NEWSPAPER LIBEL

NEWSPAPER LIBEL

A HANDBOOK FOR THE PRESS

BY

SAMUEL MERRILL

OF THE BOSTON DAILY GLOBE

A MEMBER OF THE BAR OF MASSACHUSETTS AND OF NEW YORK

The liberty of the Press consists in printing without any previous license, subject to the consequences of law. The licentiousness of the Press is Pandora's box, the source of every evil.

LORD MANSFIELD.

BOSTON
TICKNOR AND COMPANY
211 Tremont Street
1888

Press of
ALFRED MUDGE & SON, BOSTON, U. S. A.

PREFACE.

No apology seems to be needed for the publication of this work. The lack of any treatise devoted exclusively to the law of libel; the need of such a work compendious enough to serve as a book of convenient reference in newspaper offices; the demand, indeed, for more information generally, outside the legal profession, regarding the rights of the press and its obligations toward public men and others whose conduct and whose affairs become subjects of discussion as news, — these facts are sufficiently manifest to make this book its own best excuse for existence.

The text-books on the joint subject of slander and libel, designed for the use of the bar, while admirable, most of them, in their field, are far too voluminous to be often consulted by any save those for whom they were more especially prepared. In the present work, questions of pleading and practice are not considered, and, as a general rule, the cases cited are cases of newspaper libel heard in American courts. Where English cases are cited, they are, in every instance, believed to be of equal authority in this country. Some seeming and some actual conflicts will be found between the decisions of different courts, but this is an inherent difficulty of the subject, and an effort has been made to reduce the difficulty to a minimum.

References to the law text-books are made to the latest editions. The editions of the works on slander and libel are as follows: Townshend, third edition (New York, 1877); Odgers, American edition (Boston, 1881); Starkie (Folkard's), American edition (New York, 1877). Where reference is made to works in which two systems of paging are followed, the citations correspond with the original or marginal paging. For the sake of uniformity, cases are in every instance cited with the name of the original plaintiff preceding the name of the individual or company charged with the libel.[1] In the citation of cases, a date following the name of a newspaper is the date when the alleged libel was published; a date following the name of the law report indicates when the case was decided in court. Cases are generally indexed by the names of the newspapers, but the names of the cities or towns where they are published, and the words "daily," "morning," etc., are not for this purpose considered as parts of the names of the papers.

It has been said that every lawyer owes it as a debt to his profession to add something to the literature of the law. The author, while disclaiming any intention of writing a text-book for the use of the bar, ventures to hope that his work may prove of sufficient interest to his legal friends to exonerate him from his obligation to a profession of which he is no longer an active member.

[1] The *Canada Law Journal* (Toronto, Feb. 1, 1888), quoting the *American Law Review* and the *Central Law Journal*, condemns the practice followed in some of the States where in the reports they "reverse the names of the parties as they appear in the court below, and put the party appealing or prosecuting the writ of error as the plaintiff, although he may have stood in the court below as the defendant."

If ~~the~~ reader of this book is already a defendant in libel proceedings, it is to be hoped that in ~~the~~ following pages he can find a happy issue out of all his troubles; but, if such is ~~the~~ case, ~~the~~ work will perform a more important service than ~~the~~ author can confidently expect for it. If, however, whether he is a publisher or a writer for ~~the~~ press, he is as yet exempt from such difficulties, it seems not too much to believe that a careful study of these pages will enable him to remain free and clear from entanglement in ~~the~~ mysterious meshes of ~~the~~ law. In any event, ~~the~~ reader, whose legal rights and obligations are herein defined, should remember that "ignorance of ~~the~~ law is no excuse."

BOSTON, July 1, 1888.

CONTENTS.

Chapter		Page
I.	Introductory	9
II.	The Civil Action of Libel	38
III.	Criminal Libel	62
IV.	Libels as Contempts of Court	99
V.	Publication	130
VI.	Language which is Libellous	148
VII.	Privileged Publications	180
VIII.	Political Libels	208
IX.	Defences	229
X.	Damages	250
	Index	279

NEWSPAPER LIBEL.

CHAPTER I.

INTRODUCTORY.

THE first newspaper published in America was called *Publick Occurrences*, and it bore the date September 25, 1690. Its editor was Benjamin Harris, whose office was at the London Coffee House, Boston. Fifty-one years earlier the pioneer printing press was brought into the Colony from England, but the government so restricted the practice of printing that it is only strange that even at the expiration of a half-century any colonist should dare to employ the crude machinery of one of the early presses in the field of journalism. In 1662 the General Court of Massachusetts Bay had appointed two persons "licensers of the press"; and that their office was no sinecure is shown by the fact that in 1668, having allowed Thomas à Kempis' "De Imitatione Christi" to be printed, they were cautioned to make a more careful revision, and meantime the press was ordered stopped. Even the laws for a long time were not allowed to be printed, and the burning of offending books by the common hangman was a frequent occurrence.

This first American newspaper was a little sheet of three printed pages, each page containing two columns.

Mr. Harris, the sole publisher, editor, and reporter, thus announced his intentions in his prospectus: —

It is designed that the Countrey shall be furnished once a moneth (*or if any Glut of* Occurrences *happen* oftener) *with an Account of such considerable things as have arrived unto our Notice.*

In order here unto, the Publisher will take what pains he can to obtain a Faithful Relation *of all such things; and will particularly make himself beholden to such Persons in* Boston *whom he knows to have been for their own use the diligent Observers of such matters.*

In spite of the editor's declared intentions, *Publick Occurrences* did not continue to appear "once a moneth." Its publication was declared contrary to law by the Legislature, and the attention of the licensers of the press was called to it. The issue for September 25 was marked "Numb. 1," but "Numb. 2" never appeared, and thus was the infant newspaper strangled in its cradle. It was nearly fourteen years before the next newspaper was started in America.

The advent of *Publick Occurrences* was anticipated in the Colony of Massachusetts Bay not only by the appointment of licensers of the press, but by a statute on the subject of libel, enacted May 14, 1645, only seventeen years after the founding of the Colony.[1]

[1] Since the Book of Exodus was written, libels have been the subject of legislation. "Thou shalt not raise a false report." (Exodus xxiii. 1.) By the Laws of the Twelve Tables at Rome, libels affecting the reputation of another were made a capital offence, and under the Emperor Valentinian it was a capital offence to neglect to destroy a libel which another had written. (Blackstone's Commentaries, book IV., chap. 11.) Formerly, in England, a person guilty of composing a libel was deprived of the privilege of making a will (Redfield on Wills, vol. I., p. 118), and by the civil law in France the author or publisher of a libel was included among those declared unworthy of enjoying the right of inheritance from the person libelled. (Domat's Civil Law, Second Part, "*des Successions*," book I., title i., sect. iii., 8.)

This statute, which was broad enough to cover both the subjects of libel and slander, appears upon the record 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 iniury of any p.ticul^r p.son, or w^th intent to deceive & abuse y^e people by false newes or reports, & y^e same, duely p.ved in any Co^rt, or before any one ma^trate, (who hath hereby pow^r granted to heare & determine all offences against y^s lawe,) such p.son shalbe punished after y^s 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^rt 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.

Governor Berkeley, of Virginia, expressed thankfulness in 1671, that neither free schools nor printing had been introduced into that Colony, trusting that these "breeders of disobedience, heresy, and sects" would long be unknown; and as late as 1683, Governor Dongan was sent to his post at the head of the government of New York, with especial instructions not to permit the practice of printing within his jurisdiction. Nine years later, however, a press was brought into the New York Colony by a printer from Philadelphia, who was driven from the City of Brotherly Love for printing an address for a Quaker, in which the latter charged the Quakers who were holding office with inconsistency in exercising political authority, while professing the principles of the Friends.[1]

[1] Cooley on Constitutional Limitations, p. 419.

The censorship of the press, a relic of the inquisition, was established in England in 1559 by Queen Elizabeth. Prior to that time, and for a long time subsequently, the government maintained a monopoly of the art of printing, granting the privilege of a limited number of presses to members of the stationers' guild, and one press to each of the universities. When it became impossible to restrict longer the number of printing presses, the censorship became more rigid. The penalty for publishing a book without the royal license was a fine and the confiscation of the press and all copies of the unlicensed book, and the printer was forever disabled from following his trade. Newspapers were regarded with especial jealousy, and under the last two monarchs of the House of Stuart only one paper, a small semi-weekly, called the London *Gazette*, was permitted to publish political news. Even the size of newspapers was regulated by statute, and this law remained in force in England till 1826.[1] The freedom of the press was of later date than every other great concession wrung from the British government, for it was not until 1694 that Parliament refused longer to continue the press censorship in England, and thereby established the right of every man to print and publish what he pleases, under no responsibility, save for the abuse of that right. The "imprimatur," or certificate that the work had been approved by the licensers of the press, is, however, known to have been affixed to books printed in the Province of Massachusetts Bay as late as 1719, and the licensers on this side of the Atlantic only gradually ceased to exercise their functions.[2] During the last decades prior to the Revolu-

[1] Odgers on Libel and Slander, pp. 10–12.

[2] Thomas' History of Printing in America, vol. I., pp. 207, 208.

tion, indeed, the press was in many respects under greater restrictions in the Colonies than in the mother country, the home government fearing to trust the king's subjects across the water with the free use of such dangerous implements as presses and type.

The freedom of the press was asserted in the first amendment of the Constitution of the United States, and the same declaration is contained in the constitution of each of the several States.[1]

An instance of the arbitrary interference of the government in the publication of newspapers is given by Benjamin Franklin in his autobiography. The occurrence took place in 1722, when Franklin was sixteen years old, an apprentice to his brother James, publisher of the *New England Courant.* Says Franklin: —

One of the pieces in our newspaper on some political point, which I have now forgotten, gave offence to the Assembly. He [James Franklin] was taken up, censured, and imprisoned for a month by the Speaker's warrant, I suppose because he would not discover the author. I too was taken up and examined before the Council; but, though I did not give them any satisfaction, they contented themselves with admonishing me, and dismissed me, considering me perhaps as an apprentice, who was bound to keep his master's secrets. During my brother's confinement, which I resented a good deal, notwithstanding our private differences, I had the management of the paper; and I made

[1] "Give me but the liberty of the press," said Sheridan, "and I will give to the Minister a venal House of Peers, I will give him a corrupt and servile House of Commons, I will give him the full sway of the patronage of office, I will give him the whole host of ministerial influence, I will give him all the power that place can confer upon him to purchase up submission and overawe resistance, and yet, armed with the liberty of the press, I will go forth to meet him undismayed; I will attack the mighty fabric he has reared with that mightier engine; I will shake down from its height corruption and bury it amid the ruins it was meant to shelter." — New York *Sun*, Feb. 12, 1888.

bold to give our rulers some rubs in it, which my brother took very kindly, while others began to consider me in an unfavorable light, as a youth that had a turn for libelling and satire. My brother's discharge was accompanied with an order, and a very odd one, that "*James Franklin* should no longer print the newspaper called *The New England Courant*."

This order directed that James Franklin be forbidden "to Print or Publish the New England Courant, or any Pamphlet or Paper of the like Nature, except it be first supervised by the Secretary of this Province." But Franklin issued the *Courant* on the following Monday, and without the secretary's imprimatur. This offence was brought to the attention of the grand jury, but that body returned no bill. James Franklin was then put under bonds for his good behavior for twelve months. Thereafter the publication of the paper was continued in the name of Benjamin Franklin.[1]

The charge against James Franklin was the publication of certain articles "boldly reflecting on his Majesty's government and on the administration in this Province, the ministry, churches, and college; and that tend to fill the readers' minds with vanity, to the dishonor of God and the disservice of good men." The articles were not set out at length or more definitely specified. Jared Sparks says of this case: "This was probably the first transaction, in the American Colonies, relating to the freedom of the press; and it is not less remarkable for the assumption of power on the part of the Legislature, than for their disregard of the first principles and established forms of law."[2] Epes

[1] Thomas' History of Printing in America, vol. I., p. 310; Adams' Typographia, p. 29.

[2] Autobiography of Benjamin Franklin, edited by Jared Sparks, p. 19.

Sargent, too, says that the prohibition placed upon James Franklin was "an unwarrantable and despotic act; there being nothing libellous, or even reasonably offensive, in any of the articles the publication of which in the *Courant* was thus resented."[1]

The first case of newspaper libel adjudicated in an American court was that of the King *v.* Zenger, tried in New York, August 4, 1735. John Peter Zenger, a native of Germany, established the New York *Weekly Journal* in 1733, in opposition to the *Gazette*, the only other paper in the Colony, which was the government organ. The opposition sheet contained frequent and somewhat severe animadversions on the administration of Governor William Cosby, but the grand jury refused to return an indictment against the outspoken editor. The attorney-general then charged Mr. Zenger by information with criminal libel, and upon this information he was arrested, Sunday, November 17, 1734. One of the offensive articles was as follows: —

> The people of this city and province think, as matters now stand, that their liberties and properties are precarious, and that slavery is like to be entailed on them and their posterity, if some past things be not amended.

Another of the more serious charges was the publication of the following, quoting from a man who had removed from New York to Philadelphia: —

> 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

[1] Franklin's Select Works, p. 134.

call any thing 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 in the sum of $2,000, Mr. Zenger was confined in jail for more than eight months, awaiting his trial. During this time the *Journal* was published, and its opposition to the administration was unabated. Mr. Zenger's editorial duties were performed under difficulties, however, as is shown by the following extract from a card addressed to his subscribers, contained in the first issue of the *Journal* published after his arrest: —

I doubt not you'll think me sufficiently Excused for not sending my last week's *Journall*, and I hope for the future by the Liberty of Speaking to my Servants thro' the Hole of the Door of the Prison, to entertain you with my weekly *Journall* as formerly.

The council ordered the copies of the paper upon which the charges were based to be burned by the common hangman, but the magistrates refused their assent, and the papers were burned by the sheriff's servant.

Mr. Zenger's counsel were James Alexander and William Smith. They entered upon a vigorous defence, taking exception even to the legality of the commissions under which the judges held their office. The Court would neither allow the exceptions nor listen to argument upon them, saying, "The matter has come to a point that we must leave the bench or you the bar"; and the names of the two gentlemen were ordered stricken from the roll of attorneys. The prisoner's friends then retained Andrew Hamilton, of Philadelphia, who was about eighty years old, and a famous lawyer in

his day. In accordance with the common law, Chief Justice de Lancey refused to admit evidence tending to show the truth of the alleged libels, and as the prisoner did not deny the publication, no witnesses were examined. "The object of the Court appears to have been to induce the jury to return a special verdict that the defendant did publish the papers, and leave the question of libel or not to the Court."[1] Mr. Hamilton ably, eloquently, and fearlessly argued the case, appealing to the jury to be themselves witnesses of the truth of the charges which the defendant was denied the liberty of proving. The jury disregarded the intimation of the chief justice, and returned a general verdict of not guilty, leaving no alternative for the Court but to discharge the prisoner. The verdict was quickly found, and was received by the spectators in the court room with cheers. The chief justice warned the spectators to be silent, but the cheers were vigorously renewed. Mr. Hamilton, 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 defence 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, and some days later the certificate of the freedom of the city was sent to him by special messenger, duly engrossed upon parchment and bearing the city's seal, encased in a box of gold, which, as the historian says, was "five and a half ounces in weight." The result of the case of John Peter Zenger was, according to Gouverneur Morris, "the dawn of

[1] Chandler's American Criminal Trials, p. 205.

that liberty which afterwards revolutionized America."[1]

Few subjects in law have given rise to more controversy than that of the respective provinces of the Court and jury in prosecutions for criminal libel. Lord Mansfield, like Chief Justice de Lancey, charged the jury in a noted case that they were only to decide whether the defendant had published the matter in question, and that it was the exclusive province of the Court to determine whether, as a matter of law, the publication was libellous. Bitter hostility to this doctrine in England led to the passage, in 1792, of Fox's Libel Act, by which the jury are authorized to render a general verdict of guilty or not guilty, thus guaranteeing to every defendant the right of having the character of the publication, the question whether it is lawful or unlawful, passed upon by a jury. But the young republic was no longer subject to British statutes, and for a few years longer the earlier construction of the law prevailed in this country.

