but to give character to the words charged. The whole conversation of the party at the time is admissible on this point. Coleman v. Playsted, 36 Barb. (N. Y.), 26.

39. In an action for slander for falsely accusing the plaintiff of being the father of a bastard child, evidence of a contract made by defendant with the town where the child had a settlement, by which defendant agreed to save the town from expense on account of the child in consideration of a forbearance of legal proceedings against him, is competent on behalf of plaintiff, as an admission by defendant and otherwise. Page v. Merwin 54 Conn. 426, 8 Atl. Rep., 675.

40. A variation between the words proved and the words charged will not authorize a nonsuit of the plaintiff (as would have been the case before the code); but the admission by the court of the evidence acts as an amendment of the complaint on trial, which, if made by regular amendment, would be at the discretion of the court, and not reviewable on appeal. Coleman v. Playsted, 36 Barb. (N. Y.), 26.

41. Where there had been a quarrel between A. and the father of B., who has been accused of stealing a tray of biscuits, and A. said in the hearing of B. and other persons that if they did not look out he would make the tray of biscuits roar, *held*, in an action of B. against A., that averments should have been laid in the declaration connecting B. with this language of A., and that the evidence of the understanding of those present was admissible in support of those averments. Briggs v. Byrd, 11 Ired. (N. C.) L., 353.

42. For the purpose of showing the absence of an improper or unjustifiable motive for the publication of an alleged libel, defendant may show that he derived his information from articles in newspapers previously given to the public, and may give such articles in evidence before the jury. Arnott v. Standard Ass'n, 3 L. R. A., 69; 59 Conn., 86.

43. It is competent for the plaintiff to prove that after the time when the theft was alleged to have been committed the defendant continued upon friendly terms with him. Burton v. March, 6 Jones (N. C.), L., 409.

44. Upon a trial for libel, evidence showing the provocation given by plaintiff for the retaliatory and vindictive utterances constituting the libelous matter is competent under the code of North Carolina, section 266. Knott v. Burwell, 96 N. C., 272, 2 S. E. Rep., 588.

45. The plaintiff may give evidence of slanderous words of the same import as those laid in the declaration though spoken at other times. Shock v. M'Chesney, 2 Yeates (Pa.), 473.

46. In an action for libel by charging plaintiff with fraudulently appropriating money of an insurance society of which he was an officer, defendant may show the society's business methods as tending to show that it was possible for plaintiff to appropriate the funds. Mosier v. Stoll, 119 Ind., 244, 20 N. E. Rep., 752.

47. On a declaration in slander consisting of a single count, in which the slanderous words were alleged to have been uttered by the defendant "on the 1st day of November, 1856, and on divers other days and times before the purchase of the plaintiff's writ," *held*, that the plaintiff might, in support of his action, prove a single uttering of slander by the defendant on any day prior to the date of the writ. Rice v. Cotrel, 5 R. I., 340.

48. Circulars issued by the officers of the society showing that money was falsely accounted for were competent in mitigation of damages under a general denial, as tending to show a corrupt scheme which defendant attempted in good faith to expose. Mosier v. Stoll (Ind.), 20 N. E. Rep., 752.

49. The statements of the defendant subsequent to the bringing of the action are admissible against him to show that he spoke the words charged, or to explain his meaning in speaking them. Witcher v. Richmond, 8 Humph. (Tenn.), 473.

50. In an action for charging the plaintiff with being interested with an alleged confederate in selling certain cattle, evidence is admissible on behalf of the defendant of a conversation had between the confederate and a third person in reference to the stolen cattle, when it appears that the plaintiff used such third person as a medium of communication between himself and his confederate. Barkly v. Copeland, 74 Cal., 1.

51. It is not necessary to prove all the words charged, provided such of them are proved as constitute the charge alleged in the declaration. Hancock v. Stephens, 11 Humph. (Tenn.), 507.

52. The pleadings in the action on the cashier's bond are admissible on the trial of an action by the teller against the bank for libel based on statements made on the pleadings. Moore v. Manufacturers' Nat. Bank, 4 N. Y. S., 378.

53. Witnesses, under proper qualifications, may state their understand-

ing as to whom the words were applied. Tompkins v. Wisener, 1 Sneed (Tenn.), 458; Smayley v. Stark, 9 Ind., 386.

54. Evidence of the loss of the libelous paper declared upon may be given, and the plaintiff, having established that fact, may then proceed as in other civil actions to prove by secondary evidence the making, contents and publication of the paper. Gates v. Bowker, 18 Vt., 23.

55. Testimony of witnesses that a certain report of an accusation by the defendant against the plaintiff was heard by them is admissible if the report was heard after the time the accusation was made by the defendant, it being understood that the report was that the defendant had made the accusation. Evidence will be admitted to show the effect of the slander on the plaintiff. Nott v. Stoddard, 38 Vt., 25.

56. A letter stating that the writer had heard of a slanderous report with regard to the plaintiff is good evidence to prove the circulation of the report, but not to prove that the defendant circulated the report. Schwartz v. Thomas, 2 Wash. (Va.), 167.

(2) WHAT EVIDENCE IS NOT ADMISSIBLE IN ACTIONS FOR DEFAMATION.

1. A. and B., as husband and wife, sued C. for words spoken. They proved their marriage. Declarations made by the wife, B., to the effect that previous to her marriage to A. she had been married to another man, were admitted in evidence in favor of C. to show the marriage with A. invalid. *Held*, that the law, under such circumstances, would presume, in favor of the innocence of B. in contracting the second marriage, that the first marriage had been dissolved by death or decree of divorce. Klein v. Landman, 29 Mo., 259.

2. In an action for slander plaintiff testified that at and for some time prior to the cause of action she was living with her sister, Mrs. P.; that she had been working out, but had to come and help her sister, as P.'s health had failed and they could not get along without her; also, that defendant closed up a fence so that they could not get a team in, and plaintiff had to spade up the garden, cabbage patch, etc. *Held*, that the evidence, so far as it showed the sickness of P., and dependence of his family on the services of plaintiff, and closing the fence and spading the garden, was irrelevant and incompetent, as tending to excite sympathy and increase the damages. Perrine v. Winter 73 Iowa 645, 35 N. W. Rep., 679.

3. In a libel suit plaintiff may not introduce witnesses to testify to his general character in advance of other testimony. Ætna Life Ins. Co. v. Paul, 23 Ill. App., 611.

4. It is not proper for the defendant, on the trial of an action for slander, to prove that about the time of the commencement of the action the plaintiff said she intended to bring suits against the defendant and prosecute them until she broke him up. Liffrant v. Liffrant, 52 Ind., 273.

5. Where the words charged in the declaration as slanderous have a fixed and unambiguous meaning, it is not competent for a witness to say he understood the speaker to mean differently from the common import of such words. Pitts v. Pace, 7 Jones (N. C.), L., 558.

6. In actions for slander evidence may be introduced showing the occu-

pation of plaintiff, and the rank and condition in life of either party, in aggravation or mitigation of damages, but not beyond this. Perrine v. Winter, 73 Iowa, 645, 35 N. W. Rep., 679.

7. On a trial for defamation it is not competent to prove that the words were "spoken of and concerning" the plaintiff. The innuendo cannot be aided by the opinion of the witness as to the person meant by the defendants. Rangler v. Hummel, 37 Pa. St., 130.

8. Defendant published a libel on plaintiff in reply to a card published by him, and on the trial defendant offered to show plaintiff's reputation "for meddling and making insinuations in regard to his competitors in business." *Held* that, as there was nothing in either publication to call for such proof, it was properly refused. Massuere v. Dickens, 70 Wis., 83, 35 N. W. Rep., 349.

9. Evidence that the slanderous words were used in a sense different from their natural one is not competent, unless accompanied with proof that such different meaning was explained at the time they were uttered. Dempsey v. Paige, 4 E. D. Smith (N. Y.), 218.

10. In an action for a libel expressed in ordinary language, witnesses should not be allowed to testify as to the meaning which they understood the libel to convey, or that they understood it to apply to the plaintiff an offensive term found in the article. Gribble v. Pioneer Press Co., 37 Minn., 277, 34 N. W. Rep., 30.

11. If slanderous words are laid as spoken in the third person, proof that they were spoken in the second person is not admissible. M'Connell v. M'Coy, 7 Serg. & R. (Pa.), 228.

12. In an action for libel the allegations of the answer that the matters contained in the publication are true are not admissible on plaintiff's behalf as a republication. Young v. Kuhn, 71 Tex., 645, 9 S. W. Rep., 860.

13. The understanding of the by-standers cannot be shown to make slanderous words, which as stated in the declaration are not so, *per se* actionable. The plaintiff, to show malice, proved an admission of the defendant as to a conversation with the defendant's brother, and the defendant, to rebut the inference of malice, was allowed to show what he actually did say, and the circumstances of the conversation. Smith v. Gafford, 33 Ala., 168.

14. Evidence that the defendant had spoken like words after the commencement of the suit is not admissible. Holmes v. Brown, Kirby (Conn.), 151.

15. In an action for libel, evidence of defendant's financial circumstances is incompetent, either to show the influence his libel would be likely to have, or to guide the jury in assessing exemplary damages. Young v. Kuhn, 71 Tex., 645, 9 S. W. Rep., 860.

16. In an action for words used which broke off a marriage contract between the plaintiff and another, a conversation between the one who contracted marriage with the plaintiff and a third person, it not being offered to support the testimony of the former, who had been sworn as a witness, is not admissible in evidence. Moody v. Baker, 5 Cow. (N. Y.), 351.

17. Under the Maryland statute, allowing the truth to be given in evidence under the general issue in cases of libel, evidence that the defendant

was honestly mistaken in the facts leading to the publication complained of is inadmissible. Richardson v. State, 66 Md., 205, 7 Atl. Rep., 43.

18. It is inadmissible to inquire of witnesses how they understood the words charged as slanderous; the words are to be construed according to their common acceptation. Wright v. Paige, 36 Barb. (N. Y.), 438.

19. Evidence of witnesses who have no superior knowledge in the premises, as to their understanding as to what was charged by an alleged libelous publication, is inadmissible. Republican Pub. Co. v. Miner, 12 Colo., 77, 20 Pac. Rep., 345.

20. Where one threatened with a suit for slander gave a sum of money to another to indemnify him against loss by such a suit, and to that end took from such party a bond in a penalty conditioned to save him harmless, *held*, such bond and arrangement were not competent as an admission of defendant's guilt. Words spoken after an action brought cannot be brought into the aid of doubtful or ambiguous words so as to give them the character of slander. Lucus v. Nichols, 7 Jones (N. C.), L., 32.

21. Evidence that after the time of an alleged slander similar statements to those alleged to have been made by defendant were made by third persons is inadmissible, either on the question of malice or damages. Austin v. Bacon, 3 N. Y. S., 587, 19 N. Y. St. Rep., 662.

22. In an action for saying that the plaintiffs had sworn to a lie in giving their testimony in a certain suit, it appeared that the suit was trespass to try titles, and that the witnesses testified that the defendant in that suit had a field of cotton on the disputed land which would have made three bales, and which was ungathered at the time of the trial. *Held*, that the testimony was not material to the issue in the action to try titles, and that the action of slander could not be maintained. Wilson v. Cloud, 2 Spears (S. C.), 1.

23. In an action for a libel not based on the publication of what purported to be a fair and full report of a trial, but upon an iteration of a further charge after an acquittal upon such trial, evidence that the published report of the proceedings was fair and full is not admissible to show the truth of the charges. Evidence of the amount of property owned by defendant in an action of libel is not admissible. Where the truth of the charges is pleaded in an action for libel, the plaintiff cannot read the answer in evidence as a republication to show malice. Young v. Kuhn, 71 Tex., 645, 9 S. W. Rep., 860.

24. Where the proof sought to be made was that the slander was uttered and published by an affidavit, made by the defendant before a magistrate, imputing to the plaintiff the offense of hog-stealing, and the only evidence of the existence of the affidavit was an imperfect memorandum of it in the handwriting of the magistrate, who was alive and out of the state, and there was no sufficient proof of its being, in whole or in part, a copy, *held*, that the evidence was not sufficient to sustain the action. Sanders v. Rollinson, 2 Strobh. (S. C.), 447.

25. In an action for slander, evidence of the pecuniary condition of the plaintiff, for the purpose of increasing vindictive damages, is inadmissible. Reeves v. Winn, 97 N. C., 246, 1 S. E. Rep., 448.

26. The testimony of a witness who is unable to say whether the words

were spoken before or after the commencement of the suit is inadmissible. Scovell v. Kingsley, 7 Conn., 284.

27. Where a witness is called to testify as to the general reputation of a party for chastity, his examination in chief should be confined to general reputation, and not as to what particular persons, or how many, the witness may have heard speak of the person whose reputation is sought to be attacked. Brooks v. Dutcher, 24 Neb., 300, 36 N. W. Rep., 128.

28. Where pleas of justification are pleaded and withdrawn they are no longer a part of the proceedings, and therefore not legal evidence to the jury. Gilmore v. Borders, 3 Miss. (2 How.), 824.

29. Witnesses cannot be allowed to state the impression the words used made upon their minds; but they must state positively, or as near as memory will allow, the exact words. Teague v. Williams, 7 Ala., 844.

30. On trial for libel a witness testified that he heard the printer of the alleged libel say that defendant "had given him only twenty minutes to do the job in." *Held*, that such declaration was hearsay and inadmissible. McKinstry, McFarland and Thornton, JJ., dissenting. People v. Thornton, 74 Cal., 482, 16 Pac. Rep., 244.

31. Evidence of the plaintiff's poverty is irrelevant and inadmissible. Pool v. Devers, 30 Ala., 672.

32. In an action for slander for accusing plaintiff of burning defendant's barn, where the pleadings do not raise the question whether plaintiff burnt it or not, evidence of threats and remarks by plaintiff that the barn would be burnt are admissible only by way of impeachment, or, if communicated to defendant before he uttered the words complained of, in mitigation of damages; and it is error for defendant's counsel, in arguing the case to the jury, to state that they showed that plaintiff burned the barn. Hitchcock v. Moore, 70 Mich., 112, 37 N. W. Rep., 914.

(3) Evidence of Character.

1. The plaintiff cannot offer evidence of his general good character to disprove the truth of the words, nor to support his own character until it is attacked by the defendant. The defendant may attack the general character of the plaintiff, in respect to the subject-matter of the charge, in order to reduce the damages. Wright v. Schroeder, 2 Curt., 548; Rhodes v. James, 7 Ala., 728; Matthews v. Huntley, 9 N. H., 146; Springstein v. Field, Anth. (N. Y.), 185; Her v. Cromer, Wright (Ohio), 441; Severance v. Hilton, 24 N. H. (4 Fost.), 147; Shipman v. Burows, 1 Hall (N. Y.), 399; Tibbs v. Brown, 2 Grant (Pa.) Cas., 39; Chubb v. Gsell, 34 Pa. St., 114.

2. In actions of slander or libel based on charges imputing crimes, where a justification is pleaded and evidence introduced to sustain it, it is proper for the plaintiff to prove his general character in rebuttal. Downey v. Dillon, 52 Ind., 442.

3. Under the plea of the general issue only, while the plaintiff's general character may be assailed, neither particular reports nor the general currency of the particular charge can be given in evidence. Pease v. Shippen, 80 Pa. St., 513.

3a. The rule in relation to proof of the character of the plaintiff is that the inquiry must be made as to his general reputation where he is best

known, and the witnesses ought ordinarily to come from his neighborhood. But what the extent of his neighborhood is, and what credit is to be given to the witnesses near and remote, are questions for the jury in determining the general character of the person in question. Powers v. Presgroves, 36 Miss., 227.

4. Where the defendant pleads the truth in justification, the plaintiff may give his own character in evidence. Harding v. Brooks, 5 Pick. (Mass.), 244; Byrket v. Monohan, 7 Blackf. (Ind.), 83; Smith v. Lovelace, 1 Duv. (Ky.), 215.

5. A *feme sole* brought an action for words charging her with fornication and adultery. The pleas were not guilty, and that the words were true. *Held*, that the defendant might prove, in mitigation of damages, the plaintiff's general character as to chastity to be bad; and that evidence of the plaintiff's character was inadmissible until there had been an attempt by evidence to impeach it. M'Cabe v. Platter, 6 Blackf. (Ind.), 405.

6. A witness was asked what was the character of the plaintiff for chastity among the majority of her neighbors with whom he had conversed. *Held*, that such evidence was inadmissible. Adams v. Harmon, 3 Nev., 222.

7. In an action on the case for slander in accusing the plaintiff of unchasteness, where the witness deposes that the plaintiff's character for chastity is bad, it is not necessary that the witness should first be asked whether he knew the plaintiff's general character for chastity. Senter v. Carr, 15 N. H., 351.

8. Character being put in issue in an indictment for libel, the plaintiff may give evidence of his character before it is attacked by the defendant. Romayne v. Duanes, 3 Wash., 246.

9. Evidence of the general character of the plaintiff in an action for slander is admissible. Waters v. Jones, 3 Port. (Ala.), 442; Seymour v. Merrils, 1 Root (Conn.), 459; Sheahan v. Collins, 20 Ill., 325; Burton v. March, 6 Jones (N. C.), L., 409; Moyer v. Moyer, 49 Pa. St., 210.

10. A defendant may give in evidence the general bad character of the plaintiff in an action of slander, but may not prove any specific act. Vick v. Whitfield, 2 Ohio, 232; Dewit v. Greenfield, 5 Ohio, 225; Fitzgerald v. Stewart, 53 Pa. St., 343.

11. The plaintiff may give evidence of his general good character although not attacked by evidence on the part of the defendant. Williams v. Haig, 3 Rich. (S. C.), 362; Sample v. Wyann, Busb. (N. C.) L., 319; Shroyer v. Miller, 3 W. Va., 158.

12. The plaintiff's general character upon the trait involved in the charge is put in issue and may be proven; but his general character upon traits not involved in the charge or special charges, or other crimes or suspicions or rumors, are not admissible. Lambert v. Pharis, 3 Head (Tenn.), 622; S. P. B. v. I., 22 Wis., 372.

13. The defendant offered to prove the general character of the plaintiff under objection made by plaintiff's counsel. The witness was allowed to testify as to his general character. After the testimony was closed the presiding judge withdrew all the testimony touching his general character except such as impeached his character for veracity. *Held*, that the court

had the right to withdraw illegal testimony at any time before the verdict. Birchfield v. Russell, 3 Coldw. (Tenn.), 228.

14. Reports that the plaintiff swore to a lie or lies, in a distant county, cannot properly be submitted to a jury in an action for slander as elements from which a jury are to make up an estimate of their own of the character of the plaintiff. A jury, in estimating character, are to make the testimony of witnesses who are supposed to be able or capable of reflecting, in general terms, the judgment of the public. Luther v. Skeen, 8 Jones (N. C.), L., 356.

15. In an action for charging the plaintiff with theft, the defendant cannot be permitted to prove the general character of the plaintiff as an insulting, provoking, quarrelsome man; nor that, before the speaking of the slanderous words, the plaintiff was in the habit of vilifying, provoking and insulting him and his family. M'Alexander v. Harris, 6 Munf. (Va.), 465.

16. In an action for charging the plaintiff with perjury, the plaintiff proved the speaking of the words charged, and then asked the witness what was his (the plaintiff's) general character when on oath and when not on oath, as a man of truth. The witness answered the question favorably to the plaintiff. The defendant's counsel then, in cross-examining the witness, asked him what was the plaintiff's general moral character, and the plaintiff objected to the question. It was held that the question ought to have been answered, because it was on cross-examination, and because the answer might furnish evidence in mitigation of damages. Lincoln v. Chrisman, 10 Leigh (Va.), 338.

17. Proof of the character of the plaintiff subsequent to the speaking of the words is not admissible, although the character offered to be proved is of such a description as that it could not have been caused by the speaking of the words. Douglass v. Tousey, 2 Wend. (N. Y.), 352.

18. Under a general denial the plaintiff's general bad character cannot be proved. Anonymous, 6 How. (N. Y.) Pr., 160.

19. In an action for charging a man with keeping a house of prostitution it is not competent to introduce testimony proving the bad conduct or bad reputation for chastity of the plaintiff's daughter, unless evidence follows that the father knew and approved of such conduct. R—— v. M——, 21 Wis., 50.

20. The general bad character of the plaintiff may be given in evidence under the general issue in mitigation of damages, notwithstanding the defendant may have also interposed the plea of justification. Pope v. Welsh, 18 Ala., 631; Young v. Bennett, 5 Ill. (4 Scam.), 43.

21. The general character of the plaintiff may be inquired of with respect to the crime charged by the words where the plaintiff has set up his character to be good. Brunson v. Lynde, 1 Root (Conn.), 354.

22. Where the defendant introduces evidence of the truth of the alleged slander without, however, attempting to impeach plaintiff's general good character, witnesses on this point cannot be introduced by the plaintiff. Miles v. Vanhorn, 17 Ind., 245.

23. Where, in an action for words imputing the crime of larceny, the defendant does not justify the speaking, and offers no evidence impeaching the plaintiff's character, evidence of the plaintiff's good character is not admissible. Hann v. Wilson, 28 Ind., 296.

24. Under the general issue, evidence of the good character of the plaintiff is admissible, it being put in issue by the nature of the proceedings. Bennett v. Hyde, 6 Conn., 24; Sayre v. Sayre, 25 N. J. L. (1 Dutch.), 235.

25. The defendant cannot introduce evidence of what two or three persons had said in relation to the character of the plaintiff. Regnier v. Cabot, 7 Ill. (2 Gilm.), 34.

26. The plaintiff's general character is open to inquiry on the question of damages; but it is not competent for the defendant in such an action, on a plea of justification, to prove particular reports injuriously affecting it, nor a general report that the plaintiff was guilty of the particular crime charged him by the defendant. Wolcott v. Hall, 6 Mass., 514; Alderman v. French, 1 Pick. (Mass.), 1.

(4) The Burden of Proof.

1. In actions for oral slander the burden of proof is upon the plaintiff to prove only as many of the words complained of as will support his action. Whiting v. Smith, 13 Pick. (Mass.), 364; Purpla v. Horton, 13 Wend. (N. Y.), 9; Loomis v. Swick, 3 Wend. (N. Y.), 205; Wheeler v. Robb, 1 Blackf. (Ind.), 330; Chandler v. Holoway, 4 Port. (Ala.), 17; Nichols v. Hays, 13 Conn., 155; Nestle v. Van Slyck, 2 Hill (N. Y.), 282; McKee v. Ingalls, 5 Ill. (4 Scam.), 30; Scott v. Renforth, Wright (Ohio), 55.

2. If to a plea of the statute of limitations the plaintiff reply that the words were spoken within the prescribed time, he must prove the speaking of some of the actionable words within that time. Huston v. McPherson, 8 Blackf. (Ind.), 662.

3. For words spoken respecting the plaintiff's trade, if the words assume that at the time they were spoken the plaintiff was engaged in such trade, there is no need of proving that fact. Heslerr v. De Gantt, 3 Ind., 501.

4. Where, in an action for slanderous words imputing the crime of perjury, the defendant justified the speaking of the words, he must prove not only the falsity of the affidavit or testimony, but also that the statements were made wilfully, corruptly and against the better knowledge of the witness. Perjury cannot be predicated of a statement which is, according to the belief and conviction of the person making it, though he may have recklessly sworn to what he, if more cautious, might have learned to be false. Tull v. David, 27 Ind., 377.

5. The burden of proof is on the plaintiff to show that the words were spoken within two years before the suing out of his writ. Pond v. Gibson, 5 Allen (Mass.), 19.

6. In slander, where the words are not actionable in themselves, but become so by the circumstances under which they are spoken, these circumstances must be averred and proved by the plaintiff; and the best evidence must be produced. Thus, in an action for charging the plaintiff with swearing falsely before arbitrators, where the submission was by bonds, the plaintiff must show that the magistrate administering the oath had jurisdiction, and prove the materiality of the testimony; and he cannot prove the submission by parol, but must produce the bonds. Bullock v. Koon, 9 Cow. (N. Y.), 30.

7. Where the defendant is charged with having spoken perjury in relation to a particular transaction, as in giving testimony as a witness in a cer-

tain cause, the plaintiff is bound to prove the words as laid, and is not at liberty to give evidence of a general charge of perjury. Aldrich v. Brown, 11 Wend. (N. Y.), 596.

8. Where, in slander for false swearing, the words are not in themselves actionable, the plaintiff must show that the words uttered were material to the point at issue in the cause. Power v. Price, 12 Wend. (N. Y.), 500; 16 Wend. (N. Y.), 450; Wilber v. Ostrom, 1 Abb. (N. Y.) Pr. (N. S.), 275.

9. For charging a person with perjury in testifying as a witness on the trial of a cause, the plaintiff is bound to show that the evidence charged to be false was material to the issue. Roberts v. Champlain, 14 Wend. (N. Y.), 120; Hutchins v. Blood, 25 Wend. (N. Y.), 413.

10. A declaration stated a complaint before the grand jury, and that the plaintiff was sworn and gave evidence upon such complaint, and contained a colloquium concerning the evidence so given, and charged the defendant with having spoken words in themselves imputing perjury to the plaintiff in giving such testimony. It was held that the action could not be sustained without proof of such proceedings before the grand jury. Emery v. Miller, 1 Denio (N. Y.), 208.

11. Where the defendant justifies a charge of perjury, he must prove all the particulars which constitute the crime of perjury, viz.: 1. The deliberate deposition. 2. The lawfully administered oath. 3. The judicial proceeding. 4. The absoluteness of the matter testified to. 5. Its materiality to the point in question, direct or collateral; and 6. Its falsity. Hopkins v. Smith, 3 Barb. (N. Y.), 599.

12. In an action for charging the plaintiff with perjury, committed in testifying as a witness on a trial in a justice's court, the plaintiff is not bound to show affirmatively the materiality of his testimony on the trial before the justice; but the law will presume that the testimony was material unless the defendant proves the contrary. Coons v. Robinson, 3 Barb. (N. Y.), 625.

13. In an action for the speaking of words not actionable in themselves by the defendant of the plaintiff, the plaintiff alleging, by way of special damages, loss of health and consequent inability to attend the business, it is incumbent on him to show that such loss and inability were exclusively in consequence of the words spoken by the defendant. Terwilliger v. Wands, 25 Barb. (N. Y.), 313.

14. The burden of proving malice is on the plaintiff. If the words are such that the inference of malice may reasonably be drawn from them, they should be submitted to the jury; otherwise if the language would not warrant the inference. In that case the court should direct a nonsuit or dismissal. Little v. Hodges, 2 Bosw. (N. Y.), 537.

15. It appeared from the evidence on the part of the plaintiff that he testified as a witness on the trial in which the false testimony was said to have been given by him, but there was no evidence that he was there sworn as witness, except as it was to be inferred from his having testified. It was held that the fact that he testified tended to prove that he was sworn, and that, in the absence of evidence to the contrary, no further proof of his having been sworn was necessary. Cass v. Anderson, 33 Vt., 183.

16. If the defendant would avail himself, in mitigation of damages of

the fact that at the time he told the injurious story he mentioned the name of the author, it must not only appear that he did so mention the author, but the burden is thrown upon him to show by proof that he did so receive the story. Rice v. Cottrell, 5 R. I., 340.

17. The words for which an action was brought were, "that the plaintiff had sworn falsely, in a trial before a justice of the peace, as to an account in his favor against the defendant." It was held that the plaintiff was not bound to show that the justice of the peace was duly commissioned. Pugh v. Neal, 4 Jones (N. C.), L., 367.

18. Where it appears that a defendant, authorized by his relations to the party addressed to make a "privileged communication," in professing to do so makes a false charge, the inference of malice is against him, and the burden is put on him to show that he acted in good faith. Wakefield v. Smithwick, 4 Jones (N. C.), L., 327.

19. In an action charging the plaintiff with perjury, the defendant, to show the truth of the charge, must not only show that the plaintiff testified to what was untrue, but must also show that he testified to what was false, corruptly. Chandler v. Robinson, 7 Ired. (N. C.) L., 480.

20. Where words concededly defamatory are spoken or written in judicial proceedings, and the speaker or writer claims them to be absolutely privileged, the burden of proof is upon him to show that such defamatory matter was material to the issue or inquiry before the court. Marsh v. Elsworth, 35 How. Pr., 532.

§ 62. **Defendant's Evidence — General Digest of American Cases.—**

1. In an action for charging a witness with false swearing, the defendant cannot show in defense that the plaintiff was not a competent witness. Harris v. Purdy, 1 Stew. (Ala.), 231.

2. In an action for slander, reports that the plaintiff had committed the offense imputed by the words alleged, which were in circulation before the speaking of such words, are admissible only as evidence of general character. Treat v. Browning, 4 Conn., 408.

3. A written statement made at the trial by the defendant disclaiming any evil intentions towards the plaintiff cannot be given in evidence on the trial, nor sent out with the jury, although allowed by the plaintiff to be given in evidence. Hamilton v. Gleen, 1 Pa. St., 340.

4. The defendant may give in evidence under the general issue any facts tending to mitigate the damages, which he will not be permitted to do when he has pleaded the truth of the words in justification. Larned v. Buffington, 3 Mass., 546.

5. The defendant may show the words alluded to a known transaction, not amounting to a charge which the words would otherwise import. Norton v. Ladd, 5 N. H., 203.

6. Where the defendant accused the plaintiff of taking a false oath on a judicial trial, generally, it was held that it was not competent for him to show that he meant to impute falsehood only as to immaterial facts, nor that the testimony alluded to was only upon an immaterial point. Stone v. Clark, 21 Pick. (Mass.), 51.

7. The defendant may show, by the subject and the colloquium, that the design was to impute a breach of trust and not a felony, and this may be done by either evidence or a special plea. Brite v. Gill, 2 T. B. Mon. (Ky.), 65.

8. It is not competent for the defendant, in an action for slander for words uttered without any allusion to facts, the mention of which would have prevented them being actionable, to give such facts in evidence in explanation of the words. Stone v. Clark, 21 Pick. (Mass.), 51.

9. For charging the plaintiff, in the presence of "sundry persons," with perjury while giving testimony as a witness in a certain cause, it was *held* that the defendant might on the trial prove that the testimony which he gave was false; and that the plaintiff, if he meant to proceed for speaking the words on some other occasion than that named in the plea, should have new assigned. Nelson v. Bobe, 6 Blackf. (Ind.). 204.

10. In an action for words charging the plaintiff with stealing the defendant's chairs, etc., the statute of limitations was pleaded. The plaintiff proved the speaking of the words within the prescribed time; but, according to one of his witnesses, the words laid in the declaration were accompanied by explanations which showed the charge made to only amount to a breach of trust. It was *held* that evidence by the defendant that the plaintiff had committed such breach of trust was inadmissible on the ground of irrelevancy. Burk v. Miller, 6 Blackf. (Ind.), 155.

11. Where the plaintiff proved that the defendant spoke certain words of her by the name of Mrs. Edwards, the defendant was not allowed to show that in other conversations he had used similar words respecting another Mrs. Edwards. Patterson v. Edwards, 7 Ill. (2 Gilm.), 720.

12. Evidence of particular acts of hostility on the part of plaintiff's witnesses towards the defendant was *held* admissible in an action of slander to discredit their testimony. Rixey v. Bayse, 4 Leigh (Va.), 330.

CHAPTER XXV.

NONSUIT.

§ 1. **The Term Defined.**— Nonsuit is the name of a judgment given against a plaintiff when he is unable to prove his case, or when he refuses or neglects to proceed to the trial of a cause after it has been put at issue without determining such issue. A nonsuit may be either voluntary or involuntary.

§ 2. **A Voluntary Nonsuit** is an abandonment of his cause by a plaintiff and an agreement that a judgment for costs may be entered against him.[1]

§ 3. **An Involuntary Nonsuit** takes place when the plaintiff on being called, when his cause is before the court for trial, neglects to appear, or when he has given no evidence upon which a jury can find a verdict.[2]

§ 4. **The Power of the Court to Direct a Nonsuit.**— When the evidence given at the trial, with all the inferences that the jury can justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court may direct a verdict for the defendant.[3] Where there is an absence of all evidence against the defendant on the whole issue joined, or on an essential or material part of it, a verdict for the defendant may be directed without hearing the defendant's evidence.[4] But where the

[1] Bouvier's Law Dictionary, title Nonsuit.

[2] Pratt v. Hull, 13 Johns. (N. Y.), 334.

[3] Randall v. Balt. & O. R. R. Co., 109 U. S., 478; 3 Sup. Ct. Rep., 329; 27 L. C. P. Co., 1003.

[4] Parker v. Leman, 10 Tex., 116; Everette v. Stowell, 14 Allen (Mass.), 32; Steinmetz v. Wingate, 42 Ind.,

evidence tends in any way to establish the cause of action it is error to take the case from the jury or to direct a verdict.[1]

§ 5. **When it Will be Directed.**— The court will generally direct judgment of nonsuit to be entered for the defendant:

(1) If there is no evidence that the defendant published the words at all, or (if the statute of limitations be pleaded) that he did so within the period prescribed.

(2) If there is no evidence that the words refer to the plaintiff.

(3) If the words proved are not actionable *per se*, and there is no evidence of any special damage.

(4) If the words are actionable by reason only of their being spoken of the plaintiff in the way of his office, profession or trade, and there is no evidence that the words were so spoken, or that the plaintiff held such office or exercised such profession or trade at the time of publication.

(5) If the words are not actionable in their natural and primary signification, and there is no innuendo; or if the only innuendo puts upon the words a meaning that they cannot possibly bear. If, however, it is reasonably conceivable that those addressed might by reason of any facts known to them have put upon the words the secondary meaning ascribed to them by the innuendo, then it will be a question for the jury in which meaning the words were in fact understood. Whenever the words, though primarily not actionable, are yet reasonably susceptible of a defamatory meaning, the court will not as a rule grant the motion for a nonsuit.[2] "It is only when the judge is satisfied that the publication cannot be a libel, and that, if it is found by the jury to be such, their verdict will be set aside, that he is justified in withdrawing the question from their cognizance."[3] Where the words of the libel are ambiguous, allegorical, or in any way equivocal, and

574; Mullaly v. Austin, 97 Mass., 30; Singleton v. R. R. Co., 41 Mo., 465; Rigby v. Norwood, 84 Ala., 129; McCracken v. Roberts, 19 Penn. St., 390.

[1] Drakely v. Gregg, 75 U. S., 409; Hickman v. Jones, 76 U. S., 551; Stephens v. Brook, 2 Bush (Ky.), 187; Kelsy v. Oil Co., 45 N. Y., 505; Way v. R. R. Co., 35 Iowa, 585; Memphis, etc., R. R. Co. v. Bibb, 37 Ala., 699; Hill v. Canfield, 56 Penn. St., 454.

[2] Hart v. Wall, 2 C. P. D., 146; 46 L. J., C. P., 227; 25 W. R., 373.

[3] Odgers on L. & S., 572; Kelly, C. B., L. R., 4 Exch., 288.

the jury have found that they were meant and used in a defamatory sense, the court will not set aside their verdict, unless it can be clearly shown that, on reading the whole passage, there is no possible ground for the construction put upon it by the jury.[1] But where the words are not reasonably capable of any defamatory meaning, there the judge will be right in directing a nonsuit.[2]

(6) If the occasion of publication is one of absolute privilege.

(7) If the occasion is clearly or admittedly one of qualified privilege, and there is no evidence, or not more than a *scintilla* of evidence, of malice to go to the jury. If the evidence adduced to prove malice is equally consistent with either the existence or the non-existence of malice, the judge should direct a nonsuit; for there is nothing to rebut the presumption which the privileged occasion has raised in the defendant's favor.[3]

(8) Where, however, the question of privilege involves matters of fact which are disputed, it will be for the jury to find the facts, and for the judge subsequently to decide whether on the facts so found the occasion is privileged.[4] And the judge is not bound to rule whether the occasion is privileged or not till after the defendant has called all his witnesses.[5]

§ 6. **Taking the Case from the Jury — Effect of a Plea of Justification.**— A plea of justification as a plea of confession and avoidance admits a *prima facie* case for the plaintiff, and no amount of evidence in support of such a plea will justify a court in taking from the jury the consideration of the issue under it. Evidence in support of this plea, of whatever amount and weight, necessarily raises a question of preponderance; and in no such case can the court direct a nonsuit or a finding for either party absolutely.[6]

§ 7. **Illustrations — Digest of American Cases.**—

1. It is a question for the court to decide, in the first instance, whether words alleged to have been slanderous were privileged by the occasion, as-

[1] Hoare v. Silverlock, 12 Q. B., 624; 17 L. J., Q. B., 306; Fray v. Fray, 17 C. B. (N. S.), 603; 34 L. J., C. P., 45; 10 Jur. (N. S.). 1153.

[2] Hunt v. Goodlake, 43 L. J., C. P., 54; 29 L. T., 472; Mulligan v. Cole, L. R., 10 Q. B., 549; 44 L. J., Q. B., 153; 33 L. T., 12.

[3] Somerville v. Hawkins, 10 C. B., 583; 20 L. J., C. P., 131; 15 Jur., 450; Harris v. Thompson, 13 C. B., 333; Taylor v. Hawkins, 16 Q. B., 308; 20 L. J., Q. B., 313; 15 Jur., 746.

[4] Beatson v. Skene, 5 H. & N., 838; 29 L. J., Ex., 430; 6 Jur. (N. S.), 780; 2 L. T., 378.

[5] Hancock v. Case, 2 F. & F., 710.

[6] Gault v. Babbit, 1 Brad. (Ill.), 130.

suming them to have been spoken in good faith, without malice, and in the belief that they were true; and if so privileged, then the plaintiff must show express malice in order to recover. And if there is any evidence tending to show express malice, that question should be submitted to the jury. Brew v. Hathaway, 95 Mass., 239.

2. A landlord having fallen into a dispute with his tenant as to the rent, litigation ensued, pending which the landlord posted up on a tree in the street, in front of and elsewhere upon the leasehold premises, at different points, placards in words as follows: "Waiting for G.'s house rent for lower story of No. —, So. Paulina street — several months due." Whereupon the tenant sued the landlord in case for libel, setting forth the above facts in the declaration, with the innuendo, "meaning thereby to charge the plaintiff with fraudulently withholding such rent." To this declaration at the circuit a demurrer was overruled, and the general issue pleaded, with a stipulation that under it any matter that could properly be set up under any special plea might be introduced. On the trial the court excluded evidence tending to prove the innuendo, and directed the jury to find for the defendant. *Held*, on appeal, that although the innuendo could not enlarge the real sense of the words alleged libelous, yet if, under the circumstances, such meaning could be reasonably imputed to such words, then the allegation thereof was proper. The taking of the case from the jury by an instruction was error. Gault v. Babbitt, 1 Brad. (Ill.), 130.

Voluntary Nonsuit.

3. In a suit the plaintiff may, where he has made a motion for preliminary injunction which has been denied, and no rights have been acquired by the defendant by virtue of anything done in the course of the action, have a judgment of voluntary nonsuit entered. Bynum v. Powe, 97 N. C., 374, 2 S. E. Rep., 170.

4. Where a party to an action takes a voluntary nonsuit, the appellate court will revise only such decisions of the trial court as may be necessary for the appellant to suffer the nonsuit. Wartensleben v. Haithcock, 80 Ala., 565, 1 So. Rep., 38.

5. In North Carolina, when the proofs are all in, and the judge intimates an opinion that under the old practice plaintiff cannot recover, or under the new fails to establish the issue necessary to his having judgment, he may suffer a nonsuit, and have the correctness of the ruling reviewed by appeal; and the same course may be taken when the judge announces that, if the jury believe the facts to be as testified to, he will instruct them to find the issue in favor of defendant. Tiddy v. Harris, 101 N. C., 589, 8 S. E. Rep., 227.

Involuntary Nonsuit.

6. In considering a compulsory nonsuit the court must assume the truth of plaintiff's evidence, and deduce therefrom every reasonable inference of fact in his favor that might be drawn by a jury. Jones v. Bland (Pa.), 9 Atl. Rep., 275.

7. Where a complaint is dismissed on the opening of counsel, all the facts referred to in his opening, or offers of proof, should be considered, includ-

ing facts not stated in the complaint as well as those stated, unless objection to proof of such additional facts is made on the specific ground that it is not admissible under the pleadings. Clews v. Bank of New York Nat. Banking Ass'n, 105 N. Y., 398, 11 N. E. Rep., 814.

8. Where there is some testimony tending to establish the facts necessary to the maintenance of the action a nonsuit cannot be granted, even if the court is satisfied that plaintiff, upon whose testimony the case turns, is unworthy of credit, as the question of credibility is for the jury. Hornsby v. South Carolina R'y Co., 26 S. C., 187, 1 S. E. Rep., 594.

9. Where an issue of fact is to be determined by a jury, and the evidence is conflicting or conduces to make out plaintiff's cause of action, it is improper to direct a nonsuit. Lingenfelter v. Louisville & N. R. Co. (Ky.), 4 S. W. Rep., 185.

10. A nonsuit is improperly ordered when the plaintiff has introduced any evidence which, if believed by the jury, would authorize a verdict in his favor. Eaton v. Lancaster, 79 Me., 477, 10 Atl. Rep., 446; Works v. Croswell, 10 Atl. Rep., 494.

11. Where there is evidence to support the case a nonsuit will not be granted. Black v. City of Lewiston, 2 Idaho, 254, 13 Pac. Rep., 80.

12. In Illinois, where no evidence has been offered to prove any material allegation in the declaration put in issue by the pleadings and not admitted for the purposes of the trial, or otherwise waived or dispensed with, the court will, on motion, exclude the evidence offered on other issues in the case and direct the jury to find for defendant. Continental Life Ins. Co. v. Rogers, 119 Ill., 474, 10 N. E. Rep., 242.

13. **Demurrer to Evidence.**— In considering a demurrer to the evidence the court must accept as true all facts which the evidence tends to prove, together with all such reasonable inferences as a jury might draw therefrom; and, in case there is a conflict in the evidence, only such evidence as is favorable to the party against whom the demurrer is directed can be regarded. Palmer v. Chicago, St. L. & P. R. Co., 112 Ind., 250.

14. **Waiver of Error.**— Error in overruling defendant's motion for a nonsuit is waived by the defendant offering evidence in his own behalf which supplies the defect existing in the plaintiff's proofs. Denver & R. G. R'y Co. v. Henderson, 10 Colo., 4, 13 Pac. Rep., 910.

15. After plaintiff had testified the jury was excluded and defendant moved to dismiss the action on the ground that plaintiff's testimony did not sustain her complaint. *Held* rightly overruled. The proper course was to ask the court to direct a verdict for defendant. City of Plymouth v. Milner, 117 Ind., 324, 20 N. E. Rep., 235.

§ 8. Digest of English Cases.—

1. A. died possessed of furniture in a beer shop. His widow, without taking out administration, continued in possession of the beer shop for three or four years, and then died, having whilst so in possession conveyed all the furniture by bill of sale to her landlords by way of security for a debt she had contracted with them. After the widow's death the plaintiff took out letters of administration on the estate of A., and informed the defendant, the landlords' agent, that the bill of sale was invalid, as the widow had no title to the furniture. Subsequently the plaintiff was about to sell

the furniture by auction, when the defendant interposed to forbid the sale, and said that he claimed the goods for his principals under a bill of sale. On proof of these facts, in an action for slander of title, the plaintiff was nonsuited. *Held*, that the mere fact of the defendant's having been told before the sale that the bill of sale was invalid was no evidence of malice to be left to the jury, and that the plaintiff was therefore properly nonsuited. Steward v. Young, L. R., 5 C. P., 122; 39 L. J., C. P., 85; 18 W. R., 492; 22 L. T., 168.

2. Words complained of: "We are requested to state that the honorary secretary of the Tichborne defense fund is not and never was a captain in the royal artillery, as he has been erroneously described." Innuendo, that the plaintiff was an impostor, and had falsely and fraudulently represented himself to be a captain in the royal artillery. Bovill, C. J., held that the words were not reasonably capable of the defamatory meaning ascribed to them by the innuendo, and nonsuited the plaintiff. *Held*, that the nonsuit was right. Hunt v. Goodlake, 43 L. J., C. P., 54; 29 L. T., 472.

3. The plaintiff was a certificated art master, and had been master at the Walsall Science and Art Institute. His engagement there ceased in June, 1874, and he then started and became master of another school, which was called "The Walsall Government School of Art," and was opened in August. In September the following advertisement appeared in the Walsall "Observer," signed by the defendants as chairman, treasurer and secretary of the institute respectively: "Walsall Science and Art Institute. The public are informed that Mr. Mulligan's connection with the institute has ceased, and that he is not authorized to receive subscriptions on its behalf." The declaration set out this advertisement with an innuendo: "meaning thereby that the plaintiff falsely assumed and pretended to be authorized to receive subscriptions on behalf of the said institute." At the trial Quain, J., directed a nonsuit on the ground that the advertisement was not capable of the defamatory meaning attributed by the innuendo. *Held*, that the nonsuit was right; that the advertisement was not capable of any defamatory meaning. Mulligan v. Cole, L. R., 10 Q. B., 549; 44 L. J., Q. B., 153; 33 L. T., 12.

CHAPTER XXVI.

DAMAGES.

I. General Damages.

II. Special Damages.

III. Aggravation of Damages.

IV. Mitigation of Damages.

I. General Damages.

§ 1. **General Damages** are those which the law will presume to be the natural or probable consequences of the defamatory words; they arise by inference of law and need not be proved

by evidence. Such damages may be recovered wherever the immediate tendency of the words is to impair the party's reputation, although no actual pecuniary loss has in fact resulted.

In oral defamation general damages will be presumed only in cases where the words are actionable in themselves. If any special damage has also been suffered the fact should be set out in the pleadings, and should the plaintiff fail in proving the special damage he may still recover general damages.[1]

§ 2. **General Damages** are sometimes classed as (1) *Nominal;* (2) *Substantial;* (3) *Vindictive, Punitive* or *Exemplary.*

§ 3. **(1) Nominal Damages.**— Nominal damages are generally awarded where, from all the surrounding circumstances of the case, it appears that the defendant is guilty of the charge, but that the plaintiff has not been altogether blameless, and the jury by way of mitigation reduce the amount to a mere nominal sum. And in cases where no special damages are proved and the character of the person defamed is vindicated, the jury will award him a nominal sum and his costs. And in other cases where a person has unnecessarily commenced a litigation, nominal damages seem to be proper and consistent with the policy of the law. The amount of damages is a matter for the jury, and they may find the defamation to be malicious and yet award only a nominal sum.[2]

§ 4. **Illustrations — Digest of American Cases.**—

1. In an action of slander the court instructed the jury that if the plaintiff's general character and reputation was bad his compensatory damages would be thereby lessened, and should be measured by the injury actually suffered. It was held that this instruction was a substantial compliance with the request that in such case the jury might find only nominal damages. Plummer v. Johnsen 70 Wis., 131, 31 N. W. Rep., 334.

2. Although slanderous words charging theft were spoken in the presence of only a single person, who testified that it did not affect his opinion of the plaintiff, and that he still believed the plaintiff to be honest, yet, if the words were spoken maliciously, the jury are not restricted to nominal damages. Markham v. Russell, 94 Mass., 573.

[1] Brooks v. Dutcher, 22 Neb., 644; 36 N. W. Rep., 128; Fry v. Bennett, 4 Duer (N. Y.), 247; True v. Plumley, 36 Me., 466; Swift v. Dickerman, 31 Conn., 285; Cook v. Field, 3 Esp., 133; Smith v. Thomas, 2 Bing. N. C., 372, 380; 2 Scott, 546; 4 Dowl., 333; 1 Hodges, 353; Brown v. Smith, 13 C. B., 596; 22 L. J., C. P., 151; 17 Jur., 807; 1 C. L. R., 4.

[2] Cook v. Brogden 1 Times L. R., 497.

§ 5. Digest of English Cases.—

1. The plaintiff, the proprietor of Zadkiel's Almanac, had a ball of crystal by means of which he pretended to tell what was going on in the other world. The "Daily Telegraph" published a letter which stated that the plaintiff had "gulled" many of the nobility with this crystal ball; that he took money for "these profane acts, and made a good thing of it." Cockburn, C. J., directed the jury that a newspaper might expose what it deemed an imposition on the public; but that this letter amounted to a charge that the plaintiff had made money by wilful and fraudulent misrepresentations — a charge which should not be made without fair grounds. Damages one farthing. Morrison v. Belcher, 3 F. & F., 614.

2. A medical man who had obtained a diploma and the degree of M. D. from America advertised most extensively a new and infallible cure for consumption. The "Pall Mall Gazette" published a leading article on the subject of such advertisements, in which they called the advertiser a quack and an impostor, and compared him to "scoundrels who pass bad coin." Damages one farthing. Hunter v. Sharpe, 4 F. & F., 983; 15 L. T., 421.

3. The defendants, the printers and publishers of the "Manchester Courier," published in their paper a report of the proceedings at a meeting of the board of guardians for the Altrincham Poor-law Union, at which charges were made against the medical officer of the union work-house at Knutsford of neglecting to attend the pauper patients when sent for. Such charges proved to be utterly unfounded. They were made in the absence of the medical officer, without any notice having been given him. *Held*, that the matter was one of public interest; but that the report was not privileged by the occasion, although it was admitted to be a correct account of what passed at the meeting; that it was obviously unfair to the plaintiff that such *ex parte* statements should be published in the local papers; that the editor should therefore have exercised his discretion and excluded the report altogether. Damages 40*s*. Purcell v. Sowler (C. A.), 2 C. P. D., 215; 46 L. J., C. P., 308; 25 W. R., 362; 36 L. T., 416.

4. The plaintiff, who was a Q. C. and a member of parliament, was appointed recorder of Newcastle. The defendant's paper, the "Law Magazine and Review," thereupon discussed the desirability of giving such an appointment to a member of the house of commons, and declared that it was a reward for his having steadily voted with his party. Cockburn, C. J., directed the jury that a public writer was fairly entitled to comment on the distribution of government patronage; but that he was not entitled to assert that there had been a corrupt promise or understanding that the plaintiff would be thus rewarded if he always voted according to order. Damages 40*s*. Seymour v. Butterworth, 3 F. & F., 372; Ogders on L. & S., 40.

5. Plaintiff held lands on lease from Home, which he put up for sale. Defendant, who was Home's attorney, attended and said publicly before the first lot was put up, "There is a suit depending in the court of chancery in respect to this property; encroachments have been made; proceedings will be taken against the purchaser; there is no power to sell the premises; a good title cannot be made," etc. Littledale, J., directed the jury that defendant was not liable if he *bona fide*, though without authority, raised

such objections only as Home, if present, might lawfully have raised. Damages one farthing. Watson v. Reynolds, Moo. & Mal., 1.

6. Words complained of: "The old materials have been relaid by you in the asphalt work executed in front of the ordnance office, and I have seen the work done." Innuendo, "that the plaintiff had been guilty of dishonesty in his trade by laying down again the old asphalt which had before been used at the entrance of the ordnance office, instead of new asphalt according to his contract." Damages 40*s*. Baboneau v. Farrell, 15 C. B., 360; 24 L. J., C. P., 9; 3 C. L. R., 42; 1 Jur. (N. S.), 114.

§ 6. (2) **Substantial Damages.**— Substantial damages are awarded where the jury endeavor to arrive at a figure which will fairly compensate the plaintiff for the injury he has sustained.

The law is well settled that the pain and mental distress which would naturally result from a malicious slander are among the elements of damage for which the plaintiff may claim compensation.[1]

Scott, J.: "We have no doubt when the words spoken are actionable in themselves that mental suffering produced by the utterance of them is a proper element to be considered in fixing the amount of damages."[2] But the rule seems to be different where the words are not actionable in themselves and special damage only is recoverable.[3]

§ 7. **Illustrations — Digest of American Cases.**—

1. The Michigan statutes relieving publishers of newspapers from all but actual damages to property and business in actions for libel, if the publication was by mistake and in good faith, and did not involve a criminal charge, and was followed by a correction, are unconstitutional, because they deprive the party injured of the right to damages for injury to his private reputation, and exempt a special class of citizens from liability for wrongs not granted to others, and permit the doing of a wrong without liability to answer therefor. Park v. Detroit Free Press Co. (Mich.), 1 L. R. A., 599; 21 Ohio L. J., 19; 40 N. W. Rep., 731.

2. No substantial damages can be recovered against a party for charges of fraud made in good faith upon reasonable grounds without malice and apparently justified by the acts of the plaintiff. Clement v. Creditors, 37 La. Ann., 692.

3. Where it appears that a libel was published with no intent to injure the person libeled, and that all proper precautions were observed in publishing it, the recovery of damages is limited by the actual injury. Evening News v. Tryon, 42 Mich., 549; 4 N. W. Rep., 267.

[1] Hastings v. Stetson, 130 Mass., 76. Marble v. Chapin, 132 Mass., 225.

[2] Adams v. Smith, 58 Ill., 421; Swift v. Dickerman, 31 Conn., 294.

[3] Terwilliger v. Wands, 17 N. Y., 54; Wilson v. Goit, 17 N. Y., 442.

4. The law implies malice from the publication of a libelous article, and the party defamed will be entitled to recover such compensatory damages as he has sustained, regardless of the intent that actuated the publisher of the libel. Rearick v. Wilcox, 81 Ill., 77.

5. A witness who goes to the place of the former residence of a party to learn his character will not be allowed to testify as to the result of his inquiries. Douglas v. Tousey, 2 Wend. (N. Y.), 352.

6. It is proper for the defendant in a suit of libel to prove the facts and circumstances connected with the publication, to show the absence of malice in fact; and such evidence is competent on the question of exemplary damages, but not as affecting compensatory or actual damages, and the jury should be so instructed. Rearick v. Wilcox, 81 Ill., 77.

7. If the language of a newspaper article in its ordinary meaning, in connection with the subject-matter, charges only a failure to carry out a contract, or a mere deficiency in workmanship or amount of material in connection therewith, such article is not actionable without proof of special damage, but otherwise if the language of the article charges a crime or fraud; and where the defendant in an action for the libel charged to be contained in the language of the article denies that it is susceptible to the harsher construction placed upon it by the plaintiff, and at the same time the argument of the senior counsel for the defense at the trial is filled with charges of fraud, this may be considered by the jury in fixing the amount of damage. Struthers v. Peacock, 11 Phila. (Pa.), 287.

§ 8. (3) **Exemplary Damages.**— Vindictive, punitive or exemplary damages are awarded by the jury in their desire to signify their sense of the defendant's conduct by fining him to a certain extent, and therefore punish him by awarding "smart money" or damages in excess of the amount which would be adequate compensation for the injury inflicted on the plaintiff's reputation. In a recent English case a letter was sent privately to one person only, on whom it made no impression, as "he did not believe a word contained in it," but still the jury awarded £3,000 on the ground that "there must have been some vindictiveness."[1] It is clearly competent for a jury to find vindictive damages in an action of libel or slander.[2]

Damages in these actions are not limited to the amount of pecuniary loss which the plaintiff is able to prove.[3]

If the jury, acting under the evidence and the instructions of

[1] Adams v. Coleridge, 1 Times L. R., p. 87.

[2] Lord Townshend v. Hughes, 2 Mod., 150; Emblem v. Myers, 6 H. & N., 54; 30 L. J., Ex., 71; Bell v. Midland Rail. Co., 10 C. B. (N. S.), 287; 30 L. J., C. P., 273; 9 W. R., 612; 4 L. T., 293; Cooper v. Sun Printing & Pub. Ass'n, 57 Fed. Rep., 566; Nelson v. Wallace, 48 Mo. App., 193; Morning Journal v. Rutherford, 2 C. C. A., 254; 51 Fed. Rep., 513; Smith v. Sun Printing Ass'n, 55 Fed. Rep., 240.

[3] Davis & Sons v. Shepstone, 11 App. Cas., p. 191; 55 L. J., P. C., 51; 34 W. R., 722; 55 L. T., p. 2.

the court, find the defendant guilty of uttering the defamatory words, and that they were published maliciously or wantonly, then in assessing damages they will not be confined to such damages as simply compensate the plaintiff for such injuries as the evidence shows he has received by reason of the speaking and publishing of the defamatory words charged; but they may, in addition thereto, assess against the defendant by way of punishment to him and as an example to others such damages as in their sound judgment under all the evidence in the case they believe he ought to pay.[1]

§ 9. **The Law Stated by McAllister, J.**— "The principle of the rule allowing exemplary, vindictive or punitory damages, as they are called, has been severely questioned by many very able jurists, among whom was Professor Greenleaf, upon whose sturdy, accurate, profound intellect and wonderful legal attainments it is unnecessary to pass any encomiums. In his definition of damages, and upon which it would be difficult to improve, there is little countenance to the doctrine of punitory damages. He says: "Damages are given as a compensation, recompense or satisfaction to the plaintiff for an injury actually received by him from the defendant. They should be precisely commensurate with the injury — neither more nor less.[2]

"The principal grounds upon which the doctrine of exemplary damages has been assailed is that it is a false theory, and inconsistent with the nature of the proceeding, to mix the supposed interests of society with those of an individual in the pursuit of purely private redress for private injury, and is subject to great abuses, which in most cases the courts can correct only by the exercise of the delicate power of setting aside a verdict as corrupt, partial or passionate. The doctrine of exemplary, vindictive or punitory damages is, however, too firmly rooted in our jurisprudence to be disturbed. But, while still recognizing the doctrine within its proper scope, the arguments which may be urged with great if not unanswerable force against it ought to be influenced in begetting a high degree of watchfulness on the part of courts to prevent it from being perverted — from being extended beyond the real principle upon which it is said to be based — by allowing plaintiffs,

[1] Housley v. Brooks, 20 Ill., 115; Mattice v. Wilcox, 147 N. Y., 624; Templeton v. Graves, 59 Wis., 95; Mayer v. Frobe, 40 W. Va., 246.

[2] 2 Greenl. Ev., § 253, and note 2.

through the instrumentality of instructions to the jury, to characterize the acts of the defendant with degrees of enormity and turpitude which the law does not affix to them, and demand punishment for fictitious offenses, and thereby put money in their own pockets under the guise of protecting society."[1]

§ 10. **Illustrations — American Cases.—**

1. **An Indiana Case:** *Casey v. Hulgan*, 118 Ind., 590, 21 N. E. Rep., 322.

Action by John N. Hulgan against Sandy Casey for slander. Instruction numbered 4, approved in the opinion, was as follows: "If you find for the plaintiff, and that the words were spoken, if at all, with express malice, you may award exemplary or punitive damages; but if they were spoken without express malice, then you would not be justified in awarding exemplary damages; and in determining this question you will look to the evidence." There was evidence of slanderous words spoken by defendant at times other than at the time of the words sued on. Judgment for plaintiff, and defendant appeals.

Berkshire, J.: This is an action by the appellee against the appellant to recover damages because of alleged slanderous words spoken by the appellant of and concerning the appellee. We do not think the court erred in giving the instruction complained of. If express malice was proven, the jury were authorized to assess exemplary as well as compensatory damages. The words charged and proven were actionable *per se*, some of them independent of the extrinsic facts averred, and others when taken in connection therewith. Evidence of other or similar slanderous words spoken at other times and places is admissible to show that the words charged in the complaint were spoken with malice and ill-will. Markham v. Russell, 12 Allen, 573; Logan v. Logan, 77 Ind., 558; De Pew v. Robinson, 95 Ind., 109. If the act complained of was conceived in the spirit of mischief or of criminal indifference to civil obligations, then there is express malice. Railroad Co. v. Quigley, 21 How., 214: Day v. Woodworth, 13 How., 371. From the evidence as we find it in the record, we must come to the conclusion that the appellant was not troubled with a stammering tongue. He seems not to have been slow in speech. He did a great deal of talking from the time the larceny is supposed to have been committed until the recovery of the property. It seemed to be his desire, for some reason, to impress upon his hearers that the appellee was the larcener of the property, and many forms of expression were employed, some of which are charged in the complaint and others are not. The instruction was proper, and it is very evident that the jury were not misled thereby; for the amount of damages assessed is very reasonable in view of the circumstances as established by the evidence. Judgment affirmed, with costs.

§ 11. **Digest of American Cases.—**

1. In an action for libel, if the jury decide that all the actual damages sustained are merely nominal, punitive damages are not recoverable. Stacy v. Portland Pub. Co., 68 Me., 279.

[1] McAllister, J., in Holmes v. Holmes, 44 Ill., 168.

2. In an action for slander it appeared that plaintiff was engaged to employ and discharge workmen for his own employer; that defendant said of him that he was receiving money belonging to his employer for giving out work; that defendant said, in answer to a statement of plaintiff's employer, that he believed plaintiff to be honest, and that defendant would have to prove him dishonest: "Well, I know it, and I can prove it;" and that defendant said: "Yes, he (meaning plaintiff) is a thief, and I can prove it." *Held*, that such words were actionable *per se*, and that the jury might allow exemplary damages as well as damages for plaintiff's mental disturbance and suffering. Gomez v. Joyce, 56 N. Y. Sup. Ct., 607, 1 N. Y. S., 337.

3. In an action against a newspaper for a libel when the libel charges an indictable offense, even in the absence of express malice, the jury may give exemplary or vindictive damages; and this even though the article in question was copied from another newspaper. Regensperger v. Kiefer, 20 W. N. C., 97 (Penn.), 7 Atl. Rep., 724.

4. Where words spoken of a woman, charging incontinency, are actuated by actual malice or accompanied with acts of oppression or wilful wrong and indifference to the consequences to the injured party, vindictive or exemplary damages may be given. Bowden v. Bailes, 101 N. C., 612, 8 S. E. Rep., 342.

5. It is not error in a libel case to charge the jury that if they are satisfied that the publication was made from "ill-will," meaning express malice, they may find exemplary or punitive damages to such amount as the facts and circumstances in evidence may justify. Montgomery v. Knox, 23 Fla., 595, 3 So. Rep., 211.

6. Under the law of Colorado, which allows no punitive damages in an action for libel, circumstances relating to malice are not admissible in evidence. Republican Pub. Co. v. Miner, 12 Colo., 77, 20 Pac. Rep., 345.

7. In an action for damages from a libelous article in a newspaper, it was error for the court to admit proof of, and instruct the jury to consider, the wealth of defendant in estimating the damages which the plaintiff should recover, exemplary damages not being recoverable in Nebraska. Rosewater v. Hoffman, 24 Neb., 222, 38 N. W. Rep., 857.

8. Under Code of North Carolina, section 3763, making a charge of incontinency against a woman actionable *per se*, the utterance of such a charge must be followed by the same consequences as to damages as in other cases of slander, and in the absence of evidence of special damages plaintiff may recover such as are compensatory. An instruction that if malice is proved in the utterance of the words, or if the conduct of the defendant was marked by gross and wilful wrong, or was oppressive, exemplary damages may be awarded, is correct. Bowden v. Bailes, 101 N. C., 612.

9. Punitory damages should be awarded in an action of slander, only when in speaking of the slanderous words the defendant was actuated by special ill-will, bad intent or malevolence towards the plaintiff. Templeton v. Graves, 59 Wis., 95.

10. A special verdict in libel, finding facts justifying the giving of exemplary damages, but awarding nominal damages only, should be set aside as inconsistent. Cottrill v. Cramer, 59 Wis., 231, 18 N. W. Rep., 12.

11. Where, in an action for libel, the only questions submitted to the jury

were whether the article published by defendants was false; whether it was published with intent to injure the plaintiff's feelings and to degrade him in the estimation of the public; and the amount of damages which he had suffered by reason of its publication, a verdict for more than actual damage is excessive and cannot be sustained. Eviston v. Cramer, 57 Wis., 570; 15 N. W. Rep., 760.

12. Punitory damages should be awarded only where the defendant was actuated by special ill-will, bad intent or malevolence towards the plaintiff: but such express malice may be inferred from the circumstances, though it is not to be inferred merely from the fact that the words are false and injurious. Templeton v. Graves, 59 Wis., 95; 17 N. W. Rep., 672.

13. In an action against the personal representative of a decedent for damages on account of slanderous words spoken by the deceased, exemplary or punitory damages may not be awarded against the personal representatives. Sheik v. Hobson, 64 Ia., 146; 19 N. W. Rep., 875.

14. If the jury are satisfied by proper evidence there was actual malice, they may allow punitive damages. Klewin v. Bauman, 53 Wis., 244.

15. Where a publication is libelous *per se*, and proved to be false, the question of malice must be submitted to the jury, and exemplary damages may be awarded. It is for the jury to determine, in view of all the evidence, whether punitive damages should be allowed. Bergmann v. Jones, 94 N. Y., 51.

16. The fact that the alleged libel renders the defendant liable to an indictment does not prevent the jury from giving vindictive damages in a civil action for a libel. Barr v. Moore, 87 Penn. St., 385.

17. For the speaking of words actionable in themselves, exemplary damages may be given, although actual malice is not proved. Wood v. Helbish, 23 Mo. App., 389.

18. The proprietor of a newspaper is not responsible in exemplary damages for the actual malice of a reporter in procuring the publication of a libelous article, unless he has participated in or ratified and confirmed the malicious act. Eviston v. Cramer, 57 Wis., 570.

19. In an action for libel where the words published were calculated on their face to convey the impression that the plaintiff, a state senator, had been influenced by bribery in his official action, and therefore libelous, and the defendant liable at least in compensatory damages, evidence is still admissible to show that the publication was not made with any bad motive or malicious intent, and such evidence is to be considered by the jury in connection with the question of punitory damages. Wilson v. Noonan, 35 Wis., 321.

20. In an action against the proprietors of a newspaper for publishing a libel, it appeared that the report was received from an established news-agency, published in but one edition of the paper, suppressed in subsequent ones; that some of the copies of the paper, unsold when it was discovered, were not destroyed, and one copy was sold; and that on the following day a retraction was published. Actual malice on the part of the corporation or any of its officers was not proved. It was *held* that the evidence would not authorize the jury to find actual malice on the part of the defendant, and that a verdict awarding exemplary damages was improper and should be set aside. Samuels v. Evening Mail Asso., 16 N. Y. Sup. Ct., 288.

§ 12. **Assessment of Damages.**— The jury must assess the damages once for all;[1] no fresh action can be brought for any subsequent damage,[2] except, perhaps, in some cases where the words are not actionable in themselves. They should, therefore, in making up their verdict, take into consideration not only the damage that has accrued, but also such damage, if any, as will arise from the defamatory words in the future.[3] For they are to compensate the plaintiff for every loss which would naturally result from the words employed; though not for merely problematical damages which may possibly happen but probably will not.[4]

§ 13. **Assessment of Damages the Province of the Jury.**— It is the duty of the jury, acting under the instructions of the court, to carefully consider the whole of the defamatory words complained of and in evidence, and give such damages as in their opinion will fairly compensate the plaintiff for the injury done to his reputation. The amount to be given is peculiarly within the province of the jury.[5] The jury will be influenced by the circumstances attending the publication, by the character of the defamatory words, by their falseness, by the malice displayed by the defendant, as well as the provocation, if any, given by the plaintiff; and in fixing the amount of such damages they may take into consideration the rank and position in society of the parties, the pecuniary circumstances of the defendant, the mode of publication selected, the extent or continuance of the circulation given to the defamatory words, the tardiness or inadequacy or absence of any apology, the fact that the defendant could have easily ascertained that the charge he made was false, etc.[6] Where no evidence is offered

[1] Gregory and another v. Williams, 1 C. & K., 568.

[2] Fitter v. Veal, 12 Mod., 542; B. N. P., 7.

[3] Lord Townshend v. Hughes, 2 Mod., 150; Ingram v. Lawson, 6 Bing. N. C., 212; 8 Scott, 471, 477; 4 Jur., 151; 9 C. & P., 326.

[4] De Grey, C. J., in Onslow v. Horne, 3 Wils., 188; 2 W. Bl., 753; Bayley, B., in Lumby v. Allday, 1 C. & J., 305; 1 Tyr., 217; Doyley v. Roberts, 3 Bing. N. C., 835; 3 Scott, 40; 3 Hodges, 154; Darley Main Colliery Co. v. Mitchell, 11 App. Cas., 127; 55 L. J., Q. B., 339; 54 L. T., 882.

[5] Davis & Sons v. Shepstone, 11 App. Cas., 191; 55 L. T., 2.

[6] Hosley v. Brooks, 20 Ill., 115; Humphreys v. Parker, 52 Me., 502; Harbinson v. Schook, 41 Ill., 141; Lewis v. Chapman, 19 Barb. (N. Y.), 252; Harrison v. Pearce, 1 F. & F., 569; Evans v. Harries, 1 H. & N., 251; 26 L. J., Ex., 31; Ingram v.

as to damages the jury are in no way bound to give nominal damages only; they may read the libel and give such substantial damages as will compensate the plaintiff for such defamation.[1]

§ 14. **Damages — In the Discretion of the Jury.** — The amount at which general damages are to be assessed lies almost entirely in the discretion of the jury. The courts will never interfere with the verdict merely because the amount is excessive. A new trial will only be granted where the verdict is so large as to satisfy the court that it was perversely in excess, or the result of some gross error on a matter of principle; it must be shown that the jury either misconceived the case or acted under the influence of undue motives. And so, too, where the damages awarded appear strangely inadequate, a new trial will not be granted, unless it is clearly proved that the jury wholly omitted to take into their consideration some essential element of damage; or unless the smallness of the amount shows that the jury made a compromise, and did not really try the issue submitted to them.[2] But where the plaintiff is entitled to substantial damages, and the verdict in his favor cannot be impeached except on the ground that the damages are excessive, the court has power to refuse a new trial, on the plaintiff's entering a *remittitur* as to a portion of the amount found, or by his consenting to the damages being reduced to such an amount as the court considers not excessive, had they been given by the jury.[3]

§ 15. **Costs Not to be Considered.** — In assessing damages the jury should not take into consideration the question of costs. That is a matter entirely for the court; a cent will carry costs as much as $1,000. It is for the jury to say, if they find for the plaintiff, to what extent he has been damaged, irrespective of the effect, if any, which their verdict may have on the costs that follow the suit.[4]

Lawson, 6 Bing. N. C., 212; 8 Scott, 471; 4 Jur., 151; 9 C. & P., 326.

[1] Tripp v. Thomas, 3 B. & C., 427.

[2] Falvey v. Stanford, L. R., 10 Q. B., 54; 44 L. J., Q. B., 7; 23 W. R., 162; 31 L. T., 677; Kelley v. Sherlock, L. R., 1 Q. B., 686, 697; 35 L. J., Q. B., 209; 12 Jur. (N. S.), 937; Forsdike v. Stone, L. R., 3 C. P., 607; 37 L. J., C. P., 301; 16 W. R., 976; 18 L. T., 722.

[3] Belt v. Lawes (C. A.), 12 Q. B. D., 356; 53 L. J., Q. B., 249; 32 W. R., 607; 50 L. T., 441; Smith v. Times Co., 4 Pa. Dist. R., 399; Mattice v. Wilcox, 147 N. Y., 624.

[4] Odgers on L. & S., 296; Bramwell, B., L. R., 1 Q. B., 691.

II. Special Damages.

§ 16. **Special Damages Defined.**— Special damages are such as the law will not infer from the nature of the words themselves; they must therefore be especially claimed in the pleadings, and evidence of them must be given at the trial. Such damages depend upon the special circumstances of the case, upon the defendant's position and upon the conduct of third persons.[1] In some cases special damage is a necessary element in the cause of action. When on the face of them the words used by the defendant clearly must have injured the plaintiff's reputation, they are said to be actionable in themselves; and the plaintiff may recover a verdict for a substantial amount without giving any evidence of actual pecuniary loss. But where the words are not on the face of them such as the law will presume to be necessarily prejudicial to a person's reputation, evidence must be given to show that as a matter of fact some appreciable injury has followed from their use. The injury to the plaintiff's reputation is the gist of the action; he must show that his character has suffered through the defendant's false assertions; and where there is no presumption in his favor, he can only show this by giving evidence of some special damage.[2]

§ 17. **Words Actionable if Special Damage Follows.**— All defamatory words spoken of a person which, though not actionable in themselves, occasion the party special damage, become actionable upon proof being made of some actual and substantial damage following the publication or speaking of the words.[3] It has been said: "All disparaging words become actionable when followed by a special damage."[4] "All words published without lawful occasion are actionable if they have in fact produced special damages such as the law does not deem too remote."[5] "Any words by which a party has special damage are actionable."[6]

[1] Achorn v. Piper et al., 66 Iowa, 694; 24 N. W. Rep., 513.

[2] Odgers on L. & S., 262. See, also, Urban v. Helmick, 15 Wash., 155; 45 Pac. Rep., 747; Griebel v. Rochester Printing Co., 14 N. Y. S., 848; Wallace v. Rodgers, 156 Pa. St., 395.

[3] Pollard v. Lyon, 91 U. S., 225; Warnoc v. Circle, 29 Grat. (Va.), 197; Chapin v. Lee, 18 Neb., 440.

[4] Cooke on Defamation, 22.

[5] Odgers on L. & S., 89.

[6] Comyn's Dig. (Action on the Case for Defamation), D., 30.

The rule laid down by Justice Heath: "Undoubtedly all words are actionable if special damage follows"[1] has been frequently held to express the correct proposition of law. It has been usual to qualify the generality by adding, "provided the words themselves be in their nature defamatory." It must be conceded that in all actions for defamation, as libel and slander, the words upon which such actions are founded must be defamatory. But in some cases for words spoken, if the action for defamation will not lie, it by no means follows that the party is without a remedy. It may be stated as a safe proposition of law that whenever a person speaks words, of whatever nature, maliciously intending to injure another thereby, and the words have the desired effect and do actually produce damage to the party susceptible of proof, there is an actionable concurrence of loss and injury, for which, according to some authorities, an ordinary action on the case will lie, even where the action for defamation will not.[2]

§ 18. **The Rule for Words Not in Themselves Actionable without Proof of Special Damages.**— In all actions for defamation the words must be defamatory, either in themselves or from their natural and consequential results. The rule as expressed by Odgers is: "All words, if published without lawful occasion, are actionable if it be proved by evidence of special damage not too remote that they have in fact injured the plaintiff's reputation; and in such cases the action is called an action of defamation." The converse of this rule will be equally correct: "No words can be the subject of an action of defamation, however maliciously published, and although they have caused actual damage to the plaintiff, unless it is also proved that the plaintiff's reputation has in in fact been thereby injured."[3] In conclusion it may be safe to say as a general proposition of law that all words which amount only to an accusation of fraud, dishonesty, immorality, or any vicious or dishonorable conduct not in itself criminal, when not imputing to a person the infection of some contagious disease or unfitness to perform the duties of an office or employment, or the want of integrity in the discharge of such duties, or when not

[1] Moore v. Meagher, 1 Taunt., 44.

[2] Lynch v. Knight et ux., 9 H. L. C., 589.

[3] Odgers on L. & S., 89; True v. Plumley, 36 Me., 466; Fry v. Bennett, 4 Duer, 247; Brooks v. Dutcher, 22 Neb., 644; Tobias v. Harland, 4 Wend., 537; Cook v. Cook, 100 Mass., 194; McQueen v. Fulgham, 27 Tex., 463.

prejudicing such person in his or her profession or trade, are not actionable unless they have produced as a natural and necessary consequence some pecuniary loss or damage.

§ 19. **The Damages Arising from the Speaking of Words Not Actionable in Themselves Must be** — (1) actual and substantial; (2) they must actually have accrued at the time of the commencement of the suit; (3) and must be the immediate consequence of the defamatory words.[1]

§ 20. **First, the Damage Must be Actual and Substantial.** But any actual damage is sufficient. Thus, in imputations upon a woman's chastity the loss of gratuitous hospitalities specified has been held sufficient. And so, generally, where a person is prevented by the slander from receiving that which would otherwise have been conferred upon him, that is good special damage.[2] Marriage is always a good legal consideration, and the loss of a marriage is of course good special damage.[3] But it must be averred and proved that it was a marriage with some specific person, and that it was hindered by speaking the words. And it is immaterial, in case of loss of marriage, whether plaintiff be man or woman.[4] Loss of succession to any office, preferment, benefit or advantage, occasioned by the words, is good special damage.[5] Money charges occasioned by the slander form good special damage; as, that plaintiff was put to charges to defend his inheritance,[6] or to have an inquest held upon the body of a deceased person whom the slander accused him of having murdered.[7]

But it has been held to be no special damage to allege that, in consequence of the words, discord happened between him and his wife and he was in danger of a divorce.[8] Or to allege that in consequence of the words plaintiff was exposed to her father's displeasure and in danger of being put out of the house;[9] or that in consequence of the words he lost the affection of his mother, who intended him £100.[10]

[1] Moore v. Meagher, 1 Taunt., 39; Pettibone v. Simpson, 66 Barb. (N. Y.), 492.

[2] Hartley v. Herring, 8 T. R., 130; Stevens v. Hartwell, 52 Mass., 542.

[3] Ann Davis' Case, 4 Rep., 16.

[4] Cro. Jac., 323.

[5] 4 Rep., 16; 1 Buls., 138; Shepp. Coll., 192.

[6] Cro. Jac., 642.

[7] Peake v. Oldham, Cowp., 277.

[8] 1 Roll., 84; Georgia v. Kepford, 45 Iowa, 48.

[9] 1 Lev., 261.

[10] Com. Dig., title Defamation, D., 80.

§ 21. **Second, the Damages Must Have Actually Accrued** at the time of the commencement of the suit, and a subsequent accrual of damages will not support a subsequent action for the same words.[1]

§ 22. **Third, the Damage Must be the Immediate Consequence of the Defamatory Words,** and must be attributable wholly to the words; so that, where the reason of a person's refusing to employ the plaintiff was founded partly on the defendant's words, and partly on the circumstance of his having been previously discharged by another master, it was held that no action was maintainable.[2]

And it has been said that where, in consequence of the words, a third person has refused to perform a contract previously made with the plaintiff, and which he was in law bound to perform, no action is maintainable; for the plaintiff in such case is entitled to a compensation for the non-performance of the contract; and, were he allowed to maintain his action for the slander, he would receive a double compensation for the same injury: first, against the author of the slander; and secondly, against the person who had refused to perform his agreement.[3] It was held in a case where the defendant libeled a performer at a place of public entertainment and she refused to sing, and the proprietor brought his action on the ground of special damage, alleging that his oratorios had, in consequence of her absence, been more thinly attended, that the injury was too remote; that if the performer was really injured, an action lay at her suit; and that it did not appear but that her refusal to perform arose from caprice or indolence.[4]

§ 23. **Illustrations — Digest of American Cases.—**

1. It is actionable only with proof of special damages to say of a person he "was about to run away to defraud his creditors." Prettymay v. Shockley, 4 Harr. (Del.), 112.

2. To call a person "a liar." Kimmis v. Stiles, 44 Vt., 351.

3. To call a person "a cheat" (Lucas v. Flinn, 35 Iowa, 9), or "a rogue." Artieta v. Artieta, 15 La. Ann., 48.

4. Where one was twice constable, once in 1843 and again in 1846, and

[1] Buller's Nisi Prius, 7.

[2] Vicars v. Wilcocks, 8 East, 1.

[3] Morris v. Langlade, 2 Bos. & Pull., 284.

[4] Ashley v. Harrington, 1 East R., 48.

during the latter period a person said of him that while constable in 1843 he had made a false return, it was *held* that special damage must be shown; for the law implies damages for slander of officers only when they are in the office at the time of the slander. Edwards v. Howell, 10 Ired. (N. C.), L., 211.

5. It is not actionable without proof of special damages to charge a white man with being a free negro; and it does not alter the case that such white man was a minister of the gospel. McDowell v. Bowles, 8 Jones (N. C.), L., 184.

6. Slander will not lie for saying that a particular article in which another deals is bad or inferior unless special damage is alleged. Where the words are spoken not of the trader or manufacturer, but of the quality of the articles made or dealt in, to render them actionable *per se* they must import that the plaintiff is guilty of deceit or want of skill. Tobias v. Harland, 4 Wend. (N. Y.), 537.

7. No action lies for orally imputing insanity to the plaintiff without the averment of special damage. Joannes v. Burt, 6 Allen (Mass.), 236.

8. Words merely abusive and insulting are not actionable at common law unless special damages are laid in the declaration and proved. Such words are, however, rendered actionable by statute in Mississippi. Davis v. Farrington, 1 Miss. (Walk.), 304.

9. In the jurisprudence of Louisiana a distinction is not made between words actionable and words not actionable, as the basis of damages in a suit for slander, where no special damages are proved. Feray v. Foote, 12 La. Ann., 894.

10. Where a party called another a rogue, in the hearing of by-standers, in a moment of irritation, and in reference to his unwillingness to settle a debt due him, and no injury resulted from such transient expression of angry feelings, it was *held* that such case of defamation was not actionable without proof of special damage. Artieta v. Artieta, 15 La. Ann., 48.

11. Where a claim for money, won in a wager on the result of an election, was filed as a set-off, it was *held* that, as betting on elections was forbidden by public policy, to charge that a witness swore falsely in testimony given in relation to the wager does not constitute slander in legal parlance. Horn v. Foster, 19 Ark., 346.

12. Where a declaration in slander alleged that the defendant had said the plaintiff's boys "did frequently come to our house and hire negroes, and take the dogs, and go into the river bottom and kill cattle no more theirs than mine," and no special damage was alleged, it was *held* that the words were not actionable. Porter v. Hughey, 2 Bibb (Ky.), 232.

13. The defendant asserted that the plaintiff had harbored his negroes, and that he would prove it. No special damages were proved, and the language was held not to be actionable. Croskeys v. Driscoll, 1 Bay (S. C.), 481.

14. A declaration in slander set forth a colloquium of and concerning the plaintiff, in which the defendant, speaking of the plaintiff and his brother said these words: "Those two rascals killed my hogs and converted them to their own use." These words were held not actionable. Sturgenegger v. Taylor, 2 Brev. (S. C.), 481.

§ 24. **Digest of English Cases.**—

1. *It is actionable only with proof of special damages* to say of a person, "He is a rogue and a swindler; I know enough about him to hang him." Ward v. Weeks, 7 Bing., 211; 4 M. & P., 796.

2. "He is a rogue, and has cheated his brother-in-law of upwards of £2,000." Hopwood v. Thorn, 8 C. B., 293; 19 L. J., C. P., 94; 14 Jur., 87.

3. "Thy credit hath been called in question, and a jury being to pass upon it, thou foistedst in a jury early in the morning; and the lands thou hast are gotten by lewd practices." Nichols v. Badger, Cro. Eliz., 348.

4. "This gentleman has defrauded us of £22,000." Needham v. Dowling, 15 L. J., C. P., 9; Richardson v. Allen, 2 Chit., 657.

5. "The conduct of the plaintiffs was so bad at a club in Melbourne that a round robin was signed urging the committee to expel them; as, however, they were there only for a short time, the committee did not proceed further." Chamberlain v. Boyd (C. A.), 11 Q. B. D., 497; 52 L. J., Q. B., 277; 31 W. R., 572; 48 L. T., 328; 47 J. P., 372.

6. "Thou art a scurvy, bad fellow." Fisher v. Atkinson, 1 Roll. Abr., 43.

7. "A rogue, a villain, and a varlet" (for these, and words of the like kind, are to be considered as "words of heat"). Stanhope v. Blith, 4 Rep., 15.

8. "A runagate rogue." Cockaine v. Hopkins, 2 Lev., 214.

9. "A common filcher." Goodale v. Castle, Cro. Eliz., 554.

10. "A cozening knave." Brunkard v. Segar, Cro. Jac., 427; Hutt., 13; 1 Vin. Abr., 427.

11. "A cheat." Savage v. Robery, 2 Salk., 694; 5 Mod., 393.

12. "You are a swindler." Saville v. Jardine, 2 H. Bl., 531; Black v. Hunt, 2 L. R., Ir., 10.

13. "I have seen the plaintiff; and from what I have seen and heard, I think it is my duty to urge you" (plaintiff's husband) "to send for one or two doctors to see her; some opinion ought to be taken as to the state of her mind." Weldon v. De Bathe, 33 W. R., 328.

14. To say, "You cheat everybody, you cheated me, you cheated Mr. Saunders," is not actionable unless it be spoken of the plaintiff in the way of his profession or trade. Davis v. Miller et ux., 2 Stra., 1169.

15. To call a man a "blackleg" is not actionable unless it can be shown that the word was understood by the by-standers to mean "a cheating gambler, liable to be prosecuted as such." Barnett v. Allen, 3 H. & N., 376; 4 Jur. (N. S.), 488; 27 L. J., Ex., 412; 1 F. & F., 125.

§ 25. **Classes of Words, when Actionable, etc.**— Words imputing profligacy, immoral conduct, etc., even when spoken of one holding an office or carrying on a profession or business, will not be actionable unless they "touch him" in that profession or business. Thus, if alleged of a minister of the gospel or clergyman, they will be actionable, because if the charge were true it would be ground for degradation or deprivation, as it would prove him unfit to continue in the active duties of

his profession.[1] But if the same words were spoken of a trader, or even of a physician, it seems by the common law they would not be actionable without proof of special damage, as they do not necessarily affect the party in relation to his trade or profession. The imputation must be connected with the professional or business duties of the party defamed and touch him therein.

§ 26. Illustrations — Digest of American Cases.—

1. To say of a magistrate, "He is a damned rogue," is not actionable unless spoken of him in his official capacity as such magistrate. Oakley v. Farrington, 2 Johns. (N. Y.), 129.

2. It is not actionable to charge a man with keeping false books of account unless his business necessarily leads to dealing on credit and the keeping of books is incident to his business, for otherwise the charge does not touch him in his trade. Rathbun v. Emigh, 6 Wend. (N. Y.), 407.

3. To charge a justice of the peace with omitting to inform a party who had recovered a judgment before him of the fact that the constable had rendered himself liable for not returning the execution in time does not impute official misconduct and is not actionable in itself. Van Tassell v. Capron, 1 Den. (N. Y.), 250.

4. Words not actionable in themselves do not become so when spoken of a person holding an office or engaged in the practice of a profession or trade unless they affect him in such office, profession or trade—"touch him therein." Kinney v. Nash, 3 N. Y., 177.

§ 27. Digest of English Cases.—

1. *It is actionable only with proof of special damages* to impute prostitution to a school-mistress (Wharton v. Brook, Ventr., 21; Wetherhead v. Armitage, 2 Lev., 233; 2 Show., 18; Freem., 277; 3 Salk., 328), or immorality to a trader or his clerk (Lumby v. Allday, 1 Cr. & J., 301; 1 Tyrw., 217); nor are words imputing to a stay-maker that his trade is maintained by the prostitution of his shop-woman actionable without proof of special damage. Brayne v. Cooper, 5 M. & W., 249. But now see Riding v. Smith, 1 Ex. D., 91; 45 L. J., Ex., 281; 24 W. R., 487; 34 L. T., 500.

2. Words imputing adultery to a physician were laid to have been spoken "of him in his profession," but there was nothing in the declaration to connect the imputation with the plaintiff's professional conduct. *Held*, that the words were not actionable without special damage. Ayre v. Craven, 2 A. & E., 2; 4 N. & M., 220.

§ 28. Special Damages — Words Not Actionable in Themselves.—Special damages are such as may exist in fact, but which the law does not presume to have resulted from defamatory words. They depend upon the particular circumstances of

[1] Kinney v. Nash, 3 N. Y. (3 Comst.), 177; Gallwey v. Marshall, 9 Ex., 294; 23 L. J., Ex., 78.

each case, and must be explicitly claimed in the declaration and proved by competent evidence on the trial.

In the vast majority of cases proof of special damage is not essential to the right of action. Thus, it is not necessary to prove special damage —

(1) In any action of libel.

(2) Whenever the words spoken impute to the plaintiff the commission of any indictable offense.

(3) Or a contagious disease.

(4) Or are spoken of him in the way of his profession or trade, or disparage him in an office of public trust.

(5) Or a want of chastity; or adultery or fornication.

Such words, from their natural and immediate tendency to produce injury, the law adjudges to be defamatory, although no special loss or damage is or can be proved. Though even in these cases, if any special damage has in fact accrued, the plaintiff may of course prove it to aggravate the damages.[1]

§ 29. **Proof of Special Damages — In What Cases Essential.**— In all cases not included in the preceding section proof of special damage is essential to the cause of action, for the words are not actionable in themselves. As the words do not apparently and upon their face import such defamation as will be injurious, it is necessary that the plaintiff should aver and prove that some particular damage has in fact resulted from their use. Such damage, being essential to the action, must have accrued before the action is brought. A mere apprehension of future loss cannot constitute special damage. De Grey, C. J.: "I know of no case where ever an action for words was grounded upon eventual damages which may possibly happen to a man in a future situation."[2] It must also be the natural, immediate and legal consequence of the words which the defendant uttered.[3]

§ 30. **Loss of Some Material Temporal Advantage.**— The special damage necessary to support an action for defamation, where the words are not actionable in themselves, must be the loss of some material temporal advantage. The loss of marriage, of employment, of custom, of profits, and even of gratu-

[1] Odgers on L. & S., 297.
[2] Onslow v. Horne, 3 Wils., 188.
[3] Odgers on L. & S., 297.

itous entertainment and hospitality, will constitute special damage; but not the mere annoyance or loss of peace of mind, nor even physical illness occasioned by the defamatory charge.

Such loss may be either the loss of some right or position already acquired, or the loss of some future benefit or advantage, the acquisition of which is prevented. Thus, if a party causes a servant to lose his situation, or prevents his getting one by maliciously giving a false character, in either case an action will lie, though the words are not actionable in themselves. So if he prevent either a new comer from going to the plaintiff's shop, or an old customer from continuing to deal there, that will be sufficient special damage. But the plaintiff must always clearly prove that the loss is the direct result of defendant's words, and not the consequence of some independent act of a third person.[1]

Thus, it has been held in an action for slanderous words not actionable in themselves, that the plaintiff cannot prove that he sustained special damage by reason of the repetition by a third person of the words uttered by the defendant.[2]

§ 31. **Continuing Damages — The Rule in Odgers.**— Where the words are not actionable without special damage the jury must confine their consideration to such special damage as is specially alleged and proved. It may, therefore, very well be argued that if any fresh damage followed in the future that would constitute a fresh ground of action. And of this opinion was Chief Justice North.[3] But Buller[4] lays it down most distinctly that where a plaintiff "has once recovered damages he cannot after bring an action for any other special damage, whether the words be in themselves actionable or not." And Lord Holt is certainly reported as saying so.[5] In a later case the matter was much discussed,[6] and Lord Blackburn unfort-

[1] Olmstead v. Miller, 1 Wend. (N. Y.), 506; Williams v. Hill, 19 Wend. (N. Y.), 305; Stevens v. Hartwell, 52 Mass., 542; Pollard v. Lyon, 91 U. S. (1 Otto), 225; Odgers on L. & S., § 306.

[2] Stevens v. Hartwell, 11 Met. (52 Mass.), 542; Ward v. Weeks, 4 M. & P., 796.

[3] Lord Townsend v. Hughes, 2 Mod., 150.

[4] Nisi Prius, p. 7.

[5] Fitter v. Veal, 12 Mod., 542. But see the other reports of the case, 1 Ld. Raym., 339, 692; 1 Salk., 11.

[6] Darley Main Colliery Co. v. Mitchell, 11 App. Cas., 127; 55 L. J., Q. B., 529; 54 L. T., 882.

unately differed from Lord Bramwell.[1] Mr. Odgers says: "I think, however, after the decision in that case, the better opinion is that a second action will lie for fresh special damage."[2]

§ 32. **Illustrations — Digest of American Cases.—**

1. The defendant told N. that the plaintiff committed adultery with Mrs. F. N. had married Mrs. F.'s sister, and was an intimate friend of the plaintiff's. N. thought it his duty to tell the plaintiff what people were saying of him. Plaintiff, who was hoeing at the time, turned pale, felt bad, flung down his hoe and left the field; lost his appetite, turned melancholy, could not work as he used to do and had to hire more help. *Held*, that such mental distress and physical illness were not sufficient to constitute special damage; for they did not result from any injury to the plaintiff's reputation which had affected the conduct of others towards him. The court said, in giving judgment: "It would be highly impolitic to hold all language wounding the feelings and affecting unfavorably the health and ability to labor of another a ground of action; for that would be to make the right of action depend often upon whether the sensibilities of a person spoken of are easily excited or otherwise, his strength of mind to disregard abusive, insulting remarks concerning him, and his physical strength and ability to bear them. Words which would make hardly an impression on most persons, and would be thought by them, and should be by all, undeserving of notice, might be exceedingly painful to some, occasioning sickness and an interruption of ability to attend to their ordinary avocations." Terwilliger v. Wands, 3 Smith (17 N. Y.), 54. *Contra*, see Bradt v. Towsley, 13 Wend., 253, and Fuller v. Fenner, 16 Barb., 333. So, too, a husband cannot maintain an action for the loss of his wife's services caused by illness or mental depression resulting from defamatory words not actionable in themselves being spoken of her by the defendant. For the wife, if *sole*, could have maintained no action. "The facility with which a right to damages could be established by pretended illness where none exists constitutes a serious objection to such an action as this." Wilson v. Goit, 3 Smith (17 N. Y.), 445. But the refusal of civil entertainment at a public house was held sufficient special damage. Olmsted v. Miller, 1 Wend., 506. And so was the fact that the plaintiff was turned away from the house of her uncle, where she had previously been a welcome visitor, and charged not to return till she had cleared up her character. Williams v. Hill, 19 Wend., 305. So was the circumstance that persons who had been in the habit of so doing refused any longer to provide food and clothing for the plaintiff. Beach v. Ranney, 2 Hill (N. Y.), 309.

2. When the plaintiff in order to prove special damages asked a witness, to whom the defendant had spoken the words complained of, if he had not told his brother the substance of what the defendant had told him, the question being objected to, it was admitted that it was asked for the purpose of following it by evidence to prove that the plaintiff had sustained special damage by reason of such repetition. The objection was sustained. It was held that the evidence would not prove any special damage caused

[1] 11 App. Cas., pp. 143, 145. [2] Odgers on L. & S., 306.

by the defendant, who was only answerable for his own wrongful acts and not for the unauthorized and wrongful acts of another party. Stevens v. Hartwell, 11 Metc. (52 Mass.), 542.

3. Where the defendants, a mercantile agency, in their printed publication circulated among their subscribers reported that the plaintiffs had made a chattel mortgage, it was held that this simple statement was not a libel in itself, and that special damages therefrom could not be predicated without explicit proof connecting it therewith. Newbold v. Bradstreet Co., 57 Md., 38; 40 Am. Rep., 426.

4. Desertion of the husband by the wife, caused by the publication of a charge of adultery against him, is not such a natural and proximate consequence of the slander as will entitle him to special damages. Georgia v. Kepford, 45 Iowa, 48.

5. Where the ground of the action is "special damages flowing to the plaintiff from the use of the words," it is not sufficient to set forth as damages money paid voluntarily by the plaintiff — such as the charge of a notary for protesting a paper which, under the law, was not a protestable paper, or which had not been legally protested. Van Epps v. Jones, 50 Ga., 238.

6. Generally words which impute the commission of an indictable offense for which corporal punishment may be inflicted, such as a charge of larceny, are actionable in themselves, and in such cases no special damages need be alleged or proved; but where the words are not actionable in themselves and cannot be made so by inducement, and the ground of complaint is that the plaintiff has been injured in respect to his character and reputation, his business or occupation, he cannot recover without alleging that the words were spoken of him in relation to some one of these particulars, and alleging and proving special damage. Rammell v. Otis, 60 Mo., 365.

7. Words charging an unmarried female with having had illicit intercourse with a person named are not in New York actionable in themselves, and the special damage necessary to maintain an action upon them must be of a pecuniary character. In this case the only matters claimed to be special damages alleged in the complaint were that, in consequence of the speaking of the words, the plaintiff had been "slighted, neglected and misused by the neighbors and her former associates, and turned out of doors." No evidence was given of any maltreatment or neglect which could have any tendency to injure the plaintiff pecuniarily, although it appeared that the plaintiff was in substance requested to leave the house of one D., where she went to make a call. Pettibone v. Simpson, 66 Barb. (N. Y.), 492.

8. Where a father, in consequence of defamatory words spoken of his minor child, a daughter, charging her with self-pollution, although he entirely disbelieves them, refuses to supply her with promised articles of clothing or means of education, such treatment by a parent of his child is not the natural result of a falsehood reported concerning her, and is not such special damage as will sustain an action for uttering such words. Anonymous, 60 N. Y., 262.

9. When the particular special damage complained of is the result of a repetition of the slanderous words by some other person, the defendant is not liable although he may have been the original author of the charge. Pettibone v. Simpson, 66 Barb. (N. Y.), 492.

10. A declaration in an action where there is a claim for special damage on account of the plaintiff having been prevented from obtaining employment by reason of the slander should name the parties by whom such employment was refused, and if not so named no evidence of particular persons having refused to employ the plaintiff will be received. Cramer v. Cullinane, 2 MacArthur, 197.

11. In actions for words not actionable in themselves, but where the right depends upon special damages, the loss or injury relied upon as constituting the special damage must be distinctly averred in the declaration. A general averment that the plaintiff has been damaged and injured in her name and fame is not enough. Pollard v. Lyon, 91 U. S. (1 Otto), 225.

12. The refusal of gratuitous entertainment to a slandered person by a person from whom she had been accustomed to receive it is sufficient, by way of special damage, to sustain an action for slander; but it must appear and be proved that such refusal was the direct result of the publishing of the slanderous words. Pettibone v. Simpson, 66 Barb. (N. Y.), 492.

13. When a declaration for slander contains more than one count, and each count sets forth a distinct and separate slander, if either of the counts alleges words which are not of themselves actionable, the declaration must allege some special damages as resulting from those particular words; otherwise such count will be held bad on general demurrer. Holton v. Muzzy, 30 Vt., 365.

14. Where a declaration in slander sets forth English words not actionable in themselves, with an allegation of special damages, it was *held* that evidence of foreign words, spoken at the same time with English words, was admissible in evidence to show that the charge was intended to be made; but that evidence of words spoken at another time and since the commencement of the suit was not actionable. Kunholts v. Becker, 3 Den. (N. Y.), 346.

15. In an action for words spoken, not slanderous in themselves, with an allegation of special damages in consequence of a third person being influenced by the slander, it must appear that such third person heard the words spoken, or that the words were the cause of the special damages. Kunholts v. Becker, 3 Den. (N. Y.), 346.

16. In an action for slander an allegation that, by means of the words spoken, the plaintiff had fallen into disgrace, contempt and infamy, and had lost his credit, reputation and peace of mind, cannot be considered as laying a special damage. Woodbury v. Thompson, 3 N. H., 194.

17. Words not in themselves actionable may support an action of slander if they occasion special damage. To support an action for such words, spoken of a person with reference to his occupation, the declaration must contain an averment that they were spoken of and concerning the plaintiff, and of and concerning his occupation. Barnes v. Trundy, 31 Me., 321.

18. The first two counts in a declaration alleged a slander in regard to the sale of intoxicating liquor by the plaintiff, and the other counts alleged slanderous words imputing adultery, etc. The declaration contained no allegation of special damages as resulting from the words charged in the first and second counts, but at the close of the declaration there was an allegation of general damages, resulting from "the aforesaid grievances"

and "by reason of the premises;" and also an allegation that the plaintiff had been subjected to a prosecution for the violation of the law of 1853, prohibiting the sale of intoxicating liquor. *Held*, on general demurrer, that the damage occasioned by such prosecution was not such a natural and immediate consequence of the slander alleged in the first and second counts as would justify the court in referring it to those counts in the absence of an allegation attributing it to the particular slanderous words charged within. Holton v. Muzzy, 30 Vt., 365.

19. Where the words charged as libelous are not actionable *per se*, special damages must be alleged and proven. Achorn v. Piper (Iowa), 24 N. W. Rep., 513.

20. An action cannot be maintained by an author of a publication disparaging his books, in which he has a copyright, without an allegation and proof of special damage. Swan v. Tappan, 5 Cush., 104.

21. In an action for slanderous words that are not actionable in themselves the plaintiff cannot prove he sustained special damages by means of the repetition by a third person of the words uttered by the defendant. Stevens v. Hartwell, 11 Met., 542. See 126 Mass., 331.

§ 33. Digest of English Cases.—

1. If a man be refused employment through defendant's slander this is sufficient special damage. Sterry v. Foreman, 2 C. & P., 592. So, if a person who had formerly dealt with the plaintiff on credit refuses in consequence of the defendant's words to deliver to the plaintiff certain goods he had ordered until plaintiff had paid for them. Brown v. Smith, 13 C. B., 596; 22 L. J., C. P., 151; 17 Jur., 807; 1 C. L. R., 4; King v. Watts, 8 C. & P., 614. So, if the agent of a certain firm going to deal with the plaintiff be stopped and dissuaded by the defendant, and this although such firm subsequently became bankrupt, and paid but 12*s.* 6*d.* in the pound, so that had plaintiff obtained the order he would have lost money by it. Storey v. Challands, 8 C. & P., 234. The loss of the hospitality of friends gratuitously afforded is sufficient special damage. Moore v. Meagher, 1 Taunt., 39; 3 Smith, 135.

2. "If a divine is to be presented to a benefice, and one, to defeat him of it, says to the patron, 'that he is a heretic or a bastard, or that he is excommunicated,' by which the patron refuses to present him (as he well might if the imputations were true), and he loses his preferment, he shall have his action on the case for those slanders tending to such end." Davis v. Gardiner, 4 Rep., 17.

3. Loss of a situation will constitute special damage (Martin v. Strong, 5 A. & E., 535; 1 N. & P., 29; 2 H. & W., 336; Rumsey v. Webb et ux., 11 L. J., C. P., 129; Car. & M., 104). or of a chaplaincy. Payne v. Beuwmorris, 1 Lev., 248. If, however, the dismissal from service be colorable only, the master intending to take the plaintiff back again as soon as the action is over, and having dismissed him solely in order that he might show special damage at the trial, this is no evidence that the plaintiff's reputation has been impaired, but rather the contrary. If, therefore, no other special damage can be proved, the plaintiff should be nonsuited. Coward v. Wellington, 7 C. & P., 531.

4. Anthony Elcock, citizen and mercer of London, of the substance and

value of £3,000, sought Anne Davis in marriage; but the defendant *præmissorum haud ignarus*, accused her of incontinency, wherefore the said Anthony wholly refused to marry the said Anne. *Held*, sufficient special damage. Davis v. Gardiner, 4 Rep., 16; 2 Salk., 294; 1 Roll. Abr., 33; Holwood v. Hopkins, Cro. Eliz., 787. So if a man lose a marriage. Matthew v. Crass, Cro. Jac., 323; Nelson v. Staff, Cro. Jac., 422.

5. In consequence of defendant slandering the plaintiff, a dissenting minister, his congregation diminished; but this was held insufficient, as it did not appear that the plaintiff lost any emolument thereby. Hopwood v. Thorn, 19 L. J., C. P., 94; 8 C. B., 293; 14 Jur., 87. But see Hartley v. Herring, 8 T. R., 130; Davies and wife v. Solomon, L. R., 7 Q. B., 112; 41 L. J., Q. B., 10; 20 W. R., 167. So is the loss of any gratuity or present if it be clear that the slander alone prevented its receipt. Bracebridge v. Watson, Lilly, Entr., 61; Hartley v. Herring, 8 T. R., 130.

6. In consequence of defendant's words, a friend who had previously voluntarily promised to give the plaintiff, a married woman, money to enable her to join her husband in Australia, whither he had immigrated three years before, refused to do so. *Held*, sufficient special damage. Corcoran and wife v. Corcoran, 7 Ir. C. L. R., 272. But where the words spoken imputed unchastity to a woman, and by reason thereof she was excluded from a private society and congregation of a sect of Calvinistic Methodists, of which she had been a member, and was prevented from obtaining a certificate, without which she could not become a member of any other society of the same nature, it was held that such a result was not such special damage as would render the words actionable at common law. Roberts and wife v. Roberts, 5 B. & S., 384; 33 L. J., Q. B., 249; 12 W. R., 909; 10 L. T., 602; 10 Jur. (N. S.), 1027.

7. Loss of the *consortium* of a husband is special damage. Lynch v. Knight and wife, 9 H. L. C., p. 589. But merely the society of friends and neighbors is not. Medhurst v. Balam, cited in 1 Siderfin, 397; Barnes v. Prudlin or Brudel, 1 Lev., 261; 1 Sid., 396; 1 Ventr., 4; 2 Keb., 451. The fact that the plaintiff has been expelled from a religious society of which she was a member will not constitute special damage. Roberts et ux. v. Roberts, 5 B. & S., 384; 33 L. J., Q. B., 249; 10 Jur. (N. S.), 1027; 12 W. R., 909; 10 L. T., 602. Though there is an old case in which a vicar in open church falsely declared that the plaintiff, one of his parishioners, was excommunicated, and refused to celebrate divine service till the plaintiff departed out of the church; whereby the plaintiff was compelled to quit the church, and was scandalized, and was hindered of hearing divine service for a long time, and it was held that an action lay. Barnabas v. Traunter, 1 Vin. Abr., 396.

8. The plaintiff alleged that in consequence of defendant's words "she had suffered considerable annoyance, trouble, disgrace, loss of friends, credit and reputation." *Held*, that this was no special damage. Weldon v. De Bathe, 33 W. R., 328; 14 Q. B. D., 339; 54 L. J., Q. B., 113; 53 L. T., 529.