In 1768, during the administration of Sir Francis Bernard as governor of the Province of Massachusetts Bay, the Boston *Gazette* published an article which was deemed a scandalous libel upon the governor. By advice of the council, the chief magistrate laid the matter before the Assembly, but the House was of

[1] See 17 Howell's State Trials, 675; Hudson's Journalism in the United States, 81–91. The practice regarding the admission of evidence of the truth in defence was not altogether uniform in the Colonies. A few years after the trial of the Zenger case, William Parks, the government printer of Virginia, was arraigned before the House of Assembly on a charge of publishing in the *Gazette* an assertion that a certain member of the House had some years previously been convicted of sheep-stealing. Mr. Parks was allowed by the House, in spite of opposition, to prove by the records of the court that the charge was true, and was acquitted. The member retired in disgrace from public life. (See Thomas' History of Printing in America, vol. II., p. 143.)

opinion that as no individual was named in the article it could not affect the majesty of the king, the dignity of the government, the honor of the General Court, or the true interests of the Province, and accordingly that body took no further notice of it. The chief justice of the Superior Court then charged the grand jury that unless in violation of their oaths they could not avoid returning an indictment against the publisher of the offending article. "The attorney-general laid a bill before them, upon which they returned 'ignoramus,' and thus gave a sanction to libels, which multiplied more than ever." [1]

The next year the grand jury had learned to look upon libels in a different light, returning indictments against Governor Bernard himself, and eight others of the king's officers, for libels contained in certain letters addressed to the home government, wherein defamatory language was used concerning the inhabitants of Boston and of the Province. The attorney-general had refused to draw the indictments in these cases, but the grand jury had the bills drawn elsewhere, and returned them into court; the Court, however, took no notice of them, and finally the attorney-general, by order of the king, entered a *nol pros.* in each of the cases.[2]

In the first years after the formation of the Union, when the government was an experiment, many men still feared the least breath of party controversy, lest it should overthrow the newly erected national fabric. It was at this time, during the administration of John Adams, that the Alien and Sedition Laws were passed.

[1] Hutchinson's History of Massachusetts Bay, vol. III., p. 186. It should be borne in mind that Governor Hutchinson was a Tory.

[2] Hutchinson, vol. III., p. 262.

The latter law[1] declared it a public crime, punishable by fine and imprisonment, for any person unlawfully to write, print, utter, or publish any false, scandalous, and malicious writing against the government of the United States, or either house of Congress, or the President, with intent to defame them, or bring them into contempt or disrepute, or to excite against them the hatred of the people, or to stir up sedition. This law had a direct tendency to bring about the very condition of affairs which it sought to prevent, and its constitutionality was from the first strenuously denied by a large party in the government. The two obnoxious laws soon expired by their own limitation.

Shortly after their expiration, and before the heated party controversies, which were at once the cause and effect of the Alien and Sedition Laws, were at an end, Harry Croswell, of Hudson, N. Y., editor of the *Wasp*, a Federalist newspaper, was indicted for a libel on President Jefferson. The objectionable language was published September 9, 1802, and was thus set out, with innuendoes, in the indictment: —

> Jefferson [*the said Thomas Jefferson, Esq., meaning*] paid Callender [*meaning one James Thompson Callender*] for calling Washington [*meaning George Washington, Esq., deceased, late President of the said United States*] a traitor, a robber, and a perjurer; for calling Adams [*meaning John Adams, Esq., late President of the said United States*] a hoary-headed incendiary, and for most grossly slandering the private characters of men who he [*meaning the said Thomas Jefferson*] well knew to be virtuous.

At the July term of the Supreme Court, 1803, before

[1] Act of July 14, 1798, chap. 91. For cases under this law see Chap. VIII. on Political Libels.

a single justice, the defendant offered to prove that Callender had written and published a pamphlet entitled "The Prospect Before Us," containing the defamatory epithets applied to Washington and Adams, and that Jefferson had paid Callender fifty dollars before the publication of the pamphlet and the same amount afterward as a reward, "thereby showing his approbation thereof." The Court held that the truth of the charges against Jefferson, if proved, would be no defence, and that "it was no part of the province of a jury to inquire or decide on the intent of the defendant, or whether the publication in question was true, or false, or malicious." The defendant was convicted, but moved for a new trial upon exceptions taken to the rulings of the Court. The motion for a new trial was argued before the full bench at the May term, 1804. Alexander Hamilton volunteered as counsel for the defendant, and conducted the case with consummate skill, but the Court was equally divided on the question of a new trial, and the motion was lost. The public prosecutor was entitled to move for judgment on the verdict, but no motion for judgment was ever made.[1] A few weeks later Hamilton was killed in his duel with Aaron Burr.

Croswell lost his case, but measures were at once taken to remedy the law upon which the decision was based. A bill was introduced in the New York Assembly by William W. Van Ness, providing that in prosecutions for criminal libel the truth may be given in evidence in defence, when the alleged libel was published "with good motives and for justifiable ends," and providing that the jury in such cases shall have a

[1] The People *v.* Croswell, 3 Johnson's Cases, 336.

right to determine the law and the fact, and shall not be required by the Court to find the defendant guilty merely on proof of the publication by him of the matter charged to be libellous, and of the sense ascribed thereto in the indictment. This bill passed both houses unanimously, and became a law April 6, 1805. In 1821 its provisions were incorporated in the constitution, and have ever since remained a part of the fundamental law of the State.[1] The same principles are now generally maintained in this country, although in some States the right of the jury to decide the law and the fact amounts to nothing more than the power to do so free from legal accountability.[2] In a few States the law-makers have gone a step further, and declared the truth a complete defence in criminal prosecutions as well as in civil actions for libel, the words, "with good motives and for justifiable ends," being omitted.[3]

Until the case of Wason *v.* Walter, tried in 1867, the right of English newspapers to publish proceedings in Parliament was not well established. Mr. Wason, a member of the bar, preferred charges against Sir Fitzroy Kelly, chief baron of the Court of Exchequer, and

[1] "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions or indictments for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury, that the matter charged as libellous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact."—Constitution of New York, art. 1, § 8.

[2] The Legislature of Kansas has provided that in prosecutions for criminal libel the jury may, at their discretion, determine the law as well as the fact, and the Supreme Court of that State in 1887 ruled that the defendant is therefore entitled, by himself or counsel, and under the superintendence of the Court, to present and argue before the jury his theory of the law of the case, although it shall differ in some respects from that given by the Court in its instructions. State *v.* Verry, 13 Pacific Reporter, 838.

[3] See Chap. III. on Criminal Libel.

petitioned the House of Lords for his removal from the bench. In the course of the debate upon the petition, severe strictures were cast upon the petitioner. The London *Times* published a report of the debate, and an editorial in which the "futility and malignity" of the charges contained in the petition were referred to. In Mr. Wason's suit against the proprietor of the *Times*, the Court held that a faithful report of the debates in the Houses of Parliament is privileged, and that the editorial was within the limits of fair criticism.[1] For many years there were standing orders of both Houses prohibiting the publication of their proceedings.[2]

With respect to reports of legislative matters, the American Colonies followed the rule which was in vogue in England. The publication of debates was not general until after the Revolution, and even then it involved a technical breach of privilege. An injunction of secrecy was imposed upon the members of the Constitutional Convention of 1787, and the Senate sat with closed doors till 1793. In the lower house of Congress, however, the presence of reporters was allowed from the outset, but the speaker claimed the right of regulating their admission.[3] Reports of legislative proceedings are now as fully privileged throughout this country as in England.

The law of libel is too little understood in this country by those who, whether in the counting-room or "upstairs," write or pass judgment upon matter to be published in the newspapers. Publishers and editors seem disposed to leave the whole subject of their legal rights

[1] English Law Reports, 4 Queen's Bench, 73.
[2] Odgers on Libel and Slander, p. 258.
[3] Cooley on Constitutional Limitations, p. 419.

and liabilities to their counsel, and counsel are perfectly willing to assume charge of that branch of the newspaper business. Unfortunately, however, little attention is generally paid, even by legal advisers, to the question of the actionable character of matter which is published, until after suit is brought, and then a bill of costs, and often of damages, remains to be paid. Many an editor or proprietor has suddenly found himself a defendant in a tedious and expensive libel suit simply from the carelessness of a reporter, the haste of a telegraph editor, the inadvertence of an advertising clerk, or from misunderstanding on the part of any one of them of the responsibility of his position. The reporter who thinks that he has avoided the possibility of a suit for libel by omitting the name of a person whom he charges on hearsay evidence with some criminal or disgraceful act, makes as great a mistake as the news editor who considers all responsibility avoided by a liberal use of such expressions as "alleged" and "it is asserted," sprinkled through the copy which he edits; but both the reporter and the editor, and the proprietor of the paper as well, are liable to answer in damages if the charge is false and defamatory. "The stereotyped formulas of slander, 'they say,' 'it is said,' 'it is generally believed,' are about as effectual modes of blasting reputation as distinctly and directly to charge the crime."[1] But more libel suits grow out of just such misconception of the law than out of actual intention to attack the character or conduct of individuals.

Late one night in February, 1869, a number of men called at the office of the New Orleans *Times* and

[1] The Court in Horace B. Johnson *v.* St. Louis Dispatch Co., 65 Mo. (1877), 541.

stated that they had been assaulted, and desired the facts published as a matter of news. The managing editor, after a long controversy with them, agreed to insert the statement as an advertisement, signed by the men who made the charge. It was accordingly published in the following form: —

NEW ORLEANS, February 19, 1869.

We, the undersigned, most respectfully lay before the public the following very astonishing facts that took place last night near the Carrollton depot: While we were on our way home from Carrollton to New Orleans, three police officers of the above place assailed us with revolvers pointed to us, to deliver every cent we had about us. All the money that we had was five dollars, and on delivering the same they left off. What sounds more horrible is that these so-called officers were accompanied by his honor Judge Perret, judge of Carrollton and Canal Avenue.

Signed, JOHN BRIANT,
D. L. THOMPSON,
W. B. SAVORY,
H. B. DELORD,
JAMES B. RUBB,
No. 413 Frenchman Street.

It turned out that the names were fictitious, the writers unknown, and that there was no such number as 413 Frenchman Street. The only ground for the charge of assault was the fact that the men had been arrested in Carrollton for disorderly conduct, and that one of them in court had been fined five dollars by Judge Perret. The managing editor, unfortunately, did not understand that, whether the signatures were fictitious or genuine, the proprietor of the newspaper was responsible for the truth of the charges contained in the card.

The *Times* referred to the case on the following day in an editorial, concluding as follows: —

> The advertisers in question have assumed a responsibility by their publication which they have no right to expect us to share with them.

Judge Perret, however, expected the proprietor of the paper to share the responsibility with the advertisers in question, and brought a suit for damages. The authors of the card were never found, hence the papers in the suit against them were never served; but the libelled judge recovered judgment for $5,000 from Charles A. Weed, proprietor of the *Times*.[1]

Newspaper owners and writers should better understand their liability in cases of libel; but, on the other hand, the "dear public" should understand that an action for libel is a dangerous experiment. "The law of libel . . . cannot redress every injury sustained by a breach of morals or of good manners."[2] "Many a plaintiff, even though nominally successful, has bitterly regretted that he ever issued his writ. Every one who proposes to bring an action of defamation should remember that he is about to stake his reputation on the event of a lawsuit, and to invite the public to be spectators of the issue."[3]

The freedom of the press is a subject of constitutional guaranty throughout the United States, but the term "freedom of the press" has been frequently misunderstood. As has been already intimated, the expression simply means exemption from press censor-

[1] L. Charles Perret *v.* the New Orleans Times Newspaper, 25 La. Annual Reports (1873), 170.

[2] The Court in James Gordon Bennett *v.* Amor J. Williamson *et al.* (New York *Sunday Dispatch*), 4 Sandford (1851), 60.

[3] Odgers on Libel and Slander, p. 449.

ship. The courts do not take cognizance of writings designed for the press in advance of their publication, and an injunction will not be granted to restrain the publication of an alleged libel.[1] The liberty of the press has been defined as "a right to freely publish whatever the citizen may please, and to be protected against any responsibility for so doing, except so far as such publications, from their blasphemy, obscenity, or scandalous character, may be a public offence; or as by their falsehood or malice they may injuriously affect the standing, reputation, or pecuniary interests of individuals."[2]

Few periodicals in this country ever produced more commotion in proportion to their age and size than the *Mascot*, an illustrated weekly issued in New Orleans. W. Van Benthuysen was one of the objects of its satire. He appeared before Judge Monroe of the Civil District Court and represented that the proprietors of the *Mascot* had published defamatory cartoons and other matter concerning him, and that he feared that the libels would be repeated in future issues, and prayed for an injunction restraining the proprietors from publishing any matter "calculated to disparage him in the estimation of the community." The injunction was granted, but was promptly disobeyed, the proprietors manifesting great indifference to the estimation in which the community should hold Mr. Van Benthuysen. The proprietors were then committed to the parish prison for ten days for contempt. The case was carried before the Supreme Court of Louisiana, where it was declared unconstitutional to enjoin the publication of libels. "It

[1] Adams on Equity, p. 216.
[2] Cooley on Constitutional Limitations, p. 422.

would establish a complete censorship over the press so enjoined," said the Court. "Under the operation of such a law, with a subservient or corrupt judiciary, the press might be completely muzzled, and its just influence upon public opinion entirely paralyzed. Such powers do not exist in courts, and they have been constantly disclaimed by the highest tribunals of England and America." The entire proceedings against the proprietors of the *Mascot* were accordingly declared null and void.[1]

It has been said that without the guaranty of a free press, government by the people would be impossible. Nevertheless, it has been asserted by a no less distinguished jurist than David Dudley Field that "if a constitutional provision on the subject of the press is needed at all, it is for its restraint instead of its protection."[2] In the course of an extended article Mr. Field said: —

The condition of the newspaper press in this country is a subject of constant observation and constant complaint. Nobody defends it. The newspapers themselves deplore it. . . . Jefferson said, in his time, that the press was *putrid*. It has since become putrescence putrefied. The first effect is to make cowards of nine-tenths of our public men. . . . Our law of libel, it must be confessed, is imperfect, and our administration of it still more so. It is generally assumed,

[1] The State, on the information of Joseph Liversey *et al.*, *v.* F. A. Monroe, 34 La. Annual Reports (1882), 741. In Texas it is provided by statute that any person may make oath before a magistrate that he has reason to believe that another is about to publish or circulate, or is continuing to publish or circulate, a libel against him, and the person accused may be required to give a bond with surety not to publish or circulate such libel. (Code of Criminal Procedure, art. 103.) It is also provided that upon conviction for libel the Court may direct the sheriff to seize and destroy all the publications containing the libel. (Penal Code, art. 617.)

[2] *International Review*, July-August, 1876.

that the truth of a story is a sufficient reason for publishing it. The assumption is wrong. . . . There are many cases where the truth should not be published. . . . Everywhere else in the world reputation is protected. It is only here that it has lost all protection. . . . The practical result of a civil trial for libel nowadays is a reversal of positions, and the trial of the plaintiff upon his general character, instead of a trial of the defendant for libel.

It is not believed that the tone of the American press has either materially improved or materially deteriorated since Mr. Field's article was written, and the condition of the law remains substantially the same ; accordingly his comments are still worthy of respectful consideration.

President Cleveland also, in a published letter to Joseph Keppler of *Puck*, under date of December 12, 1885, wrote : —

I have just received your letter with the newspaper clipping which caused you so much annoyance. I don't think there ever was a time when newspaper lying was so general and so mean as at present, and there never was a country under the sun where it flourished as it does in this. The falsehoods daily spread before the people in our newspapers, while they are proofs of the mental ingenuity of those engaged in newspaper work, are insults to the American love for decency and fair play of which we boast. . . . If you ever become a subject of newspaper lying, and attempt to run down and expose all such lies, you will be a busy man, if you attempt nothing else.

And in an address at Harvard College, November 8, 1886, he said : "No public officer should desire to check the utmost freedom of criticism as to all official acts, but every right-thinking man must concede that the President of the United States should not be put

beyond the protection which American love for fair play and decency accords to every American citizen. This trait of our national character would not encourage, if their extent and tendency were fully appreciated, the silly, mean, and cowardly lies that every day are found in the columns of certain newspapers which violate every instinct of American manliness, and in ghoulish glee desecrate every sacred relation of private life."

Frederick Hudson, too, comments on the fact that "the newspapers are filled with personal allusions, and all sorts of charges are made against individuals and office-holders." "Let us have a national law of libel," he adds, "a national code that will benefit alike the press and the public. That will be a step in the right direction."[1] Unfortunately, however, that step cannot be taken until the powers of Congress are enlarged by an amendment to the Constitution.

The assertion by Mr. Field, that it is only in America that reputation has "lost all protection," is seemingly disproved by the following extract from a more recent English writer: —[2]

> Individual calumniation has undoubtedly become *the* offence of the day. For, take up a newspaper at almost any time, and there probably will be found some "Important Charge of Libel," a previous notification of which in the "contents bill" of the paper, will have materially increased its circulation *pro hâc vice*. In *The Times* of May 15th, 1880, no less than four libel cases were reported, and they occupied in the aggregate nearly one page of that journal!

In the article above quoted David Dudley Field suggested, as a remedy for the evil which he deplored, that a verdict by two-thirds of the jury in a civil action for

[1] Hudson, Journalism in the United States, p. 757.

[2] Flood on Libel and Slander (London, 1880), p. xxxiv.

libel be allowed by law; that a speedy trial be assured by giving libel cases preference on the calendar; that there be a given sum fixed as a penalty, to be awarded in all cases of ascertained and unjustifiable libel, unless the jury agree upon a larger sum; that the defendant be not allowed to attack the plaintiff's character at the trial except in strict justification of the libel; that the name of a responsible individual publisher of every newspaper be registered, and that the name of the writer be published at the foot of every article in which reflection is cast on the character of any person.

It cannot be denied that public interests demand some restraint upon the press in respect of defamation of character, but there is greater danger of too much than of too little restraint. Especially should the press be protected from frivolous and vexatious suits for libel. A worthless lawyer on behalf of a worthless client may, at pleasure, bring suit for damages; and although his case is equally worthless, he may compel the publisher to defend the suit at a considerable outlay of time and money. In an editorial entitled "Frivolous Libel Suits," the Philadelphia *Times* for February 9, 1888, said: —

The average cost of defending a libel suit, including the necessary time, preparation, employment of counsel, etc., is about $500, all of which the defendant must pay for the luxury of being buffeted in the courts on complaints which are wholly the inventions of suitors or lawyers. The *Times* has paid over $20,000 for the defence of libel suits since it was founded thirteen years ago, and there is a judgment of acquittal or for the defence in every case. In other words, this journal has paid over $20,000 as the price of exposing wrong-doers and battling with foolish suitors or worse than

foolish lawyers, to maintain the freedom of the press in the most liberal civilization of the world. There is no redress for this wrong against journalism, and there can be none until defeated libel suitors are made liable for all actual costs and expenses of the defendant when in the judgment of a jury the action is unwarranted.[1]

By statute in California the defendant in libel actions is granted the redress recommended by the *Times*. The Code of Civil Procedure (sec. 460, s) provides: —

In an action for libel or slander the clerk shall, before issuing the summons therein, require a written undertaking on the part of the plaintiff in the sum of $500, with at least two competent and sufficient sureties, . . . to the effect that if the action be dismissed or the defendant recover judgment, that they will pay such costs and charges as may be awarded against the plaintiff . . . not exceeding $500. . . .

In case the plaintiff recovers judgment, he shall be allowed as costs $100, to cover counsel fees, in addition to the other costs. In case the action is dismissed or the defendant recovers judgment, the defendant shall have the same allowance. But if the plaintiff recovers judgment for less than $300, he is not entitled

[1] Mr. Matthews, the accomplished editor of the Buffalo *Express*, has been making some interesting statements with regard to his experience in libel suits. In twenty-five years of professional labor, he has been sued for libel a dozen times, and in only one instance has the jury brought in a verdict against him. That was in a case tried in the plaintiff's own town, before a jury of his friends and neighbors, and they gave him $1,000 damages. This case, Mr. Matthews says, has been appealed; and what is more, he adds that he has never retracted or apologized after a suit against him had been begun. — New York *Sun*, May 29, 1887.

George Jones, of the New York *Times*, is quoted as saying: "I believe there are only six or seven suits pending against the *Times*. That's rather a small crop. This is a bad year for 'em. I 've been in the newspaper business thirty-five years, and have always had from four to sixteen libel suits on hand, and have never yet paid one cent damages." — *The Journalist*, March 13, 1886.

to costs. This provision of the California statutes seems reasonable, despite the objection that it would sometimes work hardship in the case of a poor man who was seeking redress for an attack upon his character.[1]

Another serious defect in the law as it stands at present seems to be the inequitable assumption that every publication which is false and defamatory is prompted by malice. The modern newspaper performs daily an important public service. It has become a part of our social, commercial, and political system, and we could not, if we would, go back to the time when the newspaper was a little weekly sheet containing a smattering of the news of a month before. Business and social interests demand prompt publication of all the news of all the world, and the editor cannot stop the press to verify every detail in the news of the day. Nevertheless, if in any detail an item of news is defamatory of an individual and false, the law conclusively assumes that the writer, the editor, and the publisher were all actuated by malice in making the publication. Let malice be affirmatively proved, and if the publication is false and injurious, no honest man will question the justice of a verdict against the libeller; but where actual malice is disproved and no damage has been sustained, a plaintiff has no just claim even for his costs.

The National Editorial Association, at its session in Denver in 1887, recommended the passage of a bill in the following form by the various State and Territorial Legislatures: —[2]

[1] The Provincial Legislature of Ontario, in 1887, passed a statute in some respects similar to that in California.

[2] Denver *News*, Sept. 16, 1887.

Be it enacted by the General Assembly of the State of ——:

SECTION 1. Where alleged libellous publications are made, malice shall not be presumed unless a retraction or apology is refused to be made, or unless the circumstances surrounding the publication and the refusal to retract or apologize conclusively prove malice.

There is another aspect of the question of malice which is sometimes lost sight of in the courts: it is that of malice on the part of the plaintiff. Many libel suits are little better than black-mailing schemes, as is indicated by the number of frivolous actions which are constantly being brought, in the hope of frightening newspaper publishers into settlements out of court. Where malicious charges of criminal libel are preferred, there is perhaps an adequate remedy by an action for malicious prosecution; but civil actions for alleged libel may be multiplied with impunity in most of the States, to the annoyance and serious inconvenience of newspaper publishers.

During the session of 1885 a bill was introduced in the Massachusetts Legislature, providing for the exemption from attachment of certain newspaper property. The bill grew out of libel proceedings instituted by a couple of young attorneys named Prince and Peabody against the Boston *Saturday Evening Gazette*. The *Gazette*, in its issue for March 21, 1885, published an editorial commenting upon a suit which had just been tried, wherein a young lady from New York vainly sought to recover damages from a Boston hotel proprietor for certain jewelry which had been stolen from her room. In the course of the editorial the writer said:—

In view of such advice, whatever may be thought of the necessity of a guardian for a young lady who scatters treas-

ure about in this promiscuous manner, it is clear that a whole batch of guardians would not have been amiss to take absolute charge of such advisers. . . . The advice she received from her lawyers was not worth a straw. . . . The hotel has received an excellent advertisement, and the only consolation that remains to the plaintiff, as she draws her purse and foots the bills, will be to make a resolution that in the future she will be extremely careful in relying upon callow legal advice, and will be very much more par ticular as to the use of locks and bolts.

It happened that Prince & Peabody were the legal advisers thus referred to. Mr. Peabody at once began a civil action against the *Gazette* for $300 damages, and Mr. Prince brought the case to the attention of the district attorney, with a view to criminal proceedings The constable was instructed to serve the writ in the civil action a few minutes before midnight, Saturday, March 28, and to attach the forms of two pages of the *Gazette.* Inasmuch as the paper is issued Sunday mornings, the publisher was required to deliver to his subscribers a four-page paper, in which the outside pages were reprinted upon the inside. Monday morning the forms were released from attachment, and a new edition of the *Gazette* was published. In the course of an editorial headed "Legalized Gagging," in the issue of Monday, the editor said: —

Every offer pointing towards ample security was contemptuously rejected. It was the cheap, every-day trick of a well-known class of New York pettifogging lawyers, and which has the contempt of all self-respecting men; but it served its purpose, and its instigator has achieved the questionable honor of having slyly, treacherously, and successfully impeded our business for the time being; of having injured the business of those who had sought our columns

for advertising purposes; and of having insulted our subscribers who were not concerned with him or with the small money value he places upon his wounded honor. . . . The real question at issue is not whether Mr. Peabody's honor is worth three hundred coppers or three hundred dollars; but whether every ill-informed, blundering, and irresponsible lawyer or other person seeking revenge for an injury, real or imaginary, has the power, when malice directs, to stop the business of responsible parties upon a moment's notice. . . . Every merchant, every individual in the community, is liable to become the victim of dishonesty or malice in this way. It should be made impossible, and if there is no law to meet such cases, the sooner laws are made the safer business will be from the interruptions of mischievous and malicious irresponsibles.

The mayor of Boston at once sent a communication to the Board of Aldermen (subject, however, to the approval of that board) removing from office the constable who served the writ, on the ground that the service of the attachment under the circumstances was an abuse of legal process; but the aldermen suffered the matter to lie upon the table, with the understanding that the officer should not be reappointed upon the expiration of his term. A bill was immediately introduced in the Legislature, the purpose of which was to prevent malicious attachments being placed upon newspaper property at such times and under such circumstances as to interfere with publication. This bill passed the House, but was adversely reported upon by the Senate Judiciary Committee. Its defeat was thus commented upon by the Boston *Journal*: — [1]

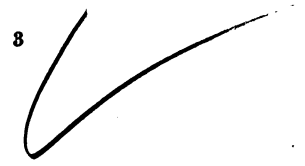
If there was any flaw in the bill, it ought to have been possible for the Senate Judiciary Committee to rectify it, and

[1] May 11, 1885.

if necessary to report the bill in a new draft, but its action in making an adverse report is a surprise. The protection which is asked for newspaper interests is essentially right and proper, and recent circumstances prove conclusively that it is necessary.

Nothing ever came of either the civil or criminal proceedings against the publisher of the *Gazette.*

A statute regarding costs, similar to that in California cited above, would go a long way toward securing to the press due legal protection against groundless actions for libel; and a law regarding exemption from attachment of certain newspaper property, such as that which failed of enactment in Massachusetts in 1885, would be a worthy companion to it in the statute books.



CHAPTER II.

THE CIVIL ACTION OF LIBEL.

EVERY attempt to define the word "libel"[1] has been more or less severely criticised, and the critic has in turn framed a definition of his own, only to find his definition treated like all the rest. The law of libel, indeed, has been called vague and uncertain, and difficult to reduce to exact principles. One reason for this is the fact that this branch of the law is based relatively less upon statutes, and more upon precedents, than other divisions of the law; and to this fact perhaps may be attributed in some measure the difficulty of finding a satisfactory definition. Under these circumstances the writer may perhaps be pardoned for not offering a definition of his own, contenting himself with quoting some of the attempts of other writers upon the subject.

"A libel is a censorious or ridiculing writing, picture, or sign, made with a mischievous and malicious intent towards government, magistrates, or individuals." This definition was given by Alexander Hamilton in the course of his argument in the famous case of the People *v.* Croswell,[2] and the definition is as noted as the

[1] The word is derived from the Latin *libellus*, which is diminutive of *liber*, a book. It acquired its bad signification from the phrase *libellus famosus*, a defamatory book or pamphlet, the adjective having in time been dropped in common use.

[2] 3 Johnson's Cases (N. Y.), 354. (See *ante*, p. 20.)

case itself. In a curious little book, published in 1674, and printed in old English text, the writer says: "A libel is taken for a scandalous writing, or act done, tending to the defamation of another."[1] These definitions mark the distinction between slander and libel; that while slander is any form of defamation addressed to the ear, libel is any form of defamation addressed to the eye. A libel may be contained in a picture,[2] and it is also a libel to scandalize any one by hanging him in effigy or by carrying a fellow about, dressed with horns, bowing at the plaintiff's door.[3] Burrill briefly defines a libel as "written defamation," while to Jeremy Bentham is attributed the following despairing attempt at a definition: "A libel is anything published upon any matter of anybody which any one was pleased to dislike." Lord Kenyon was equally indefinite: "A man may publish whatever a jury of his countrymen think is not blamable." In several of the States the difficulties of the subject are met by statute. Thus the New York Penal Code: —

§ 242. — A malicious publication, by writing, printing, picture, effigy, sign or otherwise than by mere speech, which exposes any living person, or the memory of any person deceased, to hatred, contempt, ridicule or obloquy, or which causes or tends to cause any person to be shunned or avoided, or which has a tendency to injure any person, corporation or association of persons, in his or their business or occupation, is a libel.

Dakota legislators are more brief: — [4]

[1] Sheppard on Slander, p. 282.

[2] The Queen *v.* Alexander M. Sullivan (*Weekly News*), 11 Cox's Crimina Law Cases (Eng. 1868), 44 and 51.

[3] Sir William Bolton *v.* Deane, referred to in 2 Shower (Eng. 1684), 314.

[4] Penal Code, § 6511.

Any malicious injury to good name, other than by words orally spoken, is a libel.

A writer in Sell's "Dictionary of the World's Press"[1] presents a good definition, which, shorn of its tautology, is as follows:—

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.

These definitions in general terms apply equally to criminal libels and libels considered in respect to the injury which they cause to individuals.

The law of libel has many things in common with the law of slander. The former wrong, however, is considered the more serious, inasmuch as it indicates greater malice, is less likely to be a result merely of sudden passion, and is generally more permanent in its character and more widely propagated. Some words, as "swindler" and "rascal," have been held to be actionable when written and published, but not actionable when merely spoken, unless some special damage is shown to have resulted from their use. "To constitute legal slander," says Christian in his notes upon Blackstone, "the words must impute a precise crime; hence, it is actionable to say a man is a highwayman, but it is not so to say he is worse than a highwayman." On the other hand, either charge would doubtless be held to be libellous if published in a newspaper.

[1] London, 1887, p. 72.

A libel is both a tort and a crime. It is a crime or public wrong, inasmuch as it tends to create a breach of the peace, and as such it is indictable; it is a tort, or private wrong, inasmuch as it tends to injure one's reputation by exposing him to public hatred, ridicule, or contempt. The remedy for the private wrong is a civil action for damages.[1]

The truth is in nearly every State in the Union a complete defence in a civil action for libel.[2] The gist of the action is the injury to reputation; and if the defamatory charge is shown to be true, the person against whom it was directed has at best suffered an injury to a reputation to which his true character did not entitle him.

Falsehood, malice, and injury are said to be essential in civil or criminal proceedings for libel. But the law assumes the falsity of a defamatory publication until the truth is shown; and if the publication is false, malice is also an assumption of law, unless the publication is privileged.[3] Finally injury is assumed where the language is false and defamatory, injury to reputation, without pecuniary loss, being generally sufficient to sustain the action.

The word "malicious" is made a part of most definitions of libel, and is employed in every declaration, complaint, and indictment. Most text-writers furthermore maintain that malice is essential to an action or prosecution for libel; but the word "malice," as thus used, means simply the absence of legal excuse. Save as affecting the amount of damages, the question

[1] An injunction will not issue to restrain the publication of a libel. (See p. 27.) Kidd *v.* Horry, 28 Federal Reporter (1886), 773.