9. Where the plaintiff alleged that she had been a novice in a convent, and left in order to nurse a sick relative, and defendant said of her that she had left her home because she was pregnant, whereby she alleged that she

was prevented from returning to the convent and becoming a nun, when she would have been maintained and supported by the society; and had also been brought into disgrace among her neighbors and friends, and had been deprived of and ceased to receive their hospitality, it was held that no action lay, as the plaintiff was neither a nun nor a novice at the time the words were spoken, and there was no evidence of special damage sufficient in law to maintain the action. Dwyer v. Meehan, 18 L. R., Ir., 138.

10. The defendant said of a married man that he had had two bastards, "by reason of which words discord arose between him and his wife, and they were likely to have been divorced." *Held*, that this constituted no special damage. Barmund's Case, Cro. Jac., 473.

11. The plaintiff was a candidate for membership of the Reform club, but upon a ballot of the members was not elected; subsequently a meeting of the members was called to consider an alteration of the rules regarding the election of members; before the day fixed for the meeting the defendant spoke certain words concerning the plaintiff which "induced or contributed to inducing a majority of the members of the club to retain the regulations under which the plaintiff had been rejected, and thereby prevented the plaintiff from again seeking to be elected to the club." It was held that the damage alleged was not pecuniary or capable of being estimated in money, and was not the natural and probable consequence of the defendant's words (Chamberlain v. Boyd (C. A.), 11 Q. B. D., 407; 52 L. J., Q. B., 277; 31 W. R., 572; 48 L. T., 328; 47 J. P., 372); and so where the words are not actionable in themselves, and no pecuniary damage has followed, no compensation can be given for outraged feelings, nor for sickness induced by such mental distress, even though followed by a doctor's bill. Allsop v. Allsop, 5 H. & N., 534; 29 L. J., Ex., 315; 6 Jur. (N. S.), 433; 8 W. R., 449; 36 L. T. (O. S.), 290; Lynch v. Knight and wife, 9 H. L. C., 577; 8 Jur. (N. S.), 724; 5 L. T., 291.

§ 34. **Special Damage — Words Actionable in Themselves.** Where special damage is not essential to the action, it may still be proved at the trial to aggravate the damages, if it has been properly pleaded. The same particularity is required whether the words be actionable in themselves or not. The plaintiff must still prove that the special damage alleged is the direct result of the defendant's words, as in other cases.[1] But in other respects, in this class of cases, the law is not so strict as to what constitutes special damage where the words are actionable in themselves.

§ 35. **Mental Distress, etc., when and when Not Special Damage.**— Where the words are not actionable in themselves, such matters as mental distress, illness, expulsion from a religious society, etc., do not usually constitute special damage.

[1] Tunnicliffe v. Moss, 3 C. & K., 83; Hirst v. Goodwin, 3 F. & F., 257; Odgers on L. & S., 304.

But where the words are actionable, the jury may take such matters into their consideration in fixing the amount of damages. *Lord Wensleydale:* "Mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone; though where a material damage occurs, and is connected with it, it is impossible a jury, in estimating it, should altogether overlook the feelings of the party interested." [1]

§ 36. **Special Damage where Words Are Spoken of Traders, etc.**— Where words are spoken of a person in the way of his profession or trade so as to be actionable in themselves, the plaintiff may allege and prove a general diminution of profits or decline of trade without naming particular customers or proving why they have ceased to deal with him.[2] If the plaintiff desires to go into such details at the trial he may plead them specially, and call the customers named as witnesses. Still, if the customers are not called at the trial, or if for any other reason the proof of the special damage fails, the plaintiff may still fall back on the general damage and prove a loss of income induced by the slander.[3] This he cannot do when the words are not actionable in themselves. But where the law already presumes that the plaintiff is injured in his business, so that the jury must give him some damages, evidence as to the nature and extent of plaintiff's business before and after publication is clearly admissible to enable the jury to fix the amount.

Where it is clear that the action lies without proof of any special damage, any loss or injury which the plaintiff has sustained in consequence of defendant's words, even after action brought, may be proved to support the legal presumption, and to show from what has actually occurred how injurious and mischievous the words were.[4]

[1] Swift v. Dickerman, 31 Conn., 285; Terwilliger v. Wands, 17 N. Y., 54; Coffin v. Coffin, 4 Mass., 1; Wadsworth v. Treat, 43 Mo., 163; Lynch v. Knight and wife, 9 H. L. C., 598; Haythorn v. Lawson, 3 C. & P., 196; Le Fanu v. Malcolmson, 8 Ir. L. R., 418; Mahoney v. Bedford, 132 Mass., 393; Laing v. Nelson, 40 Neb., 252; Taylor v. Hearst, 107 Cal., 262; Raines v. N. Y. Press, 92 Hun, 515; 37 N. Y. S., 45; Van Ingen v. Star Co., 1 App. Div. (N. Y.), 429; 37 N. Y. S., 114; Lonbard v. Lennox, 155 Mass., 76.

[2] Ingram v. Lawson, 6 Bing. N. C., 212; 8 Scott, 471; 4 Jur., 151; 9 C. & P., 326; Harrison v. Pearce, 1 F. & F., 569; 32 L. T. (O. S.), 298; Rose v. Groves, 5 M. & Gr., 618, 619.

[3] Mallory v. The Pioneer Press, 34 Minn., 531; Cook v. Field, 3 Esp., 133; Evans v. Harries, 1 H. & N., 251; 26 L. J., Ex., 31.

[4] Odgers on L. & S., 308.

§ 37. Illustrations — Digest of American Cases.—

1. In an action for libel, in which special damages have not been pleaded, it is proper to ask the plaintiff, "How many customers did you have?" as the question comes within the rule which, where the defamatory words were actionable in themselves, so that damage is implied, allows proof without special averment of such general facts as the vocation and position in life of the plaintiff, as bearing upon the question of special damages. But it is not admissible for the purpose of showing special damages. Mallory v. Pioneer Press Co. 34 Minn., 521, 26 N. W. Rep., 904.

2. In an action for slander for words importing a want of chastity in a female, the special damage alleged was that "the plaintiff became dejected in mind and enfeebled in body, so as to be prevented from attending to her ordinary business." It was held to be sufficient to sustain an action. McQueen v. Fulgham, 27 Tex., 463.

3. Where the words are charged to have been spoken of, etc., in his, etc., as clerk, special damages need not be alleged. Butler v. Howes, 7 Cal., 87.

4. In slander, when words actionable in themselves are alleged, special damages need not be averred. Hicks v. Walker, 2 Greene (Iowa), 440.

5. In an action of slander for words spoken, the words charged which were alleged to have been spoken of and concerning plaintiff, and of and concerning his trade and occupation as clerk for the firm of defendant and his partner, were as follows: "Your man (plaintiff) is plotting to blow me (defendant) and the concern (the firm) up, and I believe you have a hand in it." It was held that the words were actionable in themselves when connected by the colloquium and innuendo with plaintiff's occupation as clerk, without an averment of special damages; and that they were spoken in the present time makes no difference. Ware v. Clowney, 24 Ala., 707.

§ 38. Digest of English Cases.—

1. Where a declaration alleged that the defendant spoke words of the plaintiff, a dissenting minister, in the way of his office and profession, and his congregation rapidly diminished, and he was compelled for a time to give up preaching altogether, and lost profits thereby, it was held that this was a sufficient allegation of special damage, although the members of his congregation were not named. Hartley v. Herring, 8 T. R., 130; Hopwood v. Thorn, 8 C. B., 293; 19 L. J., C. P., 94; 14 Jur., 87.

2. Where the defendant published in a newspaper that a certain ship of the plaintiff's was unseaworthy, and had been purchased by the Jews to carry convicts, evidence as to the average profits of a voyage was admitted, and also evidence that upon the first voyage after the libel appeared the profits were nearly £1,500 below the average; and this although the action was brought immediately after the libel appeared, and before the last-mentioned voyage was commenced. The jury, however, awarded the plaintiff only £900 damages. Ingram v. Lawson, 6 Bing. N. C., 212; 8 Scott, 471.

3. Where the defendant advertised in "Hue and Cry" that the plaintiff had been guilty of fraud and offered a reward for his apprehension, and the plaintiff immediately sued on the libel, and after action brought was twice arrested in consequence of it, he was allowed to give evidence of

these two arrests at the trial; not indeed as special damage, for they happened after action brought, but in order to show the injurious nature of the libel, and that the plaintiff was at the time of action brought in serious danger of being arrested. Goslin v. Corry, 7 M. & Gr., 342; 8 Scott, N. R., 21. And where words actionable in themselves are spoken of an innkeeper in the way of his trade, evidence may be given of a general loss of custom and decline in his business. Evans v. Harries, 1 H. & N., 251; 26 L. J., Ex., 31.

4. "Suppose a biscuit baker in Regent street is slandered by a man saying his biscuits are poisoned, and in consequence no one enters his shop. He cannot complain of the loss of any particular customers, for he does not know them; and how hard and unjust it would be if he could not prove the fact of the loss under a general allegation of loss of custom." Martin, B., Evans v. Harries, 26 L. J., Ex., 32. But where defendant charged plaintiff with larceny, and the words were repeated by H. to Carpmole, who in consequence refused to employ plaintiff, evidence of such special damage was rejected. Tunnicliffe v. Moss, 3 C. & K., 83; Rutherford v. Evans, 4 C. & P., 74; Hirst v. Goodwin, 3 F. & F., 257.

§ 39. **Special Damage — Must be Specified in the Statement of the Claim.**— Special damage must always be explicitly claimed in the pleadings and strictly proved at the trial. Where the words are not actionable in themselves the plaintiff is confined to the special damage laid, and he must prove it as laid or fail in his suit, as there are no general damages to which he can have recourse. When special damage is proved the jury, in arriving at their verdict, must confine their consideration to the amount of such special damage as is shown by the evidence. They cannot lawfully compensate the plaintiff for pain, mental anxiety or a general loss of reputation in cases where the words are not actionable in themselves, but must confine the assessment to the actual pecuniary loss strictly as alleged and proved.[1]

§ 40. **Statement of the Claim for Special Damage.**— In no case can a claim for special damages be considered by the jury unless an averment of its having been suffered appears in the plaintiff's statement of claim. Moreover, it must be alleged therein with so much of certainty that the defendant may be able to contradict it, if untrue, by evidence; and it is the province of the judge to decide whether the averment of special damages is or is not made with the certainty requisite for such purpose.[2] Where the declaration contains allegations of

[1] Dixon v. Smith, 5 H. & N., 450; 29 L. J., Ex., 125; Work v. Stevens, 76 Ind., 181; Brown v. Brown, 14 Me., 317; Taylor v. Kneeland, 1 Doug. (Mich.), 67; Bradstreet Co. v. Oswald, 96 Va., 396; 23 S. E. Rep., 423.

[2] Flood on L. & S., 129.

different slanders at different times, a general allegation of special damage, "by means of the committing of which said several grievances," is not sufficient. It must be averred from what particular wrongful act the special damage is claimed to have resulted.[1]

§ 41. **Statement of the Claim — Its Requisites.**— An allegation stating generally that in consequence of the defendant's words the plaintiff has lost a large sum of money, or that his practice or business has declined, is not sufficiently precise. The names of the persons who have ceased to employ the plaintiff, or who would have commenced to deal with him had not the defendant dissuaded them, should be set out in the statement, and they themselves called as witnesses at the trial to state their reason for not dealing with the plaintiff. For it may not be clear that their withholding their custom was in consequence of defendant's words, as it might be due to other causes.[2] If the plaintiff cannot give the names of those who have ceased to deal with him, or cannot prove that their so ceasing is due to the defendant's words, he must fail in his suit, although there has in fact been a falling off in his business. But where a publication is libelous in itself, special damage to the business of the person may be shown, though the words were not published concerning that business; and it is not necessary to allege the names of the customers who have ceased to do business with the plaintiff in consequence of the publication.[3] As a rule, words which cause loss of custom to a trader are spoken of him in the way of his trade, and are therefore actionable in themselves. And in other cases of special damage there is no difficulty, for the plaintiff must know the names of the master who has dismissed him and of the friends who formerly showed him hospitality.[4]

§ 42. **The Rule in Actions for Libel.**— In cases of libel no averment of actual damage of any kind is essential, inasmuch as the law infers it to have occurred in such cases.[5] But although it is unnecessary in libel to aver such damage to have

[1] Hoar v. Ward, 47 Vt., 657.

[2] Ashley v. Harrison, 1 Esp., p. 50; per Best, C. J., in Tilk v. Parsons, 2 C. & P., 201.

[3] Broad v. Duester, 8 Biss. C. Ct., 265.

[4] Odgers on L. & S., 303.

[5] Ingram v. Lawson, 6 Bing. N. C., 212.

been sustained by the plaintiff, it is usual, in all cases, to introduce a general allegation that he has suffered greatly in his credit and reputation, and has endured anguish of mind, etc.; and where any special damage has really been sustained by the plaintiff on which he relies to aggravate the damages, it should be set out in the pleadings. Yet that such an averment may, if necessary, be introduced into the statement of the claim or complaint for libel as well as for slander.

This being so, we may here observe that whenever an averment of special damages is made, whether in slander or libel, the rules are just as applicable in the one case as in the other. That is to say, that just as in slander, the special damage must be the legal and natural consequence of the words, not merely of the wrongful act of some third person which has militated against the complaining party; also, that the damage must not be too remote. So, where special damage is laid in libel, the same requirements of legal rules in this respect are to be observed.[1]

§ 43. **Application of the Rule — Distinction between the Loss of Individual Customers and a General Diminution in Annual Profits.**— Loss of customers is special damage, and must be specifically alleged and the customers' names stated; if that be done the consequent reduction in plaintiff's annual income can easily be reckoned. But if no names are given it will be impossible to connect the alleged diminution in the general profits of plaintiff's business with the defamatory words; it may be due to fluctuations in prices, to a change of management, to a new shop being opened in opposition or to many other causes. Hence, such an indefinite loss of business is considered general damage, and can only be proved where the words are spoken of the plaintiff in the way of his trade, and so are actionable in themselves. For there the law presumes that such words must injure the plaintiff's business, and therefore attributes to those words the diminution it finds in his profits.[2] The loss to the plaintiff must be directly connected with the defendant's utterance of the words. If others repeat his words, with or without additions of their own, the

[1] Flood on L. & S., 130, 149.

[2] Harrison v. Pearce, 1 F. & F., 567; 32 L. T. (O. S.), 298.

defendant is not liable for the consequences of what they say. And it is only by such repetitions that a general loss of business can be brought about.[1]

§ 44. **Difficulty of Application.**— The application of the rule is frequently attended with much difficulty. An English case, decided in 1793 by Lord Kenyon, is frequently cited as an illustration. The proprietor of a theater having brought an action against a critic for a libel on one of his performers alleged in the declaration that the defendant, "contriving to terrify and deter a certain public singer, called Gertrude Elizabeth Mara, who had been retained by the plaintiff to sing publicly for him, wrote and published a certain malicious paper, etc., by reason whereof the said Gertrude Elizabeth Mara could not sing without great danger of being assaulted and ill-treated, and was prevented from so singing, and the profits of the theater were rendered much less than they otherwise would have been." Madam Mara being called as a witness did swear that on account of the obnoxious article she did not choose to expose herself to contempt, and had refused to sing. Lord Kenyon, stopping the defendant's counsel, remarked: "The injury is much too remote to be the foundation of an action. An action might equally be supported against every man who circulates the bottle too freely and intoxicates an actor, by which he is rendered incapable of performing his part upon the stage. The loss arises here from the vain fears and caprice of the actress. This action is to depend, forsooth! on the nerves of Madam Mara![2]

Campbell in his life of Lord Kenyon, in commenting upon this case, says: "By this decision Lord Kenyon meritoriously checked the doctrine that was becoming too rampant, that a man is liable for the consequences, however remote or unforeseen."[3] But the case has been criticised by other jurists.[4]

§ 45. **Illustrations — American Cases.**—

1. **A Massachusetts Case:** *Cook v. Cook*, 100 Mass., 194 (1868).

The action was for slander. The declaration alleged that "the defendant publicly, falsely and maliciously testified in the superior court for the county of Norfolk as a witness for one Fenner Cook in an action therein

[1] Odgers on L. & S., 303.

[2] Ashley v. Harrison, 1 Esp., 48; Flood on L. & S., 150.

[3] Campbell's Lives of the Chief Justices, vol. 3, p. 65.

[4] Lumley v. Gye, 2 Ellis & B., 216, 243.

pending, in which said Betsey Cook was plaintiff and said Fenner Cook was defendant, of and concerning the plaintiff, substantially as follows, viz.: Her (meaning the plaintiff) character for truth and veracity is bad. Her (meaning the plaintiff) moral character is bad. Her (meaning the plaintiff) character is bad. Her (meaning the plaintiff) character is not good. And by reason of said false and malicious testimony the plaintiff has suffered special damages, and has been put to great costs and expense thereby, and has had to pay a large sum in costs by reason thereof to said Fenner Cook, to wit, one hundred dollars, and has suffered other special costs and expenses thereby, amounting to three hundred dollars." The defendant demurred on the ground that these allegations were insufficient to sustain the action. The superior court sustained the demurrer and the plaintiff appealed.

Wills, J.: This action can be maintained only upon the ground of special damages suffered by the plaintiff by reason of the words set out as constituting the slander. To sustain the action on this ground it is necessary that the declaration should set forth precisely in what way such special damages resulted from the words relied on. It is not sufficient to allege generally that the plaintiff has suffered damages, or that he has been put to great costs and expenses thereby, or that he has had to pay $100 costs to the other party in the suit in reference to which the words are alleged to have been spoken in the form of testimony. It must be made to appear by proper averments how these special damages were occasioned by the words alleged to have been uttered falsely and maliciously. We may suppose that the plaintiff was a witness in her own behalf in the suit referred to, and that the case may have depended upon her own testimony; that, by reason of her impeachment by the testimony of this defendant, the jury were led to disbelieve the plaintiff; and that thereby she was defeated in the action and subjected to costs. But there are no allegations of this sort; and, without proper allegations to show the connection, it is not to be inferred nor supplied argumentatively. Swan v. Tappan, 5 Cush., 104; Bloss v. Tobey, 2 Pick., 320; Snell v. Snow, 13 Metc., 278. The declaration is insufficient in this respect, and the demurrer must be sustained. Cook v. Cook, 100 Mass., 194.

§ 46. Digest of American Cases.—

1. The plaintiff alleged that the defendant's words had "injured her in her good name, and caused her relatives and friends to slight and shun her." It was held to disclose no special damage. Bassell v. Elmore, 48 N. Y., 563; 65 Barb., 627; Geisler v. Brown, 6 Neb., 254. So where the allegation was merely that by reason of defendant's words "the plaintiff had been slighted, neglected and misused by the neighbors and her former associates and turned out of doors." Pettibone v. Simpson, 66 Barb., 492. And a general allegation that by reason of defendant's acts plaintiff had been compelled to pay a large sum of money, without showing how, was held insufficient. Cook v. Cook, 100 Mass., 194; Pollard v. Lyon, 1 Otto (91 U. S.), 225.

2. In an action for publishing a false and malicious statement concerning the property of the plaintiff, the special damage alleged being the loss of

the sale of the property, evidence of its value as a scientific curiosity, or for exhibition, is immaterial. Gott v. Pulsifer, 122 Mass., 235.

3. Words not of themselves actionable may become so where special damages result from their having been spoken. The plaintiff, however, to recover on such words, must aver in his declaration that special damages have resulted, stating what they are, and prove it in the trial. Strauss v. Meyer, 48 Ill., 385.

4. An action cannot be maintained for a publication which merely disparages the plaintiff's goods or property, unless special damage, which is the gist of the action, is distinctly and precisely set out in the declaration and established by the evidence. Swan v. Tappan, 5 Cush., 104. See Gott v. Pulsifer, 122 Mass., 235; and see, also, 114 Mass., 69; 119 Mass., 484.

5. An action for slander, in falsely testifying that the defendant's character for truth and veracity is bad, cannot be maintained upon a declaration which omits to specify how the alleged special damages resulted to the plaintiff from the defendant's slanderous words. Cook v. Cook, 100 Mass., 194.

6. In determining the damages in an action for slander, in calling plaintiff "a whore," the jury may take into consideration plaintiff's mental suffering, and the present and probable future injury to her reputation for chastity, caused by such publication. Boldt v. Budwig, 19 Neb., 739, 28 N. W. Rep., 280.

7. Proof that the plaintiff was refused civil treatment at a public house, in consequence of slanderous words, it seems, is sufficient to support an averment of special damages. Olmstead v. Miller, 1 Wend. (N. Y.), 506.

§ 47. Digest of English Cases.—

1. An action where one Dawes intended to employ the plaintiff, a surgeon and accoucheur, at his wife's approaching confinement; but the defendant told Dawes that the plaintiff's female servant had had a child by the plaintiff; Dawes consequently decided not to employ the plaintiff; Dawes told his mother and his wife's sister what defendant had said; and consequently the plaintiff's practice fell off considerably among Dawes' friends and acquaintances and others. The fee for one confinement was a guinea. It was held that the plaintiff was entitled to more than the one guinea; the jury should give him such a sum as they considered Dawes' custom was worth to him; but that the plaintiff clearly could not recover anything for the general decline of his business which was caused by the gossip of Dawes' mother and sister-in-law. Dixon v. Smith, 5 H. & N., 450; 29 L. J., Ex., 125. And where the plaintiff alleged that in consequence of the defendant's slander she had "lost several suitors," it was held too general an allegation; for the names of the suitors, if there were any, could hardly have escaped the plaintiff's memory. Barnes v. Prudlin, vel Bruddel, 1 Sid., 396; 1 Ventr., 4; 1 Lev., 261; 2 Keb., 451. See, also, Hunt v. Jones, Cro. Jac., 499; Davies and wife v. Solomon, L. R., 7 Q. B., 112; 41 L. J., Q. B., 10; 20 W. R., 167; 25 L. T., 799.

2. The defendant slandered a dissenting minister, who averred that his congregation diminished in consequence. But the averment was held too general to constitute special damage, the names of the absentees not being given. Hopwood v. Thorn, 8 C. B., 293; 19 L. J., C. P., 94; 14 Jur., 87.

Such an averment would, however, have been sufficient had the words been spoken of the plaintiff in the way of his office, and so actionable in themselves. Hartley v. Herring, 8 T. R., 130; Evans v. Harries, 1 H. & N., 254; 26 L. J., Ex., 31.

3. It has been held in Australia, where a different rule seems to prevail, to say to the keeper of a restaurant, "You are an infernal rogue and swindler," is not actionable without proof of special damage, as not affecting him in his trade. But the plaintiff having alleged that, by reason of the words, people who used to frequent his restaurant ceased to deal with him, it was held the special damage made the words actionable, and that the special damage was sufficiently alleged; that the cases of frequenters of theaters, members of congregations, and travelers using an inn were exceptions to the rule requiring the names of the customers lost to be set forth. Brady v. Youlden, Kerferd & Box's Digest of Victoria Cases, 709; Melbourne Argus Reports, 6th Sept., 1867.

§ 48. **Words Imputing a Want of Chastity.**— By the law of England and formerly in the United States, words imputing unchastity or adultery to a woman, married or unmarried, however gross and injurious they may be, are not actionable unless she can prove that they have directly caused her special damage. The English law on this point has often been denounced by eminent judges. "I may lament the unsatisfactory state of our law according to which the imputation by words however gross, on an occasion however public, upon the chastity of a modest matron or a pure virgin, is not actionable without proof that it has actually produced special temporal damage to her," says Lord Campbell.[1] "Instead of the word 'unsatisfactory' I should substitute the word 'barbarous,'" says Lord Brougham.[2]

Two explanations may be assigned for the undesirable state of the English law on this point: (1) In the days when the common law was formed every one was much more accustomed than they are at present to such gross language, and epithets such as "whore" were freely used as general terms of abuse without seriously imputing any specific act of unchastity. (2) The spiritual courts had jurisdiction over such charges, and though they could not award damages to the plaintiff they could punish the defendant for the benefit of his soul.[3] In Scotland a verbal imputation of unchastity is ac-

[1] Lynch v. Knight and wife, 9 H. L. C., 593; 5 L. T., 291.

[2] Jones v. Herne, 2 Wils., 87; Roberts and wife v. Roberts, 5 B. & S., 384; 33 L. J., Q. B., 249; 10 Jur. (N. S.), 1027; 12 W. R., 909; 10 L. T., 602.

[3] Odgers on L. & S., 86.

tionable without proof of special damage. Throughout the United States an imputation of unchastity to an unmarried female is actionable in itself by statute; and so is an imputation of adultery to a married woman in all the states except, perhaps, Maryland. To charge a woman with being drunk is actionable in Massachusetts.[1]

§ 49. **An Exception.**— To this singular law there was one exception in the case of actions brought in the local courts of the city of London, the borough of Southwark,[2] and, it is said, of the city of Bristol,[3] for words spoken within the jurisdiction of those courts. It was formerly the custom in those localities to cart and whip whores, tingling a basin before them. Hence to call a woman "whore" or "strumpet"[4] or "bawd,"[5] or her husband a "cuckold,"[6] was supposed to be an imputation of a criminal offense to the female plaintiff, and therefore actionable. But no action will lie in the high court of justice for such words, since the custom has never been certified by the recorder, and must therefore be strictly proved. The plaintiffs failed to prove such a custom in 1782;[7] and it would be still more difficult to do so in the present day. The city courts used formerly to take judicial notice of their own custom; but I doubt if they would do so now, the custom being entirely extinct.[8]

§ 50. **Illustrations — Digest of English Cases.—**

1. *It is actionable in England only with proof of special damages* to say of a young woman "she had a bastard;" "because it is a spiritual defamation, punishable in the spiritual court" (Per Holt, C. J., in Ogden v. Turner, Holt, 40; 6 Mad., 104; 2 Salk., 696; Dwyer v. Meehan, 18 L. R., Ir., 138); or to call a woman "a whore" or "a strumpet" is not actionable, except by special custom, if the action be tried in the cities of London and Bristol. "To maintain actions for such brabling words is against law" (Oxford et ux. v. Cross, 4 Rep., 18; Gascoigne et ux. v. Ambler, 2 Ld.

[1] Brown v. Nickerson, 1 Gray, 1.
[2] Sid., 97.
[3] Power v. Shaw, 1 Wils., 62.
[4] Cook v. Wingfield, 1 Str., 555.
[5] 1 Vin. Abr., 396.
[6] Vicars v. Worth, 1 Str., 471.
[7] Stainton et ux. v. Jones, 2 Selw. N. P., 1205, 13th ed.
[8] Odgers on L. & S., 88. See Oxford et ux. v. Cross, 4 Rep., 18; Hassell v. Capcot, 1 Vin. Abr., 395; 1 Roll. Abr., 36; Cook v. Wingfield, 1 Str., 555; Watson v. Clerke, Comb., 138, 139; notes 14 and 96 to 1 Dougl., by Frere, 380; Theyer v. Eastwick, 4 Burr., 2032; Brand and wife v. Roberts and wife, 4 Burr., 2418; Rily v. Lewis, 1 Vin. Abr., 396; Vicars v. Worth, 1 Str., 471; Hodgkins et ux. v. Corbet et ux., 1 Str., 545; Roberts v. Herbert, Sid., 97; S. C. nom. Caus v. Roberts, 1 Keble, 418.

Raym., 1004; Power v. Shaw, 1 Wils., 62 (Bristol); or to call a woman a "bawd" (Hollingshead's Case (1632), Cro. Car., 229; Hixe v. Hollingshead (1632), Cro. Car., 261), unless it be in the city of London. Rily v. Lewis, 1 Vin. Abr., 396.

2. The words "you are living by imposture; you used to walk St. Paul's church-yard for a living"—spoken of a woman with the intention of imputing that she was a swindler and a prostitute — are not actionable without special damage. Wilby v. Elston, 8 C. B., 142; 18 L. J., C. P., 320; 13 Jur., 706; 7 D. & L., 143. So to say of a married man that he has "had two bastards, and should have kept them," is not actionable, though it is averred that by reason of such words "discord arose between him and his wife and they were likely to have been divorced." Barmund's Case, Cro. Jac., 473; Salter v. Browne, Cro. Car., 436; 1 Roll. Abr., 37.

3. The defendant told a married man that his wife was "a notorious liar" and "an infamous wretch," and had been all but seduced by Dr. C., of Roscommon, before her marriage. The husband consequently refused to live with her any longer. *Held*, no action lay. Lynch v. Knight and wife, 9 H. L. C., 577; 8 Jur. (N. S.), 724; 5 L. T., 291.

4. Where the defendant asserted that a married woman was guilty of adultery, and she was consequently expelled from the congregation and Bible society of her religious sect, and was thus prevented from obtaining a certificate, without which she could not become a member of any similar society, *held* no action lay. Roberts and wife v. Roberts, 5 B. & S., 384; 33 L. J., Q. B., 249; 10 Jur. (N. S.), 1027; 12 W. R., 909; 10 L. T., 602.

5. The defendant falsely imputed incontinence to a married woman. In consequence of his words she lost the society and friendship of her neighbors and became seriously ill and unable to attend to her affairs and business, and her husband incurred expense in curing her and lost the society and assistance of his wife in his domestic affairs. *Held*, that neither husband nor wife had any cause of action. Allsop and wife v. Allsop, 5 H. & N., 534; 29 L. J., Ex., 315; 8 W. R., 449; 6 Jur. (N. S.), 433; 36 L. T. (O. S.), 290. But see Davies v. Solomon, L. R., 7 Q. B., 112; 41 L. J., Q. B., 10; 20 W. R., 167; 25 L. T., 799; Riding v. Smith, 1 Ex. D., 91; 45 L. J., Ex., 281; 24 W. R., 487; 34 L. T., 500.

III. Aggravation of Damages.

§ 51. **What May be Shown in Aggravation of Damages.**— The violence of a person's language, the nature of the imputation conveyed and the fact that the defamation was deliberate and malicious will tend to aggravate the damages, and all the circumstances attending the publication may therefore be given in evidence. Any previous transactions between the plaintiff and the defendant which have any direct bearing on the subject-matter of the action, or are a necessary part of the history of the case, are also competent for this purpose. The jury may consider the rank or position in society of the parties,

the fact that the attack was entirely unprovoked, that the defendant could easily have ascertained that the charge he made was false. These are all proper matters for the consideration of the jury. So evidence may be given to show that the defendant was culpably reckless or grossly negligent in the matter. The mode, the extent and the long continuance of publication are admissible with a view to damages, although the publication has been admitted by the pleadings. Subsequent conduct may aggravate the damages; for example, where a party has refused to listen to any explanation or to retract the charge he made.[1]

§ 52. **Extrinsic Matters in Aggravation of Damages.**— It must not be assumed that every piece of evidence which is admissible to prove malice when malice is in issue is also admissible in aggravation of damages. Evidence may be given of antecedent or subsequent libels or slanders to show that a communication *prima facie* privileged was made maliciously; and also when evidence is necessary to explain the meaning of language which without it appears ambiguous. But such evidence is not admissible where the existence of malice is undisputed, and the words of the libel are clear and unambiguous.[2] And when such evidence is admissible the jury may be instructed to give no damages in respect of it.[3] It is only when a subsequent libel has immediate reference to the one sued on that it will be admitted as a necessary part of the *res gestæ*.[4]

§ 53. **The Plaintiff's Character in Issue.**— In actions for defamation of character it is well settled that the plaintiff's general character is involved in the issue; and evidence showing what it is, and consequently its true value, may be offered upon either side to affect the amount of damages.[5]

[1] Vines v. Serell, 7 C. & P., 163; Rosewater v. Hoffman, 24 Neb., 222; Harbison v. Shook, 41 Ill., 142; Stanwood v. Whitmore, 63 Me., 209; Case v. Marks, 20 Conn., 248; Brown v. Barnes, 39 Mich., 211; Buckley v. Knapp, 48 Mo., 152; Story v. Early, 86 Ill., 461; Fry v. Bennett, 28 N. Y., 330.

[2] Stuart v. Lovell, 2 Stark., 93; Pearce v. Ornsby, 1 M. & Rob., 455; Symmons v. Blake, id., 477; 2 C., M. & R., 416; 4 Dowl., 263; 1 Gale, 182.

[3] Pearson v. Lemaitre, 5 M. & Gr., 719; 12 L. J., Q. B., 253; 6 Scott, N. R., 607; 7 Jur., 748; 7 J. P., 336.

[4] Finnerty v. Tipper, 2 Camp., 72; May v. Brown, 3 B. & Cr., 113; 4 D. & R., 670.

[5] 2 Greenl. Ev., § 275; Campbell v. Campbell, 54 Wis., 90; 11 N. W. Rep., 456; Earl of Leicester v. Walter, 2 Camp., N. P. R., 251; Larned v. Buffington, 3 Mass., 546; Stone v. Barney, 7 Met. (Mass.), 86; Burnett v. Simpkins, 24 Ill., 264; Warner v. Lockerby, 31 Minn., 421; 18 N. W. Rep., 145.

§ 54. **The Plaintiff's Character Presumed in Law to be Good.**— The law presumes the plaintiff's character to be good until it is attacked, and he can safely rest upon the presumption. As long as it is not assailed there is no comparative degree of good, better, best in his character — it stands as the best. If he himself opens the inquiry, then the comparison legitimately begins; and upon his own showing, without any attack by the defendant, his character may be qualified and reduced below the standard of the presumption, upon which he may safely rely until it is questioned by the opposite party. Without introducing any evidence his character stands without qualification or defect, and no evidence he can offer will add to or increase its force and virtue. This is the almost universal rule.[1] Nor can the fact that inquiries are made upon cross-examination, in relation to specific facts that may tend to weaken his good character and lessen his good reputation, change this rule. Such specific facts cannot be met, either as a part of the main case or upon rebuttal, with evidence of general reputation in the community where he lives. If upon such cross-examination he admits the existence of such specific facts they must stand against him for what they are worth, except as they may be explained and qualified by evidence or explanation in his behalf. If they are denied by him, and the defendant introduces evidence tending to establish them, he has the right in rebuttal to deny them and establish their falsity or non-existence.[2]

§ 55. **Negligence in Publishers of Newspapers.**— There appear to be no English cases reported as to what is and what is not gross negligence in the conduct of a newspaper. But in the United States it has been held that the jury may take into consideration the hurry necessarily incident to the preparation and publication of a daily newspaper, as where an article is

[1] Hitchcock v. Moore, 70 Mich., 112, 37 N. W. Rep., 914; Cornwall v. Richardson, Ryan & M., 305; Matthews v. Huntley, 9 N. H., 146; Stow v. Converse, 3 Conn., 326; Houghtailing v. Kelderhouse, 2 Barb. (1 N. Y.), 530; Gough v. St. John, 16 Wend. (N. Y.), 646; Anderson v. Long, 10 Serg. & R. (Penn.), 55; 1 Whart. Ev. (2d ed.), secs. 47, 50; Miles v. Van Horn, 17 Ind., 245; McCabe v. Platter, 6 Blackf. (Ind.), 405; Howard v. Patrick, 43 Mich., 121, 5 N. W. Rep., 84; Fahey v. Crotty, 63 Mich., 383; Harbison v. Shook, 41 Ill., 140.

[2] Hitchcock v. Moore, 70 Mich., 112, 37 N. W. Rep., 914.

brought in at the last moment before going to press;[1] but the excitement of an election is no mitigation.[2] It would be very difficult to say, as a matter of law, just what weight should be given by the jury to such facts and circumstances. That they are admissible and should be considered by the jury, not as an excuse or justification, but as circumstances characterizing the act, there seems to be no doubt. But the question of negligence must depend upon the circumstances peculiar to each particular case. It consists largely in a want of proper care, taking into consideration all the surrounding circumstances, and applying thereto general rules applicable to that class of business as ordinarily carried on; and what might under the circumstances in a given case tend to show negligence, under other circumstances might have no such tendency; and while, even where the very best of care is exercised, libelous matter may sometimes unavoidably creep into newspapers of character, for which the publishers will be liable to respond in damages, yet they will be protected from such damages as a jury would be sure to inflict upon those publishers who are reckless and indifferent as to the rights and feelings of others, and do not hesitate to publish scandalous matter, the publication of which can accomplish no good or useful purpose.[3]

§ 56. **Extent of Circulation May be Shown on the Question of Damages.**— When a libel is printed in an edition of many copies for general circulation, the extent of the circulation procured or caused by the publisher may be shown against him as evidence of the injury to the person libeled on the question of damages.[4]

§ 57. **Defendant's Wealth an Element in Estimating Damages.**— In actions of libel and slander, evidence of defendant's wealth has been held admissible in many of the states. Such evidence is admitted on the ground that the defendant's wealth is an element in his social rank and influence in society, and therefore tends to show the extent of the injury suffered from his words; and where punitive or exemplary damages

[1] Scripps v. Reilly, 38 Mich., 10.
[2] Rearick v. Wilcox, 81 Ill., 77.
[3] Scripps v. Reilly, 38 Mich., 20.
[4] Bigelow v. Sprague, 140 Mass., 425; 5 N. E. Rep., 144; Fry v. Bennett, 28 N. Y., 324; 3 Bosw., 200; 4 Duer, 247; Gathercole v. Miall, 15 Mees. & W., 319.

are allowed, it is admitted as a criterion to aid the jury in graduating the punishment.[1]

§ 58. **The General Rule.**—The plaintiff cannot give evidence of general good character in aggravation of damages merely, unless such character is put in issue by the pleadings; for till then the plaintiff's character is presumed good.[2] But such evidence is admissible under special circumstances to show that the libel was false to the knowledge of the defendant, and must therefore have been written maliciously.[3] In all these cases the malice proved must be that of the defendant himself. The improper motive of an agent should not be matter of aggravation against his principal.[4]

§ 59. **Illustrations — American Cases.—**

1. A Michigan Case: *Hitchcock v. Moore*, 37 N. W. Rep., 914.

In an action for slander brought by Hitchcock against Moore in the circuit court of Oakland county, Michigan, it was charged that the defendant had wrongfully accused the plaintiff, in various words and ways, of burning his barn in August, 1885. The plea was the general issue. Upon his cross-examination the plaintiff was asked questions concerning his treatment of his wife, who was a daughter of the defendant, and if he had not at one time, while they were living together, taken her down and put his foot upon her and otherwise used her cruelly. He then called his next witness and proposed to show what his, the plaintiff's, general reputation was where he resided as to being an upright, law-abiding citizen. This was excluded by the court. On appeal it was contended that the plaintiff had a right to show his general good character and reputation as a part of his main case, as such character and reputation were necessarily involved in the issue, independently of the fact whether such character is attacked by the defendant or not, and especially where, upon cross-examination, his character had been indirectly if not directly attacked; but it was held properly excluded, as the law does not allow the plaintiff, where, in actions of slander, he is on cross-examination asked questions affecting his good character, to introduce evidence of his general good character and reputation as a part of his main case.

[1] Barclay v. Copeland, 74 Cal., 1; Brown v. Barnes, 39 Mich., 211; Haynes v. Cowden, 27 Ohio St., 292; 22 Am. Rep., 303; Bennett v. Hyde, 6 Conn., 24; Buckley v. Knapp, 48 Mo., 153; Hosley v. Brook, 20 Ill., 115; Humphreys v. Parker, 52 Me., 502; Kearney v. Paisley, 13 Iowa, 89; Adcock v. Marsh, 8 Ind., 360; Lewis v. Chapman, 19 Barb. (N. Y.), 252; Jones v. Greeley, 25 Fla., 629; 6 So. Rep., 448.

[2] Cornwall v. Richardson, Ry. & M., 305; Guy v. Gregory, 9 C. & P., 584, 587; Brine v. Bazalgette, 3 Ex., 692; 18 L. J., Ex., 348.

[3] Fountain v. Boodle, 3 Q. B., 5; 3 G. & D., 455.

[4] Carmichael v. Waterford and Limerick Rail. Co., 13 Ir. L. R., 313; Robertson v. Wylde, 2 Moo. & Rob., 101; Scripps v. Reilly, 38 Mich., 10; Detroit v. McArthur, 16 Mich., 447.

§ 60. Digest of American Cases.—

1. A plea of justification, and evidence under it, are not an attack upon the general character of the plaintiff; but it authorizes the plaintiff to go into proof of general character. The general rule, stated from Starkie on Evidence, is that, when the defendant does not justify the slander, presumptions of innocence are out of the question: the defendant, by his plea, admits that the imputation was false; and therefore in strictness the character of the plaintiff is not involved in the issue. In other words, the presumption to be derived from the character tends only to prove what is already conceded. Where, indeed, the defendant justifies the slander which conveys an imputation of dishonesty, the case may admit of a very different construction, for the party is charged with a crime; and in such a case character affords just the same presumption of innocence as if the party had been tried for the offense. And next, although, as will be seen, a defendant may in some instances impeach the plaintiff's character, or even that of third persons, in order to mitigate the damages, and when he does so it is clear the plaintiff may, on the other hand, prove the goodness of his character, yet in general, as plaintiff is not allowed to adduce such evidence in the first instance, such evidence is unnecessary till the character has been impeached; for the law presumes a person's character to be good till the contrary is proved. It is a general rule that evidence must be given of the general character of the party, and not of the particular acts; for the presumption in favor of the person arises from the general uniform tenor of his conduct, and not from particular isolated facts. Stowell v. Beagle, 57 Ill., 97.

2. Upon the trial of an action for slander for charging the plaintiff with being a thief and stealing a sheep the defendant proposed to ask a witness, "What is the general reputation of the plaintiff as to being a thief?" Upon objection, the court ruled that the question should have been, "What is the general reputation of the plaintiff for honesty?" It was held this was error, and that the question should have been allowed in the form proposed. Drown v. Allen, 91 Pa. St., 393.

3. Where the court charged the jury to consider "all the evidence on both sides touching the moral character of the plaintiff," but did not definitely state what effect, if any, said character should have in determining the amount of damages, it was held that it was error to refuse to charge that in actions for slander "a person of bad character is not entitled to the same measure of damages as one of good character," and that if plaintiff's "general character" was bad that fact must be considered in determining the damages. Campbell v. Campbell, 54 Wis., 90.

4. In an action for slander the defendant cannot inquire into the social intercourse of the plaintiff with his neighbors; and where the slander charged is for horse-stealing the defendant cannot introduce evidence of rumors as to the plaintiff or his son having stolen a hog. Dillard v. Collins, 25 Gratt. (Va.), 343.

5. The plaintiff in an action of slander cannot show in order to enhance the damages that it was currently reported in the neighborhood that the defendant had charged the plaintiff with the crime alleged in the declaration. Leonard v. Allen, 11 Cush. (65 Mass.), 241.

6. It is not competent to inquire into the general state of feeling, whether kindly or the reverse, between the parties prior to the speaking the words charged. The action of slander was not designed to punish the plaintiff for general ill-will to his neighbor, but to afford the plaintiff redress for a specific injury. To constitute that injury malice must be proved in the special case set forth in the pleadings. And if general ill-will cannot be shown to enhance the damages, so general good-will cannot be shown to mitigate them. Barr v. Hack, 46 Iowa, 308.

7. The general character of the plaintiff is, however, an issue in an action of slander without regard to the pleadings or notice on the part of the defendant. But this means his character in the most general sense, not his character in relation to every foible, failing or vice which may derogate from a good general character. The question to the witness should be: What is the plaintiff's general character? The defendant cannot go beyond this in the first instance, though the plaintiff may call for the witness' grounds. Root v. King, 7 Cow. (N. Y.), 613.

8. *Proof of the character* of the plaintiff subsequent to the speaking of the words is not admissible, although the character offered to be proved is of such a description as that it could not have been caused by the speaking of the words. For example, the defendant will not be permitted to prove that the plaintiff is reputed a common prostitute, when the words charged are that she is a thief. General character is the estimation in which a person is held in the community in which he has resided, and ordinarily the members of that community are the only proper witnesses to testify as to such character. Douglas v. Tousey, 2 Wend. (N. Y.), 352.

9. Until the character of plaintiff in an action for the defamation is attacked he has no right to introduce evidence of his good character. But where defendant files a plea of justification and attempts to establish its truth, that is such an attack upon plaintiff's character as authorizes him to introduce evidence of good character. Harbison v. Shook, 41 Ill., 141. A mere denial of the plaintiff's allegation of good reputation is not to be considered in aggravation of damages. Pink v. Pink, 51 Cal., 420.

10. Where the defendant in his answer alleges matters which, if true, would tend to show that the plaintiff was guilty of the crime charged in the words complained of, and if he does not believe and has no reason to believe such alleged matters to be true, the jury may consider such allegations as showing continuing and express malice, and as matter in aggravation of damages. Chamberlain v. Vance, 51 Cal., 75.

11. A defendant proved to have uttered slanderous words of the plaintiff is not entitled to have facts tending to prove them true considered, either in mitigation of damages or as showing a privileged communication, if it appears that he uttered the slander without believing it to be true. Quin v. Scott, 22 Minn., 456.

12. In a libel suit it is error to receive evidence of the plaintiff's social position and standing in society in aggravation of damages. Prescott v. Tousey, 50 N. Y. Super. Ct., 12.

13. The jury may consider the pecuniary condition of the defendant in fixing the amount of damages. Burckhalter v. Coward, 16 S. C., 435.

14. The wealth of the defendant should be proved by general reputation

rather than by particular facts, the better to show his position in society and the damaging effect of the words. Stanwood v. Whitmore, 63 Me., 209.

15. Evidence which shows that the defendant could have ascertained from his own books of account that the statements published were false justifies an instruction for punitive damages on the ground of gross carelessness or recklessness. Lanius v. Druggist Pub. Co., 20 Mo. App., 12.

16. In an action for calling the plaintiff a thief he may show in aggravation of damages that he was married and had a family. Rhodes v. Nagles, 66 Cal., 677; Barnes v. Campbell, 60 N. H., 27.

17. Upon the question of damages, when a libel is printed in an edition of many copies of general circulation, the extent of the circulation procured or caused by the publisher may be shown against him as evidence of the injury to the person libeled. Bigelow v. Sprague 114 Mass., 14.

18. Where the plaintiff was accused of having stolen goods from his employer, during an angry dispute at an election, in the presence of from twenty to sixty persons, the mental suffering of the plaintiff is an element of damages. Mahoney v. Belford, 132 Mass., 393.

19. In an action for libel for calling plaintiff a thief, evidence that he had a wife and child *held* admissible on the question of damages. Barnes v. Campbell, 60 N. H., 27. And so in an action for slander. Rhodes v. Nagles, 66 Cal., 677.

20. In an action against the publisher of a journal for the publishing of a libelous article, of which the publisher is not the author, in fixing the amount of damages to be awarded as compensation to the plaintiff for the injury received the jury have no right to consider the wealth and standing of the defendant. The extent of the circulation of the newspaper and its character and standing for fairness, justice and truth, it seems, may be considered on such question. Storey v. Early, 86 Ill., 461.

21. No specific proof of actual injury is necessary to warrant a jury in awarding substantial, and even in a proper case exemplary, damages for publication of a malicious libel. Hubbard v. Rutledge, 52 Miss., 581.

22. In an action of slander the plaintiff may testify to mental suffering caused to him by the publication of the slander, although damages for such suffering are not specifically alleged in the declaration. Chadsey v. Thompson, 137 Mass., 136.

23. The damages should not be assessed merely according to the defendant's ability to pay; for whether the payment of the amount due to the plaintiff as compensation for the injury will or will not be convenient to the defendant does not at all affect the question as to the extent of the injury done, which is the only question to be determined. The jury are to inquire, not what the defendant can pay, but what the plaintiff ought to receive. Holmes v. Holmes, 64 Ill., 294.

24. The jury may take into consideration the pecuniary circumstances and standing of the defendant, as well as character of plaintiff; also they may consider the fact that the slander was reiterated at different times and to different persons, and that the defendant had endeavored to have plaintiff indicted, in fixing damages, and that they could give exemplary damages. Harbison v. Shook, 41 Ill., 141.

23. On the question of exemplary damages the defendant may show that he is a man of no property. Rea v. Harrington, 58 Vt., 181; Trimble v. Foster, 87 Mo., 49.

§ 61. Digest of English Cases.—

1. If the libel was sold to the public indiscriminately, heavy damages should be given, for the defendant has put it out of his power to recall or contradict his statements should he desire to do so. Per Lord Denman, 9 A. & E., 149; Per Best, C. J., 5 Bing., 402.

2. If the libel has appeared in a newspaper, proof that the particular number containing the libel was gratuitously circulated in the plaintiff's neighborhood, or that its sale was in any way especially pushed, will enhance the damages. Gathercole v. Miall, 15 M. & W., 319; 15 L. J., Ex., 179; 10 Jur., 337.

3. Where there is no malice, gross negligence on the part of the proprietor of a newspaper in allowing the libel to appear in its columns may be proved to enhance the damages. Smith v. Harrison, 1 F. & F., 565.

4. If other words, injurious and abusive, though not actionable in themselves, were uttered on the same occasion as the words complained of, these other words may be given in evidence as an aggravation of the actionable words. "Where a wrongful act is accompanied by words of contumely and abuse the jury are warranted in taking that into consideration and giving retributory damages." Per Byles, J., in Bell v. Midland Rail. Co., 10 C. B. (N. S.), 308. And see Dodson v. Owen, 4 Times L. R.; Blagg v. Sturt, 10 Q. B., 899; 16 L. J., Q. B., 39; 11 Jur., 101; 8 L. T. (O. S.), 135; Merest v. Harvey, 5 Taunt., 432.

5. The defendant's conduct of his case, even the language used by his counsel at the trial, may aggravate the damages. Per Pollock, C. B., Darby v. Ousley, 25 L. J., Ex., 230, 233; Blake v. Stevens, 4 F. & F., 235; 11 L. T., 543; Risk Allah Bey v. Whitehurst, 18 L. T., 615. So a plea of justification, if persisted in, but not proved, will enhance the damages. Warwick v. Foulks, 12 M. & W., 508; Wilson v. Robinson, 7 Q. B., 68; 14 L. J., Q. B., 196; 9 Jur., 726; Simpson v. Robinson, 12 Q. B., 511; 18 L. J., Q. B., 73; 13 Jur., 187.

IV. Mitigation of Damages.

§ 62. The Rule where the Defendant Does Not Justify.— Where a defendant does not justify he may mitigate the damages in two ways:

First. By showing the general bad character of the plaintiff.

Second. By showing any circumstances which tend to disprove malice, but do not tend to prove the truth of the charge.[1]

[1] Mapes v. Weeks, 4 Wend. (N. Y.), 659; Alderman v. French, 1 Pick., 16; Arrington v. Jones, 9 Porter, 139; Kinney v. Hosea, 3 Harr. (N. J.), 397; Regnier v. Cabott, 2 Gilm. (Ill.), 34; McCauley v. Elrod (Ky.), 27 S. W. Rep., 867; Fitzpatrick v. Daily States Pub. Co., 48 La. Ann., 1116; 20 So. Rep., 173; Holmes v. Jones, 147 N. Y., 59; Mattice v. Wilcox, 147 N. Y., 624; Wuensch v. Morning Journal, 4 App. Div. (N. Y.), 110.

§ 63. What May be Shown in Mitigation of Damages — Illustrations — Digest of American Cases.—

1. The defendant may show, in mitigation of damages, that, before the words were spoken, some statements which another had made in reference to the same offense had been communicated to him. Galloway v. Courtney, 10 Rich. (S. C.), 414.

2. The defendant may prove the facts and circumstances in reference to which the words were spoken for the purpose of showing that he did not intend by the use of them to impute to the plaintiff the crime, which, standing alone, they would naturally import. Williams v. Cawley, 18 Ala., 206. The proof was that the defendant spoke, in German, in the hearing of several persons, these words: "You stole $52 of M." *Held* competent to prove, in mitigation, that the words referred to a mere conversion by the plaintiff of a draft for $52 belonging to M., and that they were so understood by some of the hearers. Eckert v. Deitz, March Gen. T., 1858, N. Y. Sup. Ct.

3. When the defendant does not justify he may mitigate damages in two ways only: (1) by showing the general bad character of the plaintiff, and (2) by showing any circumstances which tend to disprove malice, but do not tend to prove the truth of the charge. This qualification excludes not only such circumstances as the law recognizes as competent evidence tending to prove the truth of the charge, but all circumstances which, in the popular mind, tend to cast suspicion of guilt upon the plaintiff. Storey v. Early, 86 Ill., 461.

4. The defendant charged the plaintiff, a female, with incontinency. In a suit for slander it was held that the defendant might show his mental suffering caused by his belief that the plaintiff had seduced his son in mitigation of damages. Dougald v. Coward, 96 N. C., 368.

5. The alleged slander consisted in calling the plaintiff a thief and scoundrel. At the trial the defendant testified that, at the time he used the language, he believed that his property had been stolen. The evidence was proper as tending to show good faith and in mitigation of damages. Morris v. Lachman, 67 Cal., 109.