[2] See Chap. IX. on Defences.

[3] See Chap. VII. on Privileged Publications.

of actual malice, in the sense of personal ill-will or wicked intent, is only material when the defendant claims that the publication is privileged. If the publication is false and defamatory, but consists in a report of judicial proceedings or lawful comments upon matters of public interest, or is otherwise privileged, the burden of proving actual malice is thrown upon the plaintiff; but if the publication, being false and defamatory, is not thus privileged, malice is a conclusive assumption of law, and the defendant cannot show in his defence that the matter was published without malicious intent. If, on the other hand, the publication is true, it is generally immaterial in a civil action for libel whether it was dictated by malice or not.

The San José (Cal.) *Daily Mercury* published, April 26, 1870, an imaginary interview with James Lick, the millionnaire. Mr. Lick is represented as giving an account of his life. He relates his visit to San Francisco when it was a little Mexican hamlet, and tells how he loaned $100 to a Yankee trader named Jones, who gave as security a considerable amount of land in the vicinity. Mr. Lick is supposed to continue: —

"A few days afterward I took a trip down the coast, and when I returned Jones was — will you believe he could have done so dishonorable a thing? — dead. Yes, he had died in less than ten days from the time he first got his digits on my hundred dollars, without ever even hinting to me that he was on the eve of doing such a thing. But you can't trust some people. I immediately saw that I had been played, and that mercilessly. The next thing was to sell the various sandhills, which, by force of circumstances and against my will, had become mine. But it was impossible to dispose of them. . . . Imagine my surprise when one morning a genteel-looking man, who evidently had money, came

to where I was employed, and after asking me if I was the owner of a certain piece of property, coolly offered me fifty thousand dollars for it. I could hardly believe my ears; so inquired around, and found that I had been asleep to what had been going on for some months, as concerned real estate, and that property had advanced a thousand-fold in value in a very short time. So you see, by good management and great business tact, I possessed the wealth which to you seems so vast, but which to me appears insignificant in comparison with what enterprise, such as I have exhibited, should have secured."

Learning that Mr. Lick was offended by the publication, the editor of the *Mercury* published a disclaimer of any intention of giving offence, but Mr. Lick brought suit for $1,000 damages. The District Court held that "inasmuch as the presumption of malice was fully rebutted, and there was no proof of special damage, it was the duty of the jury to find a verdict for the defendants." The Supreme Court, however, held that "if a publication be libellous, and not privileged, the law implies that it was malicious. This is not a mere presumption, which may be wholly overcome by proof, but it is a legal conclusion, which cannot be rebutted."[1] A new trial was accordingly granted.

Malice may in most States be shown by other publications of the same tenor in the same paper, whether made before or after the publication upon which suit is based.[2] It has sometimes even been held that evidence of such publications made by the defendant after the commencement of the action may be admitted for the same purpose. But when other publications than that upon which suit is based are introduced in evidence to

[1] James Lick *v.* John J. Owen *et al.*, 47 Cal. 252.

[2] Edwin Gribble *v.* Pioneer Press Co., 34 Minn. (1885), 342.

show malice, the jury should be cautioned by the Court not to award any damages on account of them, for they may be the subject of a separate action.

If the language of the alleged libel is exaggerated or intemperate, this fact is evidence of malice. Falsehood will not alone show malice, but if it appears that the writer or publisher knew that the matter was false, actual malice will be presumed. It has been held in New York that the refusal of the editor to publish a retraction does not tend to show malice or to enhance the damages as against the publisher.[1] In New Hampshire, where the Manchester *Union* charged one Barnes with being a thief, and the editor refused to publish, except as a paid advertisement, a card signed by two men, expressing their belief in Barnes' innocence, it was held that the refusal to publish the card gratuitously tended to show malice.[2] Malice may be shown by the defendant's conversation.[3] It has also been held in some cases where the defendant undertakes to show the truth of the libel, and fails in his proof, that there is evidence of malice in the publication of the libel; but by statute in Massachusetts, Illinois, Michigan, Wisconsin, and Iowa, and perhaps in some other States, an unsustained allegation of truth is not of itself proof of malice.

As has been already stated, actual malice never becomes essential to the support of the action except when the defendant claims that the alleged libel was a privileged publication. The existence of actual malice

[1] Isaac W. Edsall *v.* James Brooks *et al.* (New York *Evening Express*), 2 Robertson (1864), 414; 33 Howard's Practice Reports (1866), 191.

[2] Barnes *v.* Campbell *et al.*, 60 N. H. (1880), 27.

[3] L. E. Knapp *v.* W. I. Fuller *et al.* (*Addison County Journal*), 55 Vt. (1883), 311.

may, however, be shown for the purpose of enhancing the damages, as may also the absence of actual malice in mitigation of damages.[1] It was accordingly held in a case in Michigan that where the proprietors of a newspaper had acted with prudence in the selection of editors and other employees, they could not be compelled to pay punitive damages upon the publication of libellous matter by such employees.[2] In a more recent case in the same State the converse of this proposition was maintained. The Detroit *Evening News* published the bill of complaint in certain divorce proceedings, in which Judge Reilly was named as implicated in a charge of adultery. In connection with the report were published comments upon the case, unfavorable to Judge Reilly, which were inspired by political hostility. The Court ruled that where the proprietor of a newspaper has retained employees who ought not to have been kept, he is liable in punitive damages if, through the recklessness or malice of such employees, a libel has been published.[3] In every case a party who has been actuated in making the publication by actual malice is himself subject to punitive or exemplary damages, so called.

A publication is not deemed libellous unless it is directed against some particular individual or individuals. Defamation against mankind in general, or against an entire order or large class of men, is not actionable. Thus, Paul in his epistle to Titus stated: "One of themselves, even a prophet of their own,

[1] Dewitt C. Littlejohn *v.* Horace Greeley (New York *Tribune*), 13 Abbotts' Practice Reports (1861), 41.

[2] Donald McArthur *v.* Detroit Daily Post Co., and Daily Free Press Co., 16 Mich. (1868), 447.

[3] Cornelius J. Reilly *v.* James E. Scripps, 38 Mich. (1878), 10.

said, The Cretians are always liars. . . . This witness is true."[1] This charge of falsehood would not, however, give a right of action to any individual inhabitant of Crete; but where the editor of the New York *Commercial Advertiser* preferred a charge of falsehood against James Fenimore Cooper in a review of Cooper's "Naval History of the United States," an action for libel was maintained, for in the latter case an individual was singled out as the object of the charge.[2]

The plaintiff must show that the libellous matter refers to him. The New York *Herald* published, May 13, 1877, strictures upon an establishment carried on by Gaff, Fleischmann & Co., in Queen's County, denominating it a "swill milk" establishment. Louis Fleischmann was not named or described in the article, but he brought suit against the proprietor of the *Herald*, denying in his complaint that he had ever been a copartner in any business such as that described in the libellous article, but alleging that the article was a libel upon him. The Court held that he had no right of action; that it appeared from the complaint itself that the libel was not published of him. "It is as if the plaintiff should say, the defendant, intending a libel on him, published a libellous article concerning another."[3]

Defamatory matter may, however, be the subject of an action where the object of the writer's attack is not named. The following somewhat ambiguous advertise-

[1] Titus i. 12, 13.

[2] "It charges the plaintiff with falsehood, an imputation which, when published in a written or printed form, has been holden libellous ever since Austin *v.* Culpeper was decided" (in the reign of Charles II.).—Cooper *v.* Stone, 24 Wendell (N. Y. 1840), 441.

[3] Fleischmann *v.* Bennett, 30 N. Y. Supreme Court Reports, 200; 87 Court of Appeals Reports, 231.

ment was published in the "Personal" column of the New York *Herald*, November 19, 1876: —

The black-mailing crowd in West Twenty-fifth Street had better beware, cautious 51 and 53.

Phœbe Robertson brought suit for $10,000 damages, and showed that she kept a boarding house at 51 and 53 West Twenty-fifth Street, New York, claiming that the advertisement had injured her custom. She recovered a verdict for the full amount claimed; but a new trial having been granted on account of the wrongful admission of evidence, the case was settled out of court, by the payment of a comparatively small sum, without a second trial The Court held, however, that the language was libellous *per se*, and that the verdict was not necessarily excessive.[1]

In the *Fireman's Journal*, September 4, 1880, was published the following paragraph: —

NEW YORK DEPARTMENT. — . . . The entire staff of harness makers of the department, being three in number, have been dismissed for alleged thefts of leather belonging to the department. The rascals ought to feel thankful for getting off without more severe punishment.

William H. Dwyer, John B. Ryer, and another, harness makers, had just been discharged from the department. It was held by the Court of Common Pleas, in the suits of Dwyer and Ryer against the Fireman's Journal Company, that the words complained of constituted a charge of theft, and that they referred to the plaintiffs with sufficient distinctness to sustain an action.[2]

Where the libel is published without giving names,

[1] Robertson *v.* Bennett, 44 N. Y. Superior Court Reports, 66.
[2] 11 Daly, 248, 251.

the plaintiff is allowed considerable latitude to prove that he was intended as the object of attack. Parties, however, often err in displaying too great readiness to apply defamatory language to themselves. If the charge is that some one, not named, has been guilty of larceny, it is as if the plaintiff should cry out, "I am a thief; therefore the writer means me!" But it is not necessary that the libel should be published in the English language, or that all the world should understand what person the writer had in mind; it is enough if the plaintiff's friends and acquaintances know that the libel was directed at him. Wong Chin Fou, editor of the *Chinese American*, in his paper, June 14, 1883, accused Chin Fou Tip of having twice conspired with others to take the editor's life and having twice attempted it, and alluded to him as a cut-throat, a sneak thief, and a member of the Young Men's Christian Association. Chin Fou Tip was further charged with using the influence of the Young Men's Christian Association to obtain employment, and then stealing from his employer $3,000 worth of merchandise, in company with another man, and finally robbing his partner in crime of his share of the booty. Chin Fou Tip asserted that in consequence of the libel his friends deserted him, he lost an appointment promised him by the Chinese consul, and his health was seriously affected, but he was not required to allege that all the inhabitants of New York had read or could read the charges contained in the offending newspaper. He received a verdict for $1,000 in the Supreme Court.[1] In another case in New York the editor of the Albany *Register* was sued for publishing the following in his paper, December 5, 1809: —

[1] See the New York *Times* for March 4, 1885.

AFFIDAVITS. — 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 at the sign of the Bible is no slouch at swearing to an old story.

The Court held that the plaintiff might prove that he kept a bookstore, at which a Bible was the sign, and that he was intended in the paragraph complained of. It was also held that the language was libellous.[1]

Where the plaintiff is neither named nor specifically described, the action can still be maintained if he can show that he is included in a class of persons who are libelled under a general description. Thus where it is asserted that at all the malt houses "on the hill" in Albany, water taken from stagnant pools containing the putrid bodies of dead animals is used in the manufacture of beer, each of the brewers whose malt houses are "on the hill" has a right of action for the defamation.[2] But it has been held in another case in New York that where the libel is directed against the members of an association who have no common pecuniary interests wherein they could sustain damage, the members cannot jointly maintain an action. In this case the libel was upon the members of a volunteer hose company, who served without compensation. The ground of the action was the following paragraph, published in the New York *Sun*: —

FIREMEN. — *A singular case of remorse of conscience. — One cent reward for the thieves.* — A few days since a hat was stolen from me by some of the members of 12 Hose Company, and not being much in need of it, I had relinquished all claims to it, when, lo and behold, it appeared hung up in front of 23's hose carriage house, filled with the

[1] Steele *v.* Southwick, 9 Johnson, 214.

[2] Ryckman *v.* Delavan, 25 Wendell (N. Y. Court of Errors, 1840), 186.

brains of the penitent thieves, they having nothing further to offer in atonement for the crime. I forgive them the offence, and advise them to call and take them away, as I apprehend from their subsequent acts that they now fully realize their loss. JOSEPH W. STAGG.

All the members of the company, against some of whose members the larceny was charged, joined as plaintiffs, but the Court of Common Pleas held that they had no right of action.[1]

Shortly before the close of the War of 1812, the Albany *Argus* published a charge that the men in a certain New York regiment, by advice of their officers refused to muster for service when ordered to do so by the governor. An ensign in the regiment thereupon brought suit against the editor, but the Court held that a civil action could not be maintained by an officer of a regiment for a publication reflecting on the officers generally, unless he should show that he had suffered some special damage as a result of the publication. "The offender, in such case," said the Court, "does not go without punishment. The law has provided a fit and proper remedy, by indictment."[2]

On the other hand, it was held in Colorado that a member of a jury might maintain an action for a libel directed against the jury as a body. The Denver *Rocky Mountain News* published the following regarding the acquittal of a prisoner charged with robbery:—

We are not a little surprised at Judge Wells' lenient charge in the case. We are still more so at the infamous verdict of the jury. . . . We cannot express the contempt which should be felt for these twelve men, who have

[1] John F. Giraud *et al. v.* Moses S. Beach *et al.*, 3 E. D. Smith (1854), 337.
[2] Sumner *v.* Buel, 12 Johnson, 478.

thus not only offended public opinion, but have done injustice to their oaths.

A member of the jury in the robbery case brought suit for libel against the editor of the *News*, and was awarded a verdict of one cent. The editor carried the case before the Supreme Court of the Territory on a writ of error, but the judgment was affirmed.[1]

A corporation can recover damages for a libel precisely as an individual.[2] As has been already seen, a corporation can also be required to pay damages for libels contained in a newspaper which the corporation publishes.[3]

If loss of reputation or pecuniary loss is not a necessary consequence or a natural and proximate result of the publication, the action cannot be maintained.[4] Thus it has been held that where the alleged libel resulted in mental distress, causing sickness and consequent pecuniary loss, the words not being libellous *per se*, the plaintiff could not recover damages; in other words, loss caused by mental distress is not a "natural and proximate result" of the publication. So also where the defendant's publication caused a singer to break an engagement to sing in oratorio, for fear of being hissed, Lord Kenyon held that the damage was too remote to sustain an action brought by the manager of the oratorio.[5]

A novel case, involving a similar question, was decided

[1] Martin *v.* Byers, 2 Col. (1875), 605.

[2] Shoe and Leather Bank *v.* Thompson (*Thompson's Bank Note and Commercial Reporter*), 18 Abbotts' Practice Reports (N. Y. 1865), 413; Trenton Mutual Life and Fire Insurance Company *v.* Lewis Perrine (*Weekly Trentonian*), 3 Zabriskie (N. J. 1852), 402.

[3] McArthur *v.* Detroit Daily Post Co. *et al.*, 16 Mich. (1868), 447.

[4] See Chap. VI. on Language which is Libellous.

[5] Ashley *v.* Harrison, 1 'Espinasse (Eng. 1793), 48.

by the Supreme Court of Minnesota in January, 1885. Joseph R. Hoflin published in the St. Paul and Minneapolis *Advertiser* the following item : —

WANTED — E. B. Zier, M. D., to pay a drug bill.

It was published in a part of the newspaper with the heading, "Wanted," and among other similarly suggestive items, of which the following is a specimen: "Wanted —— to pay his room rent, and not go dead-heading his way." It appeared in evidence that a copy of this "want" was affixed to a postal card, and sent to a young woman to whom Dr. Zier was engaged to be married. The Court held that the words were not libellous on their face, but that they might become so from the circumstances under which they were published, and that this was a question for the jury. It was further held that if the words were found libellous, and if the sending of the item to the doctor's sweetheart was a natural consequence of its publication, then the defendant was liable, but that the latter question was also to be submitted to the jury.[1] Judgment for the plaintiff in the court below was affirmed. A verdict in the sum of $1,500 was held not to be excessive.