6. Drunkenness or an unaccepted apology is no defense, but only matter in mitigation of damages. Jones v. Townsend, 21 Fla., 431; 57 Am. Rep., 171; Howell v. Howell, 10 Ired. (N. C.) L., 84.

7. Where slanderous words do not, on their face, purport to be spoken on the authority of another, but are spoken as of defendant's own knowledge, it cannot be shown in mitigation of damages that they originated with another. Marker v. Dunn, 68 Iowa, 720.

8. In an action for libel the fact that the publication, though false, was an honest effort to repel an accusation made by the plaintiff against the defendant, is a mitigating circumstance. Shattuck v. McArthur, 29 Fed. Rep., 136.

9. Although a libel upon the plaintiff cannot be justified by a previous wholly independent libel upon the defendant, yet under the New York code, sections 535 and 536, as to matter in justification or in mitigation, the answer may set up matter tending to show the truth of the alleged libelous

matter; as, for instance, where the plaintiff's allegation is in effect that the defendant falsely charged the plaintiff with casting doubts upon the pedigrees of horses in a register prepared by the defendant. Battell v. Wallace, 30 Fed. Rep., 229.

10. The fact that a defendant believed the charges to be true only goes to the mitigation of damages, and not in bar of an action. Wazelka v. Hittrick, 93 N. C., 10.

11. Drunkenness is no mitigation in an action for slander. Mix v. McCoy, 22 Mo. App., 488. See Jones v. Townsend, 21 Fla., 431; 57 Am. Rep., 171; *ante*, 6.

12. Evidence in mitigation of damages that, before the defamation for which the suit was brought, the plaintiff's mother had frequently complained to others of rumors damaging to the plaintiff's character, is admissible. Though evidence had been admitted that the plaintiff's mother said to the defendant, "I want you to stop your daughter from calling my daughter a ——," the testimony of the daughter to show that she never used such language is inadmissible. Shilling v. Carson, 27 Md., 175.

13. The defendant may prove in mitigation that, a short time before the suit, a third party told plaintiff the prosecution should cost him nothing; that plaintiff appeared not to wish to sue, and that such person said to him he intended to break defendant down by lawsuit and otherwise. Douglass v. Craig, 3 La. Ann., 639.

14. For the purpose of reducing the damages the defendant may introduce evidence to show that the plaintiff's general moral character is bad, but evidence of particular facts is inadmissible. Lamos v. Snell, 6 N. H., 413; Sawyer v. Eifert, 2 Nott & McC. (S. C.), 511; Eastland v. Caldwell, 2 Bibb (Ky.), 21; Paddock v. Salisbury, 2 Cow. (N. Y.), 811.

15. Under General Statutes of Minnesota, 1878, chapter 66, section 116, the defendant may testify to his own belief and good faith in mitigation of damages. Marks v. Baker, 28 Minn., 162; 9 N. W. Rep., 678.

16. While in slander, under Revised Statutes of Wisconsin, section 2673, mitigating circumstances not pleaded cannot in general be shown by affirmative proof, yet where the plaintiff has put in evidence a fact not pleaded by him, tending to create an inference of express malice, defendant may rebut that inference by explanatory evidence. Reifey v. Timm, 53 Wis., 63; 10 N. W. Rep., 5.

17. Where the defendant gives notice that he will prove certain facts "in mitigation of damages," such facts, if otherwise proper, may be proved although they amount to a justification. Baker v. Wilkins, 3 Barb. (N. Y.), 220.

18. The defendant may prove a general report of the truth of the words spoken in mitigation of damages, but not in justification. Nelson v. Evans, 1 Dev. (N. C.) L., 9; Calloway v. Middleton, 2 A. K. Marsh. (Ky.), 372; Wetherbee v. Marsh, 20 N. H., 561.

19. Drunkenness may be shown in mitigation of damages; but if the slander is often repeated when the slanderer is sober and when drunk, it is no mitigation. Howell v. Howell, 10 Ired. (N. C.) L., 84; Jones v. Townsend, 21 Fla., 431; 57 Am. Rep., 171.

20. If the words are spoken as current report, or as expressing regret,

that fact may be given in evidence to mitigate damages. Young v. Slimons, Wright (Ohio), 124.

21. In an action for libel against the publisher of a newspaper for publishing a libelous article, the defendant may show under the general issue, in mitigation of damages, certain forged letters, purporting to have been written by reputable citizens to the defendant, charging the plaintiff in substance as in the libelous article, whereby the defendant was imposed upon and induced to publish the article. Storey v. Early, 86 Ill., 461.

22. Where the libel complained of is that defendant published that "the wretched idiot (meaning the plaintiff) set about to injure us (meaning defendant) by trying to cast doubt upon some of the early pedigrees as they appeared in the register (meaning defendant's book of pedigrees of horses)," and defendant in his answer alleged in detail the instances in which plaintiff had tried to cast doubts on the earlier pedigrees in defendant's register, *held*, that these allegations were competent under Code Civil Procedure, New York, sections 535, 536, allowing defendant to prove mitigating circumstances, and facts not amounting to a complete defense, tending to reduce plaintiff's damages, if the facts are set forth in the answer. Battell v. Wallace, 30 Fed. Rep., 229.

23. In an action against a newspaper for libel, it appeared that the article was taken from a neighboring sheet as a mere matter of news, and with no circumstances of aggravation or malice. *Held*, that the plaintiff was entitled to compensation for the injury suffered, and the manner of publication was to be considered by the jury either in mitigation or aggravation of damages. Edwards v. Kansas City Times, 32 Fed. Rep., 813.

24. A defendant justifying, and failing in his proof, may offer evidence in mitigation of damages. Morehead v. Jones, 2 B. Mon. (Ky.), 210.

25. In an action for saying, "Negro Jude said, etc., and it is reported everywhere," evidence that the negro did use the actionable words is admissible in mitigation, as showing the defendant's motive. Williams v. Greenwade, 3 Dana (Ky.), 438.

26. Declarations of the husband, pending an action for the slander of his wife, that he believed the defendant had not originated the slander, but had only repeated it, is admissible in mitigation of damages. So are statements of facts made in a negotiation for compromise. But not so of offers of certain terms of settlement. Evans v. Smith, 5 T. B. Mon. (Ky.), 363.

27. Where the defendant assented to the slanderous imputations of a third person it was held that he might give in mitigation that he derived his information from others. Kennedy v. Gregory, 1 Binn. (Pa.), 85.

28. If the words are spoken as current report, or as expressing regret, such facts may be given in evidence to mitigate damages. Young v. Slemons, Wright (Ohio), 124.

29. Under some circumstances the defendant may show in mitigation of damages from whom he heard the slanderous words. Leister v. Smith, 2 Root (Conn.), 24.

30. In mitigation of damages evidence that the party uttering the words offered an explanation of the same, the explanation being part of the same conversation and in the hearing of the same persons, and in reference to the same subject, is admissible. Winchell v. Strong, 17 Ill., 597.

31. In an action by B. against S., an editor, for a libel charging B. with holding revival meetings, preaching Rev. E.'s sermons, having a mercenary object, and being an unscrupulous adventurer, S. testified that B., when seeming to be slightly under the influence of liquor, had called on him and told him he had assisted in carrying on a meeting at a neighboring town, had taken some of the collection money, had found preaching to be damned paying business, and had got his points from E.'s sermons. It was *held* that a question to S. by his counsel, "Why did you write it?" was improperly excluded, as the answer might go in mitigation of vindictive damages. Burnett v. Smith, 23 Hun (N. Y.), 50.

32. Under a plea of justification evidence of a rumor of the truth of the alleged libel may be given in mitigation of damages, and evidence of the defendant's motive in publishing the alleged libel is admissible for the same purpose. Heilman v. Shanklin, 60 Ind., 424.

33. Where a slanderous charge of larceny is made the foundation of a suit, evidence of the plaintiff's general reputation for honesty and integrity is admissible in mitigation of damages. Warner v. Lockerly, 31 Minn., 421.

34. The publication of a retraction is not a bar to an action for publishing a libelous article, but it may be considered in mitigation of damages. Cass v. N. O. Times, 27 La. Ann., 214.

35. Where the words complained of allege a habit of committing a certain kind of unlawful act as well as a specific instance of the same, the defendant may plead in defense or in mitigation of damages other specific instances of the same kind of act of which the plaintiff has been guilty. Kimball v. Fernandez, 41 Wis., 329.

36. The defendant may set up that he spoke the words in a moment of heat and passion induced by immediately preceding acts of the plaintiff; and all the immediate circumstances under which the slanderous words were spoken may be shown where it is alleged they were spoken in heat of passion. But it is not enough that the words were spoken in the heat of passion; it must also appear that there was provocation caused by the person of whom the words were spoken. Jauch v. Jauch, 50 Ind., 135.

37. In an action for slander the sudden passion of the defendant may be adduced in mitigation of damages, but not in justification of the words. Flagg v. Roberts, 67 Ill., 145.

38. Proof that the defendant repeated but did not originate the alleged slander may be considered in mitigation of damages, but not in justification. Hinkle v. Davenport, 38 Iowa, 355.

39. In Michigan, where it appeared that the matter complained of was published with no intent to injure the person libeled, and that all proper precautions were observed in publishing it, the recovery of damages is limited to the actual injury sustained. Evening News Ass'n v. Tryon, 43 Mich., 549; 36 Am. Rep., 450.

40. The defendant said of the plaintiff: "You are a thief and a scoundrel; you have made false entries in my books; you have sold flour for me and collected therefor more than you accounted to me for, and kept the balance," etc. It was *held* that the defendant might show in mitigation of damages that the plaintiff had been discharged from his employ-

ment several weeks before the slanderous words were spoken, and had, after his discharge, gone about among the defendant's customers, warning them that defendant would charge them usurious interest, sell them out, and break them up. [Daly, C. J., doubting.] Palmer v. Lang, 7 Daly (N. Y.), 33.

41. In a libel suit want of malice may be urged in mitigation of damages; but, if the libel is proved, want of malice will not justify a verdict for the defendant. Shipp v. Story, 68 Ga., 47.

§ 64. What is Not Admissible in Mitigation of Damages — Digest of American Cases.—

1. Testimony to prove that the slanderous words had been used by the defendant in reference to a certain bill in chancery, which the defendant at the time supposed and believed the plaintiff had sworn to, though in fact it was sworn to by another person, and that allegations in said bill were false, is inadmissible in evidence, even in mitigation of damages. Owen v. McKean, 14 Ill., 459.

2. It is no defense, nor can it be given in evidence of mitigation of damages, that the defendant was told by another what he uttered against the plaintiff. Inman v. Foster, 8 Wend. (N. Y.), 602; Treat v. Browning, 4 Conn., 408.

3. The rule that evidence of a fact in mitigation of a slander is not admissible unless set up in the answer applied in an action for words charging the plaintiff with illicit intercourse with the defendant's husband; and *held*, that evidence that the plaintiff was seen alone with him in his store late at night after rumors of their intimacy were in circulation was inadmissible without averment and proof that the circumstance was communicated to the defendant before she uttered the words charged. Willover v. Hill, 72 N. Y., 36.

4. Good faith cannot protect a false publication; nor can one excuse himself for making a mistaken assault upon his neighbor's reputation by showing the absence of malice, when even had his charge been true there was no proper purpose in bringing the matter to public notice. Counter-publications which are not libelous and could have no force as a provocation are not admissible in evidence in mitigation of damages. Whittemore v. Weiss, 33 Mich., 348.

5. In an action for repeating a story that the plaintiff, an unmarried woman, had been delivered of twins, evidence that rumors charging her with fornication previously prevailed in the neighborhood is not admissible either in bar or in mitigation of damages. Peterson v. Morgan, 116 Mass., 350. See Clark v. Brown, 116 Mass., 505.

6. It seems that a retraction of a libelous article after suit is begun cannot be considered in mitigation of damages. Evening News Assoc. v. Tryon, 42 Mich., 549; 36 Am. Rep., 450.

7. In an action for slander or libel the defendant cannot avail himself of any facts in mitigation of damages unless it is made to appear that he was informed thereof when he uttered the words, and that he did so under a belief in their truth. This need not be by direct evidence if the facts are shown to have been so notorious as to create a fair presumption that they

had come to his knowledge. Hatfield v. Lasher, 57 How. (N. Y.) Pr., 258; 17 Hun (N. Y.), 23.

8. In an action for libel in publishing notice of a suit, evidence that when the correspondent sent the item he had information that such an action had been brought, and where he obtained this information, and evidence that at that time such an action had been brought against another person of the same name as plaintiff, omitting the "Jr.," and that the correspondent had received information of that fact at the time of sending the article, is not admissible in mitigation of damages, in the absence of an offer to prove that such information had been communicated to defendant otherwise than in the article sent to him. Morey v. Morning Journal Ass'n, 1 N. Y. S., 475, 123 N. Y. 207.

9. In an action against a newspaper for libel, *held*, that matters that transpired after publication cannot be considered in mitigation of damages. Edwards v. Kansas City Times Co., 32 Fed. Rep., 813.

10. Though the answer sets up no facts in mitigation of damages, the manner, nature, extent and circumstances of the publication being proved by plaintiff, an instruction that, as defendant alleges nothing in mitigation, the jury could consider nothing of that character, is improper, as any circumstances of a mitigatory character proved by plaintiff should be regarded. Moore v. Manufacturers' Nat. Bank, 4 N. Y. S., 378.

11. Defendant, in his answer in a suit for slander, alleged circumstances in mitigation, which came to his knowledge after the words complained of were spoken. The court instructed the jury that only circumstances within the knowledge of defendant before the words were spoken could be shown in mitigation of damages. *Held*, that the refusal of the court to strike out that portion of the answer worked no injury to the defendant in view of the charge of the court. Barkly v. Copeland 74 Cal., 1, 15 Pac. Rep., 307.

12. It is erroneous to instruct the jury that they may, in mitigation of damages, consider the excitement of an election leading to the publication, or the fact that the article was published for the sole purpose of defeating the plaintiff's election. Rearick v. Wilcox, 81 Ill., 77.

13. In an action brought by husband and wife for slanderous words spoken of the wife, the defendant is not allowed to show in mitigation of damages that the plaintiff kept a disorderly house. Watson v. Moore, 2 Cush. (56 Mass.), 133.

14. In an action for calling the defendant a hog-thief, evidence of the common report that the plaintiff had been accused of that crime in Mississippi, and had run away, is not admissible in mitigation of damages without showing previously that plaintiff's general character is bad, and that such report was believed by his neighbors. Nor is evidence of such report admissible in connection with a knowledge and belief of the report by the defendant to rebut the presumption of malice, in mitigation of damages, unless accompanied by a distinct admission that the charge is false. Bradley v. Gibson, 9 Ala., 406.

15. The defendant cannot prove, in mitigation of damages, that in other conversations than those alleged he spoke of the plaintiff less offensively. Bradford v. Edwards, 32 Ala., 628.

16. The defendant cannot, under the general issue alone, be permitted to

prove, in mitigation of damages, the truth of the words spoken; nor a general report that the plaintiff was guilty of the crime imputed to him. Alderman v. French, 1 Pick. (Mass.), 1.

17. Evidence that the defendant was in the habit of talking much about persons and things, and that what he said was not regarded by the community as worthy of notice, and seldom occasioned remark, was held not to be admissible in mitigation of damages. Howe v. Perry, 15 Pick. (Mass.), 506.

18. Evidence of a normal or intellectual character of a person in whose hearing and to whose understanding slanderous words are spoken is immaterial under the question of damages in an action of slander. Sheffill v. Van Deusen, 15 Gray (Mass.), 485.

19. Evidence of witnesses who heard the words spoken, that they did not believe them, is not admissible in mitigation of damages; but evidence of declaration by the plaintiff that he was not injured by them is admissible for that purpose. Richardson v. Barker, 7 Ind., 567.

20. For charging the plaintiff with adultery with J. S., the defendant cannot plead or give in evidence, in mitigation of damages, adultery with others. Matthews v. Davis, 4 Bibb (Ky.), 173.

21. The defendant has no right to prove, in mitigation of damages, the fact that "the plaintiff was, and had for a considerable time been, his enemy." Craig v. Catlet, 5 Dana (Ky.), 323.

22. In a suit against husband and wife for words spoken by the wife, evidence of the husband's efforts to prevent the circulation of the slander is not admissible in mitigation of damages. Yeates v. Reed, 4 Blackf. (Ind.), 463.

23. Under a plea of justification coupled with the general issue in an action of slander, the defendant cannot show, in mitigation of damages, that the defamatory words were spoken through heat of passion, and without malice, or with an honest intention, mistakenly, and with no design of injury. Larned v. Buffington, 3 Mass., 546.

24. The defendant cannot prove his own poverty in mitigation of damages. Case v. Marks, 20 Conn., 248. Nor evidence of his own bad character. Hastings v. Stetson, 130 Mass., 76.

25. Public report of a fact of slander in a libel cannot be given in evidence in mitigation of damages, when the libel expressly disavows all reliance on report, and professes to go on the ocular observation of the author. Nor is such a report admissible to mitigate the damages in any action of slander after the defendant has made an unsuccessful attempt to justify by giving the truth in evidence upon plea or notice, though such plea or notice be accompanied with the general issue. Root v. King, 7 Cow. (N. Y.), 613.

§ 65. **Division of the Subject.**— Matters intended to be used in mitigation of damages, from the nature of the subject, must always proceed from the defendant.

Such matters, as we have seen, are divided into two classes:

First. General bad character of the party defamed.

Second. Circumstances tending to show the absence of malice not tending to prove the truth of the charge. This class

is susceptible of a further division, and for the purpose of convenience and ready reference it may be divided into: (1) Previous publication by others; (2) matters not amounting to a justification; (3) liability of third persons; (4) absence of special damage; (5) absence of malice; (6) provocation; (7) amends and apologies.

§ 66. **Bad Character of the Party Defamed.**— One way, but a very dangerous one, says Odgers, of mitigating damages "is to show that the plaintiff's previous character was so notoriously bad that it could not be impaired by any fresh accusation, even though undeserved. The gist of the action is the injury done to the plaintiff's reputation; and if the plaintiff had no reputation to be injured, surely he cannot be entitled to more than nominal damages. Hence the fact that plaintiff had a general bad character before the date of the libel or slander may be given in evidence in mitigation of damages. But the defendant may not go into particular instances; still less may he prove the existence of a general report that the plaintiff had actually committed the particular offense of which the defendant accused him or any similar offense."

If, however, the plaintiff testifies in his own behalf, he can be cross-examined on all the details of his previous life which affect his character; but, unless such details are material to the issue, the defendant must take the plaintiff's answer, and cannot call evidence to contradict it.[1]

Proof of the bad character of the plaintiff at and before the time of the alleged slander is admissible in mitigation of exemplary as well as compensatory damages.[2]

§ 67. **Bad Character Must Have Existed Previous to the Alleged Defamation.**— Evidence as to plaintiff's bad character will not, however, be admissible unless it be shown that his character was such previously to the alleged slander or libel; for otherwise his evil reputation may have been occa-

[1] Odgers on L. & S., 320; Adams v. Smith, 58 Ill., 417; Clark v. Brown, 116 Mass., 509; Root et al. v. King et al., 7 Cow. (N. Y.), 609; Maynard v. Beardsley, 7 Wend. (N. Y.), 560; Earl of L. v. Walter, 2 Camp., 251; Stone v. Varney, 7 Met. (48 Mass.), 86; Bridgman v. Hopkins, 34 Vt., 532; Sheahen v. Collins, 20 Ill., 325; Clements v. Maloney, 55 Mo., 353; Fowler v. Chichester, 26 Ohio St., 9; Case v. Marks, 20 Conn., 248.

[2] Humphreys v. Parker, 52 Me., 502; Maxwell v. Kennedy, 60 Wis., 645; 7 N. W. Rep., 657; Knapp & Co. v. Campbell (Tex.), 36 S. W. Rep., 765.

sioned by the defendant's own publication, which would rather aggravate than diminish the damages.[1] So where evidence was offered to show the reputation of a party charged with the commission of a criminal act, the witnesses should be restricted to what they knew of such reputation before the publication of the matter complained of.[2]

§ 68. **Illustrations — Digest of American Cases.—**

1. Where a witness called for defendant, in slander, testified that the reputation of the plaintiff for chastity was bad, it is competent to ask the witness, on cross-examination, what he had heard that the defendant had said to others on that subject. In an action for slander, evidence having been offered as to the reputation of the plaintiff for chastity, and a witness for defendant permitted to testify as to what others had stated that defendant had said on the subject, it is competent for defendant to show that he had uttered slanderous statements on that matter only to plaintiff's witnesses, and not to those mentioned by the witness. Binford v. Young 115 Ind., 174, 16 N. E. Rep., 142.

2. Where the defense pleaded to an action for slander is plaintiff's general reputation, evidence of specific acts of misconduct, and rumors arising therefrom, is inadmissible. Hanners v. McClellan, 74 Iowa, 318, 37 N. W. Rep., 389.

3. In an action for slander, where it was shown that plaintiff's reputation for chastity was not questioned in the community; that some difficulty arose between defendant, a landlord, and plaintiff, his tenant, and he circulated reports about her; and where the testimony as to plaintiff's chastity was somewhat conflicting,—a judgment for plaintiff will be sustained: but one for $3,000 was excessive, and must be remitted to $2,000. Brooks v. Dutcher, 22 Neb., 644, 36 N. W. Rep., 128.

4. In an action for slander the court instructed the jury, on behalf of the plaintiff, that evidence of character was admissible for the purpose of showing the extent of the injury, but not in justification; and then directed them that if the defendant had failed under his plea of justification to prove the plaintiff guilty of the crime charged, then they would be bound under the law, no matter what the proof as to the general character of the plaintiff, to find for him in any sum not exceeding $5,000, which was the amount of the *ad damnum* laid in the declaration. This was stating the rule too broadly. While it is true that the character of a party, however bad, does not justify the utterance of slanderous words, yet the measure of damages is vastly different where the party sustains a good character. Adams v. Smith, 58 Ill., 417.

5. In an action for words spoken concerning plaintiff's credit the defendant, in mitigation, may give evidence of a general reputation of the plaintiff in respect to want of punctuality in payment of his debts. Turner v. Foxall, 2 Cranch, C. Ct., 324.

[1] Thompson v. Nye, 16 Q. B., 175; 20 L. J., Q. B., 85; 15 Jur., 285.

[2] Bathrick v. Detroit P. & T. Co., 50 Mich., 629; 16 N. W. Rep., 176.

6. Where the averment of the declaration is the imputation by the defendant to the plaintiff of general unchastity, and a general issue is pleaded, evidence may be offered in mitigation of damages that the general reputation of the plaintiff for chastity was bad. Conroe v. Conroe, 47 Pa. St., 198.

7. Plaintiff's previous reputation in respect to the crime charged by the words may be considered in mitigation. Maxwell v. Kennedy, 50 Wis., 645; 7 N. W. Rep., 657.

8. In slander charging the plaintiff with perjury, under pleas of not guilty and justification, the defendant, in mitigation of damages, offered evidence of the general bad character of the plaintiff for veracity when on oath. *Held*, that the evidence ought to have been received. M'Nutt v. Young, 8 Leigh (Va.), 542.

9. In slander charging the defendant with having accused the plaintiff of the commission of adultery it is competent, in mitigation of damages, to prove that the plaintiff, before the speaking of the words, was commonly reputed to be unchaste and licentious. Bridgman v. Hopkins, 34 Va., 532.

10. In an action for calling the plaintiff "a murderer" proof of the plaintiff's general character may be given in evidence in mitigation of damages under the plea of "not guilty." Anthony v. Stephens, 1 Mo., 254.

11. Where a person has been charged with theft it may be shown that he was generally reputed a thief in order to show that no serious injury has been inflicted on him; but in an action for accusing the plaintiff of having stolen from a former employer, evidence of the plaintiff's general reputation as to his having stolen from his employer, both at the time he was in his employ and at the time of the alleged slander, is inadmissible in mitigation of damages. Mahoney v. Belford, 132 Mass., 393.

12. Evidence of the general character of the plaintiff may in all cases be given by a defendant in an action of slander or for libel to lessen damages, even where a justification has been attempted. So, on the other hand, the plaintiff is at liberty to give evidence of actual malice and vindictive motives on the part of the defendant to enhance the damages. The defendant, however, in such case may rebut all presumption of actual malice by showing the facts and circumstances which induced him to believe the charge to be true when made, although it afterwards turned out to be false. King v. Root, 4 Wend., 113.

13. In an action for charging the plaintiff with stealing it is not admissible for the defendant to prove, under the general issue, in mitigation of damages, that there was a report in the neighborhood of the plaintiff that he had been guilty of stealing from the defendant. Young v. Bennett, 4 Scam. (Ill.), 43.

14. In an action for slander general evidence of the bad character of the plaintiff is admissible, although the defendant has justified that the imputation is true; for, if the justification should fail, the question as to the *quantum* of damages would still remain. Young v. Bennett, 4 Scam. (Ill.), 43.

15. On the trial of a suit for libel, imputing adultery to the plaintiff with a negro woman, the general issue alone being filed, the defendant offered

to prove, in mitigation of damages, that before and at the time of publishing the alleged libel the plaintiff was generally reputed and believed among his neighbors to be the father of the colored child referred to in the article. *Held*, that such evidence was not admissible under the general issue for any purpose. Strader et al. v. Snyder, 67 Ill., 404.

16. To impeach the plaintiff's character in mitigation of damages in an action of slander, the inquiry should be confined to the plaintiff's general character for integrity and moral worth, or to conduct similar in character to that with which he was charged by the defendant. A witness in an action of slander who has stated that the plaintiff's character for moral worth is bad may be asked, on cross-examination, what immorality is imputed to him. A witness called by the plaintiff in an action of slander, in support of the plaintiff's general character stated that some spoke very ill and some very well of it. It was *held* that the presiding judge might permit the plaintiff to ask the witness in what particular some people spoke against him. Leonard v. Allen, 11 Cush. (65 Mass.), 241.

17. A witness called to impeach the plaintiff's character in an action of slander stated on cross-examination that it was generally reported that the plaintiff had not treated his family well and had turned his daughter out of doors. It was held that the plaintiff could not ask his son, living in his family, whether he ever heard that the plaintiff had so treated his daughter, it being immaterial. Leonard v. Allen, 11 Cush. (65 Mass.), 241.

§ 69. Digest of English Cases.—

1. In an action for words imputing adultery to a widow, Holroyd, J., held that it was competent to the defendant to go into general evidence to impeach the plaintiff's character for chastity. Ellershaw v. Robinson et ux., 2 Starkie on Libel, 2d ed., p. 90. And Lord Tenterden is said to have admitted similar evidence, although a justification was pleaded. Mawby v. Barber, 2 Starkie on Evidence, 470.

2. When such general evidence has been given, plaintiff's counsel may go into particular instances to rebut it. Rodriguez v. Tadmire, 2 Esp., 721.

[This question does not seem to be definitely settled in the English courts.]

§ 70. (1) Previous Publications by Others.— Evidence of previous publications by others is inadmissible in mitigation of damages. The fact that others besides the defendant have defamed the plaintiff is a wholly irrelevant matter.[1] And so is the fact that on such former occasions the plaintiff did not sue the publisher or take any steps to contradict the charges made against him.[2] And when the falsehood thus unchal-

[1] Treat v. Browning, 4 Conn., 408; Inman v. Foster, 8 Wend. (N. Y.), 602; Peterson v. Morgan, 116 Mass., 350; Tucker v. Lawson, 2 Times L. R., 593; Bradley v. Gibson, 9 Ala., 406. See chap. 17.

[2] R. v. Newman, 1 E. & B., 268; 21 L. J., Q. B., 156; 3 C. & K., 252; R. v. Holt, 5 T. R., 436; Ingram v. Lawson, 9 C. & P., 833; Pankhurst v. Hamilton, 2 Times L. R., 682.

lenged grows to a persistent rumor or general report, which the defendant hears, believes and repeats, it is not regarded in law as a mitigating circumstance. Evidence of any such rumor is altogether inadmissible.[1]

§ 71. **An Exception to the Rule.**— To this rule there seems to be one exception: If defendant, in repeating the story as it reached him, gives it as hearsay and states the source of his information, then, but only then, is the fact that he did not originate the falsehood, but innocently repeated it, allowed to tell in his favor, as proving that he bore the plaintiff no malice. Thus, where it appears on the face of a libel that it is founded on a statement in a certain newspaper, the defendant is entitled to show that he did in fact read such statement in the newspaper, and wrote the libel believing such statement to be true.[2] So, if the defendant has named A. as his informant, he may prove in mitigation that he did in fact receive such information from A., though of course this is no defense to the action.[3] But where the libel does not on the face of it purport to be derived from any one, but is stated as of the writer's own knowledge, then evidence is wholly inadmissible to show that it was copied from a newspaper or communicated by a correspondent.[4] If the defendant can show that, in copying the libel from another newspaper, he was careful to omit certain passages which reflected strongly on the plaintiff, his conduct in making such omissions is admissible as showing the absence of malice.[5]

[1] Bradley v. Gibson, 9 Ala., 406; Scott v. Sampson, 8 Q. B. D., 491; 51 L. J., Q. B., 380; 30 W. R., 541; 46 L. T., 412; 46 J. P., 408: Alderman v. French, 1 Pick. (Mass.), 1.

[2] Heilman v. Shanklin, 60 Ind., 424; Young v. Slemons, Wright (Ohio), 124; Evans v. Smith, 5 T. B. Mon. (Ky.), 363; R. v. Burdett, 4 B. & Ald., 95; Mullett v. Hulton, 4 Esp., 248; Hunt v. Algar, 6 C. & P., 245; Odgers on L. & S., 313; Storey v. Early, 86 Ill., 461; Edwards v. Kansas City Times, 32 Fed. Rep., 813; Williams v. Greenwade, 3 Dana (Ky.), 432; Galloway v. Courtney, 10 Rich. (S. C.), 414.

[3] Bennett v. Bennett, 6 C. & P., 588; Mills and wife v. Spencer and wife, Holt, N. P., 533; East v. Chapman, M. & M., 46; 2 C. & P., 570; Duncombe v. Daniell, 2 Jur., 33; 8 C. & P., 222; 1 W., W. & H., 101; cited 7 Dowl., 472; Davis v. Cutbush, 1 F. & F., 487; Williams v. Greenwade, 3 Dana (Ky.), 432.

[4] Talbot v. Clark, 2 Moo. & Rob., 312.

[5] Creevy v. Carr, 7 C. & P., 64; Creighton v. Finlay, Arm., Mac. & Ogle (Ir.), 385; De Bensaude v. Conservative Newspaper Co., 3 Times L. R., 538.

§ 72. Illustrations — Digest of American Cases.—

1. The defendant may show, in mitigation of damages, that before the words were spoken some statements which another had made in reference to the same offense had been communicated to him. Galloway v. Courtney, 10 Rich. (S. C.), 414.

2. Proof that the defendant reported but did not originate the alleged slander may be considered in mitigation of damages, but not in justification. Hinkle v. Davenport, 38 Iowa, 355.

3. In Michigan, where it appeared that the matter complained of was published with no intent to injure the person libeled, and that all proper precautions were observed in publishing it, the recovery of damages is limited to the actual injury sustained. Evening News Ass'n v. Tryon, 42 Mich., 549; 36 Am. Rep., 450.

4. Under some circumstances the defendant may show, in mitigation of damages, from whom he heard the slanderous words. Leister v. Smith, 2 Root (Conn.), 24.

5. Under a plea of justification, evidence of a rumor of the truth of the alleged libel may be given in mitigation of damages. And evidence of the defendant's motive in publishing the alleged libel is admissible for the same purpose. Heilman v. Shanklin, 60 Ind., 424.

6. Where the defendant assented to the slanderous imputations of a third person, it was held that he might give in mitigation that he derived his information from others. Kennedy v. Gregory, 1 Binn. (Pa.), 85.

7. If the words are spoken as current report, or as expressing regret, such facts may be given in evidence to mitigate damages. Young v. Slimons, Wright (Ohio), 124.

8. In an action for saying "Negro Jude said, etc., and it is reported everywhere," evidence that the negro did use the actionable words is admissible in mitigation, as showing the defendant's motive. Williams v. Greenwade, 3 Dana (Ky.), 432.

9. Declarations of the husband, pending an action for the slander of his wife, that he believed the defendant had not originated the slander, but had only repeated it, is admissible in mitigation of damages. So are statements of facts made in a negotiation for compromise. But not so of offers of certain terms of settlement. Evans v. Smith, 5 T. B. Mon. (Ky.), 363.

10. In an action against a newspaper for libel it appeared that the article was taken from a neighboring sheet as a mere matter of news, and with no circumstances of aggravation or malice. *Held*, that the plaintiff was entitled to compensation for the injury suffered, and the manner of the publication was to be considered by the jury, either in mitigation or aggravation of damages. Edwards v. Kansas City Times, 32 Fed. Rep., 813.

11. In an action for libel against the publisher of a newspaper for publishing a slanderous article, the defendant may show under the general issue, in mitigation of damages, certain forged letters, purporting to have been written by reputable citizens to the defendant, charging the plaintiff in substance as in the libelous article, whereby the defendant was imposed upon and induced to publish the article. Storey v. Early, 86 Ill., 461.

12. Where slanderous words do not on their face purport to be spoken on the authority of another, but are spoken as of defendant's own knowl-

edge, it cannot be shown in mitigation of damages that they originated with another. Marker v. Dunn, 68 Iowa, 720.

13. The defendant may prove a general report of the truth of the words spoken in mitigation of damages, but not in justification. Nelson v. Evans, 1 Dev. (N. C.) L., 9; Calloway v. Middleton, 2 A. K. Marsh. (Ky.), 372; Wetherbee v. Marsh, 20 N. H., 561.

§ 73. Digest of English Cases.—

1. On the day of the nomination of candidates for the representation of the borough of Finsbury, the defendant published in the "Morning Post" certain facts discreditable to one of the candidates, the plaintiff, which he alleged he had heard from one Wilkinson at a meeting of the electors. *Held*, that Wilkinson was an admissible witness to prove, in mitigation of damages, that he did in fact make the statement which the defendant had published at the time and place alleged. Duncombe v. Daniell, 2 Jur., 82; 8 C. & P., 222; 1 W., W. & H., 101.

2. Mrs. Evans told Mrs. Spencer that she was going to Mrs. Mills' house to learn dressmaking; Mrs. Spencer thereupon told Mrs. Evans a few things about Mrs. Mills, which she said Mrs. Lewis and Mrs. Sayer had told her. Gibbs, C. J., would have admitted evidence apparently that these ladies had in fact told Mrs. Spencer what she told Mrs. Evans; but it turned out it was somebody else who had said so, and not the two ladies whom she named as her authorities. Evidence of what was said by these third persons, who were not named by Mrs. Spencer when she uttered the words complained of, was excluded. Mills and wife v. Spencer and wife, Holt, N. P., 533.

3. The "Observer" published an inaccurate report of the trial of an action brought against the plaintiff. Defendant copied this report verbatim into his paper. It was *held* that evidence that many other papers beside the defendant's had also copied the statement from the "Observer" was inadmissible. Saunders v. Mills, 6 Bing., 213; 3 M. & P., 520; Tucker v. Lawson, 2 Times L. R., 593. Evidence that defendant had copied it from the "Observer" into his own paper had been admitted apparently without question at the trial; but in allowing that evidence, Tindal, C. J., says (6 Bing., 220): "It appeared to me I had gone the full length." In Talbutt v. Clark (2 Moo. & Rob., 312), Lord Denman says, referring, no doubt, to Saunders v. Mills: "I know that in a case in the common pleas it has been held that a previous statement in another newspaper is admissible; but even that decision had been very much questioned." One officer charged another with stealing a watch; a third officer in the same regiment was called to state that he had previously heard rumors that the plaintiff had stolen that watch, but his evidence was rejected; and the court held that such rejection was right (Pigot, C. B., dissenting). Bell v. Parke, 11 Ir. C. L. R., 413; Odgers on L. & S., 315; Dobede v. Fisher, Times for July 29, 1880. It is now clearly settled that evidence of such rumors is inadmissible. Scott v. Sampson, 8 Q. B. D., 491; 51 L. J., Q. B., 380; 30 W. R., 541; 46 L. T., 412; 46 J. P., 408; Wilson v. Fitch, 41 Cal., 363.

4. But where a libel on the plaintiff, who was surveyor-general of Upper Canada, was contained in a pamphlet which was not generally circulated, copies being sent only to the principal civil officers of the province, one of

whom was called as a witness by the plaintiff, Gibbs, C. J., allowed defendant's counsel to ask the witness whether, previous to the delivery of this pamphlet, he did not read, in a public newspaper, the substance of the libel charged in the declaration. Such cross-examination appears to be still permissible in mitigation of damages, as showing that it was the former publication in the newspaper, and not the subsequent publication of the pamphlet, which injured plaintiff's reputation, although the pamphlet did not profess to be founded on the newspaper. Wyatt v. Gore, Holt, N. P., 299, 304.

§ 74. **(2) Matters Not Amounting to a Justification.**— The defendant may also urge any material circumstance which will tend to mitigate the damages against him, subject, of course, to the general rule that circumstances which, if pleaded, would have been a bar to the action, cannot be given in evidence in mitigation of damages.[1] Evidence of the truth of the slander or libel is therefore inadmissible unless a justification is pleaded.[2] And where the words are capable of two meanings — one innocent, the other harmful — no evidence can be given in mitigation of damages that in the innocent sense the words are literally true without an express plea to that effect.[3] So, evidence that there was a wide-spread report or rumor to the same effect as the words complained of is inadmissible, for it falls short of a justification, and is objectionable as hearsay.[4] But a defendant may, under a proper plea, give evidence in mitigation of damages that a certain specified portion of the defamatory words is true, provided such portion conveys a distinct imputation on the plaintiff, and is divisible from the rest and yet intelligible by itself.[5] But the plea must clearly specify the precise portions justified.[6] And without a special plea, evidence that part of the libel is true cannot be received.[7]

§ 75. **Illustrations — Digest of American Cases.**—

1. Where the plaintiff confines himself to the proof of the words laid in his declaration, the defendant, although he will not be allowed to give in

[1] Speck v. Phillips, 5 M. & W., 279; 8 L. J., Ex., 277; 7 Dowl., 470; Shoulty v. Miller, 1 Ind., 544.

[2] Underwood v. Parks, 2 Strange, 1200; Smith v. Richardson, Willes, 20; Wagner v. Holboumner, 7 Gill (Md.), 296.

[3] Rumsey v. Webb et ux., Car. & M., 104; 11 L. J., C. P., 129.

[4] Scott v. Sampson, 8 Q. B. D., 491; 51 L. J., Q. B., 380; 30 W. R., 541; 46 L. T., 412; 46 J. P., 408.

[5] McGregor v. Gregory, 11 M. & W., 287; 12 L. J., Ex., 204; 2 Dowl. (N. S.), 769; Lord Churchill v. Hunt, 2 B. & Ald., 685; 1 Chit., 480; Clarke v. Taylor and another, 2 Bing. N. C., 654; 3 Scott, 95; 2 Hodges, 65.

[6] Stiles v. Nokes, 7 East, 493.

[7] Vessey v. Pike, 3 C. & P., 512; Odgers on L. & S., 313.

evidence the truth of the defamatory matter without a special plea of justification, may yet, on the plea of not guilty, prove in mitigation such facts and circumstances as show a ground of suspicion, not amounting to actual proof of the guilt of the plaintiff. Wagner v. Holboumner, 7 Gill (Md.), 296.

2. In an action for having called the plaintiff a thief, and saying that "he had stolen his spar," the defendant, in mitigation of damages, offered in evidence the record of a verdict and judgment in his favor against A. for having taken maliciously and converted to his own use the spar in question. *Held*, that such evidence was inadmissible. Watson v. Churchill, 5 Day (Conn.), 256.

3. It is not competent for a defendant, in mitigation of damages in an action of slander, to give evidence of facts and circumstances which induced him to suppose the charges true at the time they were made, if such facts or circumstances tend to prove the charges or form a link in the chain of evidence to establish a justification; and he is not allowed to give such evidence, although he expressly disavows a justification and fully admits the falsity of the charges. Purple v. Horton, 13 Wend., 9.

4. Under a plea of justification, evidence tending to show that the defendant had reason to believe from the plaintiff's conduct that the charge was true may be considered in mitigation of damages, although it does not support the plea. Shoulty v. Miller, 1 Ind., 544.

5. A general suspicion that the plaintiff was guilty of the offense charged upon him may be offered in mitigation of damages. Springstein v. Field, Anth. (N. Y.), 185; Henson v. Veatch, 1 Blackf. (Ind.), 369.

6. The defendant may prove, in mitigation of damages, circumstances which induced him erroneously to make the charge complained of, and thereby rebut the presumption of malice, provided the evidence do not necessarily imply the truth of the charge, or tend to prove it true. Minesinger v. Kerr, 9 Pa. St., 312.

7. Any defense not amounting to a justification is admissible in mitigation of damages. Buhler v. Steever, 2 Whart. (Pa.), 313; Wilson v. Apple, 3 Ohio, 270; Regdin v. Wolcott, 6 Gill & J. (Md.), 413.

8. On the trial of an action for slander, where the defendant pleaded the general issue and justification, such evidence as may be offered in support of the plea of justification, though insufficient to support the plea, may be considered by the jury in mitigation of damages. West v. Walker, 2 Swan (Tenn.), 32; Kennedy v. Holborn, 16 Wis., 457.

9. The defendant may, in mitigation of damages, give evidence of the grounds of his belief of the truth of the charge which he has made. Cook v. O'Brien, 2 Cranch, C. Ct., 17.

10. Evidence in mitigation of damages is proper when the general issue alone is pleaded, but not when the plea of justification is also interposed. Shelton v. Simmons, 12 Ala., 466; Bowdish v. Peckham, 1 D. Chip. (Vt.), 145. But see Smith v. Shumway, 2 Tyler (Vt.), 74.

11. Evidence of the general report that the defendant is guilty of the imputed offense is inadmissible in mitigation. Mapes v. Weeds, 4 Wend. (N. Y.), 659; Scott v. McKinnish, 15 Ala., 662; Matson v. Buck, 5 Cow. (N. Y.), 499.

12. Proof of circumstances of suspicion not amounting to a full justification is not admissible on a plea of not guilty in mitigation of damages. Proof of parol declarations by the defendant, after the institution of the suit, that he did not mean to charge the plaintiff with the crime alleged, but that the words were spoken in the heat of passion, is not admissible in his favor. McAlexander v. Harris, 6 Munf. (Va.), 465.

13. The defendant cannot be allowed to prove the truth of the words charged for the purpose of mitigating damages. Swift v. Dickerman, 31 Conn., 285; Blickenstaff v. Perrin, 27 Ind., 527; Petrie v. Rose, 5 Watts & S. (Pa.), 364.

14. The defendant cannot, in mitigation of damages, introduce evidence calculated to excite a suspicion of the offense charged upon the plaintiff, but short of proof. Regnier v. Cabot, 7 Ill. (2 Gilm.), 34.

15. The defendant cannot give in evidence, in mitigation of damages or otherwise, that the plaintiff was generally suspected of the crime with which he was charged or of any particular crime. Cole v. Perry, 8 Cow. (N. Y.), 214.

16. Where the plaintiff is charged with the reputation of having neglected some particular duty the defendant cannot rely upon the reputation charged, but must aver and prove the plaintiff actually guilty. Such a case is distinguishable from one where general bad reputation is charged. There the plea may allege the existence of such reputation merely. Cooper v. Greeley & McElrath, 1 Denio, 347.

§ 76. (3) **Liability of Third Persons.**— If the defendant is liable, the fact that some one else is also liable is immaterial. It will not diminish the amount recoverable from him to show that the plaintiff has recovered or might recover damages from others. For each defendant in his turn pays damages for the injury which he himself has occasioned, not for the injury done by others.

In cases of slander the defendant is only liable for such damages as result directly from his own acts. If he chooses to repeat what another has said, that is his own conscious and voluntary act, for the results of which he alone is responsible. But he is not liable for the consequences of any repetition of his words by others. If two newspapers have made each a distinct charge against a person, and subsequently he finds his business falling off, whichever paper he sues may endeavor to show that the loss of trade is due, or partly due, to the charge made by the other paper. So if there are two distinct and separate publications of the same libel, a person who was concerned in the first publication, but wholly unconnected with

[1] Odgers on L. & S., 315; Creevy v. Carr, 7 C. & P., 64; Frescoe v. May, 2 F. & F., 123.

the second, will not be liable for any damages which he can prove to have been the consequence of the second publication and in no way due to the first. Hence evidence that the plaintiff has already sued those who were liable for the second publication, and recovered damages therefor, is inadmissible in an action brought against the defendant on the first publication.[1] So is evidence that other actions are pending against other persons for other publications of the same libel.[2]

In libels where there is only one publication, every one concerned in it is equally liable for all consequent damage. Hence the plaintiff can only bring one action; he cannot recover twice over from different defendants the same damages for the same injury. He may sue one or more or all of the joint publishers in his one action at his election. If the libel appeared in a newspaper the person libeled may sue either the proprietor or the editor or the printer, or any two or all three of them. If he only sue one of many persons liable it is no defense that others are jointly liable with that one; for all parties concerned in a common wrongful act are jointly and severally liable. But as soon as the plaintiff recovers judgment in the first action his remedy is exhausted, and every one who was jointly liable with the person sued is released. No second action can be brought on that publication against any one who might have been sued in the first action,[3] even though the plaintiff was not then aware that such other person was liable.[3] As there is no contribution between wrong-doers the proprietor of a paper cannot in law compel his careless editor to contribute toward the damages which he has been compelled to pay the plaintiff.[4]

§ 77. **(4) Absence of Special Damage.**— When special damage is alleged the burden of proving it lies on the plaintiff. The defendant may call evidence to rebut the plaintiff's proof or he may rely on the cross-examination of the plaintiff's wit-

[1] Harrison v. Pearce, 1 F. & F., 567; 32 L. T. (O. S.), 298.

[2] Brown v. Wooton, Cro. Jac., 73; Yelv., 67; Moo., 762; Duke of Brunswick v. Pepper, 2 C. & K., 683; Brinsmead v. Harrison, L. R., 7 C. P., 547; 41 L. J., C. P., 190; 20 W. R., 784; 27 L. T., 99.

[3] Munster v. Cox, 1 Times L. R., 542.

[4] Colburn v. Patmore, 1 C., M. & R., 73; 4 Tyr., 677; Moscati v. Lawson, 7 C. & P., 35; Odgers on L. & S., 317. See, also, Wichter v. Jones, 17 N. Y. S., 491; Hoboken P. & P. Co. v. Kahn (N. J., 1896), 33 Atl. Rep., 382; Id., 1060; Bennett v. Salisbury, 78 Fed. Rep., 769.

nesses. He may either dispute that the special damage has occurred at all, or he may insist, as a matter of law, that it is too remote. He may call witnesses to show that it was not the consequence of the defendant's words, but of some other cause. A plaintiff cannot recover the same damages for the same injury twice from two different defendants; but he may recover from two different defendants damages proportioned to the injury each has occasioned.[1]

§ 78. (5) **Absence of Malice.**— As a rule, unless the matter complained of be privileged, the motive or intention of the speaker or writer is immaterial to the right of action. The law looks only at the words employed and their effect on the plaintiff's reputation. But in all cases the absence of malice, though it may not be a bar to the action, may yet have a material effect in reducing the damages. The plaintiff is still entitled to reasonable compensation for the injury he has suffered; but if the injury was unintentional, or was committed under a sense of duty, or through some honest mistake, clearly no vindictive damages should be given.[2] In every case, therefore, the defendant may, in mitigation of damages, give evidence to show that he acted in good faith and with honesty of purpose, and not maliciously.[3] He may show that the remainder of the libel not set out in the pleadings modifies the words sued on, or that other passages in the same publication qualify them. But he may not put in passages contained in a subsequent and distinct publication, unless the words sued on are equivocal or ambiguous.[4] The fact that the defendant did not originate the calumny, but innocently repeated it, is admissible if he gave it as hearsay and named his authority when he repeated it, but not otherwise. He may urge that plaintiff's conduct was such as would naturally lead him to put the worst construction on his acts; or that in any other way the plaint-

[1] Harrison v. Pearce, 1 F. & F., 567; 32 L. T. (O. S.), 298; Wyatt v. Gore, Holt (N. P.), 299; Odgers on L. & S., 322.

[2] Odgers on L. & S., 317; Mason v. Paul, 46 Ill. App., 592; Palmer v. Leader Pub. Co., 6 Pa. Dist. R., 182; 27 Pittsb. Leg. J. (N. S.), 300; Benton v. State (N. J., 1897), 36 Atl. Rep., 1041; Howland v. Flood, 160 Mass., 509; Moore v. Francis, 8 L. R. A., 214; 121 N. Y., 199; 31 Cent. L. J., 10; 23 N. E. Rep., 1127; Cruikshank v. Gorden, 118 N. Y., 178.

[3] Pearson v. Lemaitre, 5 M. & Gr., 700; 12 L. J., Q. B., 253; 6 Scott, N. R., 607; 7 Jur., 748; 7 J. P., 336.

[4] Cooke v. Hughes, R. & M., 112; Darby v. Ouseley, 1 H. & N., 1; 25 L. J., Ex., 227; 2 Jur. (N. S.), 497.

iff had, by his conduct, brought the libel on himself. So the defendant's subsequent conduct may mitigate the damages.

§ 79. **Illustrations — Digest of English Cases.—**

1. Where a newspaper republished the report of a company containing reflections on the plaintiff, their manager, Wightman, J., directed the jury that if they were satisfied such publication was made innocently and with no desire to injure the plaintiff they might give nominal damages only. Davis v. Cutbush and others, 1 F. & F., 487.

2. Where an editor refused to disclose the name of his correspondent who wrote the libel, but offered to open his columns to the plaintiff, and the plaintiff accepted this offer and wrote several letters, which defendants published, replying to the charges made against him and explaining them away, Martin, B., directed the jury to take these circumstances into their consideration in favor of the defendants. Harle v. Catherall, 14 L. T., 801.

3. The defendant published an inaccurate report of proceedings in a court of justice reflecting on the character of the plaintiff; any evidence to show that the defendant honestly intended to present a fair account of what took place, and had blundered through inadvertence solely, was held admissible by Coleridge, J., in Smith v. Scott, 2 Car. & Kir., 580. And, therefore, evidence of what really did take place at the trial is admissible, though no evidence can be given of the truth or falsehood of the statements there made. East v. Chapman, M. & M., 46; 2 C. & P., 570; Vessey v. Pike, 3 C. & P., 512; Charlton v. Watton, 6 C. & P., 385.

§ 80. (6) **Previous Provocation.**— In some cases the plaintiff's conduct towards the defendant may be a bar to the action; as where the plaintiff by attacking the defendant had provoked a reply which is made honestly in self-defense. But where the facts do not amount to such a defense they may still tend to mitigate the damages. "There can be no set-off of one libel or misconduct against another; but in estimating the compensation for the plaintiff's injured feelings the jury might fairly consider the plaintiff's conduct and the degree of respect he has shown for the feelings of others."[1] Evidence is admissible in mitigation of damages to show that plaintiff had previously himself libeled or slandered the defendant, provided it be also shown that this had come to the defendant's knowledge and occasioned his attack on the plaintiff.[2] But not if such previous libels refer to other matters and did not provoke that sued on.[3] The defendant may not branch out

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

[2] Finnerty v. Tipper, 2 Camp., 76; Antony Pasquin's Case, cited 1 Camp., 351; Tarpley v. Blabey, 2 Bing. N. C., 437; 2 Scott, 642; 7 C. & P., 395; Watts v. Fraser, 7 A. & E., 223; 7 C. & P., 369; 1 M. & Rob., 449; 2 N. & P., 157; Wakley v. Johnson, Ry. & M., 422.

[3] May v. Brown, 3 B. & C., 113; 4 D. & R., 670; Sheffill v. Van Deusen, 15 Gray, 485.

into irrelevant matters in his evidence; he may cross-examine plaintiff thereon; but if he does, he must take plaintiff's answer; he cannot call evidence to contradict it.[1]

§ 81. **Previous Provocation, when Proper in Mitigation.**— The principle on which evidence of provocation is received is the same in a suit for slander as in a suit for an assault and battery, namely, that the law makes allowance for the infirmities of human nature and for what is done in the heat of passion caused by the improper conduct of the adverse party; but a defendant is not allowed to introduce evidence in mitigation of damages or a provocation given by the plaintiff at another time and not connected with the injury for which the action is brought.[2]

§ 82. **Illustrations — American Cases.**—

1. A Massachusetts Case: ***Sheffill and wife v. Van Deusen and wife***, 81 Mass., 485.

Hiram Sheffill and wife sued George J. Van Deusen and wife for slander in charging her with keeping a house of ill-fame. On the trial it appeared from the evidence that Sheffill's wife, on the evening before the slanderous words complained of were spoken, had addressed provoking and violent words to the wife of Van Deusen. This evidence, however, the trial court excluded, and Van Deusen and wife excepted. But on the appeal it was held to have been rightfully excluded, because a defendant is not allowed to introduce evidence in mitigation of damages of a provocation given by the plaintiff at another time and not connected with the injury for which the action is brought. Citing Maynard v. Beardsley, 7 Wend. (N. Y.), 560; Goodbread v. Ledbetter, 1 Dev. & Bat., 12; Bourland v. Eidson, 8 Grant (Penn.), 27; Wakley v. Johnson, Ry. & Mood., 423; Child v. Homer, 13 Pick. (Mass.), 503; 2 Greenl. Ev., secs. 225, 275.