Having considered who may be plaintiffs in libel proceedings, the question is a natural one who may be defendants. This question may be answered generally by stating that any person who participates in any manner in the publication of the libel is responsible for the damages it causes. This responsibility extends to the author, the printer, and the distributor. Liability, both civil and criminal, attaches thus to the writer,

[1] Zier *v.* Hoflin, 21 Northwestern Reporter, 862; 33 Minn. 66.

whether he be a reporter, a telegraphic correspondent, an editorial writer, or a stranger. It attaches also to one who writes down the libellous matter from the dictation of the author; to the editor, provided the matter was actually or constructively under his supervision; to the printer, including the compositor, stereotyper, and pressman; to the proprietor of the newspaper, even though he were absent or ignorant of the fact or nature of the publication; to the news agent; to the carrier who delivers the papers at the residences of subscribers; and to any other person who, knowing its character, sells, gives away, or lends a copy of the libel, or who merely reads the defamatory matter to another. In the case of the writer, he is conclusively presumed to know the actionable quality of the copy which he prepares. The editor and proprietor, too, are not allowed to plead in defence that they were not aware of the defamatory nature of the publication, or that the matter was published without their knowledge or against their orders. On the other hand, the compositor may show in defence that the copy was given to him in such "takes" that he could not know its general character; while the stereotyper, pressman, and carrier may avoid responsibility by proving that they performed their duties without being aware that the newspaper contained libellous matter. In the latter cases, however, the burden of proof is on the defendants to show that they did not wilfully aid in publishing or circulating the libel. A government letter carrier would in no case be liable, for it is a part of his duty not to know the contents of the letters and newspapers which he carries.[1]

[1] See Townshend on Slander and Libel, pp. 157, 166–168; Odgers on Libel and Slander, pp. 156–160, 359, 384. See also Chap. V. on Publication.

The writing and printing of a libel do not together necessarily amount to a publication, and until the defamatory matter reaches the hands of some person other than the original author, and the person whose character is the object of attack, it cannot be said to be published. When, finally, the libel is brought under the notice of some third person, then the act of the writer, the printer, the proprietor, the dealer, and the gratuitous circulator, each becomes an act of publication, which renders each party liable for the resulting damages. Abe Woody, a deputy United States marshal, was indicted in Texas for reading to others and exhibiting, October 5, 1882, copies of the *Grand Army Journal*, published in Washington, containing the following article: —

TEXAS. — *Ex-Governor Davis, and his pliant Burch, the indicted mail thief, who ought to have been sent to the penitentiary, but who escaped by victimizing his unsophisticated youthful fellow clerk.— The scoundrel now in this city brazenly seeking to retain his wife in a Federal office in Texas, by defaming the character of certain Republican gentlemen of the highest standing and reputation.* — There is in this city from Fort Worth, Texas, an individual who, although he claims to have served in the army of the Union, is nevertheless a disgrace to any decent community, and whose brazen impudence is equalled only by the infamy of his unpunished mail thefts while serving Uncle Sam in the capacity of a clerk in a Texas post office. We write this notice of the fellow with a view to enlightening First Assistant P. M. General Hon. Frank Hatton, and the department generally, upon the true status of this penitentiary-deserving mail robber of registered money packages. . . .

The Court held the article to be libellous *per se*, and also ruled that the exhibition of copies of a libel-

lous publication is sufficient to sustain an indictment for publishing the libel. Woody was convicted and fined $250.[1]

One who uses defamatory language orally is also liable as a publisher of a libel, if the language is used under such circumstances as would naturally result in their publication in printed form. Thus, where a speaker at a public meeting, at which reporters are present, uses defamatory language, he, as well as the reporter, printer, publisher, and dealer, is liable for the subsequent publication of the speech or any part of it. So also in the case of an interview containing slanderous reflections upon another.[2]

A telegraph company assumes the same responsibility for defamatory language contained in a news despatch which is borne by the writer and publisher. The following despatch was sent from Halifax to the St. John *Daily Telegraph*, over the wires of the Dominion Telegraph Company: —

HALIFAX, Jan. 6, [1879.] — John Silver & Co., wholesale clothiers, of Granville Street, have failed; liabilities heavy.

The clothing firm sued the telegraph company for libel, and recovered a verdict for $7,000. Upon an appeal, Chief Justice Ritchie, of the Supreme Court of Canada, said: "In the transmission of messages for publication, especially letters and news for the public newspapers, it would seem that telegraph companies assume a responsibility similar to that of publishers." In this case it was assumed that the company had

[1] The State *v.* Woody, 16 Texas Court of Appeals Reports, 252.

[2] See the case of the People *v.* Clay, cited in Chap. V. on Publication. Wheaton *v.* Beecher (Detroit *Evening News*, March 17, 1886), 33 Northwestern Reporter, 503.

written as well as forwarded the despatch, but the Court was of opinion that if the despatch had been written and ordered sent by a third party, it would at most only have affected the amount of damages in a suit against the telegraph company. A new trial was, however, granted on the ground that the verdict was excessive in amount.[1]

The person who has been libelled may sue one or all of those responsible for the publication, either jointly or separately. It is no defence in an action against the publisher of a newspaper in which a libel has appeared, to show that a verdict against the author of the same libel has been recovered and paid, nor *vice versa*. A defendant against whom damages have been recovered cannot compel another person, who might have been sued jointly with him, but who was not sued to pay any share of the damages; for it is a legal maxim that "there is no contribution among wrong-doers." Thus, if the proprietor of a newspaper is compelled to pay a verdict on account of the negligent or malicious act of an editor, he cannot compel the editor to reimburse him for his loss; likewise, if a reporter suffers fine and imprisonment for something which he has written under the orders of his city editor or managing editor, he is without redress. Furthermore, the printer or publisher of a libel cannot recover the contract price for printing a libel; nor can an action be maintained for the breach of a contract to furnish manuscript of defamatory matter, nor for pirating a libellous publication.[2]

[1] Silver *et al. v.* Dominion Telegraph Co., 10 Canada Supreme Court Reports, 238.

[2] Townshend on Slander and Libel, p. 550, *note*.

The plant of the Manistee, Mich., *Times* was mortgaged to Smith W. Fowler to secure the fulfilment of a certain agreement. Under this agreement, Mr. Fowler was given the use of one-half column of space in the paper for five years for advertising and reading matter, and the mortgagors agreed that the columns of the *Times* should not be used to publish matter detrimental to him. Mr. Fowler sent two items for publication in his half-column, in one of which he asserted that at a public meeting the publisher of the *Times* was pronounced unworthy the confidence or esteem of the people. Mr. Fowler claimed that the editor refused to publish these items, and he also claimed that several articles disrespectful to him had been published in the paper. For these violations of the agreement he sought to foreclose the mortgage, which had meanwhile been assigned to Richard Hoffman. The Court held that Mr. Fowler "had no right to require that the publisher of the *Times* should admit to its columns an article reflecting upon himself. . . . It is immaterial that Fowler had previously been badly treated by the paper." The agreement was held to be too vague to be enforced.[1]

Hiram Atkins, editor of the Montpelier, Vt., *Argus and Patriot*, has given to the world more interesting libel cases than all the other newspaper men who ever lived in that State. One day in the summer of 1867 he received a call from James N. Johnson. Mr. Johnson's errand was to secure the publication in the *Argus and Patriot* of the following article: —

A JACK AT ALL TRADES EXPOSED. — A certain would-be prominent individual living in this county, who holds the

[1] Fowler *v.* Hoffman, 31 Mich. (1875), 216.

office of assistant assessor, and who has acted in almost every capacity within the last twenty years, from a professed minister of the gospel to swindling his fellow-men out of their honest dues by thousands, deserves to have some features of his dark and hypocritical character portrayed to the public as they really are. His form, which is of the Newfoundland dog type, with a sonorous voice conceals from the public gaze somewhat as empty a head and as false a heart as can be found in a lifetime, even in this corrupt generation of radical politicians and wolves in sheep's clothing, who profess to be ministers of Christ. This pseudo minister, radical politician and federal tax-eater, has this year been chosen president of the Vermont Agricultural Society, a position he must have crawled into by hypocrisy and deceit, for the society would not have so disgraced the State had they known what they were doing. . . . By means of singeing and curling the short wool with lighted paper, and then coloring it thoroughly with lamp-black and some other ingredients, known only to the initiated, a reddish cast was given to the sheep, almost exactly like the genuine Merino, and they were exported and sold as such by the reverend gentleman as a legitimate business. . . .

Mr. Atkins read the article through, and although no names were used, he was aware that it was intended as a biography of the Rev. John Gregory. He suspected, however, that some portions of the article might be deemed libellous, and informed Mr. Johnson that he could only publish the matter on condition that the latter, and a number of other gentlemen who were interested in the publication, should agree in writing to indemnify the editor for all damage which might result to him from it. The agreement was drawn up and signed; the article was published July 25, 1867; Mr. Gregory sued and recovered $1,200 damages from Mr.

Atkins,[1] and then Mr. Johnson and his friends coolly declined to make good their written promise. The editor brought suit to enforce the agreement, but learned in the courts that a promise designed to protect him against the consequences of his own wrong-doing cannot be enforced in law.[2] This is under the general principle that indemnity cannot be recovered by one of two joint wrong-doers against the other. Book publishers, however, usually stipulate in their contracts with authors that the latter shall make good to them any loss or expense to which they may be put in the event of anything libellous being found in the work to be published under the contract; but such portion of the contract has no legal effect.

The plaintiff in libel actions is required to sustain the burden of proving that the defendant published the matter complained of, as well as that he, the plaintiff, is the person referred to in the publication. If the Court rules that the matter was published on a privileged occasion, the plaintiff must also affirmatively show that the defendant was actuated by express malice. In cases where special damage is material,[3] the burden is on the plaintiff to show that he has suffered such special damage. The defendant, on the other hand, must sustain the burden of proving that the occasion was privileged,[4] if such is his defence, or that the publication is true, or that the plaintiff's claims have been settled out of court after the publication of the libel.

Every sale of a copy of the newspaper containing

[1] Gregory *v.* Atkins, 42 Vt. 237.
[2] Atkins *v.* Johnson, 43 Vt. 78.
[3] See Chap. VI. on Language which is Libellous.
[4] See Chap. VII. on Privileged Publications.

the libel is a distinct publication of it, for which the defendant is liable in damages. The party who has been libelled has a right to a separate action for each and every such publication, but the Court will generally interfere to protect the defendant from unnecessarily vexatious proceedings. This will be done by requiring the plaintiff to consolidate his actions.

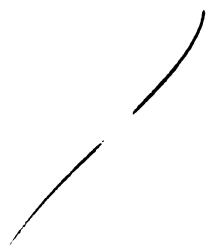
In Arkansas and Connecticut the action is barred by statute unless brought within three years from the time when the cause of action accrues. The action is similarly barred in two years in Dakota, Florida, Idaho, Indiana, Iowa, Maine, Massachusetts, Michigan, Minnesota, Missouri, Nevada, New Hampshire, New Jersey, New York, Oregon, South Carolina, Vermont, Washington Territory, and Wisconsin. In the remaining States and Territories the action must be brought within one year. The "time when the cause of action accrues" is in general the time when the libel was published, but the sale of a single copy at any time after the action shall have been barred will revive the cause of action as to the person so selling a copy.[1] If the person defamed is absent from the State at the time when the libel is published, the statute of limitations does not generally commence to run until his return within the jurisdiction.

At common law an action for libel abates upon the death of either party.[2] If judgment is entered for the

[1] Duke of Brunswick *v.* Harmer, 14 Adolphus & Ellis' Reports (Eng. Queen's Bench, 1849), 185. (See this case cited at length in Chap. IX. on Defences.)

[2] Struthers *v.* Peacock *et al.* (Philadelphia *Evening Bulletin*), 11 Philadelphia Reports (1876), 287. By statute in several States, including Ohio, Maine, Maryland, and Iowa, the law respecting the abatement of libel actions has been modified. Under a recent English decision, an action for slander of title (see Chap. VI. on Language which is Libellous) survives the death of the defendant. (Hatchard *v.* Mège *et al.*, 18 Queen's Bench Division [1887], 771.)

plaintiff, and the plaintiff dies pending an appeal, his representatives may be substituted without abatement of the action; but if the defendant dies pending an appeal from a judgment in favor of the plaintiff, the judgment dies with him.



CHAPTER III.

CRIMINAL LIBEL.

Most libels which are civilly actionable are indictable also as crimes.[1] Wherever a suit for damages on account of a libel may be maintained without express proof that the plaintiff has suffered some actual pecuniary loss on account of the publication — in other words, wherever the language is libellous *per se* — the libel may also be the subject of an indictment. The ground of the criminal prosecution in these cases is the tendency of the defamatory language to provoke a breach of the peace,[2] but it is equally a criminal libel if no breach of the peace actually takes place, or if the person libelled could not, on account of physical infirmity, resent an injury. In cases where the plaintiff, in order to maintain a civil action for libel, must show that he has suffered some special damage, as in cases

[1] But a libel is not an "infamous" crime within the meaning of the term as used in the New York Code of Civil Procedure, limiting the jurisdiction of the Albany Court of Special Sessions; that court accordingly has jurisdiction. People *v.* John Parr (*The Owl*), 42 Hun (N. Y. Supreme Court, 1886), 313. The Supreme Court of the District of Columbia in the case of the United States *v.* Buell (1 McArthur, 502), decided in 1874 that libel was an infamous crime, and, therefore, beyond the jurisdiction of the Police Court of the District, but in the more recent case of the United States *v.* Marshall (Washington *Law Reporter*, Aug. 17, 1887), this decision is overruled.

[2] Culpepper, Va., March 1. — Edwin Barbour, editor of the Piedmont *Advance*, and Ellis B. Williams, son of George Williams, editor of the Culpepper *Exponent*, engaged in a shooting affray this morning as the result of caustic editorial exchanges. Young Williams was killed, and Barbour very seriously wounded. — New York *Morning Journal*, March 2, 1888.

of "slander of title,"[1] no indictment can be sustained. In such cases a suit for damages offers an adequate remedy.

But there is a large class of cases where publications are punishable as crimes, although not civilly actionable. Criminal libel, indeed, was defined by Lord Campbell as "a publication which, in the opinion of twelve honest, independent, and intelligent men, is mischievous and ought to be punished." Under this definition, and under the statutes and decisions of the courts, are included seditious, blasphemous, and obscene libels, and libels upon the dead, none of which are actionable at the suit of an individual. Mr. Greenleaf, in his work on Evidence,[2] enumerates the following cases in which libel is a crime: —

"According to Russell,[3] and to the authorities to which he refers, the crime of libel is committed by the publication of writings blaspheming the Supreme Being; or turning the doctrines of the Christian religion into contempt and ridicule; or tending, by their immodesty, to corrupt the mind, and to destroy the love of decency, morality, and good order; or wantonly to defame or indecorously to calumniate the economy, order, and constitution of things which make up the general system of the law and government of the country; to degrade the administration of government or of justice; or to cause animosities between our own and any foreign government, by personal abuse of its sovereign, its ambassadors, or other public ministers; and by malicious defamations expressed in printing

[1] See Chap. VI. on Language which is Libellous.
[2] Greenleaf on Evidence, vol. III., § 164.
[3] Russell on Crimes, vol. I., p. 321.

or writing, or by signs or pictures, tending either to blacken the memory of one who is dead or the reputation of one who is living, and thereby to expose him to public hatred, contempt, and ridicule. This descriptive catalogue embraces all the several species of this offence which are indictable at common law; all of which, it is believed, are indictable in the United States, either at common law or by virtue of particular statutes."

An additional class of cases in the nature of criminal libel is provided for in New York by section 435 of the Penal Code. The section provides that any person who, with intent to affect the market price of public funds, or of stocks, bonds, gold or silver coin or bullion, or any merchandise whatever, "knowingly circulates any false statement, rumor, or intelligence, is punishable by a fine of not more than five thousand dollars, or by imprisonment for not more than three years, or both." Under this section of the Penal Code, Charles D. Keep, of the *Wall Street Daily News*, was arrested June 2, 1885, at the instance of Cyrus W. Field, for the publication of a paragraph charging the management of the Manhattan Elevated Railway Company with paying unearned dividends on the stock of the company in order to bull the market. Mr. Keep vainly endeavored to bring the case to a trial, but the proceedings against him, still hanging fire in the New York courts, ended with his death in 1887.