2. A New York Case: *Maynard v. Beardsley*, 7 Wend., 560.

Beardsley sued Maynard for a libel, published in a newspaper June 20, 1828, charging him with official misconduct as district attorney. The libel was proved, and that the defendant was the author. The defendant offered in evidence three several publications in another newspaper, printed in the same town, March 11 and 18, and June 17, 1828, and offered to prove that such publications were generally understood to apply to him, and that the plaintiff was the author of the publication of June 17, and that it was

[1] Odgers on L. & S., 318.

[2] Quinby v. Minn. Tribune Co., 38 Minn., 528, 38 N. W. Rep., 625; Gronan v. Kukkuck, 59 Ia., 18, 12 N. W. Rep., 748; Keiser v. Smith, 71 Ala., 481; 1 Suth. Dam., 228, 231; Lee v. Woolsey, 19 Johns., 319; Maynard v. Beardsley, 7 Wend., 560; Goodbeard v. Ledbetter, 1 Dev. & Bat., 12; Bourland v. Eidson, 8 Grat., 27; Wakley v. Johnson, Ry. & Mood., 423; Child v. Homer, 13 Pick., 503; 2 Greenl. Ev., § 275; Sheffill and wife v. Van Deusen and wife, 15 Gray, 485; Gould v. Weed, 12 Wend. (N. Y.), 12.

also generally understood that the article complained of by the plaintiff as libelous was caused by and written in consequence of and in answer to such publication. The circuit judge decided that the articles had no relation to the subject-matter of the publication complained of as libelous, and refused to receive them in evidence. The case being taken to the court of errors it was held correct, for the reason that evidence of previous publications will not be received in mitigation of damages on the ground of provocation, unless, not only the connection between the publications be manifest, but also that the provocation be so recent as to induce a fair presumption that the injury complained of was inflicted during the continuance of the feelings and passions excited by the provocation. Under other circumstances, libelous publications by the plaintiff affecting the defendant are admissible in mitigation, the only remedy of the party being by cross-action.

3. In a Minnesota Case (*Warner v. Lockerby*, 31 Minn., 421; 18 N. W. Rep., 145), the words charged were spoken on the evening of December 17, 1879, during a general quarrel between the parties, which was a renewal or rather continuance of one which commenced at an earlier hour of the same day and on the same subject. It was held proper to admit evidence of the altercation in the afternoon for the purpose of showing that plaintiff commenced the quarrel and provoked the defendant by abusive and irritating language, as plaintiff's previous conduct in provoking the speaking of defamatory words may always be shown in mitigation of damages, if the provocation be direct and immediate. In this case the provocation in the afternoon, of which that in the evening was but a continuance, was sufficiently direct and immediate.

4. A Massachusetts Case: *Child v. Homer*, 13 Pick., 503 (1829).

An action of case originally against George W. Otis and the defendants, Beals and Homer, proprietors and publishers of a newspaper called the "Boston Gazette," for alleged libels upon the plaintiff, who was at the time of the publication the proprietor and publisher of a newspaper called the "Massachusetts Journal." Otis died, and the suit was prosecuted against Beals and Homer as survivors. The plea was the general issue. At the trial the plaintiff gave in evidence the "Boston Gazette" of July 10, 1829, containing a poetical piece called "The Pill," and of July 13, containing a poetical piece called "Child David's Pilgrimage." The plaintiff's counsel relied upon the obvious meaning of the pieces themselve to show that they applied to the plaintiff, as averred in the innuendo, and no question was made upon either side but that the libelous matter referred to the plaintiff, as alleged in the innuendoes, but, on the contrary, after the decision of the point of law as hereafter stated, the counsel on both sides said that the only question of fact related to the amount of damages, and this was the only question argued to the jury. The defendant offered to give in evidence, either as a justification or in mitigation of damages, several publications by the plaintiff, alleged to be libels upon their late associate, Otis, contained in the "Massachusetts Journal" a short time before the publications complained of as libelous in this suit, and which were the real provocation to these publications by Otis. It was objected to on the ground that there was no apparent connection between the publications, and that one libel

could not be given in evidence to justify another where it did not purport to be a reply or otherwise to have reference to it. Whereupon the judge ruled that it was not competent for the defendant to give in evidence, either in justification or in mitigation of damages, a separate and independent libelous attack made upon them by the plaintiff, such publication not being referred to in the libelous publications sued for. The jury gave a verdict for the plaintiff for $500, and the defendant moved for a new trial on the ground that the evidence furnished by them was competent and ought not to have been rejected.

Wilde, J., gave the opinion on the objection as follows: "The objection is very fairly raised, and is supported by very weighty considerations. The defendants offer to give in evidence, either as a justification or in mitigation of damages, several libelous publications upon their late associate Otis, the editor of the 'Gazette,' contained in the 'Massachusetts Journal,' published by the plaintiff, a short time previous to the publication complained of in this suit, as provocations for the publications by Otis. This evidence was rejected on the grounds that no evidence was admissible, either in justification or mitigation of damages, to show a separate and independent and libelous attack made upon the defendants or either of them by the plaintiff; such publications not being referred to in the libelous publication complained of. This, as a general rule of evidence, is no doubt laid down with sufficient precision and is well supported by the authorities. But after a careful examination of these publications, we are all of opinion that they do not fall (at least not all of them) within the scope of the rule; but are rather applicable to another rule of evidence, which permits a party charged with a libelous publication to show a provocation, and to explain the subject-matter, occasion and intent of such publication. All these publications follow each other in rapid succession. The first of them was by the plaintiff, and appeared in the 'Massachusetts Journal,' on the 1st of July, 1829. The reply of the editor of the 'Gazette' was published the next day. There is nothing, however, libelous, nor can we perceive anything offensive, in either of these publications. Then followed an article in the 'Journal' of the 3d of July, another article in the 'Gazette' of the 4th, which were highly offensive and abusive. But here the parties paused, and it was much to be regretted that a contest so unprofitable and reprehensible was not suffered here to terminate. It was, however, renewed with increased bitterness by an article which appeared in the 'Journal' of the 9th of July, in which the editor of the 'Gazette' is vilified in the most reproachful and contemptuous terms. That this article was calculated to excite deep resentment and violent passion in the party assailed cannot admit of a doubt. The only question, therefore, is whether there was sufficient time for passion to subside before the article in reply was written; and we think the presumption is that there was not. The reply, though published on the 10th, must have been written on the 9th, and probably immediately after the editor of the 'Gazette' had seen the offensive publication in the 'Journal.' While he was employed in rolling back the tide of abuse upon the editor of the 'Journal,' his passion would not be likely to subside; such employment would rather serve to increase than to diminish his resentment. That an article written and sent to the press,

under the influence of such feelings as must have been awakened in the minds of Otis by the provocation received, should be treated with more indulgence than an unprovoked libel, is most reasonable; and is not inconsistent with the rules of law. The law makes allowance for the infirmities of human nature, and for acts done in the heat of passion, excited by the improper conduct of the adverse party. It requires, however, that the provocation shall be so recent as to afford a reasonable presumption that the act complained of was done under the influence of the feelings and passions excited by the provocation. (Maynard v. Beardsley, 7 Wendell, 560.) In this case we think such a presumption has been fairly raised, and that the publication in the 'Journal' of the 9th of July ought to have been received in evidence in mitigation of damages. Whether the publication in the 'Journal' of the 11th of July ought also to be denied is a question of more doubt and difficulty. The article in the 'Gazette' alleged to be the reply to that in the 'Journal' of the 10th was not published until the 13th. When it was written and sent to the press does not appear; nor does it appear when the publication of the 11th first came to the knowledge of the editor of the 'Gazette.' On a new trial perhaps new evidence on this point may be procured. But, without any additional evidence, we are of opinion that the publication in the 'Journal' of the 11th may be admitted to go to the jury — not, however, merely as a provocation of the publication of the 13th, but as connected with it, and with the publication of the 9th and 10th, all being parts of the same controversy and explanatory to each other. In the publication in the 'Journal' of the 4th of July, the editor of the 'Gazette' is challenged or invited to continue the controversy, which invitation he seems ready to accept, and in the publications which followed both parties seemed to have exerted themselves to reproach, vilify and provoke each other as much as possible. Both parties were in the wrong, and it does not seem reasonable that either of them should be allowed to recover of the other any considerable damages. These circumstances distinguish this case from all the cases cited, which it would be difficult entirely to reconcile."

§ 83. **Digest of American Cases.—**

1. In an action for slander the anger or passion of defendant at the time of the publication of the slanderous words is no justification, or even mitigation, unless it is shown the passion was provoked by plaintiff; and even then it can only be proved in mitigation of damages. Miller v. Johnson, 79 Ill., 58.

2. When words are spoken in the heat of passion occasioned by an assault by the plaintiff, courts and juries will consider the infirmities of human nature, and make allowances for words spoken under such circumstances; but when the defendant, in his cooler moments, repeats the words to different persons, this stamps the slander as malicious. Thomas v. Fisher, 71 Ill., 576.

3. Damages cannot be mitigated by evidence of a provocation given by the plaintiff to the defendant on the evening before the speaking of the slanderous words. Sheffill v. Van Deusen, 15 Gray (Mass.), 485.

4. The anger or passion of the defendant at the time of the publication of slanderous words is no justification or mitigation of damages, unless the

passion were provoked by the plaintiff; and even then it can only be shown in mitigation of damages. Flagg v. Roberts, 67 Ill., 485.

5. The defendant cannot prove, in mitigation of damages, the use of taunting and irritating language to him by the father of the plaintiff immediately before the uttering of the slanderous words. Underhill v. Taylor, 2 Barb. (N. Y.), 348.

6. It cannot be proved, in mitigation of damages, in an action of slander, that the plaintiff was in the habit of abusing the defendant. Goodbread v. Leadbetter, 1 Dev. & B. (N. C.) L., 12.

7. In an action against husband and wife for words spoken by the wife, it is not competent for the defendant to prove that circumstances relating to the plaintiff's conduct were communicated to the husband before the slanderous words were uttered. Petrie v. Rose, 5 Watts & S. (Pa.), 364.

8. The defendant cannot give in evidence, in mitigation of damages, that the plaintiff has been hostile to him for a long time and proclaimed that he did not wish to live in peace and on good terms with him. Andrews v. Bartholomew, 2 Met. (43 Mass.), 509.

9. In slander, where the defendant spoke the words immediately after a conversation between the plaintiff and a witness to whom the words were spoken, it was held that if the defendant heard such conversation and there was anything in it of an insulting character towards him, or tending to excite his anger, he had a right to show it in mitigation of damages. Ranger v. Goodrich, 17 Wis., 78.

10. Evidence that the plaintiff told a witness that the defendant was a thief and a liar, and that the witness communicated what the plaintiff said to the defendant at the time the words in question were spoken, is admissible as a part of the *res gestæ*. Walker v. Flynn, 130 Mass., 151.

11. Provocation goes only in mitigation of damages. Warner v. Lockerby, 31 Minn., 421; 18 N. W. Rep., 145, 821. Circumstances of provocation which are insufficient to justify may yet, by weakening the inference of malice, palliate the publication of a slander or libel, and may operate to mitigate the damages. Duncan v. Brown, 15 B. Mon. (Ky.), 186.

12. If the words were spoken in the heat of passion, or under excitement produced by the immediate provocation of the plaintiff, such excitement or passion may be shown in mitigation of damages. McClintock v. Crick, 4 Iowa, 453; Moore v. Clay, 24 Ala. 235; Powers v. Presgroves, 28 Miss., 227; Steever v. Beehler, 1 Miles (Pa.), 146.

§ 84. **Amends, Apologies, Retractions, etc.**—By a statute in Virginia it is provided that in an action for defamation the defendant may justify by alleging and proving that the words spoken were true; and, after notice of his intention to do so, given to the plaintiff at the time of or for pleading to such action, may give in evidence, in mitigation of damages, that he made and offered an apology to the plaintiff for such defamation before the commencement of the action, or as soon afterwards as he had an opportunity of doing so, in case the action

shall have been commenced before there was an opportunity of making or affirming such apology.[1]

In England, by Lord Campbell's act,[2] it is enacted that in any action for defamation it shall be lawful for the defendant (after notice in writing of his intention so to do, duly given to the plaintiff at the time of filing or delivering the plea in such action) to give in evidence, in mitigation of damages, that he made or offered an apology to the plaintiff for such defamation before the commencement of the action, or as soon afterwards as he had an opportunity of doing so, in case the action shall have been commenced before there was an opportunity of making or offering such apology. And that in an action for a libel contained in any public newspaper or other periodical publication, it shall be competent to the defendant to plead that such libel was inserted in such newspaper or other periodical publication without actual malice, and without gross negligence, and that, before the commencement of the action, or at the earliest opportunity afterwards, he inserted in such newspaper or other periodical publication a full apology for the said libel, or if the newspaper or periodical publication in which the said libel appeared should be ordinarily published at intervals exceeding one week, had offered to publish the said apology in any newspaper or periodical publication to be selected by the plaintiff in such action; . . . and that to such plea to such action it shall be competent to the plaintiff to reply generally, denying the whole of such plea.[3]

But aside from these statutes a defendant may give evidence of an apology or a retraction in mitigation of damages, even though such apology or retraction was not made "at the earliest opportunity after the commencement of the action."[4] Still a tardy or reluctant apology will not avail the defendant very much. A retraction should be made as publicly as the charge, and as far as possible to the same persons; and the defendant should do his utmost to stop the further sale of the libel. A

[1] Code of Virginia, 1887, 803.

[2] 6 and 7 Victoria, ch. 196; Odgers on L. & S., 323.

[3] Chadwick v. Herapath, 3 C. B., 885; 16 L. J., C. P., 104; 4 D. & L., 653; O'Brien v. Clement, 3 D. & L., 676; 15 M. & W., 435; 15 L. J., Ex., 285; 10 Jur., 395; Barry v. McGrath, Ir. R., 3 C. L., 576; Odgers on L. & S., 323.

[4] Smith v. Harrison, 1 F. & F., 565; Taylor v. Hearst, 107 Cal., 262; Turton v. N. Y. Recorder, 144 N. Y., 144; 38 N. E. Rep., 1009; Turner v. Hearst, (Cal., 1897), 47 Pac. Rep., 129.

statement cannot be called an apology unless it both unreservedly withdraws all imputation and expresses regret for having made it. The defendant must not try to exculpate himself or justify his conduct.

The apology should be full, though it need not be abject; the defendant is not bound to insert an apology dictated by the plaintiff, but it must be such as an impartial person would consider reasonably satisfactory under all the circumstances of the case.[1] It should be printed in type of ordinary size, and in a part of the paper where it will be seen; not hidden away among the advertisements or notices to correspondents.[2]

A prompt apology will, as a rule, put an end to the action. It is very difficult for the plaintiff to disregard it; if he does, the sympathies of judge and jury will probably be with the defendant. But such apology must be frank and full. A guarded, half-hearted apology will only injure defendant's position. It is no use to publish a paragraph expressing astonishment at the receipt of a lawyer's letter, and attempting to explain away or minimize an imputation clearly made. It is still worse to assert, as is sometimes done, that defendant has done the plaintiff a kindness in making a false charge against him, as it "has afforded him an opportunity of publicly denying it."[3] A so-called apology is not an apology at all, unless it unreservedly withdraws all imputations and expresses regret for having made any. If defendant apologizes at all, he should do so freely and handsomely as well as promptly.[4]

§ 85. **Illustrations — Digest of American Cases.—**

1. A retraction of the slander made so immediately as to become a part of the *res gestæ*, and freed from all suspicion that it was made by the defendant more for his own protection than for reparation to the victim of his calumny, is admissible in evidence in mitigation of damages. Owen v. McKean, 14 Ill., 459.

2. A retraction of the slander, in the presence of the defendant's family, is not admissible in mitigation of damages. Kent v. Bonzey, 88 Me., 435.

3. A retraction under Alabama code, section 2221, by a defendant in action for slander must be made before suit brought to be admissible in mitigation of damages. Bradford v. Edwards, 32 Ala., 628.

4. In the case of the publication of a newspaper libel want of express

[1] Risk Allah Bey v. Johnstone, 18 L. T., 620.

[2] Lafone v. Smith, 3 H. & N., 735; 28 L. J., Ex., 33; 4 Jur. (N. S.), 1064.

[3] Mellor, J., L. R., 1 Q. B., 701.

[4] Owen v. McKean, 14 Ill., 459; Odgers on L. & S., 524; Flood on L. & S., 332.

malice may be shown, also that a retraction of the slander was made, in mitigation of damages. Story et al. v. Wallace, 60 Ill., 51.

5. Retraction of a libelous article, published after suit begun therefor, cannot be considered in mitigation of damages. Evening News v. Tryon, 42 Mich., 549; 4 N. W. Rep., 267.

6. In an action of slander, where the court charged the jury that, if the words alleged were spoken under excitement and afterward taken back, it should be considered in mitigation of damages, but if they were spoken and afterwards persisted in it should not be, it was held that the instruction could not be complained of by the defendant. Brown v. Brooks, 3 Ind., 518.

V. Excessive Damages.

§ 86. **Excessive Damages — New Trial.** — A verdict will be set aside for excessive damages in two classes of cases: (1) Where the law recognizes some fixed rules and principles in measuring the damages, whence it may be known that there is an error in the verdict. In this class of cases are included actions on contracts or for torts done to property, the value of which may be ascertained by evidence. (2) The other class of cases includes actions for personal injuries when no rules are prescribed by law for ascertaining the damages, but from the exorbitancy of them the conclusion must be that the jury acted from passion, partiality or corruption.[1]

As excessive damages may be a sufficient cause for setting aside a verdict in actions for personal injuries, it is proposed in this section to consider when they are to be deemed excessive for this purpose. In a leading English case the principle stated is that the magnitude of the damages must be such that the court can manifestly see that the jury have been outrageous in giving such damages as greatly exceeded the injury.[2] A verdict must be set aside for excessive damages if they are such as are unreasonable and outrageous, and which all mankind must, at first blush, see to be unreasonable.[3]

The American rule: When the damages are so great that it may be reasonably presumed that the jury, in assessing them, did not exercise a sound discretion, but were influenced by passion, partiality, prejudice or corruption, the court may

[1] Coffin v. Coffin, 4 Mass., 1; Stafford v. Morning Journal, 68 Hun, 467; Pavlovski v. Thornton, 89 Ga., 829.

[2] Wilford v. Berkeley, 1 Burr., 609.

[3] Seeman v. Allen, 2 Wils., 160; Huckle v. Mooney, 2 Wils., 205.

set aside the verdict and send the cause to another tribunal for revision.[1]

§ 87. **Must Grossly Exceed What Would be Adequate.**— To warrant the granting of a new trial for excessive damages, however, the damages must be not only more than the court would have awarded if it had tried the case, but they must, especially in actions for defamation, so greatly and grossly exceed what would be adequate in the judgment of the court that they cannot be reasonably accounted for except upon the theory that they were awarded, not in a judicial frame of mind, but under the influence of passion — of excited feeling rather than of sober judgment, or of prejudice; of a state of mind partial to the successful party and unfair to the other. The damages must be so exorbitant as to shock the sense of the court, and satisfy it, after making a just allowance for difference of opinion among fair-minded men, that they cannot be accounted for except on the theory that in the particular case the proper fair-mindedness was wanting.[2] It must be confessed that the expression of the principles upon which the new trials are to be granted for excessive damages is somewhat general; but the subject is one which, from its very nature, hardly admits of more specific treatment. The motion appeals in a measure to the discretion of the court, but the discretion must be a judicial one. It is not to be granted or denied at the mere pleasure or fancy or feeling of the court. The matter being one which cannot be determined by the application of any definite and determined rules, it is to be acted upon in the exercise of a sound practical judgment in view of all the relevant facts of the particular case.[3]

§ 88. **Illustrations — Digest of American Cases.**—

1. While the granting of a new trial for excessive damages appeals to the discretion of the court, yet it should appear that the award was so grossly excessive that it could not be accounted for except on the ground

[1] Coffin v. Coffin, 4 Mass., 1; Coleman v. Southwick, 9 Johns. (N. Y.), 45; Crocker v. Hadley, 102 Ind., 416, 1 N. E. Rep., 734.

[2] Pratt v. Pioneer Press Co., 32 Minn., 217, 20 N. W. Rep., 87; Worcester v. Proprietors Canal Bridge Co., 16 Pick. (Mass.), 541; Kinsey v. Wallace, 36 Cal., 462; Cook v. Cook, 36 U. C., Q. B., 553; Potter v. Thompson, 22 Barb. (N. Y.), 87; 1 Suth. Dam., 810; Coleman v. Southwick, 9 Johns. (N. Y.), 45.

[3] Pratt v. Pioneer Press Co., 32 Minn., 217, 20 N. W. Rep., 87.

of prejudice. Pratt v. Pioneer Press Co., 32 Minn., 217; 18 N. W. Rep., 836, and 20 N. W. Rep., 87.

2. The code of Georgia, section 3067, provides that, in cases of tort, when the entire injury is to the peace and feelings of the plaintiff, no measure of damages can be prescribed; and that the verdict of the jury should not be disturbed unless the court suspect bias or prejudice. *Held*, that in an action for libel, unless it appear from the facts that the jury were influenced by improper motives, their verdict should stand. Brown v. Autrey (Ga.), 3 S. E. Rep., 669.

AMOUNTS HELD NOT TO BE EXCESSIVE.

1. **$20,000.** The Detroit "Evening News" published an article headed: "DEBAUCHERY AND RUIN — *The Sad Story of a Crazed Husband and Broken Family — The Wreck of a Canadian Home Charged to a Michigan University Professor.*" The article stated in substance that one Joseph P. Wardle, a farmer of Oxford county, Ontario, took his wife to Ann Arbor to be treated for a cancer; that she was cured and returned home, though not before making familiar acquaintance with her physician. Mrs. Wardle had a cousin at Ann Arbor — a Mrs. Hotchkiss — whom for some reason Mr. Wardle did not like to have his wife visit, and when she returned to Ann Arbor it was ostensibly to consult the physician concerning her health. While at her home in Ontario Mrs. Wardle received from her cousin a letter stating that she would shortly pay her a visit, and also stating: "If you don't tell any stories about me, I won't tell any about you and the doctor." Wardle had had some suspicions of his wife's fidelity, and having seen the letter, the expression quoted confirmed them in a measure, and he determined to watch his wife closely. A few days afterwards, on calling for his mail at the postoffice, he was handed a letter addressed to C. D. Brenton. He said it was not for him, but being informed that his wife received letters so addressed he kept it, opening and reading it at his first opportunity. Its contents revealed to him the proof of his wife's infidelity, and he returned home and charged her with lewdness, which she did not deny. He ordered her to leave his house, giving her all the personal property she claimed as her own and $300 in cash. She was driven to Woodstock, where she took the train, and is supposed to have gone to her cousin at Ann Arbor. . . . Five days after this terrible discovery Mr. Wardle left for Buffalo by the Canada Southern Railroad with a load of lambs, but before he reached that city his troubles had driven him crazy. On his arriving at Buffalo he had become so violent that he broke loose from those in charge of him and hurled himself in front of a moving train. The article contained extracts from some Canadian papers stating that Mrs. Wardle was not afflicted in any way whatever, but had been ensnared by the rascally physician's affection, and could not resist the temptation of paying him annual visits, one of the articles closing as follows: "If professors of this description are to be kept at the head of important institutions, the usefulness of hospitals, etc., will soon be gone. And what certainty and security is there for any man's wife or daughter's character being left untarnished after once visiting them for treatment of any disease whatever? It is to be hoped that the matter will be looked into, and if the professor is guilty we will have

great pleasure in making his name public." Donald Maclean, the professor of surgery in the university at Ann Arbor, brought a suit for libel, though his name was not mentioned in the article. He recovered a verdict of $20,000 — probably the largest sum in damages ever recovered in an American court for defamation of character. Judgment was entered, from which an appeal was taken, but the judgment was affirmed with costs; Sherwood, J., dissenting. For some reason not appearing the question of excessive damages was not raised in the supreme court. Maclean v. Scripps, 52 Mich., 214; 17 N. W. Rep., 815.

2. **$20,000.** The "New York Herald" published an account of the burning of a village, which recklessly and falsely charged plaintiff with setting the fire. Plaintiff demanded the name of the correspondent; but this was refused, and he was treated peremptorily and discourteously, and a pretended editorial retraction, after he had complained, was so worded as to be capable of being construed as a reiteration of the charge. The jury gave a verdict of $20,000 damages. *Held*, that this would not be disturbed but for the fact that there was some confusion concerning the charge on the subject of special damages — none having been demanded in the declaration — which made it possible that the jury might erroneously have considered this element in making up their verdict; and the verdict being for so very large an amount, the doubt on this point properly entitled defendant to a new trial. Malloy v. Bennett, 15 Fed. Rep., 371.

3. **$4,000.** The plaintiff, a young married woman about to become a mother or already the mother of a babe, was living separate from her husband, but from what reason does not appear, and hence was deprived of her natural protector. The defendant was the father of her husband, she having married his son. He seems to have been somewhat prejudiced against his daughter-in-law, and he accused her to various persons of adultery. She brought a suit for slander against him for saying of her in the German language: "Mein sohn hat sie nicht verfuehrt; das ist den da W——;" which was alleged to signify in the English language: "My son did not get her pregnant. It is from that one (meaning G. R.) there." The defendant being unable to justify, a verdict was rendered against him for damages, $4,000. On appeal he complained that they were excessive. Upon this point the court said under all the circumstances the amount did appear quite large. "We should have been satisfied had it been less. But we can see nothing that would justify us interfering with the verdict on that ground. The amount of damages is always a subject for the exercise of the sound discretion of the jury, who may give more or less, according to their conclusions from the whole case. A verdict will not be set aside unless the case be such as to furnish evidence of prejudice, partiality or corruption on the part of the jury. The cause must be gross to justify ordering a new trial on the question of damages. The acts complained of were done without any justification or apparent excuse, and hence the inference is purely from feelings of malice. Under these circumstances the verdict must stand." Blakeman v. Blakeman, 31 Minn., 396; 18 N. W. Rep., 103.

4. **$2,500.** The defendant was wealthy and the plaintiff's character was good, and yet the defendant was charged with having spoken of the plaint-

iff in the French language: "La fille, K., a fait la putaine avec mon garçon," which in English is, "the girl, K., has acted the whore with my boy." On the trial the defendant failed to show any justification or legal excuse for the imputation, and was mulcted in damage to the amount of $2,500. On appeal Scholfield, J., said: "The damages assessed, though large, we cannot say are excessive." Schmisseur v. Kreilich, 92 Ill., 347.

5. **$2,500.** In the Chicago "Times" of September 8, 1868, under the head of "Our Drinking," appeared the following: "J. W., a blacksmith by trade, forty years of age, but of late a saloon-keeper at No. 133 Canal street, died suddenly at his saloon, in a fit Saturday while sitting at breakfast. W. had formerly lived with his wife at M., Mich. In 1861 he enlisted and was absent three years. On his return he was astonished to find an infant child in his wife's arms, a progeny he could not father. He left his wife and has since that time drunk very hard. At the time of his death he had been on a spree of a week's duration. An inquest was held yesterday at the saloon and the verdict was 'died while in a fit of over drinking.'" The "Times" on learning the falsity of the imputation upon the wife, published an apology in the Sunday edition. In a suit brought by the widow there were three trials. On the first the jury assessed damages at $3,800, which the court set aside. On the second trial the jury failed to agree. On the third trial the damages were assessed at $2,500. The court gave a judgment which the supreme court affirmed. Story et al. v. Wallace, 60 Ill., 52.

6. **$2,000.** In an action of slander brought by the plaintiff against the defendant in the district court of Holt county, Nebraska, the petition alleged that the defendant, with the intent and purpose of injuring the plaintiff, etc., falsely and maliciously published certain defamatory words by which he charged the plaintiff with being a woman of bad character for chastity, the particular allegations of the petition being that in said conversation he made use of the following language: "She is a whore." The plaintiff also alleged that she was a married woman and had sustained damages in the sum of $5,000. In answer to this the defendant set up the truth of the matter by way of justification. The cause was tried by a jury and resulted in a verdict in favor of plaintiff, assessing her damages at $3,000. A motion for a new trial was overruled and the defendant brought error to the supreme court. It was contended that the damages were excessive and were given under the influence of passion and prejudice. But the court said: "We can see nothing in the record which would indicate that the verdict was the result of either passion or prejudice, and it would not, for that reason, be molested. But we are of the opinion that in the estimation of the damages the jury failed to take into consideration some elements which they should have considered, and for that reason the verdict is greater than was warranted under all the circumstances of the case, as proven by the evidence on the trial. For this reason the judgment of the district court will be reversed and a new trial granted, unless the defendant in error file a *remittitur* of one thousand dollars within thirty days. In case such *remittitur* is filed the judgment of the district court will be modified and affirmed for the sum of two thousand dollars." Brooks v. Dutcher, 22 Neb., 816; 36 N. W. Rep., 128.

7. **$2,000.** The jury may take into consideration the pecuniary circumstances of the parties in assessing damages; and where it appears that the

defendant was worth over one hundred thousand dollars and that the plaintiff was a man in humble life, and the slander imputed to the defendant the crime of perjury in a suit of the plaintiff against the defendant to recover for his labor, and that the slander was uttered in a public place in the hearing of many people, it was held that a verdict of $2,000 was not excessive. Flagg v. Roberts, 67 Ill., 485.

8. **$2,000.** The plaintiff, at the time of the publication of an alleged libel, was a candidate for the office of representative in congress. He had at a former period held the office of commissioner of pensions, and the publication complained of consisted of charges of malfeasance and corrupt conduct of the plaintiff as such commissioner. The charges had been the subject of investigation by a committee of the house, and the proceedings of the committee were before the defendant, and were largely drawn upon in the various articles which it published and which were claimed to be libelous. Parts of the testimony were referred to which tended to establish the charge of malconduct, while the plaintiff claimed that the defendant who wrote the articles did not refer to the parts of the testimony and proceedings which exculpated him.

At the conclusion of the trial the counsel for the defendant stated to the court that it was not claimed on the part of the defense that there was anything wrong in Dr. Van Aernam's conduct in the pension office, and the plaintiff's counsel then stated that upon the defendant's statement the plaintiff would rest; and thereupon the court charged the jury that there must be a verdict for the plaintiff for nominal damages at least. To this charge the defendant's counsel excepted, and the jury rendered a verdict for the plaintiff for $2,000 damages. On appeal the court of appeals sustained the ruling of the court, though the question of excessive damages was not directly raised or passed upon. Van Aernam v. Blusteen, 103 N. Y., 355; 7 N. E. Rep., 537.

9. **$2,000.** In an action by one in humble life against a defendant shown to be worth over $100,000, for words uttered in a public place, charging perjury in a suit by the plaintiff against him for wages, it was held that a verdict for $2,000 was not excessive. Flagg v. Roberts, 67 Ill., 485.

10. **$2,000.** The plaintiff was a merchant in a Wisconsin town; the defendant a wealthy land-owner and resident of the same place. They had known each other for more than twenty-five years, and were on friendly but not intimate terms. On the afternoon of a summer day in 1881 the defendant was engaged in a discussion in front of the plaintiff's store with the town assessor relative to the assessment of his property. The discussion becoming somewhat animated, the plaintiff, from the stoop of his store building, asked the assessor if they were having "a prayer-meeting." The assessor replied, "I guess so." Thereupon the defendant turned around towards the plaintiff, and starting for him said, "You G—d d—d s—n of a b—h!" to which the plaintiff answered, "Then you are a bastard." Continuing to advance towards the plaintiff, the defendant said: "G—d d—n you; you couldn't break Cooling's will. G—d d—n you; you broke open a granary and stole my wheat." These epithets and charges of theft were repeated several times in a loud and angry tone. There were twenty or thirty people present, including the plaintiff's family. The action was predicated

upon the charge of theft. The jury awarded $2,000 damages. Of this award on appeal the supreme court said: "When it is considered that the defendant persisted for many months (such was the evidence) in falsely charging that the plaintiff had committed an infamous crime; that he repeated the charge to many citizens; that he was evidently prompted by ill-will and bad intent towards the plaintiff, who was engaged in a business in which public confidence in his honesty and integrity of character was absolutely essential to success; and that the defendant is a man of wealth, who could not be punished adequately by the award of light damages, we cannot say that the award of $2,000 is so large that it must be the result of a perverted judgment or of any improper influence on the minds of the jurors." Judgment affirmed. Templeton v. Graves, 59 Wis., 95; 17 N. W. Rep., 672.

11. **$2,000.** Mrs. R., who resided in the state of Wisconsin, desiring to adorn herself in proper habiliments, engaged Mrs. B., a dressmaker, to construct for her out of certain materials furnished for that purpose a garment properly fitted and fashionable. After the completion of the garment Mrs. R., becoming dissatisfied, caused to be circulated in the neighborhood some handbills, in which she charged the dressmaker with retaining portions of the aforesaid material and imputed to her the crime of larceny. Mrs. B., feeling aggrieved at this proceeding, brought suit for libel. On the trial she was awarded $2,000 by the jury, and the supreme court refused to disturb the finding. Bowe et al. v. Rogers et al., 50 Wis., 598; 7 N. W. Rep., 547.

12. **$1,600.** In an action for slander $1,600 damages are not excessive where there are numerous malicious utterances to different persons to the effect that plaintiff, a physician, was no doctor, that his treatment would kill a patient, and that persons employing him would thereby murder their own families; there being no proof of the truth of such utterances, and the words seeming to have been uttered for the sole purpose of destroying plaintiff's means of livelihood. Cruikshank v. Gorden, 118 N. Y. 178.

13. **$1,600.** In an action on the case for slander brought in the superior court for Cook county, Illinois, the words spoken were, "She is a thief;" "She stole thirty dollars from me," and other expressions implying the same thing. On the trial the jury returned a verdict in favor of the plaintiff and assessed her damages at the sum of $2,400. Of the sum found by the jury $800 was remitted, and thereupon the court overruled the motion of defendant for a new trial and entered judgment on the verdict for the sum of $1,600. That judgment was afterwards affirmed in the appellate court, and defendant took the case to the supreme court on her further appeal. On the question of excessive damages the court said: "Whether the damages found by the jury are excessive or not is a question not open to review in this court. The amount of damages sustained by the plaintiff in an action at law is a question of fact, as to which the finding of the appellate court is conclusive upon this court." Stumer v. Pitchman, 124 Ill., 250; 22 Ill. App., 399.

14. **$1,500.** Where the parties to a suit for slander were rival tradesmen in the same city, and the words proved to have been spoken at three different times by the defendant were that the plaintiff "had stole two or three thousand dollars from the defendant's brother in Ohio," and upon the

trial the jury brought in their verdict assessing the plaintiff's damages at $3,000, and upon the motion for a new trial the plaintiff remitted one-half, and judgment was rendered for $1,500, *held*, that such damages were not excessive. Upham v. Dickinson, 50 Ill., 97.

15. **$1,450.** In a New York case (1826) the declaration alleged a contract of marriage between the plaintiff and Parkman Baker; and that the defendant, to prevent the intended marriage, in a conversation with Baker, declared that he had had carnal intercourse with the plaintiff, by reason whereof Baker refused to marry her. The trial was had at the Cayuga circuit, and resulted in a verdict of $1,450 for the plaintiff. In the supreme court *Woodworth, J.*, said: "The damages, although liberal, are not so extravagant as to require the interposition of the court. There are no grounds to believe the jury were influenced by passion or partiality." Moody v. Baker, 5 Cow., 352.

16. **$1,400.** The plaintiff, a young lady of good education and respectable connections, had been for some years employed as a school teacher, and was much respected in that employment. Her mother was dead. Her father, a physician, was unable to render any aid in supporting the family, and she had younger sisters than herself, who depended on her for advice and assistance. The defendant had been for many years a representative from his town on the general court, twice a senator from his county, a magistrate of very respectable character, and the richest man in Methuen. And yet he addressed to the committee of the school district a written communication, in which, after stating that he had been informed that the plaintiff had been employed to teach the school, remonstrated against such employment and accused her of a want of chastity in several instances, and pledged himself to prove the charges. Litigation ensued, and a jury fixed the plaintiff's damages at $1,400. On appeal, the supreme judicial court said: "The damages are extremely large, perhaps too large, but not so extravagant as to justify the interference of the court." Bodwell v. Osgood, 20 Mass., 379.

17. **$1,400.** In a New York case for an alleged libel published in the New York "American," the plaintiff, who was then a candidate for reelection to the office of lieutenant-governor, was charged with being intoxicated and drunk and a disgusting and loathsome object, etc., and with being often drunk and intoxicated when in the discharge of his legislative duties and when acting as president of the senate, etc.; that he was an habitual drunkard. The case was tried at the Delaware circuit. The jury returned a verdict of $1,400 damages. In passing upon the point of excessive damages the supreme court, quoting from Tillotson v. Cheetham, 2 Johns. (N. Y.), 63, said: "We cannot interfere on account of the damages. A case must be very gross and the recovery enormous to justify an interposition on a question of damages in an action of slander." Root v. King, 7 Cow. (N. Y.), 609.

18. **$1,375.** In a suit by a midwife against a newspaper company for damages to her in such business from an alleged libelous statement published in such newspaper, to the effect that she was well known as an abortionist, although the charge was retracted in the newspaper the second day after its publication and no evidence of actual damage was given,

a verdict for $1,375 was held not to be excessive. Meyer v. Press Pub. Co., 46 N. Y. Superior Ct., 127.

19. $1,000. In an action for charging the plaintiff with being a whore, $1,000 damages are not excessive. Knight v. Lee, 80 Ind., 201.

20. $1,000. The defendant charged the plaintiff, in the presence of his family, with having stolen corn and oats from him. The case was tried on the plea of not guilty. The jury returned a verdict in favor of the plaintiff and assessed his damages at $1,000, for which amount the court entered judgment and the defendant appealed. Scott, J.: "It must be admitted the damages found are quite as high as the evidence will justify, but we are not prepared to say the amount is so excessive as would warrant a reversal of the judgment." Miller v. Johnson, 79 Ill., 59.

21. $1,000. A public officer in a report of an official investigation into his conduct published the testimony of a witness with these comments: "I am extremely loath to impute to C. or S., his partner, improper motives in regard to the false accusations against me; yet I cannot refrain from the remark that if their motives have not been unworthy of honest men, their conduct to feed the flame of calumny, etc., has been such as to merit the reprobation of every man having a particle of honor or virtue, etc. They have much to repent for the groundless and base insinuations they have propagated against me." The publication was held to be libelous and $1,000 damages sustained, the court holding that a verdict will not be set aside for excessive damages unless they are so flagrantly outrageous as manifestly to show that the jury was actuated by passion, partiality, prejudice or corruption. Clark v. Binney, 19 Mass., 112.

22. $866. Where a declaration containing three counts alleged as the words complained of: (1) "She is a whore and unfit to keep a school." (2) "She is a bitch and whore right from the hill in Boston." (3) A general allegation "that the defendant charged the plaintiff with having been guilty of the crimes of fornication and adultery,"—on the trial of the issues a verdict was returned for $866 upon all the counts as general damages. Whitney v. Smith, 31 Mass., 364.

23. $707.50. The plaintiff, Mr. Shute, a married man, though for some reason living separate from his wife, had been employed by the overseers of the poor of Malden, Mass., for four years to take charge of the almshouse. An unmarried female, named Lydia Oakes, was employed at the almshouse during the same time. The plaintiff was in humble circumstances; he had nothing but his good character to secure him in his place. In March, 1825, at a town meeting, in a debate relative to the appointment of a new superintendent, Mr. Barrett, a man of substance and influence, charged the plaintiff with adultery, fornication, open and gross lewdness, and lewd and lascivious and cohabitation with Miss Oakes, the unmarried female. The jury assessed the damages at $707.50, and the defendant moved for a new trial on the ground of excessive damages. Under the circumstances the court held that the amount was not "an outrageous sum;" nor did it appear that the jury were influenced by "passion or prejudice," and the new trial was refused. Shute v. Barrett, 25 Mass., 81.

24. $591.67. Miss Lydia Oakes was employed at the almshouse in Malden, Mass., as a domestic under Mr. Isaac Shute, the superintendent, by

trade formerly a shoemaker, an honest man, and a man of correct habits; his character was perfectly fair and unimpeached, except that reports unfavorable to his conduct in relation to Miss Oakes had got into circulation. He was a man of small property, and before he was appointed superintendent some of his own family had been assisted by the town. He was not living with his wife, but her mind was deranged at times. At the annual town meeting, during a debate relative to the appointment of a new superintendent, Mr. William Barrett, a man of wealth and influence in the community, charged Shute with adultery and fornication with an unmarried female, and thereupon Miss Oakes brought her suit for defamation of character. Sixteen or eighteen witnesses on the part of the defendant stated that unfavorable reports regarding plaintiff's chastity had been prevalent, but none of them had any personal knowledge of any acts of illicit intercourse. It was shown, however, that plaintiff and the superintendent had been seen to walk together arm in arm at Harvard college and Bunker Hill, and that the wife, with whom the superintendent did not live, sent word to the plaintiff forbidding her to go blue-berrying with her husband. The jury returned a verdict for the plaintiff, and assessed her damages at $591.67. The defendant moved for a new trial on the ground of excessive damages; but the motion was refused. Oakes v. Barrett, 25 Mass., 81.

25. $500. Rudolph Bergmann sued George Jones for the following publication in the New York "Times," purporting to be a report of an officer's search in the cellar of a New Jersey grocery: "While feeling around in the water his hand came in contact with what he believes to have been a human arm, and afterwards with teeth which he judges were those of a human being. . . . Bergmann's neighbors now recall the fact that a year ago a man who boarded with Bergmann strangely disappeared, and a few days later his grocery was replenished with a new stock." The result was a verdict for $500, which was sustained. Bergmann v. Jones, 94 N. Y., 51.

26. $500. In an action of slander, where the defamatory words consisted in a charge of felony resulting in the arrest and imprisonment of the plaintiff, the jury awarded $500 damages. *Held*, the damages were not excessive. Plummer v. Johnson, 70 Wis., 131, 35 N. W. Rep., 334.

27. $500. In a suit tried at the Monroe county circuit in New York the words charged and which were proved on the trial to have been spoken were: "You are a thief; you stole my wife's dress." The plaintiff had resided in Oswego, and had removed to Rochester about six weeks previous to the speaking of the words complained of, where she kept a boarding-house. The defendant and his wife and a number of other persons boarded with her, and on the occasion of the speaking of the words the house was broken up. The jury awarded $500 damages. In the supreme court, on the question of a new trial for excessive damages, Marcy, J., said: "The amount allowed the plaintiff is certainly very liberal; but the rule is that in actions of slander the court will not grant a new trial on the ground of excessive damages unless the amount is so flagrantly outrageous and extravagant as manifestly to show that the jury acted corruptly or under the influence of passion, partiality or prejudice. The verdict in this case does not warrant such an inference." Douglass v. Tousey, 2 Wend. (N. Y.), 352.

28. $100. Defendant admitted that he called plaintiff (a married woman) a "bitch," and told her that she "was not running around there alone for the mere purpose of picking berries, but to be ridden around there by men." He also testified that, when he could not understand what she was saying, he would tell her to raise her petticoats, and make certain suggestive motions with the hand. There was evidence that the language was uttered in the course of a quarrel, during which plaintiff had accused defendant of trying to run away with another man's wife. *Held*, that a verdict for $400 was not excessive. Rhoads v. Anderson (Pa.), 13 Atl. Rep., 823.

29. $100. Where the editors of a newspaper in speaking of a steamboat agent called him an impertinent fellow, and charged him with withholding newspapers which had been intrusted to him for their paper, and warned their friends against sending them any more favors by him, the publication was held to be a libel, and a verdict for $100 was sustained. Kemler v. Sass, 12 Mo., 499.

30. A case must be very gross, and the damages enormous, to justify ordering a new trial on a mere question of damages in an action of slander. Tillotson v. Cheetham, 2 Johns., 63; Coleman v. Southwick, 9 Johns., 45; Southwick v. Stevens, 10 Johns., 443; Root v. King, 7 Cow., 613; Moody v. Baker, 5 Cow., 351; Cole v. Perry, 8 Cow., 214; Ostrom v. Calkins, 5 Wend., 263; Douglass v. Tousey, 2 Wend., 352.

§ 89. Digest of English Cases.—

1. £500. The appellants were the owners of a daily newspaper called the Natal "Witness," in which they constantly attacked the official conduct of the respondent, the British resident commissioner in Zululand, asserting that he had himself violently assaulted a Zulu chief; that he had set on his native police to assault and abuse others, etc. They vouched for the truth of these stories, declaring that though some doubt had been thrown on them, they would prove to be true on investigation. They then proceeded, on the assumption that the charges were true, to comment on the respondent's conduct in most offensive and injurious language. At the trial in Natal, on September 4, 1883, it was proved that the charges against the respondent were absolutely without foundation; the appellants made no attempt to support them by evidence. Damages £500. Motion for a new trial refused by the supreme court of Natal. *Held*, on appeal to the judicial committee of the privy council, that the distinction must be closely drawn between comment or criticism and allegations of fact; that such a publication was in no way privileged, and that the damages were not excessive. Davis & Sons v. Shepstone, 11 App. Cas., 187; 55 L. J., P. C., 51; 34 W. R., 722; 55 L. T., 1; 50 J. P., 709; Odgers on L. & S., 38.

2. £5,000. Defendant wrote "A History of New Zealand," and therein stated that the plaintiff, a lieutenant in the Kai Jwi cavalry, had charged at some women and young children who were harmlessly hunting pigs, "and cut them down gleefully and with ease;" that he had dismissed from the service a subordinate officer who had protested against this cruelty, and that he was ever afterwards known among the Maoris by the nickname "Kohuru" (the murderer). Defendant admitted that these facts did not appear in the official reports, or in any other history of New Zealand; but he said he had heard rumors to the effect, and he called a witness who had

made a statement to the governor of New Zealand on hearsay evidence, containing substantially the same charge, a copy of which statement the governor had forwarded to the defendant. Huddleston, B., directed the jury that it was no defense whatever that the charges were made in the *bona fide* belief that they were true, and without any malice towards the plaintiff. Damages £5,000. Bryce v. Rusden, 2 Times L. R., 435.

3. **£100.** Two sureties were proposed for the Berwick election petition, neither of whom had any connection with the borough. Affidavits were put in to show that one of them was an insufficient surety, being embarrassed in his affairs. The "Times" set out these affidavits and added the remarks: "But why, it may be asked, does this cockney tailor take all this trouble, and subject himself to all this exposure of his difficulties and embarrassments? He has nothing to do with the borough of Berwick-upon-Tweed or its members. How comes it then that he should take so much interest in the job? There can be but one answer to these very natural and reasonable queries. He is hired for the occasion. The affair in fact is a foul job throughout, and it is only by such aid that it can possibly be supported." In an action brought on the whole article the defendant pleaded that the publication was a correct report of certain legal proceedings, "together with a fair and *bona fide* commentary thereon." But the jury thought the comment was not fair, and gave the plaintiff damages £100. Cooper v. Lawson, 8 A. & E., 746; 1 P. & D., 15; 1 W., W. & H., 601; 2 Jur., 919.

4. **100 Marks.** The plaintiff was a barrister and gave counsel to divers of the king's subjects. The defendant said to J. S. (the plaintiff's father-in-law), concerning the plaintiff, "He is a dunce, and will get little by the law." J. S. replied, "Others have a better opinion of him." The defendant answered, "He was never but accounted a dunce in the Middle Temple." *Held*, that the words were actionable, though no special damage was alleged. Damages one hundred marks. Peard v. Jones, Cro. Car., 382.

5. **£60.** The defendant on being applied to for the character of the plaintiff, who had been his saleswoman, charged her with theft. He had never made such a charge against her till then. He told her he would say nothing about it if she resumed her employment at his house; subsequently he said that if she would acknowledge the theft he would give her a character. *Held*, that there was abundant evidence that the charge of theft was made *mala fide*, with the intention of compelling plaintiff to return to defendant's service. Damages £60. Jackson v. Hopperton, 16 C. B. (N. S.), 829; 12 W. R., 913; 10 L. T., 529.

6. **£20.** Sir Gervas Clifton never made any complaint of his butler's conduct while he was with him; but he suddenly dismissed him without notice and without a month's wages. The butler naturally, but illegally, refused to leave the house without a month's wages; a violent altercation took place, and eventually a policeman was sent for, who forcibly ejected the butler. Sir Gervas subsequently gave the butler a very bad character, in too strong terms, and made some charges against him which were wholly unfounded. Damages £20. Rogers v. Clifton, 3 B. & P., 587.

7. **£100.** A barrister editing a book on the law of attorneys referred to

a case, Re Blake, as reported in 30 L. J., Q. B., 32, and stated that Mr. Blake was struck off the rolls for misconduct. He was in fact only suspended for two years, as appeared from the "Law Journal" report. The publishers were held liable for this carelessness, although of course neither they nor the writer bore Mr. Blake any malice. Damages £100. Blake v. Stevens. 4 F. & F., 222; 11 L. T., 543.

8. **£100.** On an examination into the sufficiency of sureties on an election petition, under 9 Geo. IV., ch. 22, § 7, affidavits were put in to show that one of them (the plaintiff) was embarrassed in his affairs and an insufficient surety. A newspaper report of the examination proceeded to ask why the plaintiff, being wholly unconnected with the borough, should take so much trouble about the matter. "There can be but one answer to these very natural and reasonable queries. He is hired for the occasion." *Held*, that this question and answer formed no part of the report, and therefore enjoyed no privilege; and that it was properly left to the jury to say whether they were a fair and *bona fide* comment on a matter of public interest in that borough. Damages £100. Cooper v. Lawson, 8 A. & E., 746; 1 W., W. & H., 601; 2 Jur., 919; 1 P. & D., 15.

9. **£287.** Defendant published, in the form of a circular headed "Take Notice. Important to Farmers," a fairly accurate report of two actions brought by the plaintiff in the Ashford county court to recover the price of manures he had sold. These circulars were extensively distributed on market days in the home and adjoining counties, and plaintiff's business consequently fell off. The jury considered that the defendant published it with a view of injuring the plaintiff. Damages £287. Salmon v. Isaac, 29 L. T., 885.

10. **£250.** Plaintiff brought an action against defendant and applied for an injunction. Defendant applied at the same time for a receiver, which was refused. Thereupon defendant said he "would make it d—d hot for Dodson," and inserted in a newspaper he owned a report of the application, setting out all his own counsel had said against the plaintiff's solvency, etc., at full length, but omitting all mention of plaintiff's affidavit. *Held*, ample evidence of malice. Damages £250. Dodson v. Owen, 2 Times L. R., 111.

11. **£200.** Defendant wrote to his wife's uncle telling him that his son and heir was leading a fast, wild life, and was longing for his father's death, and that all his inheritance would not be sufficient to satisfy his debts. The court of star chamber were satisfied that this letter was written with the intention of alienating the father from the son and inducing the father to leave his lands and money to the defendant or his wife, and not from an honest desire that the son should reform his life; and they fined defendant £200. Peacock v. Reynal, 2 Brownl. & Gold., 151; Odgers on L. & S., 274.

12. **£40.** There had been a dispute between plaintiff and defendant prior to the slander about a sum of £20 which the plaintiff claimed from the defendant. At the trial, also, the plaintiff offered to accept an apology and a verdict for nominal damages if defendant would withdraw his plea of justification. The defendant refused to withdraw the plea, yet did not attempt to prove it. *Held*, ample evidence of malice. Damages £40. Simpson v. Robinson, 12 Q. B., 511; 18 L. J., Q. B., 73; 13 Jur., 187.

13. **£100.** Plaintiff was town clerk and clerk to the borough justices.

Defendant said that he should feel great pleasure in ridding the borough of men like the plaintiff. So he sent a petition, charging plaintiff with corruption in his office and praying for an inquiry, to an official who had no jurisdiction over the matter. Damages £100. Blagg v. Sturt, 10 Q. B., 899; 16 L. J., Q. B., 39; 11 Jur., 101; 8 L. T. (O. S.), 135.