The provision of the New York Penal Code under which the prosecution of Mr. Keep was conducted is not peculiar, except in form, to the State of New York. Mr. Townshend states the law upon this subject in a general way, as follows: "As regards a corporation

engaged in manufacturing, trading, or banking, or other occupation in which credit may be material to its success, there language concerning such a corporation calculated to injuriously affect its credit must *necessarily* occasion it pecuniary injury, and in such a case an action may be maintained by the corporation without proof of any special damage."[1] Not only can an action for damages be maintained, but a criminal prosecution may be instituted by the proper officer of the corporation against the author or publisher of the libel.

A corporation may also be a defendant in a prosecution for libel, precisely as in a civil action. "It is true the corporation may not be imprisoned, but the fact that the same measure of punishment cannot be inflicted in this way cannot vitiate the indictment; the judgment is of the same character, that is, a fine and costs."[2]

Malice on the part of the defendant must be shown in order to sustain a prosecution for criminal libel. It is not necessary, however, to show that the defendant was actuated by personal ill-will or a malevolent disposition; it is enough if it appears that he wrote the libel or took part in publishing it without lawful excuse. The absence of lawful excuse constitutes what is termed "legal malice," and this, in criminal as well as in civil cases, is sufficient to sustain the charge of libel.[3] Under this rule of law, Robin Damon, editor and publisher of the Salem, Mass., *Evening News*, was convicted of

[1] Townshend on Slander and Libel, p. 503.

[2] The State *v.* Nashville Banner Publishing Co., 3 Lea (Tenn. 1879), 731.

[3] The rules on the subject of malice (see p. 41), as well as on the subject of privileged publications (see Chap. VII.), apply equally in civil and criminal proceedings.

criminal libel and fined $500, with the alternative of spending six months in the house of correction. His offence consisted in being the responsible publisher of the *News* on the 18th of May, 1883, when a communication from a resident of Salem was published in the paper, in Mr. Damon's absence from the city, and without his knowledge, concerning John W. Hart, the city marshal. The communication was headed "A Malicious City Marshal," and contained charges, by implication, that Mr. Hart had taken bribes.[1]

It has been said that an editor or publisher cannot be held criminally liable unless some negligence or blame attaches to him; but the presumption of culpable knowledge or connivance in the publication of the libel can generally be disproved only by showing that the publisher has been a victim of fraud or imposition on the part of some of his subordinates. He is legally bound to exert vigilance in the conduct of his business and to employ trustworthy assistants, and this obligation rests alike upon the managing editor, the publisher, the proprietor, and even the news agent who circulates copies of the newspaper. "Legal criminality is merely legal responsibility, and may exist where there is no moral criminality whatever."[2] It would seem that if the excuse, "didn't know it was loaded," will ordinarily be received as a complete defence where one man shoots another, the excuse, "didn't know it was libellous," or, "didn't know it was going to be published," ought to be received in full defence in a case of criminal libel; but such is not the law. Malice, either actual or constructive, must,

[1] Commonwealth *v.* Damon, 136 Mass. 441.

[2] Hoit on Libel, . . .

however, be more clearly shown in criminal than in civil cases, and disproof of actual malice will tend in mitigation of punishment.

The Boston *Saturday Evening Express*, in its issue for September 11, 1870, charged "State Cop" Dean with having acted, while a soldier in the army, in a manner to indicate cowardice, and with having been drunk while on duty as a deputy of the constable of the Commonwealth. Albert Morgan, the proprietor of the *Express*, was arrested at the instance of Chauncey C. Dean, and tried and convicted of criminal libel. The Court held that to constitute a defence it was necessary for Mr. Morgan to prove that he used due care in conducting the paper, and that the libel was published notwithstanding such care. Mr. Morgan showed in his defence that the libel was published without his knowledge, and that he promptly published an apology and retraction, but the Court ruled that this was not in itself sufficient.[1]

The principles of law just stated are based, in most of the States, upon the common law and the decisions of the courts. In New York, similar principles are thus laid down by statute in the Penal Code : —

§ 246. — Every editor or proprietor of a book, newspaper or serial, and every manager of a partnership or incorporated association, by which a book, newspaper or serial is issued, is chargeable with the publication of every matter contained in such book, newspaper or serial. But in every *prosecution* for libel the defendant may show in his defence that the matter complained of was published without his knowledge or fault and against his wishes, by another who had no authority from him to make the publication, and whose act was disavowed by him as soon as known.

[1] Commonwealth *v.* Morgan, 107 Mass. 199.

It will be observed that the civil liability is broader than the criminal liability. In a civil action for damages a verdict may be obtained against the proprietor of a newspaper even though he had actually forbidden, in advance, the publication of the libel, and exercised due care to prevent it.[1] In such case, however, the plaintiff cannot recover punitive damages, but only the damages to property or reputation which, in the opinion of the jury, have been the immediate actual result of the libel.

As has been seen in the preceding chapter, defamatory matter may be the subject of an action whether the person defamed is named in the libel or not, and this is equally true in criminal cases. Edmund Yates, editor of the London *World*, was sentenced to four months' imprisonment on conviction for publishing the following paragraph, January 17, 1883 : —

> A strange story is in circulation in certain sporting circles concerning the elopement of a young lady of very high rank and noble birth with a young peer, whose marriage was one of affection, but whose wife has, unfortunately, fallen into a delicate state of health. The elopement is said to have taken place from the hunting field. The young lady, who is only one or two and twenty, is a very fair rider, and the gentleman a master of hounds.

The Earl of Lonsdale considered himself one of the objects of attack, and convinced a jury of that fact. Mr. Yates received his sentence from Chief Justice Coleridge, and just two years lacking a day after the publication of the libel, began his term of confinement in Holloway prison. He led the easy life of a

[1] Hall *v.* Dunn *et al.* (*Political Beacon*), 1 Ind. 344. (See this case cited at length in Chap. V. on Publication.)

first-class misdemeanant in elegant quarters within the prison walls for less than half his term, and then, March 10, 1885, a pardon from the Home Secretary transferred his editorial headquarters back to the office of the *World*.

As already stated, it is a criminal libel to publish defamatory matter regarding a deceased person. It is necessary, however, to allege in the indictment in such a case that the libel was published with intent to bring scandal upon the family of the deceased, and to provoke his surviving relatives and friends to a breach of the peace. The courts are disposed to look with disfavor upon such prosecutions, and convictions for such libels are very rare. Lord Chief Justice Coleridge said in a recent English case, "It must be, I think, some very unusual publication to justify an indictment or information for aspersing the character of the dead." Mr. Justice Stephen is even quoted as saying, "The dead have no rights, and can suffer no wrongs," and intimating that in his opinion it should under no circumstances be held a criminal offence to traduce the dead.[1] But in some States libels upon deceased persons are expressly provided for by statute.[2]

The case in which Lord Coleridge is above quoted was one growing out of a publication in *Truth*. That lively paper had described a deceased duke of Vallombrosa in the following terms: —

An army contractor who was nearly hanged on the charge of supplying as meat to a French army corps the flesh of soldiers who had died in hospital or who had been killed in battle. Luckily for him the first Empire came to an end

[1] Boston *Post*, April 23, 1887.

[2] See the New York statute, *ante*, p. 39.

before the trial could take place, and the contractor, having retired to Italy and purchased a dukedom, became a grand seigneur, and an ardent adherent of the Bourbons.

The Duke of Vallombrosa, son of the deceased duke in question, sought a criminal information against Henry Labouchere, M. P., editor of *Truth*, but it was refused. One ground of the refusal was the fact that neither the living duke nor any of his family was in England, and, therefore, no breach of the peace was likely to result from the publication.[1]

Libels of a criminal character may also be published of sects, companies, or other classes of persons without naming any individuals, provided the defamatory words tend to expose the members generally to hatred or contempt. Thus it was held in the case of a military officer, who had brought a civil action against the editor of a newspaper for a libel which applied equally to all the officers in the plaintiff's regiment, that a civil action could not be maintained without proof that the plaintiff had suffered some special damage on account of the libel, but that the writer or publisher of the libel was liable to an indictment.[2] In this case the Court remarked, "The generality and extent of such libels make them more peculiarly public offences." For a similar libel, reflecting on the conduct of the officers and men of the Sixty-fifth Canadian Regiment during the Northwest rebellion in 1885, Edmund E. Sheppard, editor of the Toronto *Morning News*, was fined $200 in the Court of Queen's Bench at Montreal, although he

[1] The Queen *v.* Labouchere, 12 Queen's Bench Division (1884), 320. See also Commonwealth *v.* Origen Batchelder (Boston *Anti-Universalist*), Thacher's Criminal Cases (1829), 191.

[2] Sumner *v.* Buel (Albany *Argus*), 12 Johnson (N. Y. 1815), 475.

knew nothing of the libellous matter until it was in print.

A novel case, involving this question, was decided in the Supreme Judicial Court of New Hampshire in December, 1868. John B. Palmer was publisher of the Concord *Democratic Standard* in 1861. That he was n't exactly a "war Democrat" is shown by the following scraps of poetry and prose which he published August 3, 1861: —

THE LATE BATTLE — IMPROMPTU.

It frightened the Federals to see them come,
They wheeled about and away they run;
They *Run* so fast to tell the news,
They left their knapsacks, guns, and shoes.

EPIGRAM.

To Manassas Junction
The Yankees thought was fun,
But greatly were mistaken,
For they only took the *Run*.

CHANGING TUNE.

"Forward to Richmond, let us fly!"
The Yankees shout, while blundering on,
But Davis changed their battle cry
To "Backward, boys, to Washington."

☞ Our Southern papers are filled with heart-sickening accounts of the murders and robberies which individuals in Old Abe's Mob are perpetrating on the Southern people. Innocent women and children are shot on their own doorsteps, for wearing what is called "secession bonnets." No wonder the Northern people run, when the honest men of the South march toward them.

☞ The Black Republicans are making a great ado over

the treatment of our dead and wounded soldiers by the Confederate troops, at the Battle of Bull Run. But not one word have they to say about the conduct of *ours* upon men, women and children, in Hampton, Martinsburg, Fairfax, Germantown, and other places in Virginia and Missouri through which they have passed.

These verses and paragraphs were published August 3. Two days later the First New Hampshire Volunteers, a three-months regiment, reached Concord on their return from the front, having completed their term of service. The feeling against the copperhead editor became so intense, on account of the publication and the editor's subsequent conduct, that threats of violence were made against him by the returned soldiers. He had been warned earlier in the summer of the personal danger which he was incurring, but his only measure of protection was the purchase of a revolver, with which he declared himself ready to meet the whole of Old Abe's "mob," if need be. On the morning of August 8, several soldiers entered his office and asked for the *Standard* containing the obnoxious matter, and Mr. Palmer promptly and freely gave them several copies. Later in the day his office was attacked by a mob composed of privates belonging to the First Regiment, and others, and though the plucky editor made as good a defence as he was able, his printing materials were entirely destroyed. Mr. Palmer sought to recover damages from the city under chapter 1519, New Hampshire laws of 1854, which provides for the payment of indemnity by cities and towns for property destroyed by mobs. The city in its defence relied upon the second section of the same chapter, which was as follows: "No person or persons shall be entitled to the benefits

of this act if it shall appear that the destruction of his or their property was caused by his or their illegal or improper conduct." The Court held that all of the publications were *prima facie* libellous, except the quatrains entitled "Epigram" and "Changing Tune," and that they constituted "illegal conduct" within the meaning of the section above quoted, unless justified or excused by facts sufficient to constitute a defence to an indictment for libel. In the decision of the case the Court said: "If he had no justifiable motive, inasmuch as the natural and inevitable tendency of the publication is to injure and degrade, he is guilty of libel even though the facts alleged in the articles were true."[1] The Court cited the case of Sumner *v.* Buel (above referred to) somewhat at length, and with approval. Mr. Palmer accordingly lost his case against the city.

A libel may be the subject of an indictment where it injuriously affects one in his office, profession, or trade, or where it imputes a contagious or infectious disease, or where it tends to expose one to hatred, contempt, or ridicule. It is not necessary that it convey a charge of crime; it is sufficient if its tendency is to bring its subject into ridicule and contempt.

The Charleston, S. C., *Bulletin* published an article under the heading, "Goat Racing Club," giving a ludicrous account of the proceedings of a fictitious club, and mentioning the names of several persons as members. It was held to be a criminal libel.[2]

Julius Chambers, a Philadelphia correspondent of the New York *Herald*, sent to that paper a report of an interview with a prisoner in the Moyamensing jail, in

[1] Palmer *v.* Concord, 48 N. H. (1868), 217.

[2] State *v.* Henderson, 1 Richardson's Law Reports (1845), 179.

which the affairs of the fraudulent "Peruvian Company" were discussed. The prisoner was quoted as saying that Senator McPherson, of New Jersey, was the "mysterious senator" who had often been referred to in connection with the affairs of the company; that he owned one-twentieth of the stock in the concern, and that he worked very hard in its interests. This report was published in the *Herald*, April 22, 1882, and Mr. Chambers was immediately indicted for criminal libel. Senator McPherson, the prosecutor, pressed the case strongly, and the correspondent was convicted, the Court holding that a man cannot "lawfully publish a story of another which is calculated to make him contemptible or ridiculous in the eyes of his associates and acquaintances, although he accompanies the publication with a statement of his own disbelief in the story."[1] Mr. Chambers was fined $1,000, and the fine was immediately paid.

A publication is a seditious libel if its object and effect are to disturb the peace of society or the existence of government. Prosecutions for seditious libel have, however, been extremely rare in this country, save in the brief period during which the Alien and Sedition Laws were in force (July 14, 1798–March 3, 1801). These laws were designed among other things to restrain the license of the press in the discussion of political affairs; but their effect was to provoke the newspapers of the day to still more bitter invective against political opponents, and especially against the administration of John Adams. They constituted one of the chief causes of the overthrow of the Federal

[1] Commonwealth *v.* Chambers, 15 Philadelphia Reports, 415. Mr. Chambers has since become managing editor of the *Herald*.

party. "Under the Alien Law the 'aliens' became still more fractious; under the Sedition Law the 'seditious' became still more scurrilous; and the result was, that the government found itself impudently bullied by those it attempted to chastise. It was reserved for later times to demonstrate that, after all, a press the most unfettered is a press the most restrained." [1]

As has been seen, it is a seditious libel "to cause animosities between our own and any foreign government, by personal abuse of its sovereign, its ambassadors, or other public ministers." [2] Criminal proceedings were undertaken under this principle of law against William Cobbett, of Philadelphia, editor of *Porcupine's Gazette*, in November, 1797, a few months before the passage of the Alien and Sedition Laws. The proceedings were instituted in the Supreme Court of Pennsylvania, the Court holding that a prosecution of this character can be maintained in a State court. The language charged with being libellous was the following, published in *Porcupine's Gazette*, July 17, 1797:—

> The degenerate prince that now sways the Spanish sceptre, whom the French have kept on the throne merely as a trophy of their power, or as the butt of their insolence, seems destitute not only of the dignity of a king, but of the common virtues of a man. . . . In the present state of things, the independence of the United States is little more than a shadow; it is really not worth what it cost to acquire and support it; and, unless a stop can be put to the progress of factions and foreign interference, instead of a blessing, it will erelong be a burden which even the vassals of Prussia would not take off our hands as a gift.

[1] Wharton, State Trials of the United States, p. 26.
[2] See *ante*, p. 63.

Besides these passages, two others were relied upon by the government in the prosecution. They were dated July 24 and July 31, 1797, and were especially defamatory toward the Spanish minister to the United States. Judge McKean in his charge to the grand jury said: —

"At a time when misunderstandings prevail between the republics of France and the United States, and when our general government have appointed public ministers to endeavor their removal and restore the former harmony, some of the journals or newspapers in the city of Philadelphia have teemed with the most irritating invectives, couched in the most vulgar and opprobrious language, not only against the French nation and their allies, but the very men in power with whom the ministers of our country are sent to negotiate. These publications have an evident tendency not only to frustrate a reconciliation, but to create a rupture and provoke a war between the sister republics, and seem calculated to vilify, nay, to subvert, all republican governments whatever. Impressed with the duties of my station, I have used some endeavors for checking these evils by binding over the editor and printer of one of them, licentious and virulent beyond all former example, to his good behavior; but he still perseveres in his nefarious publications; he has ransacked our language for terms of insult and reproach. . . . It is now with you, gentlemen of the grand jury, to animadvert on his conduct; without your aid it cannot be corrected."

The grand jury refused to lend its aid to correct Mr. Cobbett's conduct, for by a strict party vote the Fed-

eralists upon the jury succeeded in defeating the indictment.[1]

Another case of alleged seditious libel came before the courts of the same State six years later, shortly after the expiration of the Alien and Sedition Laws, and, as in the case of Cobbett, the defendant escaped conviction. Joseph Dennie, editor of the Philadelphia *Portfolio*, was indicted in July, 1803, for the publication of the following paragraph in his paper on the 23d of April in that year: —

A democracy is scarcely tolerable at any period of national history. Its omens are always sinister, and its powers are unpropitious. With all the lights of experience blazing before our eyes, it is impossible not to discover the futility of this form of government. It was weak and wicked at Athens, it was bad at Sparta, and worse at Rome. It has been tried in France, and terminated in despotism. It was tried in England, and rejected with the utmost loathing and abhorrence. It is on its trial here, and its issue will be civil war, desolation, and anarchy. No wise man but discovers its imperfections, no good man but shudders at its miseries, no honest man but proclaims its fraud, and no brave man but draws his sword against its force. The institution of a scheme of polity so radically contemptible and vicious is a memorable example of what the villany of some men can devise, the folly of others receive, and both establish in despite of reason, reflection, and sensation.

Philadelphia was at that time the capital of the youthful republic, and great anxiety was felt lest the attacks upon the new frame of government which were published in the newspapers of the city should result in its overthrow. The Court, in charging the petit jury,

[1] The case of William Cobbett, Wharton's State Trials of the United States, p. 322.

thus laid down the law regarding seditious libels: "If the consciences of the jury shall be clearly satisfied that the publication was seditiously, maliciously, and wilfully aimed at the independence of the United States, the Constitution thereof, or of this State, they should convict the defendant. If, on the other hand, the production was honestly meant to inform the public mind, and warn them against supposed dangers in society, though the subject may have been treated erroneously, . . . they should acquit the defendant." The jury returned a verdict of not guilty.[1] Probably no prosecution for such publications as this, or that of Cobbett, could ever be successful in this country, save in time of war or great popular excitement. A government whose constitution is worthy of respect and confidence has nothing to fear from comments and criticisms, friendly or hostile, upon the fundamental law upon which it is based.

Shortly after the execution at Manchester, England, of the three Irishmen, Allen, Larkin, and O'Brien, in 1867, for implication in the Fenian uprising of that year, the *Weekly News*, an Irish newspaper, published several cartoons, for which the editor, Alexander M. Sullivan, was indicted for seditious libel. One of the cartoons represented the British government in the form of a woman, holding aloft a bloody dagger and trampling upon the scales of justice, the picture being entitled "It is Done." Another cartoon represented a woman, intended to personify the British government, bearing a dagger and pursued by the angel of justice from a place where three bodies lay upon the ground. The *Weekly News* contained also a series of articles

[1] Respublica *v.* Dennie, 4 Yeates, 267. For cases under the Alien and Sedition Laws, see Chap. VIII. on Political Libels.

relating to the trial and execution of the three men. Judge Fitzgerald, in charging the jury, said that it was open to the defendant to show that error was committed on the part of the judge or jury at the trial of Allen, Larkin, and O'Brien, but that he was not at liberty to impute corruption. "It is also quite open to the defendant to discuss the executions as a political blunder, for that is a subject upon which public opinion is very much divided."[1] Mr. Sullivan was convicted.

In the nature of a seditious libel was the "bogus proclamation," published in the New York *World* and *Journal of Commerce*, May 18, 1864, at a time when the result of the Rebellion was a matter of grave doubt. The forged document was as follows: —

EXECUTIVE MANSION, May 17, 1864.

FELLOW-CITIZENS OF THE UNITED STATES: —

In all seasons of exigency it becomes a nation carefully to scrutinize its line of conduct, humbly to approach the Throne of Grace, and meekly to implore forgiveness, wisdom, and guidance.

For reasons known only to Him, it has been decreed that this Country should be the scene of unparalleled outrage, and this nation the monumental sufferer of the Nineteenth Century. With a heavy heart, but an undiminished confidence in our cause, I approach the performance of a duty rendered imperative by my sense of weakness before the Almighty, and of justice to the people.

It is not necessary that I should tell you that the first Virginia campaign under Lieut.-Gen. Grant, in whom I have every confidence, and whose courage and fidelity the people do well to honor, is virtually closed. He has conducted his great enterprise with discreet ability. He has crippled their strength and defeated their plans.

[1] The Queen *v.* Sullivan, 11 Cox's Criminal Cases, 44 and 51.

In view, however, of the situation in Virginia, the disaster at Red River, the delay at Charleston, and the general state of the country, I, ABRAHAM LINCOLN, do hereby recommend that THURSDAY, the 26th day of May, A. D. 1864, be solemnly set apart throughout these United States as a day of fasting, humiliation, and prayer.

Deeming, furthermore, that the present condition of public affairs presents an extraordinary occasion, and in view of the pending expiration of the service of (100,000) one hundred thousand of our troops, I, ABRAHAM LINCOLN, President of the United States, by virtue of the power vested in me by the Constitution and the laws, have thought fit to call forth, and hereby do call forth, the citizens of the United States between the ages of (18) eighteen and (45) forty-five years, to the aggregate number of (400,000) four hundred thousand, in order to suppress the existing rebellious combinations, and to cause the due execution of the laws.

And furthermore, in case any State or number of States, shall fail to furnish by the fifteenth day of June next their assigned quota, it is hereby ordered that the same be raised by an immediate and peremptory draft.

The details for this object will be communicated to the State authorities through the War Department.

I appeal to all loyal citizens to favor, facilitate and aid this effort to maintain the honor, the integrity, and the existence of the National Union, and the perpetuity of popular government.

In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the city of Washington this 17th day of May, one thousand eight hundred and sixty-four, and of the independence of the United States the eighty-eighth.

(Signed) ABRAHAM LINCOLN.

By the President.

WM. H. SEWARD, *Secretary of State.*

The author of the hoax was Joseph Howard, Jr., a newspaper man then residing in Brooklyn. An effort was made to secure its publication in all the Associated Press papers by sending it upon manifold paper as if it were a regular press despatch. The two papers named were victimized, and the *Herald* also printed 25,000 copies of its issue with the supposed proclamation under a "scare head" before the imposture was discovered. The *World* and *Journal of Commerce* were suppressed by order of the President, and several of the editors and proprietors placed under arrest. The order of arrest was almost immediately countermanded, but the two offices were under strict military guard, and the issue of newspapers from them was suspended for three days. Howard was imprisoned for some months at Fort Lafayette awaiting trial, but he was finally discharged, on account of political influence, without punishment. His motive in committing the forgery was supposed to be a desire to influence the stock market, but he has since declared that he acted thoughtlessly, and merely intended to produce a newspaper sensation. The legal questions involved in this remarkable case were never the subject of judicial decision, although Major-Gen. Dix and several minor officers were arrested, charged with violating both the State and national laws in suppressing the two newspapers and apprehending the victims of the hoax. The action of the government was severely criticised, and seems hardly justifiable, even as a war measure.[1]

The Chicago *Times*, in 1863, under the management of Wilbur F. Storey, was also suppressed by the government for seditious sentiments; but, as in the case of the

[1] Hudson, Journalism in the United States, pp. 373, 670.

World and *Journal of Commerce*, the order was revoked by the President after the office of publication had been under military guard for three days. Mr. Storey's trials during the war were so great, that at its close he announced, "After this the *Times* will support all wars that the country may undertake." The course of the *Times* in opposing everything connected with the conduct of the war excited great popular resentment, but the action of the War Department in suppressing the paper was equally unpopular. "It was the making of the paper, in all probability. Indignation was expressed by many who before condemned the publication, and partisan feelings ran so high, that a riot would surely have resulted had not the President revoked the order." [1]

Libels on State governments, as well as upon the Federal government, are indictable as seditious libels;[2] and so also are libels on municipal corporations.[3] But "while it may be proper to prosecute criminally the author of a libel charging a *legislator* with corruption, criticisms, no matter how severe, on a *legislature* are within the range of the liberty of the press, unless the intention and effect be seditious." [4] As will be seen in the chapter on Privileged Publications, comments upon the policy of the government, and upon other matters of public concern, including the conduct of government officials of whatever rank, are protected by the law of privilege, if published in good faith. A

[1] Chicago *Herald*, Oct. 28, 1884.

[2] The law upon this subject has been modified in Texas by art. 633 of the Penal Code: "No publication as to the government, or any of the branches thereof as such, is an offence under the name of seditious writings or any other name."

[3] Wharton's Criminal Law, vol. II., § 1602.

[4] Wharton's Criminal Law, vol. II., § 1613.

prosecution cannot accordingly be based upon a publication which was written without malice, where the defendant believed, on reasonable grounds, that what he was writing was for the public good.

Seditious articles are none the less libels against the government because they are copied as news from foreign newspapers. Thus Richard Pigott was convicted in Ireland of seditious libel in publishing in the *Irishman* articles taken from the Boston *Pilot* and other American papers relating to the Fenian movement.[1] The articles were published about the time of the Fenian uprising in Ireland of 1867.

Prosecutions for seditious libel have naturally been much more frequent in England than in this country. One curious case, and especially interesting on this side of the ocean, was that of the King *v.* John Horne (afterward John Horne Tooke). The seditious article was as follows:—

KING'S ARMS TAVERN,
CORNHILL, June 7, 1775.

At a special meeting this day, of several members of the Constitutional Society, during an adjournment, a gentleman proposed that a subscription should be immediately entered into by such of the members present who might approve the purpose, for raising the sum of £100 to be applied to the relief of the widows, orphans, and aged parents of our beloved American fellow-subjects, who, faithful to the character of Englishmen, preferring death to slavery, were for that reason only inhumanly murdered by the King's troops at or near Lexington and Concord, in the province of Massachusetts, on the 19th of last April; which sum being immediately collected, it was therefore resolved that Mr. Horne do pay to-morrow into the hands of Mess. Brownes and

[1] The Queen *v.* Pigott, 11 Cox's Criminal Cases, 44 and 60.

Collinson, on the account of Dr. Franklin, the said sum of £100, and that Dr. Franklin be requested to apply the same to the above-mentioned purpose. JOHN HORNE.

This letter was published June 9, 1775, in the *Morning Chronicle and London Advertiser*, the *London Packet, or New Lloyd's Evening Post*, and the *Public Advertiser*. Mr. Horne was tried before Lord Mansfield in the Court of King's Bench, July 4, 1777. He conducted his own case, and was convicted. He was ordered to pay a fine of £200, to be imprisoned twelve months and until his fine was paid, and to find sureties for his good behavior for three years after his release from prison.[1]

Leigh Hunt and his brother published the *Examiner* in London in 1814. A society journal having called the Prince of Wales (afterward George IV.) an Adonis, Hunt added in the *Examiner*, "A fat Adonis of 50." For this grievous libel on the regent the brothers were sentenced to pay a fine of £500 each, and to be imprisoned for two years. The fines were paid by the contributions of friends, but the imprisonment was served in person. Their connection with the *Examiner* was not interrupted by their residence in jail.[2]

A blasphemous libel is one which contains matter relating to God, Jesus Christ, or the Bible, designed to wound the feelings of readers or bring the Christian religion into contempt. The following article, published by Abner Kneeland, who had formerly been a minister, in the Boston *Investigator*, December 20, 1833, was held to be such a libel:—

[1] The King *v.* Horne, 20 Howell's State Trials, 651.
[2] American Encyclopædia, "James Henry Leigh Hunt."

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 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 theatre at Athens five hundred years before the Christian era.

3. Universalists believe in miracles, which I do not; but believe that every pretension to them can either 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.

Mr. Kneeland was sentenced to sixty days' imprisonment in the common jail.[1]

The *Freethinker*, published in London, in its issue for March 26, 1882, contained this paragraph: —

The God whom Christians love and adore is depicted in the Bible with a character more bloodthirsty than a Bengal tiger or a Bashi-Bazouk. He is credited with all the vices and scarcely any of the virtues of a painted savage. Wanton cruelty and heartless barbarity are his essential characteristics. If any despot at the present time tried to emulate, at the expense of his subjects, the misdeeds of Jehovah, the great majority of Christian men would denounce his conduct in terms of indignation.

[1] Commonwealth *v.* Kneeland, Thacher's Criminal Cases, 346; affirmed 20 Pickering, 206.

For this, and a number of other publications of like character, the publisher, Ramsey, and the editor, Foote, together with Charles Bradlaugh, M. P., who had previously been connected with the *Freethinker*, were indicted. Bradlaugh secured a separate trial, and was acquitted.[1] The jury in the case of Ramsey and Foote failed to agree, and when the case came on for a new trial it was *nol. pros'd*, the defendants having already been convicted of a similar offence.[2] Lord Chief Justice Coleridge declared at the trial: "I have no doubt that the mere denial of the truth of Christianity is not enough to constitute the offence of blasphemy." He quoted, with approval, Starkie's definition: "The wilful intention to insult and mislead others by means of licentious and contumelious abuse offered to sacred subjects, or by wilful misrepresentations or wilful sophistry, calculated to mislead the unwary, is the criterion and test of guilt."[3]

If the matter complained of is based upon conscientious conviction, and is not designed as an attack upon the faith of others, it is not generally believed to be blasphemous, even though it may wound the feelings of those who entertain contrary views.

A publication is an obscene libel when its tendency is to deprave and corrupt the minds of persons reading it.[4] It is no defence that the writer's object was scien-

[1] The Queen *v.* Bradlaugh, 15 Cox's Criminal Cases, 217.

[2] The two men were sentenced to nine and twelve months' imprisonment respectively for blasphemous articles and pictures contained in the "Christmas number" of the *Freethinker*, 1882. (Odgers on Libel and Slander, second English edition, London, 1887, p. 446.)

[3] The Queen *v.* Ramsey *et al.*, 15 Cox's Criminal Cases, 231.

[4] For such a libel, contained in certain "Fog Horn Stories," published in *Town Topics*, Dec. 10, 1886, Eugene D. Mann, publisher of the paper, was arrested at the instance of Anthony Comstock, and fined fifty dollars. See the New York *Star*, May 6, 1887.

tific or philanthropic, if the matter is so published that it is likely to fall into the hands of persons to whom it will be of no value scientifically or otherwise, but whose minds will be contaminated by its perusal.

Where a prosecution is for an alleged seditious, blasphemous, or obscene libel, the defendant cannot give evidence in defence that the publication is true.[1] And a full and impartial report of such a trial would not be privileged if the reporter set forth in his copy the blasphemous, obscene, or seditious matter upon which the trial is based.[2] Indeed, it has been held that even an indictment need not set forth the subject-matter of the libel when it is charged with being obscene.[3] But it is not enough to charge the defendant in the indictment with publishing "an indecent and obscene newspaper, called *John Donkey*, manifestly designed to corrupt the morals of the youth of said county"; but the language charged with being obscene must be sufficiently described to enable the Court to judge of its character.[4]

The old maxim, "the greater the truth, the greater the libel," which was formerly applied to libels when considered as crimes, brought the law into contempt. It was always an outrageous doctrine, and it was none the less a reproach upon the law that its original authorship was ascribed to so eminent a jurist as Sir Matthew Hale. The doctrine grew out of the theory upon which the criminality of libels is based; viz., the ten-

[1] Folkard's Starkie on Slander and Libel, p. 720. The Sedition Law of July 14, 1798, has been regarded as declaratory of the sense of Congress that in prosecutions for libels upon the government the defendant ought to be allowed to show the truth in justification. Greenleaf on Evidence, vol. III., § 177.