14. £50. Defendant changed his printer, and on a privileged occasion stated in writing, as his reason for so doing, that to continue to pay the charges made by his former printer, the plaintiff, would be "to submit to what appears to have been an attempt to extort money by misrepresentation." *Held*, that these words, imputing improper motives to the plaintiff, were evidence of malice to go to the jury. Damages £50. Cooke v. Wildes, 5 E. & B., 328; 24 L. J., Q. B., 367; 1 Jur. (N. S.), 610; 3 C. L. R., 1090.

15. £200. Defendant having lost certain bills of exchange published a handbill offering a reward for their recovery, and adding that he believed they had been embezzled by his clerk. His clerk at that time still attended regularly at his office. *Held*, that the concluding words of the handbill were quite unnecessary to defendant's object, and were a gratuitous libel on the plaintiff. Damages £200. Finden v. Westlake, Moo. & Malk., 461.

16. £900. Where the defendant published in a newspaper that a certain ship of the plaintiff's was unseaworthy, and had been purchased by the Jews to carry convicts, evidence as to the average profits of a voyage was admitted, and also evidence that upon the first voyage after the libel appeared the profits were nearly £1,500 below the average, and this although the action was brought immediately after the libel appeared, and before the last mentioned voyage was commenced. Damages £900. Ingram v. Lawson, 6 Bing. N. C., 212; 8 Scott, 471.

17. £500. Bingham caused a libel on plaintiff, the proprietor of a newspaper, to be printed by Hinchcliffe as a placard, and distributed five thousand such placards. He also put the same libel into a rival newspaper, the defendant's, as an advertisement. Plaintiff sued both Bingham and Hinchcliffe, as well as the defendant, alleging that the circulation of his paper had greatly declined. The action against the defendant came on first, and his counsel, having failed to prove the justification pleaded, contended that the decline of circulation must principally be ascribed to the five thousand placards, not to the advertisement. Martin, B., while admitting that defendant was not liable for damage caused by the placards, ruled that it lay on defendant to prove that the damage sustained by the plaintiff was in fact due to the placard, and not to the advertisement. Damages £500. Harrison v. Pearce, 1 F. & F., 567; 32 L. T. (O. S.), 298.

18. £25. A newspaper may comment upon the hearing of a charge of felony and the evidence produced thereat, and discuss the conduct of the magistrates in dismissing the charge without hearing the whole of the evidence; but it may not proceed to disclose "evidence which might have been adduced," and thus argue from facts not in evidence before the magistrates that the accused was really guilty of the felony. Damages £25. Hibbins v. Lee, 4 F. & F., 243; 11 L. T., 541.

19. £1,000. The "Morning Post" published an article on a trial which had greatly excited public attention, giving a highly-colored account of

the attorneys on one side, concluding with the sweeping condemnation: "Messrs. Quirk, Gammon and Snap were fairly equaled, if not outdone," alluding to the notorious firm of pettifoggers in "Ten Thousand a Year." This account of plaintiff's conduct was taken almost verbatim from the speech of counsel on the other side, and no allusion was made to the evidence subsequently produced to rebut his statements. Damages £1,000. Woodgate v. Ridout, 4 F. & F., 202.

20. **£54 7s.** The plaintiff was the widow and administratrix of her deceased husband, and advertised a sale of some of his property. Defendant, an old friend of the husband, thereupon put an advertisement in the papers offering a reward for the production of the will of the deceased. The defendant subsequently called on the solicitor of the deceased and was assured by him there was no will; but, in spite of this, the defendant attended at the sale and made statements which effectually prevented any person present from bidding. After waiting twelve months the plaintiff again put the same property up for sale and defendant again stopped the auction. Cockburn, C. J., left it to the jury to say whether, after the interview with the plaintiff's solicitor, defendant could still possess an honest and reasonable belief that the deceased had left a will. The jury found that he had not that belief. Damages £54 7s. Atkins v. Perrin, 3 F. & F., 179.

§ 90. Digest of American Cases.—

Amounts Held to be Excessive.

1. **$8,000.** The complaint charges the defendant with having spoken of and concerning M. B., an unmarried female under twenty-one years of age, that she was a whore; that she had slept with one M., and that he had sexual intercourse with her and she had become pregnant, and then procured or suffered an abortion to be procured upon her. The defendant answered by general denial and a plea of justification on the grounds of the truth of the allegations. There was a trial resulting in a verdict for $8,000. The court required the plaintiff to remit the amount in excess of $2,000, and only rendered judgment for the latter amount. Kern v. Bridwell, 119 Ind., 226. 21 N. E. Rep., 664.

2. **$8,000.** Massie, the warden of the Central prison, sued the "Toronto Irish Canadian" for publishing the following: "How long will a just God allow the poor wretches sent to the Central to be reformed (not debased and brutalized) to suffer the tortures of the damned at the hands of this fiend? Is it possible that in this enlightened age men are to be driven insane by the tortures of this modern Nero?" On the trial it was held that the defendant had exceeded the limits of the privilege, but a verdict for $8,000 was set aside as excessive. Massie v. Ontario Printing Co., 11 Ontario, 362.

3. **$5,000.** Perhaps the most remarkable case on record is that of David L. Pratt, a physician of Saint Paul, Minn. He sued the "Pioneer Press" for the publication in July, 1881, of an article headed "Culpable Neglect," giving an account of how he had allowed the dead body of an infant to remain in the room with its sick mother, where it had died while under his care, until it had begun to decompose. On the first trial he was awarded $2,000, but the verdict was set aside on the ground that it was not sustained

by the evidence. On the second trial the jury could not agree. On the third trial a verdict was rendered in his favor for $5,000, which was set aside as excessive. On the fourth trial the jury again failed to agree. On the fifth trial the jury returned a verdict of $4,275. Upon the defendant's motion for a new trial the court ordered the plaintiff to remit all of his damages in excess of $2,000, and upon this being done the motion was denied and judgment entered. The defendant, however, appealed, but the supreme court sustained the action of the lower court, affirming the judgment. Pratt v. Pioneer Press Co., 30 Minn., 41; 14 N. W. Rep., 62; 14 N. W. Rep., 365; 15 N. W. Rep., 174; 32 Minn., 217; 17 N. W. Rep., 387; 18 N. W. Rep., 836; 20 N. W. Rep., 87; 35 Minn., 251.

4. $5,000. Plaintiff was an undertaker, and being called by a friend of the family of a deceased person, commenced embalming the remains. Before he had finished, another undertaker, who had been called by the family, took charge. Plaintiff's bill was not paid, and the editor of a newspaper published the fact, and offered to pay it himself. Plaintiff answered in a letter, which was published by the editor, stating that those who were legally and morally bound repudiated the bill. The editor subsequently paid the bill, and defendant, in the article in question, condemned the interference of the editor, referring to plaintiff's claim as unjust, and as one which the family pronounced "blackmailing in color, and in no way meritorious." The article also charged plaintiff with intoxication and offensive conduct on the day he had charge of the remains. Plaintiff's bill was for $500, and the evidence was that $100 was a reasonable price. *Held*, that a verdict for plaintiff for $5,000 shows prejudice and is excessive. Holmes v. Jones, 3 N. Y. S., 156.

5. $4,000. A. sued B. for saying that A. burnt his barns. It appeared that the fire was incendiary, and that A. had expressed malice against B., intimating that his barns might be burned; that B. honestly believed the declaration to be true; that no one else was on investigation suspected; and that A. had sustained little injury. A verdict for $4,000 was held to be excessive. Haight v. Hoyt, 50 Conn., 583.

6. $1,000. Mr. Davis owned three tracts of land. The one in Illinois he conveyed to Mr. and Mrs. R.—Mrs. R. being his daughter—and they executed a contract to support Mr. D. and his wife, who were both old and feeble, during their lives, and to bury them when dead, as a consideration for the deed. R. and his wife desired to sell their land and go to Kansas, with the full consent of Mr. D. They entered into negotiations with one P. S., and a verbal offer was made by the latter to pay $3,800 cash September 1, 1887, or $1,800 then and $2,000 March 1st next. On September 1st a deed of the land was tendered S. He declined to take it and pay the money, because one V. T., another son-in-law of Mr. D., told him his wife was a legal heir to the land, and that one Mrs. B., of Ohio, was another heir, and that if he bought he would buy a lawsuit; that Mr. D. was not capable of doing business, and had not been for a good many years, etc. The sale of the land was lost, and a suit for slander of title brought. The jury assessed plaintiff compensatory damages at $1,000. There was some evidence on the part of the defense tending to show that the motives for speaking the words were not malicious, and that the damage, if any, by

reason of not completing the sale to S. was trifling. It was held that the damages were unreasonably large. Van Tuyl v. Riner et al., 3 Brad. (Ill.), 556.

VI. Remoteness of Damages.

§ 91. **The Law Stated.**— Special damages must be the natural and probable result of the defamation complained of. In some cases it can be shown that a person contemplated and desired such result at the time of publication; in other cases the result is so clearly the natural and necessary consequence of the libel or slander that it may fairly be said the person charged ought to have contemplated it, whether in fact he did so or not. But where the damage sustained is neither the necessary and reasonable result of a person's misconduct, nor such as can be shown to have been in his contemplation at the time, there the damage will be held too remote. Evidence cannot be given of any special damage which would not flow from the alleged defamatory words in the ordinary course of events, unless there are special circumstances in the case which show that the party intended and desired that result. It is not enough that his words have in fact produced such damage, unless it can reasonably be presumed that a person when he utters the words either knew or ought to have known that such damage would ensue.[1]

§ 92. **Illustrations — American Cases.—**

1. **A Massachusetts Case:** *Dudley v. Briggs*, 141 Mass., 582; 6 N. E. Rep., 717.

The plaintiff, in his declaration, alleged that he had been for many years a compiler and publisher of directories of cities, towns and counties in the commonwealth and elsewhere; that by care, attention, skill and faithfulness, and after great labor and expense, he acquired a large number of subscribers among the business men and other people throughout the cities and towns of Bristol county, and elsewhere in the commonwealth, for the Bristol county directory, which he had compiled and published biennially for many years and until the acts and doings of defendants; that he had at great labor and expense, acquired a large and valuable list of advertisers in his said directory, from whom, as well as from said subscribers, he obtained a large income, and would have continued to do so but for the acts and doings of the defendant. And the plaintiff further alleged that, according to his usual custom in the compilation and publication of said directory, he would have compiled and published the same in the year 1885, and had made preparations thereto, but that the defendant and his can-

[1] Dudley v. Briggs, 141 Mass., 582; 6 N. E. Rep., 717; Odgers on L. & S.; Bradley v. Fuller, 118 Mass., 239; Democratic Pub. Co. v. Jones, 83 Tex., 302; 18 S. W. Rep., 652.

vassers and other servants and agents, in order to injure him (the plaintiff), and to deprive him of the opportunity of compiling and publishing said directory for the year 1885 and thereafterwards, and receiving the gains and profits therefrom, and to secure the same to the defendant, together with all the gains and profits arising therefrom, and otherwise injure the plaintiff, knowingly, wilfully, falsely and fraudulently pretended and represented to many persons, and particularly to plaintiff's patrons, the advertisers in said directory and the subscribers thereto throughout said Bristol county, that plaintiff had gone out of the business of compiling and publishing said directory; that he had sold out said business to defendant; that the said canvassers and other agents of defendant were compiling the materials for plaintiff's directory the same as formerly; and made other false and fraudulent representations, of which the plaintiff was not then fully informed, and thereby deceitfully and wrongfully induced plaintiff's said patrons, advertisers and subscribers in and throughout said Bristol county to give to defendant their advertisements and subscriptions, and to pay him instead of the plaintiff therefor, whereas in truth and in fact the representations were wholly false and untrue, etc.; and the defendant did knowingly, wrongfully, injuriously and deceitfully compile and publish the said Bristol county directory for the year 1885, and vend and sell the same to plaintiff's patrons; and the plaintiff was thereby prevented from compiling, publishing and selling his said directory for the year 1885, as he had done before, and thereby lost great gains and profits, and was put to great expense in preparing for said compilation and publication till he learned of defendant's acts and doings, and will hereafter be prevented from compiling and publishing said directory except at an increased expense and with diminished profits.

The defendant demurred for the reason that a legal cause of action had not been set forth and that it did not appear thereby that the plaintiff had any copyright, monopoly, special or exclusive property or right thereof in or to the publication of the Bristol county directory or any directory whatever, or to the patronage of the subscribers thereto or advertisers therein, or that the defendant was under any duty or obligation to the plaintiff in respect thereof, or that the acts or purpose of the defendant, or the means by which they were accomplished, were unlawful, or that the defendant had committed any wrong against the plaintiff or any property of the plaintiff. After a hearing the demurrer was sustained, and judgment entered for the defendant. The plaintiff appealed. An attempt was made to bring the case within what is called slander of goods manufactured and sold by another. This implies that the plaintiff was engaged in the business of making and selling directories, and that the defendant made statements disparaging his business. The supreme court held that the declaration did not show that the business of the plaintiff in publishing a new directory every two years was a continuous business. If the publication of a directory by the plaintiff every two years was a separate publication, the declaration amounted to an averment that he intended to publish a directory for 1885, whereby he expected to make profits, but by reason of the acts of the defendant he abandoned his intention and lost the profits he otherwise would have made. "An intention in the mind of the plaintiff to compile and publish a direct-

ory is not property, and the abandonment of such an intention is not a loss of property." The fatal objection to the case was that it was entirely problematical whether the plaintiff would have actually published a directory if the defendant had not made fraudulent representations as alleged. He abandoned his intention in consequence of the defendant's acts, but this upon principle is not sufficient to support an action. The judgment was affirmed. Citing Bradley v. Fuller, 118 Mass., 239; Lumley v. Gye, 2 El. & Bl., 216; Blofield v. Rayne, 4 Barn. & A., 410; Morrison v. Salmon, 2 Man. & G., 385; Sykes v. Sykes, 3 Barn. & C., 541.

§ 93. Digest of English Cases.—

1. A declaration alleged that the defendant falsely and maliciously spoke of the plaintiff, a working stonemason, "He was the ringleader of the nine hours' system," and "He has ruined the town by bringing about the nine hours' system," and "He has stopped several good jobs from being carried out by being the ringleader of the system at Llanelly," whereby the plaintiff was prevented from obtaining employment in his trade at Llanelly. *Held*, on demurrer, that the alleged damage was not the natural or reasonable consequence of the speaking of such words, and that the action could not be sustained. Miller v. David, L. R., 9 C. P., 118; 43 L. J., C. P., 84; 22 W. R., 332; 30 L. T., 58.

2. The defendant insinuated that the plaintiff had been guilty of the murder of Daniel Dolly; the plaintiff thereupon demanded that an inquest should be taken on Dolly's body, and incurred expense thereby. *Held*, that such expense was recoverable as special damage, though it was not compulsory on the plaintiff to have an inquest held. Peake v. Oldham, Cowp., 275; 2 W. Bl., 960.

3. "Suppose that during the war of 1870 an Englishman had been pointed out to a Parisian mob as a German spy, and thrown by them into the Seine, it could not be contended that one act was not the natural and necessary consequence of the other." Mayne on Damages (3d ed.), p. 426; 4th ed., p. 454.

4. The defendant said to Mr. Knight of his wife, Mrs. Knight, "Jane is a notorious liar; . . . she was all but seduced by a Dr. C., of Roscommon, and I advise you, if C. comes to Dublin, not to permit him to enter your place. . . . She is an infamous wretch, and I am sorry that you had the misfortune to marry her, and if you had asked my advice on the subject I would have advised you not to marry her." Knight thereupon turned his wife out of the house and sent her home to her father, and refused to live with her any longer. *Held*, that the loss of *consortium* of the husband can constitute special damage; but that in this case the husband's conduct was not the natural or reasonable consequence of defendant's slander. *Secus*, had the words imputed actual adultery since the marriage. Lynch v. Knight and wife, 9 H. L. C., 577; 8 Jur. (N. S.), 724; Parkins et ux. v. Scott et ux., 1 H. & C., 153; 31 L. J., Ex., 331; 8 Jur. (N. S.), 595; 10 W. R., 562; 6 L. T., 394.

5. Where the libel attacked the character of both husband and wife, and the declaration alleged that the wife fell ill and died in consequence of it, evidence of such damage was excluded in an action brought by the surviving husband. Guy v. Gregory, 9 C. & P., 584.

6. Where a person published a libel on a public singer, in consequence whereof she refused to fulfill an engagement into which she had entered with the plaintiff, the latter brought an action against the person who had published said libel. Lord Kenyon held the action not maintainable. "The injury was too remote and impossible to be connected with the cause assigned for it. Her refusal might have proceeded from apprehension; and the plaintiff was not at liberty to suggest the libel as the cause of that injury, which might have proceeded from another cause, or perhaps from caprice or insolence." Ashley v. Harrison, 1 Esp., 48; Flood on L. & S., 150.

§ 94. **The Defamatory Words Must be the Predominating Cause of the Damage Claimed.**—The special damage must be the direct result of the defamatory words. The jury cannot consider any damage which is produced not so much by the defendant's words as by some other fact or circumstance unconnected with him, such as the spontaneous resolution of a third person. The defendant's words must at all events be the *predominating* cause of the damage assigned; otherwise the damages will be considered too remote.

§ 95. **Illustrations — Digest of English Cases.**—

1. Bingham caused a libel on plaintiff, the proprietor of a newspaper, to be printed by Hinchcliffe as a placard, and distributed five thousand such placards. He also put the same libel into a rival newspaper, the defendant's, as an advertisement. Plaintiff sued both Bingham and Hinchcliffe as well as the defendant, alleging that the circulation of his paper had greatly declined. The action against the defendant came on first, and his counsel, having failed to prove the justification pleaded, contended that the decline of circulation must principally be ascribed to the five thousand placards, not to the advertisement. Martin, B., while admitting that defendant was not liable for damage caused by the placards, ruled that it lay on defendant to prove that the damage sustained by the plaintiff was in fact due to the placard, and not to the advertisement. Verdict for the plaintiff, £500. Harrison v. Pearce, 1 F. & F., 567; 32 L. T. (O. S.), 298; Wyatt v. Gore, Holt, N. P., 299.

2. The defendant slandered the plaintiff to his master, B. Subsequently B. discovered from another source that the plaintiff's former master had dismissed him for misconduct. Thereupon B. discharged the plaintiff in the middle of the term for which he had engaged his services. *Held*, that no action lay against the defendant; for his words alone had not caused B. to dismiss the plaintiff. Vicars v. Wilcox, 8 East, 1; 2 Sm. L. C., 553 (8th ed.), as explained in Lynch v. Knight and wife, 9 H. L. C., 590, 600.

3. The plaintiff was a candidate for membership of the Reform club, but upon a ballot of the members was not elected. Subsequently a meeting of the members was called to consider an alteration of the rules regarding the election of members. Before the day fixed for the meeting the defendant spoke certain words concerning the plaintiff, which "induced or contributed to inducing a majority of the members of the club to retain the regulations under which the plaintiff had been rejected, and thereby pre-

vented the plaintiff from again seeking to be elected to the club." *Held* that the damage alleged was not pecuniary or capable of being estimated in money, and was not the natural and probable consequence of the defendant's words. Chamberlain v. Boyd (C. A.), 11 Q. B. D., 407; 52 L. J. C., Q. B., 277; 31 W. R., 572; 48 L. T., 328; 47 J. P., 372.

4. The plaintiff alleged that certain persons would have recommended him to X., Y. and Z. had not the defendant spoken certain defamatory words of him on the Royal Exchange, and that X., Y. and Z. would, on the recommendation of those persons, have taken the plaintiff into their employment. The plaintiff claimed damages for the loss of the employment. Such damage was *held* too remote, for it was caused by the non-recommendation, not by the defendant's words. Sterry v. Foreman, 2 C. & P., 592; Hoey v. Felton, 11 C. B. (N. S.), 142; 31 L. J., C. P., 105.

5. In an action of slander of title to a patent, the plaintiff alleged as special damage that in consequence of defendant's opposition the solicitor-general refused to allow the letters-patent to be granted with an amended title, as the plaintiff desired. *Held*, that this damage was too remote, being the act of the solicitor-general and not of the defendant. Haddon v. Lott, 15 C. B., 411; 24 L. J., C. P., 49; Kerr v. Sheddon, 4 C. & P., 528.

6. Special damage alleged that, in consequence of defendant's words, Butler would not deliver some barley which plaintiff had bought of him, except for cash on delivery. Butler, being called, admitted in cross-examination that he should have insisted on cash on delivery anyhow, even if defendant had never said anything at all, and that that was his understanding of the contract between himself and the plaintiff. *Held* no special damage. King v. Watts, 8 C. & P., 614.

§ 96. **Acts of Third Persons.**— The act of a third party, if directly caused by the defendant's language, is not too remote, provided the defendant either did contemplate or ought to have contemplated such a result. The defendant cannot be held liable for any eccentric or foolish conduct on the part of the person he addressed; but only for the ordinary and reasonable consequences of his words. The fact that such act is in itself a ground of action by the plaintiff against such third party is immaterial. "To make the words actionable by reason of special damage, the consequence must be such as, taking human nature as it is, with its infirmities, and having regard to the relationship of the parties concerned, might fairly and reasonably have been anticipated and feared would follow from the speaking of the words."[1] "If the experience of mankind must lead any one to expect the result, the defendant will be answerable for it."[2]

[1] Lynch v. Knight and wife, 9 H. L. C., p. 600.

[2] R. v. Moore, 3 B. & Ad., 188; Société Française des Asphaltes v. Far-

§ 97. **Illustrations — Digest of English Cases.—**

1. Mrs. Scott charged Mrs. Parkins with adultery. She indignantly told her husband, and he was unreasonable enough to insist upon a separation in consequence. *Held*, that no action lay. Parkins et ux. v. Scott et ux., 1 H. & C., 153; 31 L. J., Ex., 331; 8 Jur. (N. S.), 593; 10 W. R., 562; 6 L. T., 394; 2 F. & F., 799; Lynch v. Knight and wife, 9 H. L. C., 577; 5 L. T., 291.

2. The plaintiff engaged Mdlle. Mara to sing at his concerts; the defendant libeled Mdlle. Mara, who consequently refused to sing lest she should be hissed and ill-treated; the result was that the concerts were more thinly attended than they otherwise would have been, whereby the plaintiff lost money. *Held*, that the damage to the plaintiff was too remote a consequence of defendant's words to sustain an action by the plaintiff. It was, in short, not so much the result of defendant's words as of Mdlle. Mara's timidity or caprice. Ashley v. Harrison, 1 Esp., 48; Peake, 256.

3. The defendant is not answerable "if, in consequence of his words, other persons had afterwards assembled and seized the plaintiff and thrown him into a horse-pond by way of punishment for his supposed transgression." Per Lord Ellenborough, C. J., in Vicars v. Wilcocks, 8 East, 3.

4. A man may not recover the same damages for the same injury twice from two different defendants, but he may recover from two different defendants damages proportioned to the injury each has occasioned; and clearly, where words are spoken by a defendant with the intent to make a third person break his contract with the plaintiff, the fact that such person did break his contract with the plaintiff in consequence of what the defendant said may be proved as special damage against that defendant. Carrol v. Falkiner, Kerford & Box's Digest of Victoria Cases, 216.

5. If I tell a master falsely that his servant has robbed him, and thereupon he instantly dismisses him, I must be taken to have contemplated this as a natural and probable consequence of my act. But if the master horsewhips his servant instead of dismissing him, this is not the natural result of my accusation; I could not be held liable for the assault as special damage. See per Williams, J., in Haddon v. Lott, 15 C. B., 411; 24 L. J., C. P., 50.

§ 98. **Belief of Third Persons in the Defamatory Words.—** It seems to be essential that the third person whose act constitutes the special damage should believe the words spoken by the defendant, if it is shown that the words spoken did directly induce the act. The law is otherwise in England.[1]

§ 99. **Illustrations — Digest of American Cases.—**

1. Where the plaintiff was under twenty-one and lived at home with her father, and the defendant foully slandered her to her father, in consequence of which he refused to give her a silk dress and a course of music lessons

rell, 1 Cababé & Ellis, 563; Carrol v. Falkiner, Kerford & Box's Digest of Victoria Cases, 216; Odgers on L. & S., 328.

[1] Odgers on L. & S.; Bishop v. Journal Co. (Mass., 1897), 47 N. E. Rep., 119.

on the piano which he had promised her, although he entirely disbelieved the defendant's story, this was held not to be such special damage as will sustain the action, on the ground that such treatment by a parent of his child is not the natural result of a falsehood told him against her. Grover, J., in delivering the opinion of the court, says: "I do not think special damage can be predicated upon the act of any one who wholly disbelieves the truth of the story. It is inducing acts injurious to the plaintiff, caused by a belief of the truth of the charge made by the defendant, that constitutes the damage which the law redresses." Anon., 60 N. Y., 262; Wilson v. Goit, 17 N. Y., 445.

§ 100. **Digest of English Cases Sustaining the Contrary Doctrine.**—

1. The plaintiff and another young woman worked for Mrs. Enoch, a straw bonnet-maker, and lived in her house. The defendant, Mrs. Enoch's landlord, who lived two doors off, came to Mrs. Enoch and complained that the plaintiff and her fellow-lodger had made a great noise and been guilty of openly outrageous conduct, adding, "No moral person would like to have such people in his house." Mrs. Enoch thereupon turned them out of her house, and dismissed them from her employ, not because she believed the charge made, but because she was afraid it would offend her landlord if they remained. *Held*, that the special damage was the direct consequence of the defendant's words. Knight v. Gibbs, 1 A. & E., 43; 3 N. & M., 467; Gillett v. Bullivant, 7 L. T. (O. S.), 490.

§ 101. **Repetition by Third Parties.**— It may happen that a person who invents a lie and maliciously sets it in circulation may sometimes escape punishment altogether. For if one originate a slander of such a nature that the words are not actionable in themselves, the utterance of them is no ground of action, unless special damage follows. If a person tell the story to an employer, who thereupon dismisses an employee defamed, he will have an action; but if it is only told to his friends and relations, and no pecuniary damage ensues, then no action lies, although the story is sure to get round to the master sooner or later. The unfortunate man whose lips actually uttered the slander to the master is the only person that can be made defendant; for it is his publication alone which is actionable as causing special damage. It is only in cases where the words are not actionable in themselves that the rule as to the remoteness of damages inflicts this apparent hardship; for where the words are actionable in themselves, and in all cases of libel, the jury find the damages generally, and will be careful to punish the author of a pernicious falsehood with all due severity; although, of course, the judge will

still direct them not to take into their consideration any damage which ensued from a repetition by a stranger.[1]

§ 102. **Exceptions to the Rule.**— There are two apparent exceptions to this rule:[2] (1) Where, by communicating a slander to A., the defendant puts A. under a moral necessity to repeat it to some other person immediately concerned; here, if the defendant knew the relation in which A. stood to this other person, he will be taken to have contemplated this result when he spoke to A. In fact, here A.'s repetition is the natural and necessary consequence of the defendant's communication to A. (2) Where there is evidence that the defendant, though he spoke only to A., intended and desired that A. should repeat his words, or expressly requested him to do so. Here the defendant is liable for all the consequences of A.'s repetition of the slander; for A. thus becomes the agent of the defendant. But they are only apparent exceptions to the general rule. For whenever the first publisher either expressly or impliedly requests or procures the republication, he directly causes all damage that flows from the republication; the second publisher is really his agent, for whose act he is liable. So, wherever the original publication to A. places A. under a legal or moral obligation to repeat the defendant's words, such repetition is clearly the natural consequence of defendant's communication to A.

§ 103. **Digest of English Cases Illustrating the English Rule.**—

1. The plaintiff was governess to Mr. L.'s children. The defendant told her father that she had had a child by Mr. L. The father went straight to Mr. L. and told him what defendant had said. Mr. L. thereupon said that the plaintiff had better not return to her duties; for although he knew that the charge was perfectly false, still for her to continue to attend to his children would be injurious to her character and unpleasant to them both. *Held*, that the repetition by the father to Mr. L., and his dismissal of the plaintiff, were both the natural consequences of the defendant's publication to the father. Gillett v. Bullivant, 7 L. T. (O. S.), 490.

2. H. told Mr. Watkins that the plaintiff, his wife's dressmaker, was a woman of immoral character. Mr. Watkins naturally informed his wife of this charge, and she ceased to employ the plaintiff. *Held*, that the plaintiff's loss of Mrs. Watkins' custom was the natural and necessary consequence of the defendant's communication to Mr. Watkins. Derry v. Handley, 16 L. T., 263.

3. A police magistrate dismissed a trumped-up charge brought by the plaintiff, a policeman, and added: "I am bound to say, in reference to this

[1] Rutherford v. Evans, 4 C. & P., 79; Tunnicliffe v. Moss, 3 C. & K., 83. See ch. 17.

[2] Odgers on L. & S., 167, 168.

charge and a similar one brought from the same spot a few days ago, that I cannot believe William Kendillen on his oath." This observation was duly reported to the commissioners of police, who in consequence dismissed the plaintiff from the force. Lord Denman held that the dismissal was special damage, for which the defendant would have been liable if the action had lain at all; for he must have known that such a remark would certainly be reported to the commissioners, and would most probably cause them to dismiss the plaintiff. Nonsuit on the ground of privilege. Kendillon v. Maltby, 1 Car. & Marsh., 402.

4. Plaintiff "was in communication of marriage with J. S., who was seized in fee of land worth £200 per annum." Defendant spoke words to plaintiff's servant imputing unchastity to the plaintiff; "and by reason of these words she lost her marriage." *Held*, that no action lay, because the words were not spoken to J. S. Holwood v. Hopkins (1600), Cro. Eliz., 787.

5. Weeks was speaking to Bryce of the plaintiff, and said: "He is a rogue and a swindler; I know enough about him to hang him." Bryce repeated this to Bryer as Weeks' statement. Bryer consequently refused to trust the plaintiff. *Held*, that the judge was right in nonsuiting the plaintiff; for the words were not actionable *per se*, and the damage was too remote. Ward v. Weeks, 7 Bing., 211; 4 M. & P., 796.

6. A groom in a passion called a lady's-maid "a whore." A lady, hearing the groom had said so, refused to afford the lady's-maid her customary hospitality. *Held*, that no action lay, for the groom had never spoken to the lady. Clarke v. Morgan, 38 L. T., 354; Dixon v. Smith, 5 H. & N., 450; 29 L. J., Ex., 125.

7. Defendant said of the plaintiff, a veterinary surgeon, in the White Lion public-house at Barnet, "He does not know his business." No one then in the public-house ceased to employ plaintiff in consequence, but some others did, to whom the circumstance was reported. *Held*, that defendant was not liable for the loss of their custom. Hirst v. Goodwin, 3 F. & F., 257; Rutherford v. Evans, 4 C. & P., 74; Tunnicliffe v. Moss, 3 C. & K., 83.

8. The defendant, a passenger on board a steam-packet, complained to the captain that the plaintiff, the third officer, had been guilty of misconduct towards one of the lady passengers. On the arrival of the vessel at Jamaica the captain reported this charge to the marine superintendent of the company there, who reported it to the directors at the chief office of the company in London, who dismissed the plaintiff from the service of the company. The plaintiff sought leave to issue a writ to be served on the defendant, who resided in Jamaica. None of the above cases were cited to the court. Leave was refused, on the ground that the case did not come within the words of the repealed rule, Order XI, r. 1; but Bramwell, L. J., intimated that in his opinion the alleged special damage was too remote, differing from Denman, J., in the court below. Bree v. Marescaux (C. A.), 7 Q. B. D., 434; 50 L. J., Q. B., 676; 29 W. R., 858; 44 L. T., 644, 765.

9. If I make an oral statement to the reporter of a newspaper, intending and desiring him to insert the substance of it in the paper, I am liable for all the consequences of its appearing in print, although I never expressly requested the reporter to publish it. Bond v. Douglas, 7 C. & P., 626; R. v. Lovett, 9 C. & P., 462; Adams v. Kelly, Ry. & Moo., 157; R. v. Cooper, 8 Q. B., 533; 15 L. J., Q. B., 206.

10. But if I write you a private letter containing a libel on A., and you make a copy of it which you send to a newspaper to be published to all the world, without my leave, and in a way which I could not have anticipated, then this republication is your own unlawful act, for the consequences of which you alone are liable. I must pay damages only for the publication to you. Per Best, C. J., 5 Bing., 402, 405.

§ 104. **Inadequacy of Damages.**— The reluctance of the courts to interfere with the verdicts of juries is so great that, in actions of tort sounding merely in damages, the general rule has been held to be that a new trial will not be granted for mere inadequacy of damages. The reason for holding parties so tenaciously to the damages found by the jury in such actions is, that in cases of this class there is no scale by which the damages are to be graduated with certainty. They admit of no other test than the intelligence of the jury governed by a sense of justice. To the jury, therefore, as a favorite and almost sacred tribunal, is committed, by unanimous consent, the exclusive task of examining the facts and circumstances, and valuing the injury and awarding compensation in damages. The law that confers on them this power, and exacts of them the performance of this solemn trust, favors the presumption that they are actuated by pure motives, and it is not until the result of the deliberations of the jury appears in a form calculated to shock the understanding and impress no dubious conviction of their prejudice and passion that courts have found themselves compelled to interpose.[1] It is now the settled rule of law, in actions of tort, that a verdict will be set aside as inadequate for the same reasons that will justify the setting aside of a verdict for excessive damages.[2] This right will be enforced particularly in those cases in which the smallness of the verdict shows that the jury have made a compromise, or that their verdict is the result of passion or prejudice, or a perverted judgment.[3]

[1] Pritchard v. Hewitt, 91 Mo., 547; 1 Graham & Waterman on New Trials (2d ed.), 451; Gregory v. Chambers, 78 Mo., 294.

[2] Robinson v. The Town of Waupaca, 77 Wis., 544; Emmons v. Sheldon, 26 Wis., 648; Whitney v. Milwaukee, 65 Wis., 409; Watson v. Harmon, 85 Mo., 43; Caldwell v. Vicksburg, etc., R. R. Co., 41 La. Ann., 624; Duncan v. Jackson, 16 Fla., 338; 3 Sedgwick on Damages, § 1326; Sullivan v. Wilson, 15 Ind., 246. New trials for inadequate damages in actions for slander have been refused in the following cases: Wavle v. Wavle, 9 Hun, 125; Colyer v. Huff, 3 Bibb, 34; Forsdike v. Stone, 3 C. P., L. R., 607; and granted in Rixey v. Ward, 3 Rand. (Va.), 52.

[3] 1 Graham & Waterman on New Trials (2d ed.), 451; Falvey v. Stanford, L. R., 10 Q. B., 54. But see Richards v. Rose, 9 Ex., 219.

CHAPTER XXVII.

THE CRIMINAL LAW OF DEFAMATION.

§ 1. **The Criminal Libel Defined.**— Any publication which has a tendency to disturb the public peace or good order of society is a libel by the common law, and is indictable as such.[1] As defined by Wharton, it is a malicious publication expressed either in printing or writing, or by signs or pictures, tending either to injure society generally, or to blacken the memory of one dead or the reputation of one living, and expose him to public hatred, contempt or ridicule;[2] the malice of the publication being the essence of the offense.[3]

The offense may consist in the tendency of the communication to weaken or dissolve religious or moral restraints, or to alienate men's minds from the established constitution of the state, or to engender hatred and contempt of the government, or the administration of public justice, or in general to produce some particular inconvenience or mischief, or to excite individuals to the commission of breaches of the public peace, or other illegal acts.[4]

§ 2. **General Illustrations — Digest of American Cases.**—

1. The publication of a false and malicious libel has always, by the common law of Massachusetts, been an offense punishable by indictment. Com. v. Chapman, 13 Met., 68; Com. v. Holmes, 17 Mass., 336; Com. v. Whitmarsh, Thach. Cr. Cas., 447.

2. In New Hampshire an indictment at common law may be sustained for a libel. State v. Brunham, 9 N. H., 34.

3. A husband cannot be indicted in North Carolina for slandering his wife. State v. Edens, 95 N. C., 693.

4. On the trial of an indictment for slander under North Carolina acts of 1879, chapter 156, the admission of the defendant that he spoke the words charged does not shift the burden of proof upon him to show that he had not slandered an innocent woman. Her innocence is a question for the jury

[1] Wharton's Crim. Law, § 2525; Com. v. Holmes, 17 Mass., 336; State v. Avery, 7 Conn., 268; 3 Swift, Dig., 340.

[2] People v. Crosswell, 3 Johns. Cas. (N. Y.), 354; Com. v. Clapp, 4 Mass., 163; State v. Fraley, 4 McCord, 317; Wharton, Crim. Law, § 2525.

[3] 4 Black. Com., 150; Wharton, Crim. Law, § 2525; McClain's Crim. Law, §§ 1059 to 1069.

[4] 2 Starkie on Slander, 130.

upon the evidence, and no presumption of her innocence should be allowed to prevail against the defendant. State v. McDaniel, 84 N. C., 803.

5. Under the Alabama code, 1876, section 4107, in the trial of an indictment for speaking falsely of a woman in the presence of a third party, charging her with a want of chastity, the prosecution is not bound to prove malice on the part of the defendant towards the woman in order to secure his conviction. Haley v. The State, 63 Ala., 83.

6. In Massachusetts an indictment for a libel on W., after averring that he held the office of judge at the time of its publication, set forth the libel with innuendoes as follows: "We accuse him of disgracing his office; of perverting the law, which, bad as it is, is yet worse in such hands; of doing injustice on his seat; of descending from his official dignity; of suffering his personal feelings to interfere with the discharge of his functions. Let W. choke a week or so on this pill, and we have one or two more as hard to swallow in reserve" (meaning that the defendant had one or two libels on W. in reserve for future publication). "We think we shall do service to God and man by removing this unjust magistrate from the seat he disgraces" (meaning that W. ought to be impeached of crimes and misdemeanors, and ought to be removed and disgraced from his office). There was no express colloquium or averment in the indictment that the libel was of and concerning the removal of W. from office by impeachment. The court held that the first innuendo did not enlarge the meaning of the words of the libel; and that, even if the second innuendo aggravated their meaning, it might be rejected as surplusage, the words of the libel being sufficient in themselves to sustain the indictment. Com. v. Snelling, 32 Mass., 321.

7. On the trial of a charge of criminal libel based on the fact of a hotel-keeper's having written "frod" after a guest's name, it was held that persons to whom the hotel-keeper exhibited it might testify as to the meaning attached to it by them. State v. Fitzgerald, 20 Mo. App., 408.

8. On the trial of an indictment for a libel it appeared that the newspaper article on which the indictment was founded was in the first edition of the paper, and there was testimony, the truth of which was denied by the defendants, tending to show that before the second edition of the paper appeared a question was raised in defendant's office as to the truth of the facts stated in the article, and that reporters were sent to investigate. It was held that it might be shown by a person in the office where the investigation would have been made, that, on the day in question, the reporters came there and examined the books. People v. Sherman, 103 N. Y., 513.

9. A criminal prosecution may be sustained, in Missouri, for a libel on a corporation; but the question whether the words were damaging is to be determined by considering the effect on the market value of the shares, and not by examining the assets and liabilities of the company. Brennan v. Tracy, 2 Mo. App., 540. Allegations that the corporation was pecuniarily injured is not necessary to a criminal prosecution for a libel upon a private corporation. State v. Boogher, 3 Mo. App., 442.

10. In a prosecution for saying of a woman, "She is a whore and was in a certain whore-house," evidence that she had consulted with a witness as

to the advisability of her entering said house was held admissible for the defense. McMahan v. The State, 13 Tex. App., 220.

11. A publication headed "A Malicious Marshal," stating that the writer had been driven from his stand on the sidewalk; that there were other parties who were allowed to obstruct the walk, and asking: "Why this partiality? Does it require the presentation of a turkey, potatoes, flowers, a gold watch or other perquisites, quietly delivered, to close the eye of this vigilant official in every particular case?" *Held* libelous. Commonwealth v. Damon, 136 Mass., 441.

12. In a prosecution for libel it may be shown in mitigation of punishment that defendant was provoked by a libel on himself which had been published shortly before by the prosecuting witness. Hartford v. State, 96 Ind., 461; 49 Am. Rep., 185.

§ 3. **The Offense, when Committed.**— The offense of criminal libel is committed by 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 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 public justice; or to cause animosities between our own and any foreign government by personal abuse of its sovereign 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 expose him to public hatred, contempt or ridicule.[1]

§ 4. **The Test of Criminality.**— The grounds for criminal prosecutions in cases for libels is the tendency of the defamatory matter to provoke breaches of the peace; but it is equally criminal if no breach of the peace occurs, or if the person libeled could not, on account of physical infirmity, resent an injury. But it must be borne in mind that not every libel for which a civil action lies will support a criminal prosecution. The test seems to be that, in all cases where a party, in order to maintain a civil action, must show special damages in order to recover, no indictment can be sustained, because, as it is said in such cases, a suit for damages offers an adequate remedy.

[1] 3 Greenleaf, Evidence, § 164; McClain's Crim. Law, ch. 45.

§ 5. **The Subject Classified.**— In considering the subject of criminal libels at common law it will be convenient to arrange them into the following classes:

Class I. Libels tending to injure the administration of the government and of public justice.

Class II. Libels tending to injure society in general and to corrupt public morals.

Class III. Libels tending to blacken the memory of one who is dead and to injure his family and posterity.

Class IV. Libels tending to blacken the reputation of one who is living and expose him to public hatred, contempt or ridicule.

Class I.

§ 6. **Libels Tending to Injure the Administration of the Government and of Public Justice.**— In this class are included all those publications short of actual treason which tend to create disaffection toward the form of the government or the administration of the laws, or which tend in any way to injure the administration of the government or public justice. The object of the governmental bonds of our system is to check those uprisings which have a tendency to unlawful revolution, but not to interfere with temperate discussions of political questions.[1]

§ 7. **Libels on the Government.**— Prosecutions for this class of libels have not been very common in the United States. A government even of the people, by the people and for the people, it seems, is subject to calumny. It must expect to meet it as much as the sailor at sea expects to meet with storms; the waves may try the strength of the ship, but if she is well built, well manned and managed they rarely break it. The crime of treason is the aggravated form of this offense.

§ 8. **Words Defamatory of the Constitution and Laws.**— All malicious endeavors by word or writing to promote public disorder, or to induce riot, rebellion or civil war are clearly seditious libels, and may be overt acts of treason. But where no such conscious endeavor is proved, still, if the natural and necessary consequence of any words, deed or writing be to subvert the laws and constitution and to excite or promote

[1] 2 Bishop, Crim. Law, § 926; Respublica v. Dennie, 4 Yeates, 267; United States v. Hudson, 7 Cranch, 32.

discontent and disorder among the people, a criminal intent will be presumed; and the author is guilty of sedition.[1] All publications the direct tendency of which is to bring the constitution into hatred and contempt, and to induce the people to disobey the laws and defy legally constituted authority, are seditious libels, for which the author is criminally liable.

Mere theoretical discussions of abstract questions of political science, comparisons of various forms and systems of government, and controversies as to details of our own constitutional law, are clearly permissible. And so is any *bona fide* effort for the repeal by constitutional methods of any law deemed obnoxious. The prosecution must prove that the publication is calculated to disturb the tranquillity of the state and to lead ignorant persons to endeavor to subvert the government and to break the laws. Without satisfactory proof of such tendency there is no evidence of that criminal intention which is essential to constitute the offense.[2]

§ 9. **Libels Tending to Injure the Administration of Public Justice.**— Libels tending to injure the administration of public justice, so far as they amount to a contempt of court, are usually punished by the courts in this country in a very summary way without indictment or information. This class of offenses is more generally known by the name of contempts of court, rather than the name of libels upon the administration of public justice.

Class II.

§ 10. **Libels Tending to Injure Society in General and to Corrupt Public Morals.**— This class of libels may be subdivided into different kinds of defamatory publications: (1) Obscene Libels; (2) Blasphemy; and (3) Profanity.

§ 11. **(1) Obscene Libels.**— It is fully established that any immodest and immoral publication, tending to corrupt the mind and to destroy the love of decency, morality and good order, is punishable by the common law.[3]

It is a misdemeanor to publish obscene and immoral books and pictures, for such an act is destructive of the public moral-

[1] R. v. Burdett, 4 B. & Ald., 95; R. v. Collins, 9 C. & P., 456.

[2] Odgers on L. & S., 486.

[3] 2 Starkie on Slander, 155; Bell v. State, 1 Swan (Tenn.), 42; State v. Appling, 25 Mo., 315.

ity and welfare, though it may not reflect on any particular person.[1]

The test of obscenity is this: "Whether the tendency of the matter charged as obscene is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."[2]

"Obtaining and procuring" obscene works for the purpose of uttering and selling them is a misdemeanor indictable at common law, for it is an overt act taken in pursuance of an unlawful intention; but merely "preserving and keeping them in one's possession" for the same purpose is not indictable; for "there is no act shown to be done which can be considered as the first step in the prosecution of a misdemeanor."[3]

§ 12. **Illustrations—Digest of American Cases.—**

1. Where a writing, in the form of a letter addressed to the wife of another man, contained words that she had acted licentiously towards the writer, had invited him to an adulterous intercourse with her, and had sought opportunity to effect it, which writing was composed and sent to her with the intent to insult and abuse her, to debauch her affection and alienate her from her husband, to entice her to commit adultery and to bring her into disgrace and contempt, it was held that the writing was a libel, and the sending of it an offense of a public nature which might be the subject of an information. State v. Avery, 7 Conn., 266.

2. Peter Holmes was indicted at the circuit court of common pleas at Worcester, Massachusetts, in 1820, for publishing a lewd and obscene print contained in a certain book entitled "Memoirs of a Woman of Pleasure," and also for publishing the same book. The second count of the indictment alleged that the defendant, "being a scandalous and evil-disposed person, and contriving and devising and intending the morals, as well of youth as of other good citizens of said commonwealth, to debauch and corrupt, and to raise and create in their minds inordinate and lustful desires, knowingly, unlawfully, wickedly, maliciously and scandalously did utter, publish and deliver to one A. B. a certain lewd, wicked, scandalous, infamous and obscene printed book, entitled "The Memoirs of a Woman of Pleasure," which said printed book is so lewd, wicked and obscene that the same would be offensive to the court and improper to be placed upon the records," and so it was not set out in the indictment except by its title. The defendant was convicted and he appealed to the supreme judicial court.

[1] R. v. Curl, 2 Strange, 788; 1 Barnard., 29; People v. Muller, 96 N. Y., 408.

[2] Cockburn, C. J., in R. v. Hicklin, L. R., 3 Q. B., 371; 37 L. J., M. C., 89; 16 W. R., 801; 18 L. T., 395; 11 Cox, C. C., 19.

[3] Lord Campbell, C. J., in Dugdale v. Reg., Dears. C. C., 64; 1 E. & B. 425; 22 L. J., M. C., 50; 17 Jur., 456; and per Park, J., in R. v. Rosenstein, 2 C. & P., 414.

The indictment was held good and the conviction sustained. Commonwealth v. Holmes, 17 Mass., 335.

4. Sharpless and others were indicted for exhibiting an indecent picture to divers persons for money; "a lewd, scandalous and obscene painting." The defendants consented that a verdict should be returned against them and afterwards moved in arrest of judgment. But the court held that a picture tends to excite lust as strongly as a writing, and the showing of it is as much a publication as the selling of a book. The motion was not allowed. Com. v. Sharpless, 2 Serg. & R., 91.

5. It is an indictable offense at common law to publish an obscene book or to print or publicly utter obscene language; and so of any offense tending to corrupt the morals of the people. And any public show or exhibition which outrages public decency, shocks humanity, or is *contra bonos mores*, is punishable at common law. Com. v. Holmes, 17 Mass., 336; Com. v. Sharpless, 2 Serg. & R., 91; Knowles v. The State, 3 Day, Cases (Conn.), 103; State v. Brown, 1 Wil. (Vt.), 619; Bell v. The State, 1 Swan (Tenn.), 42; Barker v. Com., 7 Harris, 412; Wharton on Crim. Law, § 2549.

§ 13. Digest of English Cases.—

1. An information was granted against John Wilkes for printing and publishing an obscene and impious libel entitled "An Essay on Woman," upon which he was convicted and sentenced to pay a fine of £500, to be imprisoned for twelve months, and to find security for good behavior for seven years. R. v. Wilkes, 4 Burr., 2527; 2 Wils., 151; Dig. L. L., 69.

2. An information was granted against the printer of a newspaper called "The Daily Advertiser, Oracle and True Briton" for publishing an advertisement by a young married woman offering to become anybody's mistress on certain pecuniary terms. R. v. Stuart, 3 Chit. Crim. L., 887.

3. Where an officer of the Society for the Suppression of Vice purposely went to the prisoner's shop and asked to see some indecent prints and was shown several by the prisoner in a back room, of which he bought two in order to found a prosecution thereon, this was held a sufficient publication to sustain the charge. R. v. Carlile, 1 Cox, C. C., 229.

4. Sir Charles Sedley was indicted for having exposed his naked body in a balcony in Covent Garden, and for having committed other indecent acts before a great multitude of people. The indictment was openly read to him in court; and afterwards, on being required to take his trial at the bar, he submitted to it. From the different reports of this case it appears that, after the abolition of the star chamber, the court of king's bench was considered as the *custos morum*, to whom the cognizance of such offenses most properly belonged; and although it was afterwards contended that judgment was given against the defendant on account of the personal violence he used in throwing down bottles upon the mob, yet, from the language of the reporters, it clearly appears that the judges considered the offense to have been committed against modesty and good manners, and found it necessary to interfere in those profligate times to punish such immodest practices, which the court said were as frequent as if not only christianity but morality also had been neglected. Keb. R., 720; 2 Str., 791; Foster, 99; Mich., 15, C. 2.

5. The Protestant Electoral Union published a book called "The Confes-

sional Unmasked," intended to expose the abuses of the Roman Catholic discipline and to promote the spread of the Protestant religion. But, however praiseworthy such a motive may be thought, many passages in the book were necessarily obscene, and it was seized and condemned as an obscene libel. R. v. Hicklin, L. R., 3 Q. B., 360; 37 L. J., M. C., 89; 16 W. R., 801; 18 L. T., 395; 11 Cox, C. C., 19.

6. The union thereupon issued an expurgated edition of "The Confessional Unmasked," with some new matter. For selling this George Mackey was tried at the Winchester quarter sessions on October 19, 1870, when the jury, being unable to agree as to the obscenity of the book, were discharged without giving any verdict. The union thereupon published "A Report of the Trial of George Mackey," in which they set out the full text of the second edition of "The Confessional Unmasked," although it had not been read in open court, but only taken as read and certain passages in it referred to. A police magistrate thereupon ordered all copies of this "Report of the Trial of George Mackey" to be seized and destroyed as obscene books. *Held*, that this decision was correct. Steele v. Brannan, L. R., 7 C. P., 261; 47 L. J., M. C., 85; 29 W. R., 607; 26 L. T., 509.

§ 14. (2) **Blasphemy.**— In general, blasphemy may be described as consisting in speaking evil of the Deity with an impious purpose to derogate from the Divine majesty, and to alienate the minds of others from the love and reverence of God. It is purposely using words concerning God, calculated and designed to impair and destroy the reverence, respect and confidence due to him as the intelligent creator, governor and judge of the world. It embraces the idea of detraction when used towards the Supreme Being, as "calumny" usually carries the same idea when applied to an individual. It is a wilful and malicious attempt to lessen men's reverence to God by denying his existence or his attributes as an intelligent creator, governor and judge of men, and to prevent their having confidence in him as such.[1] Its mischief consists in weakening the sanctions and destroying the foundations of the christian religion, which is part of the common law of the land, and thus weakening the obligations of oaths and the bonds of society. Hence, all contumelious reproaches of our Saviour, Jesus Christ,[2] all profane scoffing at the Holy Bible, or exposing any part thereof to contempt and ridicule,[3] and all writings

[1] Com. v. Kneeland, 20 Pick. (Mass.), 213; Heard on L. & S., § 337.

[2] The State v. Chandler, 2 Harr., 553; The People v. Ruggles, 8 John., 290; The People v. Porter, 2 Parker, 14; Rex v. Waddington, 1 Barn. & Cress., 26; Com. v. Holmes, 17 Mass. 336.

[3] Updegraph v. The Com., 11 Serg. & Raw., 394; The People v. Ruggles, 8 Johns., 290; Regina v. Heterington, 5 Jur., 529.

against the whole or any essential part of the christian religion, striking at the root thereof, not in the way of honest discussion and for the discovery of truth, but with the malicious design to calumniate, vilify and disparage it, are regarded by the common law as blasphemous and punished accordingly.[1]

Blasphemy against the Almighty by denying his being or providence, contumelious reflections upon the life and character of Jesus Christ, and in general scoffing, flippant and indecorous remarks and comments upon the Scriptures, are offenses at common law; for christianity, as has frequently been asserted by high authorities, is part of that law.[2]

Blasphemy, on the other hand, is a crime against the peace and good order of society; it is an outrage on men's religious feelings, tending to a breach of the peace. The word necessarily involves an intent to do harm or to wound the feelings of others, for it is derived from two Greek words — "*blasto*," I hurt, and "*phemi*," I speak, signifying, therefore, speaking so as to hurt.[3]

The intent to shock and insult believers, or to pervert or mislead the ignorant and unwary, is an essential element in the crime. *Actus non facit reum, nisi mens sit rea.* The existence of such an intent is a question of fact for the jury, and the *onus* of proving it lies on the prosecution. The best evidence of such an intention is usually to be found in the work 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. If, however, the author abstains from ribaldry and licentious approach, a similar design may still perhaps be inferred if it be found that he has deliberately had resort to sophistical arguments, that he has wilfully misrepresented facts within his knowledge, or has indulged in sneers and

[1] Updegraph v. The Com., 11 Serg. & Raw., 394: Com. v. Kneeland, 20 Pick., 220; The People v. Ruggles, 8 Johns., 293: Rex v. Carlisle, 3 Barn. & Ald., 161; 3 Greenl. Ev., § 68; Traske's Case, Hobart, 826; R. v. Atwood, Cro. Jac., 421; 2 Roll. Abr., 78; R. v. Clendon, cited 2 Str., 789; R. v. Hall, 1 Str., 416; Paterson's Case, 1 Brown (Scotch), 629; Robinson's Case, id., 643.

[2] 2 Starkie on Slander, 136.

[3] Odgers on L. & S., 447.

sarcasms against all that is good and noble; for then it is clear that he does not write from conscientious conviction, but desires to pervert and mislead the ignorant; or, at all events, that he is criminally indifferent to the distinctions between right and wrong. But where the work 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, the author is entitled to be acquitted, for his work is not a blasphemous libel.[1]

"It is still blasphemy, punishable at common law, scoffingly or irreverently to ridicule or impugn the doctrines of the christian faith; yet any man may, without subjecting himself to any penal consequences, soberly and reverently examine and question the truth of those doctrines which have been assumed as essential to it." Mr. Justice Coleridge said: "I apprehend that there is nothing unlawful at common law in reverently denying doctrines parcel of christianity, however fundamental. It would be difficult to draw a line in such matters according to perfect orthodoxy, or to define how far one might depart from it in believing or teaching without offending the law. The only safe, and, as it seems to me, practical rule is that which I have pointed at, and which depends on the sobriety and reverence and seriousness with which the teaching and believing, however erroneous, are maintained."[2]

Mere vehemence or even virulence of argument must not be taken as evidence of this intent to injure. Sarcasm and ridicule are fair weapons, even in heterodox hands, so long as they do not degenerate into profane scoffing or irreverent levity. "If the decencies of controversy are observed, even the fundamentals of religion may be attacked without a person being guilty of blasphemous libel."[3]

§ 15. **Heresy.**— At common law heresy was no crime. The secular courts took no cognizance of any man's religious opinions; and indeed before the days of Wiclif heretics were scarce. Towards the end of the fourteenth century, however, heresy came to be regarded as a crime punishable with death, and acts were passed in the reigns of Henry IV. and Henry V. which

[1] Odgers on L. & S., 441.

[2] Shore v. Wilson, 9 Clark & Fin., 524.

[3] Lord Coleridge, C. J., in R. v. Ramsey and Foote, 48 L. T., 739; 15 Cox, C. C., 231; 1 C. & E., 146.

condemned all heretics to be burnt alive and gave the clergy the power of defining heresy just as they pleased. This state of things lasted till the reign of Henry VIII., when the law was rendered in some particulars less severe. Under Edward VI. there were but two executions for heresy. Mary restored the old system for a short period, during which about three hundred persons were burnt.

But by the 1 Eliz., ch. 1, sec. 6, all statutes relating to heresy were repealed, though somehow two men were burnt in her reign and two under James I. "At this day," says Sir Edward Coke, "no person can be indicted or impeached for heresy before any temporal judge, or other that hath temporal jurisdiction."

§ 16. **Distinction between Heresy and Blasphemy.**— Heresy and blasphemy are entirely distinct and different things, both in their essence and in their legal aspect. Originally both were ecclesiastical offenses not cognizable in the secular courts. Then statutes were passed under which both became crimes punishable in the ordinary law courts. Now heresy is once more a purely ecclesiastical offense, punishable only in the clergy; while blasphemy is the technical name for a particular offense against the state.

Heresy is the deliberate selection and adoption of a particular set of views or opinions which the majority consider erroneous. To persist in the tenet of his choice after its error and its injurious tendency have been pointed out to him was regarded as a sin, and the obstinate heretic who refused to recant was bidden to do penance for the good of his soul.[2]

It is not blasphemy, then, to seriously and reverently propound any opinions, however heretical, which are conscientiously entertained by the accused. Honest error is no crime in this country, so long as its advocacy be rational and dispassionate, and do not degenerate into fanatical abuse, or into scurrilous attacks upon individuals. Heresy and blasphemy are entirely distinct and different things. "The law visits not the honest errors, but the malice, of mankind."[1] "Every man may fearlessly advance any new doctrines, provided he does

[1] Odgers on L. & S., 446.

[2] Starkie on L. & S., 147.

so with proper respect to the religion and government of the country."[1]

Or, to quote the words of Lord Mansfield, "The common law of England, which is only common reason or usage, knows of no prosecution for mere opinions."[2]

§ 17. **The English Law of Blasphemy.**— In the earlier times the secular courts of Great Britain interfered to punish blasphemous libels for the same reason as they did in the case of any other libel, viz., in order to prevent a disturbance of the peace. Blasphemous preaching and writing led to dangerous outbreaks of fanaticism, and the state had, therefore, a direct interest in their suppression.

The earliest reported decision upon the subject appears to have been rendered in the star chamber in 1618. The defendant, John Traske, was "a minister that held opinion that the Jewish Sabbath ought to be observed, and that we ought to abstain from all manner of swine's flesh. Being examined upon these things he confessed that he had divulged these opinions, and had labored to bring as many to his opinion as he could; and had also written a letter to the king, wherein he did seem to tax his majesty of hypocrisy, and did expressly inveigh against the bishops high commissioners as bloody and cruel in their proceedings against him and a papal clergy. Now he, being called *ore tenus*, was sentenced to fine and imprisonment, not for holding those opinions, for those were examinable in the ecclesiastical courts, but for making of conventicles and factions by that means, which may tend to sedition and commotion, and for scandalizing the king, the bishops and the clergy."[3]

According to Starkie the first instance of a prosecution for words reflecting upon the christian religion was Atwood's case.[4] A very similar case was decided in the king's bench in the same year, 1618. The language complained of in this case seems to have been aimed chiefly at the prevailing mode of worship: "The religion now professed is but fifty years

[1] Best, J., in R. v. Burdett, 4 B. & Ald., 132.

[2] Evans v. The Chamberlain of London, 16 Parl. History, 325; 2 Burn, Eccl. Law, 218.

[3] Traske's Case, Hobart Rep., 236; Odgers on L. & S., 450.

[4] Atwood's Case, Cro. Jac., 421; 2 Roll. Abr., 78.

old; preaching is but prating; prayer once a day is more edifying." The court at first doubted if they had jurisdiction, as the words did not clearly tend to a breach of the peace. The attorney-general thought the case ought to go before the ecclesiastical court of high commission. But the king's bench decided that the indictment lay, "for these words are seditious words against the state of our church and against the peace of the realm; and although they are spiritual words, still they draw after them a temporal consequence, viz., the disturbance of the peace."[1]

The next decision upon this subject found in the English reports was rendered in the court of king's bench in 1676[2]—an information presented against Taylor for blasphemy. Upon the trial it was shown that he had preached aloud and persistently in the market-place at Guildford words of which the following are a sample: "Christ is a Whoremaster, and Religion is a Cheat, and the Profession is a Cloak, and they are both Cheats. . . . All the Earth is mine, and I am a King's Son; my Father sent me hither, and made me a Fisherman to take Vipers, and I neither fear God, Devil nor Man; I am a Younger Brother to Christ, an Angel of God. . . . No Man fears God but an Hypocrite. . . . Christ is a Bastard. . . . God damn and confound all your Gods." The information alleged, among other things, that these words tended to destroy christian government and society. It was argued on behalf of Taylor, as it was in the earlier case of Atwood, that the offense was punishable only in the spiritual court. But Chief Baron Hale said: "That such kind of wicked, blasphemous words were not only an offense to God and religion, but a crime against the laws, state and government, and therefore punishable in this court; for to say religion is a cheat is to dissolve all those obligations whereby the civil societies are preserved; and christianity is parcel of the laws of England, and therefore to reproach the christian religion is to speak in subversion of the law." Or, as the judgment is more briefly given in Keble, Hale, C. J.: "These words, though of ecclesiastical cognizance, yet that 'religion is a cheat' tends

[1] Starkie on Slander, 186; Odgers on L. & S., 451.

[2] R. v. Taylor, 1 Ventr., 293; 3 Keble, 607, 621; Tremayne's Entries, p. 226.

to dissolution of all government, and therefore punishable here, and so of contumelious reproaches of God or the religion established."[1] The court condemned Taylor, as part of his punishment, to stand in the pillory, both at Westminster palace yard and also at Guildford, where he spoke the words, with a paper fixed to his head with these words written on it in large letters: "For Blasphemous Words tending to the Subversion of all Government."

These adjudications are regarded by English writers as the first stage in the development of the law of libel. The state steps in to suppress harangues which endanger the peace and good order of society. The substance or matter of the harangue is comparatively immaterial; the "secular arm" is only concerned with its political consequences. The law does not "take the Deity under its protection." It does not attempt to "avenge the insult done to God." The offender is punished for his offense against his fellow-men, not for his offense against God. No judge and jury ever tried a man for a sin that was not also a crime.[2]

In sentencing Holyoake in 1842 Erskine said: "The arm of the law is not stretched out to protect the character of the Almighty; we do not assume to be the protectors of our God, but to protect the people from such indecent language." Mr. Justice Ashhurst, in passing sentence upon Williams, who was tried in 1797 for publishing Paine's Age of Reason, said: "Although the Almighty does not stand in need of the feeble aid of mortals to vindicate His honor and law, it is nevertheless fit that courts of judicature should show their abhorrence and detestation of people capable of sending into the world such infamous and wicked books. All offenses of this kind are not only offenses to God, but crimes against the law of the land, and are punishable as such, inasmuch as they tend to destroy those obligations whereby civil society is bound together. And it is upon this ground that the christian religion constitutes part of the law of England."[3]

At the trial of Gathercole in 1838 Baron Alderson told the jury that "a person may, without being liable to prosecution

[1] 3 Keble, 607; 2 Starkie on Slander, 136; Odgers on L. & S., 452.

[2] Odgers on L. & S., 453.

[3] 2 Starkie on Slander, 141; Odgers on L. & S., 453; 26 Howell's State Trials, 714.

for it, attack any sect of the christian religion save the established religion of the country; and the only reason why the latter is in a different situation from the others is because it is the form established by law, and is therefore a part of the constitution of the country. In like manner and for the same reason any general attack upon christianity is the subject of criminal prosecution, because christianity is the established religion of the country." And he directed the jury to acquit the prisoner if they thought the libel "was merely an attack upon the Roman Catholic church."[1]

A second stage in the development of this branch of the English law seems to have been developed in the eighteenth century. In Woolston's case, decided in 1729, the court of king's bench greatly extended the principle of that decision, making criminal liability depend on the heretical character of the opinions expressed. Woolston was a fellow of Sidney College, Cambridge, who had published six "Discourses on the Miracles of our Saviour," urging that they were not to be taken literally, but allegorically or mystically. His arguments, which were conveyed in most forcible language, gave great offense to the bishops, and Woolston was prosecuted and found guilty. The indictment against him contained an express allegation that these discourses were published "with an intent to vilify and subvert the christian religion;" hence the verdict of the jury amounted to a finding that such was Woolston's intent. His counsel moved in arrest of judgment that these discourses did not amount to a libel on christianity, since the Scriptures were not denied; that the offense was of ecclesiastical cognizance; that the defendant should have been proceeded against under a statute of William III.; and he was prepared to go further and argue that even though the book was a libel upon christianity, yet the common law had not cognizance of such an offense, when he was stopped by the court, Raymond, C. J., declaring that "christianity in general is parcel of the common law of England, and therefore to be protected by it. Now whatever strikes at the very root of christianity tends manifestly to a dissolution of the civil government. So that to say an attempt to subvert the established

[1] 2 Lewin, C. C., 254; Odgers on L. & S., 453.

religion is not punishable by those laws upon which it is established is an absurdity. I would have it taken notice of that we do not meddle with any differences in opinion, and that we interpose only where the very root of christianity itself is struck at, as it plainly is by this allegorical scheme, the New Testament, and the whole relation of the life and miracles of Christ being denied; and who can find this allegory?"[1]

Hawkins, in his Pleas of the Crown, lays down the law in 1716 as follows: "Offenses of this nature, because they tend to subvert all religion and morality, which are the foundation of government, are punishable by the temporal judges with fine and imprisonment."[2]

Baron Greene, in his charge to the jury in the trial of Father Petcherini in 1855, said: "There could be no doubt that the act of burning a Bible in public was one of grave and serious nature, and amounts by the law of the land to a criminal offense. It has been truly stated to you that the christian religion is part and parcel of the law of this land. Any publication or any conduct tending to bring christianity or the christian religion into disrespect, or expose it to hatred or contempt, is not only committing an offense against the majesty of God, but is in violation of the common law of the land. Among the ways in which that offense may be committed is by exposing the Word of God, or any part of it, to obloquy or hatred. The highest authorities have laid down the law in that way, both ancient and modern."[3]

The law as laid down in the Woolston case seems to have been followed in a civil case in England as late as in 1867, in which the court of exchequer decided that the defendant was justified in refusing to carry out a contract to let certain rooms, because the plaintiff proposed to deliver in them lectures, the titles of two of which were advertised as follows: "The Character and Teachings of Christ: the former defective, the latter misleading;" "The Bible shown to be no more inspired than any other book." The action was tried in the passage court at Liverpool, and the recorder directed the verdict to be en-

[1] Fitz., 64; 1 Barnard., 162, 266; 2 Strange, 832; 2 Starkie on Slander, 138; Odgers on L. & S., 455.

[2] Hawkins' Pleas of the Crown, Book 1, ch. 5.

[3] R. v. Father Petcherini, 7 Cox, C. C., 84.

tered for the defendant, but gave the plaintiff leave to move the court of exchequer to enter the verdict for him, the damages being contingently assessed at 10*l.* on each count. The plaintiff accordingly moved *ex parte* for a rule *nisi* in pursuance of the above leave. The lectures never were delivered, and the propositions intended to be maintained in them could hardly have been expressed on the placards in less offensive language. Yet Kelly, C. B., held that it was clear from the advertisements that the lecturer was going to attack christianity in general, and to do this publicly was clearly blasphemy at common law.[1]

But it seems from the report of the case that the associate barons did not concur in the law as laid down by the chief baron, and the case is in other respects unsatisfactory as an authority on common law.[2]

Speaking upon this subject a late English writer says: "In the nineteenth century the law against blasphemy reaches a third stage. There is no longer any danger to the state; no amount of heretical sermons would produce a revolution now; though if their tone were very offensive and aggravating the audience might possibly assault the preacher. Nor does our law any longer interfere with men's religious opinions; no court in England, whether secular or ecclesiastical, will now take cognizance of such matters. It is the malicious intent to insult the religious feelings of others by profanely scoffing at all they hold sacred which deserves and receives punishment."[3]

This is the view that has recently been taken by the lord chief justice of England in his charge to the jury in the trial of Ramsey and Foote for blasphemy:

"It is clear to my mind that the mere denial of the truth of the christian religion is not enough alone to constitute the offense of blasphemy. What, then, is enough? No doubt we must not be guilty of taking the law into our own hands and converting it from what it really is to what we think it ought to be. I must lay down the law to you as I understand it and as I read it in books of authority. But, what is more material

[1] Cowan v. Milbourn, L. R., 2 Ex., 230; 36 L. J., Ex., 124; 15 W. R., 750; 16 L. T., 290.

[2] Odgers on L. & S., 456.

[3] Odgers on L. & S., 458.

to the present purpose, the statement of the law by Mr. Starkie has again and again been assented to by judges as a correct statement of the existing law. I will read it to you, therefore, as expressing what I lay down to you as law in words far better than any at my command:

"'There are no questions of more intense and awful interest than those which concern the relations between the Creator and the beings of His creation; and though as a matter of discretion and prudence it might be better to leave the discussion of such matters to those who, from their education and habits, are most likely to form correct conclusions, yet it cannot be doubted that any man has a right not merely to judge for himself on such subjects, but also, legally speaking, to publish his opinions for the benefit of others. When learned and acute men enter upon these discussions with such laudable motives, their very controversies, even where one of the antagonists must necessarily be mistaken, so far from producing mischief, must in general tend to the advancement of truth, and the establishment of religion on the firmest and most stable foundations. 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 mischief which may arise from the mistaken endeavors of honest ignorance by the splendid advantages which result to religion and to truth from the exertion 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 in morals, a state of apathy and indifference to the interests of society, is the broad boundary between right and wrong.'[1]

[1] 2 Starkie on Slander, 146.

"Now that I believe to be a correct statement of the law. Whether it ought to be or not is not for me to say. I tell you the law as I understand it, leaving you to apply it to the facts of the particular case before you." . . "If the law, as I have laid it down to you, is correct — and I believe it has always been so — if the decencies of controversy are observed, even the fundamentals of religion may be attacked without a person being guilty of blasphemous libel. There are many great and grave writers who have attacked the foundations of christianity. Mr. Mill undoubtedly did so; some great writers now alive have done so too; but no one can read their writings without seeing a difference between them and the incriminated publication, which I am obliged to say is a difference, not of degree, but of kind. There is a grave, an earnest, a reverent, I am almost tempted to say a religious tone in the very attacks on christianity itself, which shows that what is aimed at is not insult to the opinions of the majority of christians, but a real, quiet, honest pursuit of truth. If the truth at which these writers have arrived is not the truth we have been taught, and which, if we had not been taught it, we might have discovered, yet because these conclusions differ from ours, they are not to be exposed to a criminal indictment. With regard to these persons, therefore, I should say they are within the protection of the law, as I understand it."[1]

But, says Odgers: It is no new law that the lord chief justice has laid down. Precisely the same view was held by Mr. Justice Coleridge, and stated to the jury in Pooley's case, tried at Bodman summer assizes, in 1857;[2] and Mr. Justice Erskine, in sentencing Adams at Gloucester in 1842, for selling the "Oracle of Reason," said: "By the law of this country every man has a right to express his sentiments in decent language." And in summing up in Holyoake's case the same judge told the jury: "If you are convinced that he uttered the words with levity, for the purpose of treating with contempt the majesty of the Almighty God, he is guilty of the offense. If you think he made use of these words in the heat of argument without any such intent, you will give him the benefit of the doubt."

[1] Reg. v. Ramsey and Foote, 48 L. T., 733; 15 Cox, C. C., 231: 1 C. & E., 126; Odgers on L. & S., §§ 459, 688.

[2] Odgers on L. & S., 459: Sir James Stephen's Digest of the Criminal Law, 97, n.

Mr. Justice Best gave a similar direction to the jury in Mary Carlile's case in 1819; and Lord Denman in Moxon's case[1] expressly directed the attention of the jury to the fact that "the purpose of the passage cited from 'Queen Mab' was, he thought, to cast reproach and insult upon what, in christian minds, were the peculiar objects of veneration," and left to the jury these questions: "Were the lines indicated calculated to shock the feelings of any christian reader? Were their points of offense explained, or was their virus neutralized by any remarks in the margin, by any note of explanation or apology? If not, they were libels on God, and indictable."

§ 18. **Illustrations — Digest of English Cases.—**

1. An information was exhibited against Peter Annet for a certain malignant, profane and blasphemous libel, entitled "The Free Inquirer," tending to blaspheme Almighty God, and to ridicule, traduce and discredit His Holy Scriptures, particularly the Pentateuch, and to represent and to cause it to be believed that the prophet Moses was an impostor, and that the sacred truths and miracles recorded and set forth in the Pentateuch were impositions and false inventions; and thereby to diffuse and propagate irreligious and diabolical opinions in the minds of his majesty's subjects, and to shake the foundations of the christian religion, and of the civil and ecclesiastical government established in this kingdom. To this information he pleaded guilty. "In consideration of which, and of his poverty, of his having confessed his errors in an affidavit, and of his being seventy years old, and some symptoms of wildness that appeared on his inspection in court, the court declared they had mitigated their intended sentence to the following, viz.: To be imprisoned in Newgate for a month; to stand twice in the pillory with a paper on his forehead inscribed 'Blasphemy;' to be sent to the house of correction to hard labor for a year; to pay a fine of 6*s.* 8*d.*, and to find security, himself in 100*l.* and two sureties in 50*l.* each, for his good behavior during life." R. v. Annet, 1 Wm. Bl., 395; 3 Burn, Eccl. Law (9th ed.), 386.

2. Southwell was convicted of blasphemy in January, 1842, for publishing the "Oracle of Reason." Later in the same year Adams was tried before Mr. Justice Erskine, at Gloucester assizes, for selling No. 25 of the said "Oracle of Reason," and convicted. At the same assizes George Jacob Holyoake was tried before Mr. Justice Erskine for oral blasphemy. It appeared that he had been lecturing on emigration and the poor-laws, and at the close a man, said to have been sent on purpose to entrap him, rose and said: "The lecturer has been speaking of our duty to man; has he nothing to tell us as to our duty to God?" Holyoake, being thus challenged, replied: "I do not believe there is such a thing as a God. . . . I would have the Deity served as they serve the subalterns — place him on half-pay." But Holyoake was known to be a friend of Southwell's, and a writer in the

[1] 2 Townsend's Modern State Trials, 388.

"Oracle of Reason," and he was convicted and sentenced to six months' imprisonment. See Trial of Holyoake, London, 1842.

3. Father Vladimir Petcherini, a monk, was indicted in Ireland in 1855 for having contemptuously, irreverently and blasphemously burnt a Bible in public with intent to bring the same into disregard, hatred and contempt; and in other counts with intent to bring religion into discredit: and in other counts with having caused and procured it to be burnt with such intents. There was some evidence that a Bible had been burnt in the defendant's presence among a heap of other books and papers, but very little that he knew it or sanctioned it. Greene, B., directed the jury that, if he sanctioned it, it would follow "as of course that the intention of the act could only be to bring into contempt the authorized version of the Holy Scriptures." The defendant was acquitted. Reg. v. Petcherini, 7 Cox, C. C., 79.

4. An information was exhibited against John Wilkes for publishing an obscene and impious libel, tending to vitiate and corrupt the minds and manners of his majesty's subjects; to introduce a total contempt of religion, modesty and virtue; to blaspheme Almighty God; and to ridicule our Savior and the Christian religion. R. v. Wilkes, 4 Burr., 2527; 2 Wils., 151.

5. Richard Carlile on his trial read over to the jury the whole of Paine's "Age of Reason," for selling which he was indicted. After his conviction his wife published a full, true and accurate account of his trial, entitled "The Mock Trial of Mr. Carlile," and in so doing republished the whole of the "Age of Reason," as a part of the proceedings at the trial. *Held*, that the privilege usually attaching to fair reports of judicial proceedings did not extend to such a colorable reproduction of a book adjudged to be blasphemous; and that it is unlawful to publish even a correct account of the proceedings in a court of justice, if such an account contain matter of a scandalous, blasphemous or indecent nature. R. v. Mary Carlile, 3 B. & Ald., 167. See, also, Steele v. Brannan, L. R., 7 C. P., 261; 41 L. J., M. C., 85; 20 W. R., 607; 26 L. T., 509.

6. Richard Carlile was sentenced to pay a fine of £1,500, to be imprisoned for three years, and to find sureties for his good behavior for the term of his life. He was still in Dorchester gaol in 1825. In the meantime the sale of heterodox books continued at his shop, and his shopmen were sentenced to various terms of imprisonment. In June, 1824, William Campion, John Clarke, William Maley and Thomas Perry were sentenced to imprisonment in Newgate for three years, Richard Hassell for two years and Thomas Jeffryes for a year and a half for selling blasphemous publications. Odgers on L. & S., § 444.

7. Williams was convicted of having published a libel entitled "Paine's Age of Reason," which denied the authority of the Old and New Testaments, asserted that reason was the only rule by which the conduct of men ought to be guided, and ridiculed the prophets, Jesus Christ, his disciples and the Scriptures. Upon being brought up to receive sentence Mr. Justice Ashurst observed that such doctrines were an offense not only against God but against law and government, from their direct tendency to dissolve all the

bonds and obligations of civil society, and that upon this ground it was that the christian religion constituted part of the law of the land. 2 Starkie on Slander, § 141.

8. To write and publish that the christian miracles were not to be taken in a literal but in an allegorical sense was held blasphemous in 1729; but there the court clearly considered that to attack the miracles was to attack christianity in general, and could not be included amongst "disputes between learned men upon particular controverted points." "I would have it taken notice of," says Lord Raymond, C. J., "that we do not meddle with any differences of opinion, and that we interpose only where the very root of christianity is struck at." R. v. Woolston, 2 Str., 834; Fitz., 66; 1 Barnard., 162.

9. To deliver a lecture publicly maintaining that the character of Christ is defective and His teaching misleading, and that the Bible is no more inspired than any other book, was held blasphemy by the court of exchequer in a civil case, without any regard to the style of the lecture or the religious convictions of the lecturer. Cowan v. Milbourn, L. R., Ex., 230; 36 L. J., Ex., 124; 15 W. R., 750; 16 L. T., 290.

10. It is blasphemy to write and publish that Jesus Christ is an impostor, the christian religion a mere fable, and those who believe in it infidels to God. R. v. Eaton, 31 Howell's St. Tr., 927. And so to write and publish that Jesus Christ was an impostor, a murderer in principle and a fanatic. Such words would be libelous of whomsoever written; and the jury also had found as a fact that the intention of the prisoner was malicious; and the court on motion refused to arrest the judgment. R. v. Waddington, 1 B. & C., 26.

11. A publication which denies the divinity of Jesus Christ is not a blasphemous libel, if written in a reverent and temperate tone, and expressing the conscientious convictions of the author. Shore and others v. Wilson and others, 9 Clark & F., 355.

12. Edward Elwall was indicted before Mr. Justice Denton for a book alleged to be blasphemous, entitled "A True Testimony for God and for His Sacred Law; being a plain, honest defense of the First Commandment of God against all Trinitarians under Heaven, Thou shalt have no other gods but me." He was acquitted, though he admitted publication. R. v. Elwall, Gloucester Summer Assizes, 1726.

13. An information was filed against Jacob Ilive for publishing a profane and blasphemous libel tending to vilify and subvert the christian religion and to blaspheme our Savior Jesus Christ; to cause His divinity to be denied; to represent him as an impostor; to scandalize, ridicule and bring into contempt His most holy life and doctrine; and to cause the truth of the christian religion to be disbelieved and totally rejected, by representing the same as spurious and chimerical, and a piece of forgery and priestcraft. R. v. Ilive, Dig. L. L., 83.

14. In 1817 William Hone was tried on three successive days (December 18th, 19th and 20th) for publishing three parodies on the Catechism, the Litany and the Athanasian Creed — before Abbott, J., on the first day, and Lord Ellenborough, C. J., on the other two. He was on each occasion ac-

quitted, the libels being political attacks on the government, and not written with any intent of ridiculing the compositions parodied. The Three Trials of William Hone, London, 1818.

15. A man called Pooley was indicted at the Bodmin summer assizes, July, 1857, before Coleridge, J., his son, the present Lord Coleridge, C. J., being counsel for the prosecution. The prisoner had scribbled on a gate some disgusting language concerning Jesus Christ, and was convicted of a blasphemous libel, but was subsequently discovered to be insane. R. v. Pooley, Digest of Criminal Law, 97.

16. In November, 1868, John Thompson was committed for trial by the Southampton magistrates on the prosecution of the Rev. Arthur Bradley, the incumbent of a church there, for publishing the following blasphemous libel: "I believe Jesus of Nazareth to be the Messiah at his first coming as an anti-typical Paschal Lamb who died for sins in allegory; and I believe John Cochran of Glasgow to be the Messiah at his second coming, and the anti-typical High Priest who has taken away sin in reality." In March, 1869, the grand jury ignored the bill. Foote, Ramsey and Kemp were indicted for blasphemous libels and pictures contained in the Christmas number of the "Freethinker;" Foote being the editor, Ramsey the registered proprietor, and Kemp the printer and publisher of that paper. On the first trial, March 1, 1883, the jury could not agree and were discharged. The prisoners were tried again on Monday, March 5, 1883, and convicted and sentenced to twelve, nine and three months' imprisonment respectively. North, J., directed the jury that any publication containing "contumelious reproach or profane scoffing against Holy Scripture and the christian religion" was a blasphemous libel. R. v. Foote, Ramsey and Kemp, Times for March 2d and 6th, 1883.

17. In the same year Ramsey and Foote were indicted for articles which had appeared in other numbers of the "Freethinker," which were alleged to be blasphemous. Mr. Bradlaugh, M. P., was at first included also in this indictment, but the case against him was tried separately, and he was acquitted on the ground that he was in no way responsible for the publication. See 15 Cox, C. C., 217. Ramsey and Foote were tried before Lord Coleridge, C. J., on April 24, 1883. The jury could not agree upon a verdict, and on Tuesday, May 1, the attorney-general issued his *fiat* for a *nolle prosequi*. R. v. Ramsey and Foote, 48 L. T., 733; 15 Cox, C. C., 231; 1 C. & E., 126.

18. In Scotland up till the year 1813 blasphemy was, in certain circumstances, a capital offense. The only person executed for blasphemy appears to have been Thomas Aikenhead, a young student just twenty years of age, and the son of a surgeon in Edinburgh. He seems to have been very harshly, if not illegally, treated; no counsel appeared for him; his crime consisted in loose talk about Ezra and Mahomet and in crude anticipations of materialism. He was hanged on January 8, 1697, buried beneath the gallows, and all his movables forfeited to the crown. See Maclaurin's Crim. Cases, 12; 3 Mer., 382, n. Two other persons were prosecuted, Kininmouth and Borthwick, but neither was convicted; in the first case the prosecution dropped, while Borthwick fled the country. Hume on Crimes, II, 518.

§ 19. **The American Law of Blasphemy.**—

(1) *Common law.* Blasphemy is any oral or written reproach maliciously cast upon God, His names, attributes or religion.[1] A malicious reviling of the Sacred Scriptures, the Old or the New Testament, is blasphemy.[2]

The law stated by Chief Justice Shaw: "Blasphemy may be described as consisting in speaking evil of the Deity, with an impious purpose to derogate from the Divine majesty, and to alienate the minds of others from the love and reverence of God. It is purposely using words concerning God calculated and designed to impair and destroy the reverence, respect and confidence due to him as the intelligent creator, governor and judge of the world. It embraces the idea of detraction, when used towards the Supreme Being, as 'calumny' usually carries the same idea when applied to an individual. It is a wilful and malicious attempt to lessen men's reverence of God by denying his existence, or his attributes as an intelligent creator, governor and judge of men, and to prevent their having confidence in him as such."[3]

By Chief Justice Kent: "The free, equal and undisturbed enjoyment of religious opinion, whatever it may be, and free and decent discussions of any religious subject, is 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. Though the constitution has discarded religious establishment it does not forbid judicial cognizance of those offenses against religion and morality which have no reference to any such establishment or to any particular form of government, but are punishable because they strike at the root of moral obligation and weaken the security of the social ties. . . . Surely then we are bound to conclude that wicked and malicious words, writings and actions which go to vilify the gospel continue, as at common law, to be an offense against the public peace and safety."[4]

(2) *Under statutes.* In most of the United States statutes have been enacted against this offense, but these statutes are

[1] State v. Chandler, 2 Harr. (Del.), 553; 2 Bishop's Crim. Law, § 88.

[2] People v. Ruggles, 8 Johns. (N. Y.), 290.

[3] Com. v. Kneeland, 20 Pick. (Mass.). 206.

[4] People v. Ruggles, 8 Johns. (N. Y.), 290.

not understood in all cases to have abrogated the common law; the rule being that where the statute does not vary the class and character of an offense, but only authorizes a particular mode of proceeding and of punishment, the sanction is cumulative, and the common law is not taken away.[1] And it has been decided that neither these statutes nor the common-law doctrine is repugnant to the constitutions of those states in which the question has arisen.[2]

§ 20. **Illustrations — Digest of American Cases.—**

1. Ruggles was indicted at the general sessions of the peace in Washington county, New York, in 1810, for wickedly, maliciously and blasphemously uttering and with a loud voice publishing in the presence and hearing of divers good and christian people the words: "Jesus Christ was a bastard, and his mother must be a whore." Ruggles was tried before Mr. Justice Spencer and found guilty. He was sentenced to be imprisoned for three months and to pay a fine of $500. The judgment was affirmed. People v. Ruggles, 8 Johns. (N. Y.), 290.

2. In January, 1834, Abner Kneeland was indicted for publishing in the Boston "Investigator," of which he was the editor and publisher, an article which was claimed to contain some scandalous, profane and blasphemous words of and concerning God and of and concerning Jesus Christ and of and concerning the final judging of the world. The article in question as set forth in the indictment is as follows: (1) Universalists believe in a God, which I do not; but believe that their God, with all his moral attributes (aside from nature itself) is nothing more than a mere chimera of their own imagination. (2) Universalists believe in Christ, which I do not; but believe that the whole story concerning Him is as much a fable and a fiction as that of the god Prometheus, the tragedy of whose death is said to have been acted on the stage in the theater at Athens five hundred years before the Christian era. (3) Universalists believe in miracles, which I do not; but believe that any pretension to them can be accounted for on natural principles, or else is to be attributed to mere trick and imposture. (4) Universalists believe in the resurrection of the dead, in immortality and eternal life, which I do not; but believe that all life is mortal, that death is an eternal extinction of life to the individual who possesses it, and that no individual life is, ever was, or ever will be eternal. He was tried, convicted

[1] Rex v. Carlisle, 3 Barn. & Ald., 161; Rex v. Robinson, 2 Burrow, 803; Rex v. Waddington, 1 Barn. & Cress., 26; Com. v. Ayer, 3 Cush., 150; 3 Greenl. Ev., §§ 69. 102; Archbold, Crim. Pl., 2 (12th Eng. ed.).

[2] Heard on Libel and Slander, § 343; 2 Bishop on Crim. Law, § 92; People v. Ruggles, 8 Johns. (N. Y.), 270; Com. v. Kneeland, 20 Pick., 206; Thacher, Crim. Cas., 346; Com. v. Hardy, 1 Ashm., 410; Updegraph v. Com., 11 S. & R., 394; Odell v. Garnett, 4 Blackf., 549; Holcomb v. Cornish, 8 Conn., 375; The State v. Chandler, 2 Harring. (Del.), 553; The State v. Kirby, 1 Murph., 254; The State v. Ellar, 1 Dev., 267; The State v. Jones, 9 Ired., 38.

and sentenced to imprisonment for three months in the common gaol. Com. v. Kneeland, 20 Pick., 206.

3. Updegraph was indicted for blasphemy founded on a Pennsylvania statute, passed in 1700, providing that whosoever shall wilfully, premeditatedly and despitefully blaspheme and speak loosely and profanely of Almighty God, Christ Jesus, the Holy Spirit, or the Scriptures of Truth, on conviction thereof shall forfeit the sum of £10. The defendant was charged with saying: "That the Holy Scriptures were a mere fable; that they were a contradiction; and that although they contained a number of good things, yet they contained a great many lies." The jury found him guilty and the finding was affirmed. Updegraph v. Com., 11 Serg. & R., 394; 2 Archbold, Crim. Law, 319.

4. In Delaware, Chandler was tried on an indictment charging him with having proclaimed publicly and maliciously with intent to vilify the christian religion, and to blaspheme God, that "The Virgin Mary was a whore and Jesus Christ was a bastard." The jury having found him guilty the court held the offense to be blasphemy and refused to arrest the judgment. State v. Chandler, 2 Harring. (Del.) Rep., 553.

§ 21. **Liberty of the Press Not to be Abridged.**— The law of blasphemy will not be so administered as to abridge the liberty of speech and the press. For, as Duncan, J., said in the case of Updegraph, "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."[1]

§ 22. **Profanity** is a species of blasphemy.[2] The utterance of the name of God is not necessary to constitute the offense. Any words importing an imprecation of future Divine vengeance may constitute profane swearing.[3] Public swearing is a nuisance at common law; but to be indictable, it seems, it must be in a public place and an annoyance to the public.[4] A single act of profane swearing has been held not to be indict-

[1] Duncan, J., in Updegraph v. Com., 11 S. & R., 394, 405, 406; S. P., Shaw, C. J., in Com. v. Kneeland, 20 Pick., 206, 221; Whart. Crim. Law, § 2538; 2 Bishop, Crim. Law, § 93.

[2] 2 Bishop, Crim. Law, § 91.

[3] Gaines v. The State, 7 Lea (Tenn.), 410; 40 Am. Rep., 64; Holcomb v. Cornish, 8 Conn., 375; Com. v. Spratt, 14 Phila. (Penn.), 365; Odell v. Garnett, 4 Blackf. (Ind.), 549.

[4] State v. Jones, Ired. L. (N. C.), 38; State v. Pepper, 68 N. C., 259; 12 Am. Rep., 637; State v. Steele, 3 Heisk. (Tenn.), 135; Barker v. Com., 19 Pa. St., 412.

able as a nuisance;[1] but it is otherwise where it is continued in the hearing of citizens for five minutes, although only on a single occasion.[2]

Under the statute of Connecticut, "profane swearing" was said to be constituted by any words importing an imprecation of future Divine vengeance. Thus, "You are a God damned old rascal," "You are a damned old rascal to hell," "You are a damned old rascal," were severally held to be words of profane swearing.[3]

Profane swearing and cursing was made a criminal offense under a statute of George II. A day laborer, common soldier, sailor or seaman was subject to a fine of one shilling; every other person under the degree of a gentleman, two shillings; every person above the degree of a gentleman, five shillings; and when the offense was committed in the presence of a justice of the peace, the justice could enter up the fine without further proof.[4]

By an early law of Indiana territory it is provided, "If any person of the age of sixteen years or upwards shall profanely curse, damn or swear by the name of God, Jesus Christ or the Holy Ghost, every person so offending, being thereof convicted, shall forfeit and pay for every such profane curse, damn or oath a sum not exceeding two dollars nor less than fifty cents, at the discretion of the justice who may take cognizance thereof." In case the offender was unable to pay his fine he was to be kept at hard labor on the highways for the space of two days for each offense.[5]

§ 23. **Illustrations — Digest of American Cases.—**

1. In 1829 one Amasa Holcomb, a citizen of Connecticut, was a party to a lawsuit before James Cornish, a justice of the peace. The justice decided the suit some way, but what way does not appear from the record; but we are warranted, we think, in the presumption, from the subsequent proceedings, that it was not decided in Amasa's favor. Instead of taking an appeal according to law he arose, and, in the presence and hearing of the justice, sinfully and wickedly and contrary to law said, "Damn you to

[1] Gaines v. State, 7 Lea (Tenn.), 410; 40 Am. Rep., 64.

[2] State v. Crisp, 85 N. C., 428; 39 Am. Rep., 713.

[3] 2 Bishop, Crim. Law, § 91.

[4] 1 Hawkins' Pleas of the Crown (Cur. ed.), 363; 8 Mod., 59; Sayer, 304; Stra., 686; 2 Ld. Raym., 1360.

[5] Gross' Index to Laws of Illinois, V.

hell;" and therefore the justice, as he lawfully might under the laws of Connecticut, fined him $1. Then Amasa said, "You are a God damned old rascal." Again there was a fine of $1, to which Amasa responded, "You are a damned old rascal to hell." Another fine; for which Amasa went him one better with, "You have given a God damned judgment, and you did it designedly. You are a damned old rascal for doing it." It does not appear how this contest ended; the justice no doubt thinking that Amasa, if allowed to escape from the court, might beat him on executions, ordered him into the custody of keepers. For the fines Amasa seems not to have concerned himself, and it may be, for aught appears, that he did intend to beat the justice on execution; but for being ordered into the custody of the keepers he brought an action of trespass for assault and battery and false imprisonment. Upon the trial, the justice having pleaded the circumstances, etc., it was held by a unanimous court that the words imported an imprecation of future Divine vengeance, and amounted to acts of profane cursing and swearing within the meaning of the statute. Holcomb v. Cornish, 8 Conn., 375. Nearly half a century later the same thing occurred in a justice's court in Indiana. There was cursing and swearing and fining *vice versa ad infinitum*, but owing to the unwillingness of the citizens of that state to perpetuate profanity the several swear-words do not appear in the record. Odell v. Garnett, 4 Blackf., 549.

2. Profane and blasphemous language in a public place in the presence and hearing of divers persons is indictable at common law. State v. Steele, 3 Heisk. (Tenn.), 135; State v. Graham, 3 Sneed (Tenn.), 134.

3. The utterance of obscene words in public, being a gross violation of public decency and good morals, is indictable. Bell v. State, 1 Swan (Tenn.), 42.

4. Public profane swearing, where it takes such form and is uttered under such circumstances as to constitute a public nuisance, is an indictable offense under the common law; but the single utterance of a profane word is not in itself indictable, at least when not spoken in a loud voice or with repetitions. It is not necessary to make out the offense that the language used should be heard by a large portion of the community. It is sufficient if three or four persons were present and heard the words uttered. Gorse v. State, 71 Ala., 7.

5. The defendant was charged with openly and publicly, on Sundays as on other days, on the public streets, with a loud voice, in the hearing of the citizens, speaking and uttering wicked, scandalous and infamous words, representing men and women in obscene and indecent positions with design to debase and corrupt the morals of the youth as of other citizens. It was held that such acts were indictable as a misdemeanor, and that it was not necessary to aver that they were a common nuisance. It was also held not necessary to set out particularly in the indictment the words spoken and the attitudes described. It is sufficient that the words were averred and found to be "wicked, scandalous and infamous," and the attitudes to be "obscene and indecent," and both designed and manifestly tending to the corruption of public morals. Barker et al. v. Commonwealth, 19 Pa. St., 412.

Class III.

§ 24. Libels Tending to Blacken the Memory of the Dead.— It is a misdemeanor at common law, punishable on indictment with fine and imprisonment, to write and publish defamatory matter of any person deceased, provided it be published with the malevolent purpose to injure his family and posterity, and to expose them to contempt and disgrace; for the chief reason of punishing offenses of this nature is their tendency to a breach of the peace. And although the party be dead at the time of publishing the libel, yet it stirs up others of the same family, blood or society to revenge and to break the peace. The malicious intention of the defendant to injure the family and posterity of deceased must be expressly averred and clearly proved.[1]

It is not necessary to prove that the libeler in fact desired that a breach of the peace should follow on his publication: that is probably the last thing he wished for; still less is it necessary to prove that an actual assault ensued, though if it did, evidence of such assault is admissible.[2] It is sufficient if the necessary or natural effect of defendant's words is to vilify the memory of the deceased and to injure his posterity to such an extent as to render a breach of the peace imminent or probable.[3]

Hence any writing put forth to blacken the memory of one deceased is a libel, "for it stirs up others of the same family, blood or society to revenge and to break the peace." The law, with a view to preserve the peace and happiness of families, and to prevent them from being invaded and embittered by contemptuous reflections on the dead, has assigned a punishment for such libels as traduce the memory of the deceased, and have thus an obvious tendency to excite the resentment of the living. This principle, however, is never carried so far as to trespass on the utility of history and the salutary freedom of the press. The law will always take into considera-

[1] 5 Rep., 125*a*; Hawkins, P. C., i, 542; R. v. Topham, 4 T. R., 126; 2 Starkie on Slander, 212; Com. v. Clap, 4 Mass., 163.

[2] R. v. Osborn, Kel., 230; 2 Barnard., 138, 166.

[3] Odgers on L. & S., 443.

tion the mind with which such publications are made, and discriminate between the historian and the slanderer.[1]

Lord Kenyon, C. J.: "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 contrasted with good, would be to exclude the most useful part of history. And therefore it must be allowed that such publications may be made fairly and honestly. But let this be done whenever it may, whether soon or late after the death of the party, if it be done with malevolent purpose to vilify the memory of the deceased, and with a view to injure his posterity, then it comes within the rule — then it is done with a design to break the peace, and then it becomes illegal."[2]

§ 25. Illustrations — Digest of English Cases.—

1. Libel complained of: "On Saturday evening died of the small-pox at his house in Grosvenor square, Sir Charles Gaunter Nicoll, knight of the most honorable order of the Bath, and representative in parliament for the town of Peterborough. . . . He could not be called a friend to his country, for he changed his opinions for a red ribbon, and voted for that pernicious object, the excise." It was alleged that this passage was published with intent to vilify, blacken and defame the memory of the said Sir Charles, and to stir up the hatred and evil will of the people against the family and posterity of the said Sir Charles. An information was granted. R. v. Critchley, 4 T. R., 129, n.

2. But an indictment which alleged that a libel on the late Earl Cowper had been published with intent to disgrace and vilify his memory, reputation and character, but did not go on to aver any intent to create ill blood, or throw scandal on the children and family of Earl Cowper, or to provoke them to a breach of the peace, was held bad after a verdict of guilty, and judgment arrested. R. v. Topham, 4 T. R., 126.

Class IV.

§ 26. Libels Tending to Blacken the Reputation of One Who is Living, and Expose Him to Public Hatred, Contempt or Ridicule — The Grounds upon which They Are Indictable. Libels of this kind are more frequently referred to in the books than those enumerated in the preceding class. Their tendency

[1] 1 Hawk. P. C., Curw. ed., p. 542, § 1; 1 Russ. Crimes, Grea. ed., 243; Commonwealth v. Clap, 4 Mass., 163, 168; Case de Libellis Famosis, 5 Co., 125; Holt on Libel, 236.

[2] Rex v. Topham, 3 Bac. Abr., 494; 2 Barnard., K. B., 138, 166.

is to provoke or cause breaches of the peace and other illegal acts, and for this reason they are indictable.[1]

A libel in its more restricted sense, as committed against an individual, is a malicious defamation, made public by either printing, writing, signs or pictures, tending to blacken the reputation of one who is living, and thereby to expose him to public hatred, contempt or ridicule. Since it is well settled that the law does not recognize the injury to the private right of reputation as a ground of penal restraint, but founds its prohibitions and penalties mainly if not wholly on the ground of protection to the public peace against those interruptions which injuries to reputation are so likely to occasion, it follows that the degree of discredit is immaterial to the essence of the libel, since the law cannot determine the degree of forbearance which a party reflected upon will exert before he is excited and provoked to acts of outrage, and therefore prohibits all imputations conveyed by such means and possessing such a tendency.[2]

§ 27. **(1) Breaches of the Peace.**— As every person desires to appear agreeable in life, and must be highly provoked by ridiculous representations having a tendency to lessen him in the esteem of the world, and by the effect of ridicule to cast a shade upon his talents and virtue, the policy of the law is that not only charges of a flagrant nature and which reflect a moral turpitude upon a party are libelous, but also such as set him in a scurrilous and ignominious light; for these reflections equally create ill blood and provoke parties to acts of revenge and breaches of the peace. Everything, therefore, written of another which holds him up to scorn and ridicule that might reasonably be, according to our natural passions, considered as provoking a party to a breach of the peace, is a libel, and indictable as such.[3]

§ 28. **Illustrations — Digest of English Cases.—**

1. Information for writing a scandalous letter to one Hatton Rich, who was indebted to defendant in a large sum of money, of which he had delayed him three years by obtaining a protection, etc. The words of the

[1] 2 Bishop, Crim. Law, § 900; 2 Starkie on Slander, 211; State v. Jeandell, 5 Harr., 475; State v. Smily, 37 Ohio St., 30; State v. Schmitt, 49 L. J., 579; People v. Jackman, 96 Mich., 269; Hartford v. State, 96 Ind., 461; State v. Spear, 13 R. I., 324; State v. Brady, 44 Kan., 435.

[2] Heard on L. & S., § 333; Sorenson v. Balaban, 42 N. Y. S., 654.

[3] Holt on Libel, 223.

libel were: "If he [Hatton Rich] had any honesty, civility, sobriety or humanity he would not so deal with him, and that he one day would be damned and be in hell for his cheating." On not guilty pleaded and verdict for the king an arrest of judgment was moved, assigning as a reason that the subject of the letter was not scandalous, but showed a zeal in the defendant to maintain the sense of the injury he had sustained.

Twisden, Justice: "The letter is provocative and tends to the incensing Mr. Rich to a breach of the peace, and therefore an information lies;" and afterwards the court adjudged the letter scandalous, and the defendant was fined forty marks. Sir T. Raym., 201.

2. An information being moved for against the printer of "Lloyd's Evening Post" for a ludicrous paragraph giving an account of the Earl of Clanrickard's marriage with an actress of Dublin, and appearing with her in the boxes with jewels, etc., cause was shown against making the rule absolute — 1st. That Lord Clanrickard was not a peer of Great Britain. *Sed non allocatur.* For *per cur.* as he is sworn to be a married man, it is a high offense, even against a commoner. 2d. That this paragraph was taken from another paper, against whose printers informations were also moved. 3d. That in his next paper, Kinnersley had voluntarily made a public recantation. *Sed non allocatur.* For *per cur.* it is high time to put a stop to this intermeddling in private families. Rule absolute. The King v. Kinnersley, Trinity Term, 1 Geo. III., B. R., 1 Black. Rep., 294.

3. An information was granted against the defendant for publishing a libel in the "Critical Review," tending to traduce, vilify and ridicule Admiral Knowles, and to insinuate that he wanted courage and veracity; and to cause it to be believed that the admiral was of a conceited, obstinate and incendiary disposition, etc. The defendant was convicted of this libel and punished by imprisonment. The King v. Doctor Smollett, 32 Geo. II., 1759, K. B.

4. The defendant was indicted for sending to Lady Caroline Fox, wife of Henry Fox, one of his majesty's privy council, a certain scandalous paper entitled "The case of the orphan and creditors of John Ayliffe (who had been hanged for felony) for the opinion of the public, with an *addenda* of interesting queries for the answer of those it concerns." The libel grossly reflected on Mr. Fox, and the indictment alleged "that it tended to disturb the peace and happiness of the said Henry Fox, and to extort money to himself, the said defendant." The King v. Bonnell, 1 Geo. III., 761, K. B. See likewise the case of The King v. Thicknesse, 3 Geo. III., 1765, K. B., Digest of the Law of Libels.

5. A. being very old, and having a good estate which he intended to settle on B., who was his heir-general, I. S., who had married a niece of A., wrote a letter to A. that B. was not the son of one of the name of A., and was a hunter of taverns, and that divers women followed him from London to his house and desired to hear of A.'s death, and that all his estate would not pay his debts, etc., and signed it and sent it sealed and directed to A. This was held to be a libel, and I. S. was fined 200*l.* and B. left at liberty to bring his action at law. 2 Brownl., 151; Patch., 10 Jac., C. B.; Peacock v. Sir George Reynell.

§ 29. (2) **Other Illegal Acts.**— Bishop says the doctrine appears to be, though it is not very clearly illustrated by adju-

dicated cases, that any publication which tends to excite to any crime may be treated as a libel, being thus viewed as a substantive offense.[1] Starkie says: The mischievous quality of a communication may consist in its tendency to excite an individual to the commission of some illegal act.

The offense may consist either in a direct solicitation, or in the holding out of some indirect but forcible motive to the commission of such an act.[2]

Under the criminal law all advisers are considered as principals, and are identified with them as to all penal consequences. In petit treason[3] and felonies, a procurer, by solicitation or advice, is punishable as an accessory before the fact; and by many statutes creating new offenses, counselors, aiders and abettors are subjected to specific punishments.

And where the solicitation is not followed by the actual commission of the offense contemplated, it is perfectly clear that the adviser is liable to be punished for his wilful attempt to violate the law through the agency of another.[4]

And secondly, the holding out any indirect but forcible motive to induce the commission of an illegal act is in itself indictable. Thus it is not only illegal to send a challenge to fight, but even an attempt to provoke another to send such a challenge is a misdemeanor, since the endeavor is an act done towards the accomplishment of the offense.[5]

With respect to communications tending to acts of personal violence, there is an important distinction between words spoken and written, or printed publications; the former are not indictable at common law, though they be scurrilous, and reflect upon the character of an individual, or even be addressed personally to him, unless they amount to a direct solicitation to a breach of the peace, as by a challenge to fight.[6]

But it seems to be perfectly settled 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,

[1] 2 Bishop, Crim. Law, § 903.
[2] 2 Starkie on Slander, 207.
[3] 1 Hale's P. C., 615.
[4] R. v. Phillips, 6 East, 464; R. v. Southernton, 6 East, 126; R. v. Higgins, 2 East. 5.
[5] 2 Starkie on Slander, 208.
[6] 6 Mod., 125; Ld. Raymond, 1030.

contempt or ridicule,[1] 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 a party reflected upon will exert before he is excited and provoked to acts of outrage, and therefore prohibits equally all imputations conveyed by such means, and possessing such a tendency.[2]

§ 30. **Oral Defamation.**— In the absence of statutory enactments it seems clear, on all the authorities, that words merely spoken are not indictable, unless they can be converted into an offense of another description, a matter of misdemeanor, as tending to provoke a breach of the peace, either by threats of immediate personal violence, or by provoking another to send a challenge. It is unwise to make mere words uttered on any occasion amount to a crime, from the difficulties that may exist in the proof of the words, and from the fact that so many circumstances may exist which afford an opportunity for explaining the words. The words by themselves may carry an imputation, but they must be taken together with the circumstances in which they were uttered, and connected with other expressions used at the same time which may explain and qualify them. There are many cases in which the English courts have distinctly said that, in the case of words spoken, unless the words are spoken of a magistrate at the time that he is engaged in the performance of his duty, the court will not interfere; and the reason of the interference on such an occasion is because words so uttered are a direct obstruction to the course of justice, and because the uttering of them under such circumstances is an offense which may indeed be visited by the magistrate himself at the moment as an offense against his court, by his inherent right to punish contempts.[3]

[1] 3 Black. Com., 150; Hawk. Pl., ch. 73, sec. 1; 5 Co., 125; 5 Mod., 165; Salk., 418; Str., 422, 791; 12 Mod., 221; Ld. Raym., 416; 1 Sid., 270; State v. Mason, 26 Or., 272; State v. Brady, 44 Kan., 435; Palmer v. Concord, 48 N. H., 211.

[2] 2 Starkie on Slander, 211.

[3] Heard on Libel and Slander, § 349; Ex parte The Duke of Marlborough, 1 New Sessions Cases, 195; 5 Queen's Bench, 955; Ex parte Chapman, 4 Ad. & El., 773; The State v. Taylor, 3 Sneed, 662; Bell v. The State, 1 Swan, 42. And see Barker v. The Com., 7 Harris (Pa.), 412.

§ 31. **Publication of Libels under the Criminal Law.**— In civil cases it is necessary to show a publication to some third person other than the person defamed. In criminal cases this is not absolutely necessary; it is sufficient to prove a publication to the prosecutor himself, provided the obvious tendency of the words be to provoke the prosecutor and excite him to break the peace. In all other respects the law as to publication is practically identical in civil and criminal cases. The libel, if contained in a letter, may be published even by sending it to the prosecutor himself, especially where its contents tend to provoke a breach of the peace, though in a civil case it would not be a sufficient publication.[1]

A libel may be published either by speaking or singing, as where it is maliciously repeated or sung in the presence of others; or by delivery, as when a libel or a copy of it is delivered to another;[2] or by pictures or signs, as by painting another in an ignominious manner, or making the sign of a gallows or other reproachful and ignominious sign upon his door or before his house.[3]

[1] State v. Avery, 7 Conn., 266; Hodges v. State, 5 Humph. (Tenn.), 114; Hicks' Case, Hob., 215; Poph., 139; cited 6 East, 476; Clutterbuck v. Chaffers, 1 Stark., 471; R. v. Wegener, 2 Stark., 245; Phillip v. Jansen, 2 Esp., 624; R. v. Hornbrook, Selwyn's Nisi Prius, 12th ed., 1065; 13th ed., 1000; R. v. Brooke, 7 Cox, C. C., 251; Odgers on L. & S., 432; 2 Archbold, Crim. Law, 319, 322, n.; McClain's Crim. Law, § 1055; Hasse v. State, 53 N. J. L., 34.

[2] 5 Rep., 125*b*; Lamb's Case, Moore, 813; Johnson v. Hudson, 7 Ad. & El., 233; 1 Saund., 132, 6th ed.

[3] Jefferies v. Duncombe, 11 East, 226; Heard on Libel and Slander, § 264.

CHAPTER XXVIII.

PLEADINGS IN CRIMINAL PROCEEDINGS.

§ 1. Rules of Pleading.— In regard to the technical rules of law in drawing indictments and informations for libels, but little remains to be added to the rules already laid down in relation to drawing the declaration in civil proceedings. The publication of a libel is a misdemeanor, and all who in anywise take part in it are liable as principals. For example, if

one person repeats and another writes a libel, and a third party approves of what is written, all are liable as makers of the libel; for all persons who concur and show their assent or approbation to do an unlawful act are guilty.[1] In the indictment the averment of extrinsic matters is unnecessary where the criminal quality of the publication may be collected from its contents. But where the terms of the libel are, independently of extrinsic matters, innocent or meaningless, but are in fact defamatory in connection with the matters to which they relate, then such matters must be stated in the indictment, and the connection with the libelous publication shown.

The rule of pleading requires that where the words are ambiguous and equivocal, and require explanation by reference to some outside matters to make them actionable, the indictment must not only allege the existence of such matters, but that the libel in question was published of and concerning such matters.[2]

If the libel is contained in a letter addressed to the prosecutor this is evidence of a publication sufficient to support an indictment, on the first and general principle of preserving orderly and decent conduct in society — for the preventing of breaches of the peace.[3] Therefore, the indictment must allege that the intention of sending the letter was to provoke the prosecutor and to excite him to break the peace.[4] Where the indictment is founded on a libel written to degrade the memory of one deceased it should be alleged to have been published with a design to bring contempt on the family of the deceased, and to excite his relations to a breach of the peace.[5]

In indictments for publishing obscene libels it is not always necessary that the contents of the publication should be inserted; but whenever it is necessary to do so, or whenever the indictment undertakes to state the contents, whether necessary or not, the same rule applies as in the case of libel — that is to

[1] Heard on L. & S., § 350; Regina v. Drake, Holt, 425.

[2] Heard on L. & S., § 351; 1 Gabbett's Crim. Law, 664.

[3] Rex v. Burke, 7 Term, 4.

[4] Rex v. Wegener, 2 Starkie, 245; Hodges v. The State, 5 Humph., 112; Bennett & Heard's Leading Criminal Cases, vol. 2, p. 312; Avery v. The State, 7 Conn., 266. And see Regina v. Brooke, 7 Cox, C. C., 251.

[5] Rex v. Topham, 4 Term, 126; Heard on L. & S., § 352.

say, the alleged obscene publication must be set out in the very words of which it is composed, and the indictment must undertake or profess to do so by the use of appropriate language. The excepted cases occur whenever a publication of this character is so obscene as to render it improper that it should appear on the record, and then the statement of the contents may be omitted altogether and a description thereof substituted; but, in this case, a reason for the omission must appear in the indictment by proper averments.[1] If one of the original printed papers is attached to the indictment, in place of inserting a copy, it is not a sufficient indication that the paper is set out in the very words.[2]

It is not necessary to allege that the matter published is false; and such an allegation need not be proved though it be made on the record.[3] But the illegality of the publication must be averred by means of the word maliciously, or by some equivalent term.[4]

§ 2. **The Indictment — Its Formal Parts.**— An indictment consists of four formal parts:

(1) *The caption.*

(2) *The commencement.*

(3) *The statement.*

(4) *The conclusion.*

(1) *The caption* precedes the commencement. It is merely the style of the court in which the indictment was preferred — a preamble upon the record.

ILLUSTRATIONS.

THE ENGLISH FORM.

"*Middlesex, to wit.*"[5]

[1] Com. v. Holmes, 17 Mass., 396; Com. v. Tarbox, 1 Cush., 66; The State v. Brown, 32 Va., 619; The People v. Girardin, 1 Mann., 90; Com. v. Sharpless, 2 Serg. & R., 91; Barker v. Com., 7 Harris, 412; Bennett & Heard's Leading Criminal Cases, I, 321, 322.

[2] Com. v. Tarbox, 1 Cush., 66; Heard on L. & S., § 354.

[3] Rex v. Burke, 7 Term, 4.

[4] Per Rolle, C. J., Style, 393; 1 Saunders, 242, 6 (6th ed.); 2 Starkie on Slander, 303; 1 Gabbett, Crim. Law, 665.

[5] Archbold, Crim. Pleadings, ch. 30, § 12.

AN AMERICAN FORM.

STATE OF ILLINOIS, } ss.
Cook County. }

Of the April Term of the Circuit Court, in the year of our Lord 1889.[1]

(2) *Commencement.*

THE ENGLISH FORM.

"The jurors for our lady the queen upon their oath present."[2]

AN AMERICAN FORM.

"The grand jurors chosen, selected and sworn in and for the county of Cook, in the name and by the authority of the people of the state of Illinois, upon their oaths present."[3]

Commencement of the second and subsequent counts of the indictment.

"And the jurors aforesaid, on their oath aforesaid, do further present."[4]

ANOTHER FORM.

"And the grand jurors aforesaid, chosen, selected and sworn as aforesaid, in and for the county and state aforesaid, in the name and by the authority of the people of the state of ——, upon their oath do further present."[5]

(3) *The statement.* In this part of the indictment are contained the essential requisites or ingredients of the offense, the real facts and circumstances attending its commission. They must be set out with certainty and precision, charging the defendant directly and positively with the commission of the offense.

The essential parts of the statement are:

(a) The name of the person accused.

(b) Statement of the criminal intent.

(c) The charge, with the colloquium and innuendoes.

(a) *The name of the person accused.* The rule is that the name the defendant is usually known by in the community where he resides will suffice. Initials in general are not sufficient; but if the defendant is in the habit of using them for his christian name he may be so indicted. The christian name should be given in full; but a middle name, being no essential part of a person's name in law, may be omitted. If the name

[1] Bassett, Crim. Pleadings, 7.
[2] 2 Archbold, Crim. Plead., 316.
[3] Bassett, Crim. Pleadings, 7.
[4] 1 Bishop's Crim. Proc., § 409.
[5] Bassett's Crim. Pleadings, 15; McClain's Crim. Law, § 1059.

be unknown or the accused refuses to disclose it, he may be indicted as a person whose name is to the grand jurors unknown.[1]

ILLUSTRATION.

That *John Smith*, late of the county of Cook, in the state of Illinois.

(b) *The statement of criminal intent.* This is the necessary ingredient of the offense. In an indictment for a libel the usual form is:

"In contriving and unlawfully, wickedly and maliciously intending to injure, vilify and prejudice one J. N., and to deprive him of his good name, fame, credit and reputation, and to bring him into great contempt, scandal, infamy and disgrace, on, etc., at the county aforesaid, unlawfully, wickedly and maliciously."[2]

(c) *The charge with the colloquium and innuendoes.* What has been said in relation to prefacing the declaration at common law in suits for defamation applies equally to drafting the indictment. The charge states the offense. The colloquium shows the application of the libelous matter to the person in question, and the innuendoes point out the meaning where it does not clearly appear from the libel. They are all substantial averments, and should be stated with certainty.

ILLUSTRATION.

"Did write and publish, and cause and procure to be written and published, a false, scandalous, malicious and defamatory libel in the form of a letter directed to the said J. N., containing divers false, scandalous, malicious and defamatory matters and things of and concerning the said J. N., which said libel is as follows: "To J. N., scoundrel" (meaning the said J. N.): "It may not be amiss to acquaint you" (meaning the said J. N.) "as the time draws near. You" (meaning the said J. N.) "may prepare yourself" (again meaning the said J. N.) "for a trial for stealing the turkeys out of my" (meaning the said J. S.'s) "yard; where I" (meaning himself, the said J. S.) hope to see you (meaning the said J. N.) "sing a neck psalm and punished according to law. Subscribed, J. S." (meaning the said J. S.), tending to impeach the honesty, integrity, virtue and reputation of the said J. N., and thereby expose him (the said J. N.) to public hatred, contempt and ridicule.

(4) *The conclusion.*

ILLUSTRATIONS.

AT COMMON LAW.

1. "Contrary to the common law of the land and against the peace and dignity of the people," etc.

[1] 1 Bishop's Crim. Proc., §§ 117–130.

[2] 3 Chitty, Crim. Law, 877; 2 Bish. Crim. Proc., § 738; McClain's Crim. Law, § 1061.

UNDER A STATUTE.

2. "Contrary to the form of the statute in such case made and provided."

WHEN THE OFFENSE CHARGED IS CRIMINAL, BOTH AT COMMON LAW AND UNDER A STATUTE.

3. "Contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the people of the state of ——."

§ 3. Illustrations — Digest of American Cases.—

THE INDICTMENT.

1. An indictment for a libel which set out the letter containing the alleged libel, prefacing the letter with these words, "which said libel is in substance as follows, to wit," was held to be sufficient. State v. Smith, 7 Lea (Tenn.), 249.

2. An indictment for libel should set forth the literal language of the libel. Coulson v. State, 16 Tex. App., 189; Conlee v. State, 14 Tex. App., 222.

3. The very words of the libel should be set forth. Commonwealth v. Sweney, 10 Serg. & R. (Pa.), 173; State v. Brownlow, 7 Humph. (Tenn.), 63.

4. A charge that the defendant published a story received from another that B. was a promoter of a scheme for the formation of a fraudulent stock company is sufficient to send the case to a jury. Commonwealth v. Chambers, 15 Phila. (Pa.), 415.

5. Under Indiana Revised Statutes of 1881, section 1925, punishing "libel" is valid, though it does not define the offense. It will be understood in its common-law sense. Hartford v. State, 96 Ind., 461.

6. It is not necessary that the charge should be more specific than the libelous publication. Melton v. State, 3 Humph. (Tenn.), 389.

7. An indictment for libel on B. need not describe B. as of any profession, occupation or place of residence. Commonwealth v. Varney, 10 Cush. (Mass.), 402.

8. When a matter set forth in an indictment for a newspaper libel does not amount to a libel the defect cannot be supplied by other parts of the libelous publication. Commonwealth v. Snelling, Thach. (Mass.) Cr. Cas., 388.

9. An information for libel alleged by inference only that the libel was published in a newspaper. *Held*, that this omission did not render the indictment fatally defective. State v. Dowd, 39 Kan., 412.

10. An information for slander set forth the slanderous words in the English language. *Held*, that the state could not prove the utterance of equivalent words in German. Stichtd v. State, 25 Tex. App., 420.

11. An indictment which charged the defendant with libeling one A., "intending to injure the said A., he (the said A.) being then and there sheriff of the county of W.," was held to allege a libel on A. in his private capacity. Com. v. Wardwell, 136 Mass., 164.

12. An indictment alleging that defendant caused to be printed in a certain newspaper the libelous words "he had attempted to assassinate H.," etc., was held sufficient. In re Kowalsky, 73 Cal., 120.

13. An indictment for libel is good if it charges the publication of matter not libelous in itself, but charges such publication with proper inducement and innuendoes to set forth and explain the defamatory statements of the publication. State v. Spear, 13 R. I., 324.

14. An indictment for slandering a female, under Penal Code of Texas, § 645, by falsely imputing to her want of chastity, charging the language used as that "she was unchaste and not virtuous," and that defendant "could at any time have carnal intercourse with her if he could get her to a private, secluded place," is not sustained by proof that defendant said that "the whole M. family [to which she belonged] were whores," and that "on one occasion he could have had carnal intercourse with her if he had had an opportunity." Frisby v. State, 26 Tex. App., 180, 9 S. W. Rep., 463.

15. In an action for criminal libel the complaint charged that the defendant published of and concerning the complainant a certain "false, scandalous, malicious and defamatory libel, therein and thereby accusing and imputing to the said Adolphus A. Ellis, prosecuting attorney, infamous and degrading acts," namely, of refusing to prosecute a suspected crime of murder, because the law forbade his taking bribes. *Held*, that the complaint was sufficient. People v. Jones, 67 Mich., 544, 35 N. W. Rep., 419.

16. An indictment for libel, alleging in substance that on a specified date at the county of S. the defendant wilfully and maliciously and with intent to injure one Terry, a resident of such county, caused to be printed and published and expressed by printing in a certain newspaper (naming it) printed in the city and county of B., and published and circulated in the county of S., the following defamatory and libelous words of and concerning said Terry, to wit, that "he (said Terry meaning) had attempted to assassinate Hopkins," contrary to the force and effect of the statute, etc.,—if defective, yet contains a sufficient substantial statement of the facts constituting the alleged offense to prevent a discharge of the defendant upon *habeas corpus*. Re Kowalsky, 73 Cal., 120.

17. An indictment for criminal libel which charges that defendant did unlawfully and maliciously compose, write and cause to be printed and published, etc., sufficiently alleges the manner of publication. Tracy v. Com., 87 Ky., 578, 10 Ky. L. Rep., 611, 9 S. W. Rep., 823.

18. A. lived in Pennsylvania near the New York line. He delivered a sealed letter, the contents of which were libelous, to a messenger to be delivered to B. in New York, for which it was held he could be indicted in Pennsylvania. Com. v. Dorrance, 14 Phil. (Penn.), 671.

19. An indictment charged defendant with publishing an article in the German language, and set out a translation thereof into English. In a prefatory statement it was averred that W. had been a congressman and was an aspirant to the office of postmaster. The indictment charged that the article reflected on him. *Held*, that the prefatory statement justified this charge, although it was not averred that W. was the only congressman who was an aspirant to that office. State v. Schmitt, 49 N. J. L., 579, 9 Atl. Rep., 774.

20. An indictment charging in a single count a libel by a single publication of matter imputing improper motives to sheriff, jury and judge in a trial cannot be objected to for duplicity, because the action of the judge

criticised was at a different time from that of the sheriff and independent of it, especially as the instructions of the court were based solely on that part of the libel reflecting on the action of the judge. Tracy v. Com., 87 Ky., 578, 9 S. W. Rep., 822, 1 Lawyers' Rep., 611.

21. An indictment for criminal libel, consisting of an effigy and inscription, set forth the libelous words as "By George, the old liar," meaning the prosecutor, and that he, the said prosecutor, "was an old liar, then and thereby reflecting on the character," etc. There was no allegation that the prosecutor was generally known by the term used, or that defendants were in the habit of applying it to him. *Held*, after verdict, that the indictment was sufficient. Johnson v. Commonwealth (Pa.), 14 Atl. Rep., 425.

22. An indictment averring that defendant "did unlawfully and maliciously compose, write and cause to be printed and published of and concerning," etc., certain libelous matter, sufficiently informs the defendant of the offense with which he is charged. Tracy v. Commonwealth, 87 Ky., 578, 9 S. W. Rep., 822.

23. An information which charges defendant with writing, publishing and circulating a libel, which is set out in full, is not fatally defective in failing to state the mode of publication. State v. Dowd, 39 Kan., 412, 18 Pac. Rep., 483.

24. In an indictment the alleged libelous matter must be set out according to its tenor — to give the substance is not sufficient; though the misuse or omission of a letter, which works no such change in a word as to make of it a different one, will not be treated as a fatal variance. State v. Townsend, 86 N. C., 676.

25. An information for a libel, founded on a letter written in a foreign language, need not set out the letter or aver in what language it was written. Averring its substance authorizes the prosecution to introduce the letter and a translation. State v. Witters, 27 La. Ann., 346.

26. In an indictment, where it does not appear from the paper itself who was its author, or the persons of or concerning whom it was written, or the purpose for which it was written, each of these should be explicitly averred as facts for the consideration of the jury. Where a paper is not libelous on its face, but possesses a latent meaning which renders it libelous, the latent meaning must be explicitly set forth by way of averment or colloquium, so as to make it appear upon the face of the indictment that the paper is a libel. State v. Henderson, 1 Rich. (S. C.), 179.

27. An indictment must set forth matter libelous on its face, of which the court is to judge, or matter not libelous on its face, and allege that it was intended by the prisoner to be so, in which case the question of intent is for the jury to determine. State v. White, 6 Ired. (N. C.) L., 418.

28. An indictment charging in the usual form the publication in a specified newspaper of the words, "Now my worthies," A., B. and C., "beautiful trio you are — three as mild-mannered men and smooth-tongued scoundrels as ever scuttled a ship or cut a throat," was held to be substantially good. Crowe v. The People, 92 Ill., 231.

29. An indictment setting out words libelous *per se*, the innuendo to which points a merely restricted meaning, which would not be attributed

to the words except by reference to extrinsic facts, will yet be good if the facts necessary to show such meaning appear in the publication itself. State v. Mott, 45 N. J. L., 494.

30. A criminal information for slander, in accusing a woman of want of chastity, should set forth, at least substantially, the words or acts upon which the imputation is predicated, and should further charge that the words were uttered in the presence of some one. Wiseman v. State, 14 Tex. App., 74; Conlee v. State, id., 222.

31. A newspaper publication referred to one as an ex-congressman and aspirant for a certain public office. A prefatory statement made it apparent that A. was meant. *Held*, that he was sufficiently identified by the publication to enable an indictment for libel to be founded on it. A charge in effect that a member of congress carried through fraudulent pension claims in order to catch votes, *held* sufficient to support an indictment for libel. State v. Schmitt, 49 N. J. L., 579.

32. An indictment charging that the defendant published a libel on the 21st of the month may be supported by a publication on the 19th of the same month. Com. v. Varney, 10 Cush. (Mass.), 402.

33. In an indictment one cannot set forth the publication of a libel "in the following false, scandalous and defamatory words," etc. *Held*, that the omission, in the recital following, of the word "evening," after the word "Tuesday," which occurred in the original publication, was a fatal variance. Com. v. Buckingham, Thach. (Mass.) Cr. Cas., 29. But the omission of the date and signature at the end of the libel, not affecting the meaning, is not a variance. Com. v. Harrison, 2 Gray (Mass.), 289.

34. The North Carolina code, section 1113, makes it an offense to attempt to destroy the reputation of an innocent woman. In the trial of a person indicted for the offense it was held that the offense consists not in falsely charging her with incontinency, but in attempting to destroy her reputation; and that an "innocent woman" is one who has never had actual illicit intercourse with a man. State v. Dorris, 92 N. C., 764.

35. An allegation that the defendant sent the same to several specific persons, and thereby published the same, is a sufficient averment of publication. Such an allegation is not merely a conclusion of law. It is sustained by proof that the defendant sent the libel to one only of the persons specified. State v. Barnes, 32 Me., 530.

36. It is not necessary that a libel should appear on its face to have been written of the prosecutor if the innuendoes connect the libel with the prosecutor, but it should aver that the alleged libelous matter was published of and concerning the prosecutor. Com. v. Muser, 1 Brews. (Pa.), 492.

37. A statement that a certain judge had violated the state constitution and was disqualified and liable to impeachment and to indictment, to the scandal of the administration of justice, was held on indictment to charge libelous matter against the judge personally and not against the administration of justice merely. Richardson v. State, 66 Md., 205.

38. A grand juror's complaint alleging that the respondents did break and disturb the public peace by ringing and causing to be rung and tolled a certain church bell, and well knowing that one P. was then living, did report and aver that said P. was dead and was to be buried on the next

succeeding day, and did ring the said bell with the intent to have it believed that the said P. was then dead, and with intent to annoy, harass and vex the said P. and his family and friends, is insufficient, and judgment will be arrested upon motion, etc. State v. Riggs, 22 Vt., 322.

39. An indictment for a libel charging a publication, "Complaints have reached us of disgusting familiar practices being perpetrated upon little girls in the drug store on the corner of Smith and Jefferson streets, kept and run by W. A. Wheaton. More complaints will be followed with a detailed report of how *not* to run a drug shop," was held to be bad for ambiguity. State v. Corbett, 12 R. I., 288.

Precedents.

§ 4. Libels on Individuals.—

(1) *An indictment for writing a ridiculous poem and sending the same to the person libeled.* From Chitty's Criminal Pleadings, vol. 3, 889.

(a) *Caption:* Surrey, to wit.

(b) *Commencement:* The jurors for our lord the king upon their oath present.

(c) *Statement:* That J. F., late of O. in the said county of S., schoolmaster, wickedly, maliciously and unlawfully minding, contriving and intending, as much as in him lay, to injure, scandalize and vilify the good name, fame, credit and reputation of M. B., widow, a good, peaceable and worthy subject of our said lord the king, and to bring her into great hatred, contempt, ridicule and disgrace, on, etc., with force and arms, at O. aforesaid, in the county aforesaid, wickedly, maliciously and unlawfully did write and cause to be written a certain scandalous, malicious and defamatory libel of and concerning the said M. B., which said false, scandalous, malicious and defamatory libel is according to the tenor following, to wit: The penitent tyrant; believe and tremble. "Now C—n (meaning the town of C. in the said county of S.) dry up every tear. No more does tyranny appear; 'Tis changed to penitence severe: Lament no more, to thee is giv'n The succ'ring hand of pitying heav'n; Tyrannus (meaning the said M. B.) quite worn out with swearing, Lawsuits and scandal, and despairing, With all the blackest scenes of sinning, That h—l e'er found since the beginning, In C—n (meaning the town of C. aforesaid) takes up her (meaning the said M. B.'s) abode, To seek her (meaning the said M. B.'s) long-offended G—d: She (meaning the said M. B.) in imploring sorrow lies, Repentance streaming from her (meaning the said M. B.'s) eyes; Calling forgiveness from the skies; Oh! C—n (meaning the town of C. aforesaid) think thyself divine: No righteousness compar'd to thine; Since no one place we now may see Can wash out sin as well as thee:" Which said scandalous, malicious and defamatory libel he, the said J. F., afterwards, to wit, on the same day and year aforesaid, at O. aforesaid, in the county aforesaid, wickedly, maliciously and unlawfully did send, and cause to be sent, to the said M. B. in the form of a letter, directed to the said M. B. by the name of Mrs. M. B. at C.

(d) *Conclusion:* To the great damage, disgrace, scandal and infamy of the said M. B., to the evil and pernicious example of all others in the like case offending, and against the peace, etc.

SECOND COUNT.

(a) *Commencement:* And the jurors aforesaid upon their oath aforesaid do further present.

(b) *Statement:* That the said J. F. wickedly, maliciously and unlawfully minding, contriving and intending to injure, oppress, aggrieve and vilify the good name, fame, credit and reputation of the said M. B., and to bring her into great contempt, ridicule and disgrace, afterwards, to wit, on the same day and year aforesaid, with force and arms, at O. aforesaid, in the county aforesaid of his great hatred, malice and ill-will towards the said M. B., wickedly, maliciously and unlawfully did write and publish, and caused to be written and published, a certain scandalous, malicious and defamatory libel of and concerning the said M. B., which said last-mentioned scandalous, malicious and defamatory libel is according to the tenor following, to wit: The penitent tyrant, etc. [*here set out the libel as before*].

(c) *Conclusion:* To the great damage, disgrace, scandal and infamy of the said M. B., to the evil and pernicious example of all others in the like case offending, and against the peace, etc.

(2) *For publishing a letter imputing the crime of theft.* From Stubbs and Titmarsh's Crown Circuit Companion, 335. London edition, 1783.

Middlesex. The jurors, etc.

That G. D., late of the parish of St. Giles, in the Fields, in the county of Middlesex, gentleman, wickedly, maliciously and unlawfully minding, contriving and intending, as much as in him lay, to injure, oppress, aggrieve and vilify the good name, fame, credit and reputation of one J. T. and to bring him into great contempt, hatred, infamy and disgrace, on the 7th day of September, in the twenty-first year, etc., with force and arms, at, etc., a certain false, scandalous and libelous writing against the said J. T. falsely, maliciously and scandalously did write and publish, and in the name of him, the said G. D., then and there did cause to be written and published, in the form of a letter, directed to him, the said J. T., which said writing is as follows, to wit: To J. T.: These scoundrels (meaning the said J. T.) it may not be amiss to acquaint you (meaning him, the said J. T.), as the time draws near, you (meaning the said J. T.) may be preparing yourself (again meaning the said J. T.) for a trial for stealing turkeys out of my (meaning his, the said G. D.'s) yard, when I (meaning himself, the said G. D.) hope to see you (meaning the said J. T.) sing a neck psalm, and perish according to law, you hell-hound (meaning the said J. T.). Subscribed, G. D. (meaning himself, the said G. D.); and that he, the said G. D., with intention to scandalize the said J. T. and bring him into contempt, hatred, infamy and disgrace, the said false, malicious and scandalous libelous writing, so as aforesaid framed, written and made, afterwards, to wit, on the said 7th day of September, in the year aforesaid, and on divers other days and times, as well before as afterwards, at the parish aforesaid, in the county aforesaid, to one A. B.

and to one C. D. and to divers other liege subjects of our said lord the king, then and there present, falsely, maliciously and scandalously did openly deliver and cause to be delivered, to the great scandal, infamy and damage of the said J. T., to the evil example of all others in the like case offending, and against the peace, etc.

(3) *The same form, modified for use in the United States*, is taken from Moore's Criminal Law, § 723. In its travels to the west it has shed some of its superfluous maledictions, but it still treats "stealing turkeys" as a capital offense.

(a) [*Caption.*]

(b) [*Commencement.*]

(c) *Statement:* That C. D., on, etc., at, etc., in the said county, unlawfully and maliciously did write, print and publish a certain false, scandalous, malicious, defamatory libel of and concerning the said A. B., which said libel is as follows: "To A. B., scoundrel" (meaning the said A. B.): "It may not be amiss to acquaint you" (meaning the said A. B.), "as the time draws near, you" (meaning the said A. B.) "may be preparing yourself" (again meaning the said A. B.) "for a trial for stealing the turkeys out of my" (meaning his, the said C. D.'s) "yard, when I" (meaning himself, the said C. D.) "hope to see you" (meaning the said A. B.) "sing a neck psalm, and perish according to law. Subscribed, C. D." (meaning himself, the said C. D.), tending to impeach the honesty, integrity, virtue and reputation of the said A. B., and thereby to expose him, the said A. B., to public hatred, contempt and ridicule.

(d) [*Conclusion.*]

(4) *Indictment for writing and sending a libelous letter to a third person.* From Odgers on Libel and Slander, 681.

(a) [*Caption.*]

The jurors for our lady the queen, upon their oath, present that (before and after the time of the committing of the offense hereinafter mentioned one C. D. was, and still is, a solicitor of the supreme court, and exercised and carried on the profession or business of such solicitor at ——, in the county of ——; and that) A. B., being a person of an evil and wicked mind, and wickedly, maliciously and unlawfully contriving and intending to injure, vilify and prejudice the said C. D., and to bring him into public contempt, scandal, infamy and disgrace, and to deprive him of his good name, fame, credit and reputation (in his said profession and business, and otherwise to injure and aggrieve him therein), on the —— day of ——, in the year of our Lord ——, wickedly, maliciously and unlawfully did write and publish, and cause and procure to be written and published (in the form of a letter directed to one E. F.), of and concerning the said C. D. (and of and concerning him in his said profession and business, and of and concerning his conduct and behavior therein), the false, malicious and defamatory words following, that is to say: [*Here set out the libel verbatim, with all necessary innuendoes.*] To the great damage, scandal and disgrace of the said C. D. (in his said profession and business), to the evil example of all others in the like case offending, and against the peace of our said lady the queen, her crown and dignity.

(5) *An indictment for sending a libelous letter — Archbold's form, adapted to use in American courts.* From Bassett's Criminal Pleadings, 151.

(a) [*Caption.*]

(b) [*Commencement.*]

(c) *Statement:* That A. B., late of C., in the county of C., contriving, and unlawfully, wickedly and maliciously intending to injure, vilify and prejudice one E. F., and to deprive him of his good name, fame, credit and reputation, and to bring him into great contempt, scandal, infamy and disgrace, on the 1st day of July, in the year of our Lord ——, with force and arms, at C. aforesaid, in the county aforesaid, unlawfully, wickedly and maliciously did write and publish, and cause and procure to be written and published, a false, scandalous, malicious and defamatory libel in the form of a letter directed to the said E. F., containing divers false, scandalous, malicious and defamatory matters and things of and concerning the said E. F., and of and concerning, etc. [*here insert such of the subject of the libel as it may be necessary to refer to by the innuendoes in setting out the libel*], according to the tenor and effect following, that is to say [*here set out the libel and innuendoes*], he, the said A. B., then and there well knowing the said defamatory libel to be false, to the great damage, scandal and disgrace of the said E. F., to the evil example of all others in the like case offending; against, etc., and contrary, etc.

(6) *An indictment for hanging a man in effigy — Archbold's form, adapted to use in the American courts.* From Bassett's Criminal Pleadings, 152.

(a) [*Caption.*]

(b) [*Commencement.*]

(c) *Statement:* That A. B., late of C., in the county of C., contriving and unlawfully, wickedly and maliciously intending to injure, vilify and prejudice one E. F., and to deprive him of his good name, fame, credit and reputation, and to bring him into great contempt, scandal, infamy and disgrace, on the 1st day of July, in the year of our Lord ——, with force and arms, at C. aforesaid, in the county aforesaid, unlawfully, wilfully and maliciously did make, and cause and procure to be made, a certain gibbet and gallows, and also a certain effigy and figure intended to represeht one E. F., and then and there unlawfully, wickedly and maliciously did erect, set up and fix, and cause and procure to be erected, set up and fixed, the said gibbet and gallows, in a certain yard and place near unto a certain common highway there situate, called ——, and near to a certain ferry called the Horse ferry, where the said E. F. was used and accustomed to ply in the way of his trade and business of a waterman; and then and there unlawfully, wickedly and maliciously did hang up and suspend, and cause and procure to be hung up and suspended, the said effigy and figure to and upon the said gibbet and gallows, with the name of the said E. F. inscribed on a piece of wood and affixed to the said effigy and figure, with divers scandalous inscriptions and devices affixed upon and about the same, reflecting on the character of the said E. F., and did then and there keep and continue, and cause and procure to be kept and continued, the said gib-

bet and gallows, so erected and set up as aforesaid, with the said effigy and figure hung up and suspended to and from the same as aforesaid, for a long space of time, to wit, for the space of —— days, then next following, and during all that time unlawfully, wickedly and maliciously did then and there publish and expose the said gibbet and gallows with the said effigy and figure thereon, to the sight and view of divers good and worthy citizens of said state, passing and repassing in and along the highway aforesaid, to the great scandal, infamy and disgrace of the said E. F., to the evil example of all others in the like case offending; against, etc., and contrary, etc.

(7) *For posting up a handbill (under statutes of Pennsylvania).* Bishop's Statutory Crimes, § 388.

(a) [*Caption.*]

(b) [*Commencement.*]

(c) *Statement:* That S. T., of ——, in the county of ——, at said ——, on the 1st day of July in the year of our Lord ——, contriving and intending to blacken the reputation of one R. B., grocer, and expose him to public hatred, contempt and ridicule, then and there maliciously did publish of and concerning the said B. a malicious and defamatory libel, tending to blacken the reputation of the said B. and thereby expose him to public hatred, contempt and ridicule, the tenor of which libel is the following: "All persons are cautioned against being swindled by R. B., grocer" (meaning the aforesaid B.). "He sells by false scales and cheats in every way possible," against the peace of the commonwealth and contrary to the form of the statute in such case made and provided.

(8) *For attempting to publish a libel (under the statutes of Maine).* Bishop's Statutory Crimes, § 392.

(a) [*Caption.*]

(b) [*Commencement.*]

(c) *Statement:* That S. T., of ——, in the county of ——, at the said ——, on the 1st day of July in the year of our Lord ——, contriving and intending maliciously to defame one R. B., grocer, to provoke him to wrath, expose him to public hatred, and deprive him of the benefits of public confidence and social intercourse, did then and there maliciously make, compose and write a false, scandalous, malicious and defamatory writing, then and there meaning and intending the same to be a libel, and then and there meaning and intending to publish the same of and concerning the said R. B., in the words following, to wit: [*Here set out the libel, with innuendoes, etc.*] But the said T. then and there failed, and was interrupted and prevented in the execution of his aforesaid purpose, so that he did not and could not publish the same.

(d) [*Conclusion, etc.*]

§ 5. **Libels on the Dead.—**

(1) *An indictment for writing a libelous epitaph.* From Odgers on Libel and Slander, 684.

The jurors for our lady the queen, upon their oath, present that before the committing of the offense hereinafter mentioned, to wit, on the 29th day of May, 1883, John Batchelor, of Penarth, in the county of Glamorgan,

died, and that Thomas Henry Ensor, being a person of an evil and wicked mind, wickedly, maliciously and unlawfully designing and intending to injure and defame the character, reputation and memory of the said John Batchelor, and to vilify and to throw scandal upon his family and posterity, and to bring them into public contempt and infamy, and to stir up the hatred and ill-will of the subjects of our lady the queen against them, and to deprive them of their good name, fame and reputation, and to provoke them to a breach of the peace, on the 23d day of July, 1886, wilfully, maliciously and unlawfully did write and publish, and cause and procure to be printed and published, of and concerning the said John Batchelor, his family and posterity, the false, scandalous, malicious and defamatory words following, that is to say: "Suggested epitaph for the Batchelor statue" [*here copy the libel verbatim*], to the scandal and reproach of the name and memory of the said John Batchelor, to the great damage and disgrace of his family and posterity, to the evil example of all others in the like case offending, and against the peace of our said lady the queen, her crown and dignity.[1]

(2) *Information for a libel reflecting on the chastity of a deceased woman.* From Chitty's Crim. Law.

(a) [*Caption.*]

(b) [*Commencement.*]

(c) *Statement:* That before the time of printing or publishing of the wicked, false, scandalous and defamatory libel hereinafter next mentioned, Caroline, late the wife of Sir John Wrottesley, but commonly called Lady Caroline Wrottesley, died leaving the said Sir J. W. her surviving, to wit, at London, in the parish of St. Mary-le-Bow in the ward of Cheap; and that Robert Thomas Weaser, late of London aforesaid, printer; Thomas Arrowsmith, late of London aforesaid, gentleman; and William Strackell, late of London aforesaid, printer,— being persons of a wicked and malicious disposition, and wickedly and maliciously contriving and intending to injure, defraud, disgrace and vilify the memory, reputation and character of the said Caroline, late the wife of the said Sir J. W., but commonly called Lady C. W., then deceased, and to cause it to be believed that the said C. during her life-time was a person of immoral, unchaste and licentious con-

[1] In the case of R. v. Ensor, 3 Times L. R., 366, four of the counts ran thus: "A false, scandalous and defamatory libel, having a tendency to cause a breach of the peace, and which on the 27th day of July, 1886, did cause a certain breach of the peace, to wit, an assault by one Cyril Batchelor and one Llewellyn Batchelor upon one Henry Lascelles Carr at Cardiff, in the county of Glamorgan, in the form of a letter or newspaper paragraph delivered and read by the said T. H. Ensor to John Henry Taylor, James Harris, Henry Lascelles Carr, and divers other persons at Cardiff aforesaid, according to the tenor and effect following, that is to say." These words were inserted because in that case an assault had actually followed the libel; but they are not essential to an indictment for such an offense. Where there has been no assault the defendant is still criminally liable if there be other evidence of a criminal intent. Odgers on L. & S., 683.

duct, and to bring the said Sir J. W., the surviving husband of the said C., and the children, family and relations of the said C. into great scandal, infamy, contempt and disgrace, and to stir and excite them to a breach of the peace of our sovereign lord the king, on, etc., at, etc., aforesaid, with force and arms, wickedly, maliciously and unlawfully did print and publish, and caused to be printed and published in a certain newspaper called "John Bull," a certain wicked, false, scandalous, malicious and defamatory libel of and concerning the said C., late the wife of the said Sir J. W., entitled "Queen's Visitors," in one part of which said libel is contained the false, scandalous, malicious and defamatory matter following, that is to say: "Having gone through the list of the queen's female visitors, and there appearing no probability of any increase to it, we cannot but call the serious attention of our readers to the names which we have laid before them in our analysis. It is to be remarked, not whether the persons named (with a few exceptions) are disreputable and unfit associates for a queen at any time, but that at the moment we are told that thousands of people are assured of her innocence. We find, putting their rank and quality out of the question, a list of twenty-six names of ladies who have, during seven months, visited Brandenburgh house. From these twenty-six we shall, in conclusion, subtract those who were by various circumstances influenced in their conduct, and leave the net product to the judgment of our readers and the respectability of insulted majesty;" and in another part thereof is contained the false, scandalous, malicious and defamatory matter following, of and concerning the said C., late the wife of the said Sir J. W., bart., commonly called Lady C. W. (that is to say), Countess of T., Lady Mary B., Mrs. H. G. B. and Lady O. (a foreigner) could not refuse the solicitations of the men of the family, Lady C. W. (then and there meaning the said C., late the wife of the said Sir J. W., commonly called Lady C. W.), Lady T.'s daughter and Lady M.'s sister having been detected in a criminal intrigue with her menial servant (then and there meaning and intending that the said C., late the wife of the said Sir J. W., commonly called Lady C. W., had been in her life-time guilty of a criminal intrigue with her menial servant), to the great disgrace and scandal of the memory, reputation and character of the said C., to the great damage and infamy of the said Sir J. W., and the said children, family and other relations of the said C., late the wife of the said Sir J. W., to the evil example of all others, and against the peace of our said lord the king, his crown and dignity.

Second count: And the said coroner and attorney of our said present sovereign lord the king giveth the court here further to understand and be informed that, before the time of the publishing the wicked, false, scandalous, malicious and defamatory libel hereinafter next mentioned, the said C., late the wife of the said Sir J. W., baronet, commonly called Lady C. W., died, leaving the said Sir J. W. her surviving, to wit, etc., aforesaid, and that the said R. T. W., T. A. and W. S., being such wicked and maliciously-disposed persons as aforesaid, and wickedly and maliciously contriving and intending as aforesaid, on the same day and year aforesaid, with force and arms, at, etc., aforesaid, did wickedly, maliciously and unlawfully publish, in a certain newspaper called "John Bull," a certain other wicked, false, scandalous, malicious and defamatory libel, of and concerning

the said C., late the wife of the said Sir J. W. (commonly called Lady C. W.), entitled "Queen's Visitors;" in one part of which said last-mentioned libel is contained the false, scandalous, malicious and defamatory matter following, that is to say [*set out the libel as before*] (then and there meaning and intending that the said C., late the wife of the said Sir J. W., commonly called Lady C. W., had been in her life-time guilty of criminal intrigue with her menial servant), to the great scandal of the memory, reputation and character of the said C., to the great damage, disgrace and infamy of the said Sir J. W. and the children, family and other the relations of the said late wife of the said Sir J. W., to the evil example of others, and against the peace, etc.

(d) [*Conclusion.*]

§ 6. Blasphemous Libel.—

(1) *Indictment for a blasphemous libel.* From Odgers on Libel and Slander, 678.

The jurors for our lady the queen, upon their oath, present that A. B., being a wicked and evil-disposed person, and disregarding the laws and religion of the realm, and wickedly and profanely devising and intending to bring the Holy Scriptures and the christian religion into disbelief and contempt among the people of this kingdom, on the —— day of ——, A. D. ——, unlawfully and wickedly did compose, print and publish, and cause and procure to be composed, printed and published, a certain scandalous, impious, blasphemous and profane libel of and concerning the Holy Scriptures and the christian religion, in one part of which said libel there were and are contained, amongst other things, certain scandalous, impious, blasphemous and profane matters and things of and concerning the Holy Scriptures and the christian religion, according to the tenor and effect following, that is to say [*here set out the first blasphemous passage*]; and in another part thereof there were and are contained, amongst other things, certain other scandalous, impious, blasphemous and profane matters and things of and concerning the said Holy Scriptures and the christian religion, according to the tenor and effect following, that is to say [*here set out other blasphemous passages*]; to the high displeasure of Almighty God; to the great scandal and reproach of the christian religion; to the evil example of all others in the like case offending, and against the peace of our said lady the queen, her crown and dignity.

§ 7. Obscene Libels.—

(1) *An English precedent of an indictment for exposing to sale and public view an obscene print.*

London. The jurors, etc.

That G. A., late of London, bookseller, being a scandalous and evil-disposed person, and devising, contriving and intending the morals as well of youth as of divers other liege subjects of our said lord the king to debauch and corrupt, and to raise and create in their minds inordinate and lustful desires, and the clergy of this kingdom to bring into great contempt, hatred, scandal, infamy and disgrace, on the 14th day of May, in the thirteenth year, etc., with force and arms, at London aforesaid, to wit, at the parish of Saint Faith, in the ward of Castle Baynard, in London aforesaid, in a

certain open and public shop of him, the said G. A., there situate, unlawfully, wickedly, maliciously and scandalously did sell and utter to one J. A., a liege subject of our said lord the king, a certain lewd, wicked, scandalous, infamous and obscene print on paper, entitled "The Parson Receiving Tythes in Kind," representing a man in the habit of a clergyman in an obscene, impudent and indecent posture with a woman; and which said lewd, wicked, scandalous, infamous and obscene print on paper is contained in a certain printed pamphlet then and there uttered and sold by him, the said G. A., to the said J. A., entitled "The Covent Garden Magazine, or Amorous Repository, calculated solely for the entertainment of the polite world, for April, 1773," to the manifest corruption and subversion of youth, and other liege subjects of our said lord the king, in their manners and conversation, to the great scandal, infamy and disgrace of all the clergy of this kingdom, in contempt of our said lord the king and his laws, to the evil and pernicious example of all others in the like case offending, and against the peace, etc.

(2) *Another precedent.* From Odgers on Libel and Slander, 679.

(a) [*Caption.*]

The jurors of our lady the queen, upon their oath, present that A. B., being a wicked and evil-disposed person, and unlawfully devising, contriving and intending to debauch and corrupt the morals of the young and of divers other liege subjects of our said lady the queen, on the —— day of ——, A. D. ——, in a certain open and public shop of him, the said A. B., situate and being at number —— High street, in the parish of ——, in the town of ——, in the county aforesaid, unlawfully, wickedly, designedly and maliciously did publish and sell, and cause and procure to be published and sold, to one C. D., a certain lewd, scandalous and obscene picture [print, photograph *or* engraving], entitled ——, and representing —— [*here give such a detailed description of the picture as will manifestly show its indecency*], to the manifest corruption of the morals of the young, and of other liege subjects of our said lady the queen, in contempt of our said lady the queen, to the evil example of all others in the like case offending, and against the peace of our said lady the queen, her crown and dignity.

§ 8. Libels Tending to Injure the Administration of the Government.—

(1) *English precedents. An indictment for seditious words.* From Odgers on Libel and Slander, 679.

(a) [*Caption.*]

The jurors of our lady the queen, upon their oath, present that A. B., being a wicked, malicious, seditious and evil-disposed person, and wickedly, maliciously and seditiously contriving and intending the peace of our lady the queen and of this realm to disquiet and disturb, and the liege subjects of our said lady the queen to incite and move to hatred and dislike of the person of our said lady the queen and of the government established by law within this realm, and to incite, move and persuade great numbers of the liege subjects of our said lady the queen to insurrection, riots, tumults

and breaches of the peace, and to prevent by force and arms the execution of the laws of this realm and the preservation of the public peace, on the —— day of ——, A. D. ——, in the presence and hearing of divers, to wit, —— of the liege subjects of our said lady the queen then assembled together, in a certain speech and discourse by him, the said A. B., then addressed to the said liege subjects so then assembled together, as aforesaid, unlawfully, wickedly, maliciously and seditiously did publish, utter, pronounce and declare with a loud voice of and concerning the government established by law within this realm, and concerning our said lady the queen, and the crown of this realm, and of and concerning the liege subjects of our said lady the queen, committing and being engaged in divers insurrections, riots and breaches of the public peace, amongst other words and matter, the false, wicked, seditious and inflammatory words and matter following, that is to say [*here set out the seditious words verbatim*], in contempt of our said lady the queen, in open violation of the laws of this realm, to the evil and pernicious example of all others in the like case offending, and against the peace of our said lady the queen, her crown and dignity.

§ 9. **Libels Tending to Injure the Administration of Public Justice.—**

(1) *An English form of an indictment for defamatory words spoken to a magistrate in the execution of his duty.* From Odgers on Libel and Slander, 680.

Middlesex, to wit.

The jurors for our lady the queen, upon their oath, present that heretofore, to wit, on the —— day of ——, in the year of our Lord ——, one A. B. was brought before C. D., esquire, then and yet being one of the justices of our said lady the queen, assigned to keep the peace of our said lady the queen, in and for the county of Middlesex, and also to hear and determine divers felonies, trespasses and other misdeeds committed in the said county; and the said A. B. was then charged before the said C. D., upon the oath of one E. F., that he, the said A. B., had then lately before feloniously taken, stolen and taken away divers goods and chattels of the said E. F. And the jurors aforesaid, upon their oath aforesaid, do further present that the said A. B., being a scandalous and ill-disposed person, and wickedly and maliciously intending and contriving to scandalize and vilify the said C. D. as such justice as aforesaid, and to bring the administration of justice in this kingdom into contempt, afterwards, and whilst the said C. D., as such justice as aforesaid, was examining and taking the depositions of divers witnesses against him, the said A. B., in that behalf, to wit, on the day and year aforesaid, wickedly and maliciously, in the presence and hearing of divers good and liege subjects of our said lady the queen, did publish, utter, pronounce, declare and say with a loud voice to the said C. D., and whilst the said C. D. was so acting as such justice aforesaid, the false, wicked, malicious and seditious words and matter following, that is to say: [*Here set out the seditious words verbatim.*] To the great scandal and reproach of the administration of justice in this kingdom, to the great scandal and damage of the said C. D., in contempt of our lady the queen

and her laws, to the evil example of all others in the like case offending, and against the peace of our said lady the queen, her crown and dignity.

(2) *Information for verbal slander.* 3 Chitty's Crim. Law, 915.

(a) [*Caption, etc.*]

That M. J., late of, etc., spinster, being a wicked and ill-disposed person, and wickedly intending to vilify, scandalize and bring into disgrace the characters of one J. L., one R. W. and one W. H. M., they, the said J. R. and W. H., being, at the time of the committing the offense hereinafter mentioned, commissioners duly appointed under and by virtue of an act of parliament passed in the thirty-ninth year of the reign of his present majesty, entitled an act to repeal the duties imposed by an act made in the last session of parliament for granting an aid and contribution for the prosecution of the war, and to make more effectual provision for the like purpose by granting certain duties upon income in lieu of the said duties, for hearing and determining appeals relative to the duties upon income, and by virtue of such appointment acting as such commissioners in the hearing and determining appeals arising in the respective wards of Cumberland, Eskdale and Leath, in the said county of Cumberland, and wickedly and maliciously intending to vilify the proceedings of the said commissioners in hearing and determining appeals as aforesaid, and to bring into contempt and hatred his majesty's government, on, etc., at, etc., wickedly, wilfully, falsely and contemptuously, in the presence and hearing of the said commissioners, whilst they, the said commissioners, were acting in the execution of their said office in hearing and determining appeals relating to the said duties upon income, at a certain meeting duly holden by them for that purpose, on the said, etc., at, etc., uttered and pronounced and loudly published to the said commissioners these false, contemptuous, malicious, scurrilous and abusive words of and concerning the said commissioners, and of and concerning the proceedings of the said commissioners in the execution of their said office following, that is to say: "You (meaning the said J. R. and W. H. as such commissioners as aforesaid) are a blackguard perjured pack, and I (meaning the said M.) will bring you before the court of king's bench;" to the great scandal and infamy of the said J. R. and W. H. as such commissioners as aforesaid, in disparagement of the said proceedings of the said commissioners, in the disturbance of the administration of justice, and in contempt of the government of our lord the king and his laws, and against the peace, etc.[1]

[*Conclusion.*]

[1] ENGLISH NOTE.— This precedent was settled by a very eminent crown lawyer. Mere words of a private individual are not, in general, indictable, though, if reduced into writing, they would be libelous. 3 Salk., 190. But scandalous aspersions of a magistrate in the execution of his office are regarded as criminal, and subject the offender to punishment, at the discretion of the court in which he is convicted. Comb., 46. And to these the rule is strictly confined. For if the language, however opprobrious, apply only to the justice in his private capacity, no indictment can be supported. So that if a man at a vestry meeting call an absent magistrate

abusive names in reference to a private quarrel (2 Campb., 142), if, in his absence, he say, "if he is a sworn justice he is a rogue, and a forsworn rogue," or if he apply to him the names of ass, fool, coxcomb or blockhead, no indictable offense will have been committed. 2 Stra., 1157, 8; 2 Salk., 698; 2 Campb., 142. And it seems that to make any words thus indictable they must be spoken *to the* magistrate, and not in his absence. 2 Campb., 142; 2 Stra., 1157; 1 Stra., 420, 1.

For other forms of indictments for libels, see McClain's Criminal Law Edition of 1897, sec. 1069.

GENERAL INDEX.

THE REFERENCES ARE TO THE PAGES.