[2] See Chap. VII. on Privileged Publications

[3] The People *v.* Girardin *et al.* (Detroit *City Argus*), 1 Mich. (1848), 90.

[4] The State *v.* Charles H. Hanson, 23 Texas (1859), 232.

dency of the defamatory matter to provoke a breach of the peace. It was assumed that defamatory charges would have an increased tendency to excite the person against whom they were directed to acts of violence if the charges were true. The maxim stands about on a par with the schoolboy's byword, "you must n't twit on facts."

The Supreme Court of New York, in 1804, sustained the common law doctrine that the truth could not be pleaded in justification of a criminal libel, but the Legislature of the State, in 1805, enacted that the truth might be given in evidence in defence when the matter upon which the prosecution was based was published "with good motives and for justifiable ends." This legislation in New York was followed by similar statutes or constitutional provisions or decisions of the courts in all the other States, so that now the maxim, "the greater the truth, the greater the libel," no longer expresses the law in any State in the Union.[1] The reform in the law was not effected in Massachusetts until 1826, and that it was of still later date in Connecticut is shown by an extract from the autobiography of P. T. Barnum.

Mr. Barnum was editor and publisher of a weekly newspaper in Danbury, Conn., called the *Herald of Freedom*, from 1831 until 1834. He was sentenced to pay a fine of $100 and to be imprisoned sixty days in the common jail for criminal libel under the following circumstances: —

I was indicted [says Mr. Barnum] for informing the readers of my paper, that a certain lay dignitary of a church in Bethel had "been guilty of taking usury of an orphan boy."

[1] See *ante*, pp. 20–22. See also Chap. IX. on Defences.

The general fact was accompanied by severe editorial commentary, and criminal prosecution was instituted against me. The case came to trial, and several witnesses, including the party accused, proved substantially the truth of my statement. But, alas! "the greater the truth, the greater the libel."

After recounting the circumstances of his imprisonment, during which he edited his paper as usual and "received several hundred additional subscriptions," he gives the following extract from the *Herald of Freedom* of December 12, 1832, regarding his return home from jail: —

P. T. BARNUM and the band of music took their seats in a coach drawn by six horses, which had been prepared for the occasion. The coach was preceded by forty horsemen, and a marshal, bearing the national standard. Immediately in the rear of the coach was the carriage of the Orator and the President of the day, followed by the Committee of Arrangements and sixty carriages of citizens, which joined in escorting the editor to his home in Bethel. . . .

He adds in conclusion: —

No one will be surprised that I should have regarded such a return to my home and family as a triumphal march. It was in effect a vindication, because an approval of my course, and a condemnation both of the "common law of libel," and of all who had been engaged in my prosecution.

In a few of the States[1] the truth is a complete defence in criminal prosecutions for libels upon individuals, exactly as in civil actions for damages; in most of the others the statutes or decisions of the courts declare the

[1] Arkansas, Connecticut, Georgia, Indiana, Maryland, Mississippi, Missouri, New Jersey, North Carolina, Tennessee, and Vermont; so also in the District of Columbia.

truth an absolute defence only when the alleged libel was published "with good motives and for justifiable ends." The rule thus qualified was recognized in the case of Thomas D. Bonner, of the Pittsfield, Mass., *New England Cataract*, who was prosecuted for publishing the following: —

However, there were a few who, according to the old topers' dictionary, were drunk; yea, in all conscience, drunk as a drunken man; and who, and which of you, desperadoes of the town, got them so? Was it you, whose groggery was open, and the rat soup measured out, at your bar, to drunkards, while a daughter lay a corpse in your house, and even on the day she was laid in her cold and silent grave, a victim of God's chastening rod upon your guilty drunkard-manufacturing head? Was it you, who refused to close your drunkery on the day that your aged father was laid in the narrow house appointed for all living, and which must erelong receive your recreant carcass? We ask again, was it you? was it you?

At the trial in the lower court the judge charged the jury that the burden of proof was on the defendant to show the truth of the charges, and also to prove that the charges were published with good motives and for justifiable ends, and this construction of the law was sustained in the Supreme Judicial Court.[1] Mr. Bonner was convicted. The rule in this case now prevails in nearly all the States. In Massachusetts, however, the law was changed by the statute of 1855, and now the truth is declared a sufficient justification, "unless malicious intention is proved."[2] This change throws the burden of proving malicious intention upon the government.

[1] Commonwealth *v.* Bonner, 9 Metcalf (1845), 410.

[2] Public Statutes, chap. 214, § 13.

Though the truth alone is no defence in criminal libel, evidence that the publication was true, or that the writer or publisher believed it to be true, will tend in mitigation of punishment in case of conviction. And "if a publication be proper and meritorious, the fact that malice contributed to its concoction does not make it a libel."[1]

If the truth is the ground of defence, the proof must be as broad as the charge. The justification must relate strictly to the charges contained in the alleged libel, and not to some distinct though similar matter; and the truth of one of many charges will not avail in defence.

Patrick Ford, editor of the *Irish World*, instituted criminal proceedings against Patrick Rellihan, editor of *Ireland's Liberator*, on account of an article published in the latter paper in October, 1884, under the following heading:—

JUDAS ISCARIOT FORD. — *The Evil Genius of the Irish Movement Reviewed and Exposed — Facts About His Private Life that Cannot be Disproved — His Attack on Catholicity and His Attempts to Lead an Independent Bolt from the Church — Deserter, Betrayer, Infidel, Freemason, Sham Reformer, Swindler of the Emergency Fund, Would-be Dictator and Political Prostitute! — His Conduct in the O'Donnell Case and His Shameful Treatment of Susan Gallagher — Starvation Wages in the Irish World Office — Ford Betrays General Butler and the Greenback Party, and Insults Every Irish Democrat by the Sale of Blaine.*

After quoting this "scare head" it is comparatively immaterial what constituted the substance of the article itself, but it may be added that the principal charge

[1] Wharton's Criminal Law, vol. II., § 1654.

was that Ford had used a balance of $32,000 of the O'Donnell defence fund in paying his private debts. Upon the witness-stand Rellihan admitted that his only reason for believing that Ford paid his debts from the O'Donnell fund was that Ford had no money of his own with which to pay them, and upon this admission Rellihan was convicted, and sentenced to two months' imprisonment.[1]

At the same time that the law was so reformed that the truth might be pleaded in defence in criminal prosecutions for libel, another reform was also effected. Prior to that time the judges had always assumed the authority to determine whether the matter complained of was in reality libellous, the only question left for the jury being whether the defendant had published the matter as charged in the indictment. Throughout the United States, however, as the law now stands, the jury is authorized to find a general verdict of guilty or not guilty, thus reserving for them the question whether the publication is unlawful and whether the defendant is legally responsible for it. In New York, indeed, the jury is not allowed to find a special verdict in a prosecution for libel.[2] The question of the relative provinces of judge and jury was raised in the case of the Commonwealth *v.* McClure *et al.* in Pennsylvania. The Philadelphia *Times* published, April 25, 1876, charges against Nathaniel McKay of wrongful appropriation of government property. At the trial of the publishers of the *Times*, Judge Thayer said, in charging the jury: "Some pains have been taken to impress upon you the fact that you have a right to render such a verdict as

[1] See daily papers of Jan. 24, Feb. 7, and March 27, 1885.
[2] Code of Criminal Procedure, § 436.

you choose, and that you are not to be subject to the control of the Court. That is a very old controversy, gentlemen, and one long since settled. . . . You have an undoubted right to return a general verdict, for which you are answerable only to your own consciences."[1] But, as stated by the Court in a case in California, "while in actions for criminal libel the jury are to determine the law as well as the facts, they are, of course, not at liberty to determine that what the statute declares to be a criminal libel is not such."[2]

The same evidence of publication is required to sustain an indictment for libel as in the case of a civil action. Every sale of a copy of the newspaper containing the libel is a fresh crime, and the courts generally, in imposing sentence, take into consideration the extent to which the defendant has been the means of disseminating the defamation. They will not, however, impose a cumulative sentence, with an added penalty for each and every sale of a copy of the paper, even though the indictment contain a separate count for every such sale. Evidence that the copy of the newspaper upon which the prosecution is based was purchased of a person employed at the newspaper office, or of an employee of the news agent, in the regular course of business, will sustain a charge against the news agent or the proprietor of the paper of publishing the libel, even though it is proved that the employer had no actual knowledge of the sale. The charge may be rebutted only by showing that the proprietor or news agent did not authorize the sale, and was in no wise guilty of negligence, but the burden of proof in such case is upon

[1] Commonwealth *v.* McClure *et al.*, 11 Philadelphia Reports, 469.

[2] People *v.* Henry B. McDowell, 71 Cal. (1886), 194.

the defendant. "The mere delivery of a libel to a third person by one conscious of its contents amounts to a publication, and is an indictable offence."[1]

It is a crime in any State to circulate a libel there which was printed in another jurisdiction. James Blanding, a resident of Massachusetts, caused the publication of a libel in the Providence, R. I., *Gazette*. Copies of the *Gazette* containing the libel were circulated in Massachusetts, and this fact was held sufficient to sustain an indictment of Mr. Blanding in the latter State.[2]

A person may be indicted for libel where he merely related the defamatory matter to a reporter in an interview.[3]

The remedy in case of criminal libel is by indictment, or, in some States, by criminal information. The utmost precision is absolutely necessary in drawing up the indictment, and the subject-matter of the libel must be literally set forth, except, as has been seen, when the defendant is charged with publishing an obscene libel, when it may be omitted from the indictment altogether. The carelessness of clerks in district attorneys' offices has come to the timely relief of many newspaper editors and publishers. An instance of this good luck occurred in Vermont some twenty years ago. Hiram Atkins, of the Montpelier *Argus and Patriot*, was indicted for publishing the following, August 10, 1865:—

One other political bruiser we like to have forgotten — but had we done so that face would have haunted our dreams ever more. That one is "Uncle Nat. Eaton," for-

[1] Odgers on Libel and Slander, p. 384.

[2] Commonwealth *v.* Blanding, 3 Pickering (1822), 304. See also the Cutting case in Chap. V. on Publication.

[3] The People *v.* Clay, 86 Ill. (1877), 147. See this case cited at length in Chap. V. on Publication.

merly of Calais, but now "Mugwump" No. 2, of Middlesex. This old political *roué* was about town all day in full blast, notwithstanding that the corpse of his dead wife was lying in his house at home. . . . If a dead nigger had been in his house, the old hypocrite would probably have been heard of sitting in his back kitchen, clothed in sackcloth and ashes; but as it was only his wife, what did it matter? . . .

The indictment set forth — "that Hiram Atkins, of Montpelier, in the county of Washington, being a person of an envious, evil, and wicked mind, and of a most malicious disposition, and wickedly, maliciously, and unlawfully intending and contriving, as much as in him lay, to injure, oppress, aggrieve, and vilify the good name, fame, credit, and reputation of Nathaniel Eaton, . . . to cause it to be suspected and believed by the citizens of this State, that the said Nathaniel Eaton, whose wife had died on the last day of July before that time, *attended a political convention all day, while his wife was lying dead in his, the said Eaton's, house*, wickedly, maliciously, and wilfully did compose and write" — the libel above quoted. The Supreme Court of Vermont held that the publication was libellous, but inasmuch as the indictment did not formally aver that a political convention was in fact held on the day alleged, the meaning of the libel could not be ascertained with due legal precision, and the indictment was ordered quashed.[1]

Where the prosecution is for a libel upon an individual, it is not composition of felony for the prosecutor to settle with the defendant out of court, accepting an apology, or payment of money, or both, in satisfaction.[2]

[1] State *v.* Atkins, 42 Vt. 252.

[2] Folkard's Starkie on Slander and Libel, p. 729.

The maximum penalty in case of conviction for criminal libel is as follows in the several States and Territories: —

	Fine.		Imprisonment.	Where Imprisoned.
Alabama [1]	$500	and	Six months,	County jail.
Arizona	5,000	or	One year,	Territorial prison.
Arkansas	5,000	and	One year.	
California	5,000	or	One year,	County jail.
Colorado	500	or	One year,	Penitentiary.
Connecticut	500	and	One year.	
Dakota	500	and	One year,	County jail.
Florida	1,000	and	One year,	County jail.
Georgia [2]	1,000	and	Six months.	
Idaho	5,000	or	Six months,	County jail.
Illinois	500	or	One year,	County jail.
Indiana [3]	1,000	and	One year,	County jail.
Iowa	1,000	or	One year,	County jail.
Kansas	1,000	or	One year,	County jail.
Maine	1,000	and	Less than one year,	
Michigan [4]	100	and	Ninety days,	County jail.
Missouri	200	and	Six months,	County jail.
Montana	5,000	or	Six months,	County jail.
Nebraska [5]	500	and	Six months,	County jail.
Nevada	5,000	or	Six months,	County jail.
New York	500	and	One year,	Penitentiary or jail.
Ohio	500	and	Six months.	
Oregon [6]	500	or	One year.	County jail.
Pennsylvania	1,000	and	Twelve months.	
Rhode Island	1,000	or	One year,	
Texas [7]	2,000	or	Two years,	County jail.
Utah	1,000	or	One year,	County jail.
Washington Territory	1,000	and	One year,	County jail.
Wisconsin	250	or	One year,	County jail.
Wyoming	500	or	One year,	Penitentiary.

[1] Or "hard labor for the county" not exceeding six months.

[2] Or "to work in the chain gang . . . not to exceed twelve months."

[3] The fine shall be not less than five dollars, and in case imprisonment is added it shall be for a term not less than ten days.

[4] For a second or subsequent offence the prisoner shall be fined not less than fifty dollars nor more than five hundred dollars and costs, or imprisoned in the State house of correction not more than three years, or both fined and imprisoned.

[5] "Provided that if the said libel is published in a newspaper having a general circulation, the person so offending shall be punished by imprisonment in the penitentiary, not less than one nor more than three years." — Chap. 104, General Laws of 1887.

[6] The fine shall be not less than one hundred dollars, or in case of imprisonment it shall be for a term not less than three months.

[7] In case of fine it shall be not less than one hundred dollars.

The foregoing table includes all the States and Territories in which special provision is made by statute for punishment for criminal libel. In Massachusetts this offence comes within the following section of the Public Statutes: "In cases of legal conviction, where no punishment is provided by statute, the Court shall award such sentence as is conformable to the common usage and practice in this State, according to the nature of the offence, and not repugnant to the constitution."[1] Criminal libel is similarly provided for in many of the other States. In Louisiana the punishment is by "fine or imprisonment, or both, at the discretion of the Court,"[2] and the judge has express power to sentence any person convicted of a fourth offence to perpetual imprisonment.[3]

The criminal remedy for libel is much older than the civil, and it is generally the more advisable means of redress where vindication of character and not compensation for injury is the object to be sought; but lawyers who have an eye to a bill of costs will continue to advise clients to institute a civil action. Generally speaking, a civil action for libel is "a dangerous experiment." In a large majority of cases the plaintiff, after advertising to all the world that he is willing to sell his reputation for money, discovers that his reputation won't bring enough after all to more than pay his counsel fees.

As has been already shown, the author or publisher of a libel is subject to both civil and criminal liability for the same publication. Where punitive damages

[1] Public Statutes, chap. 215, sec. 1.
[2] Revised statutes, sec. 804.
[3] Revised statutes, sec. 974.

have been recovered in a civil action, however, and the same defendant is convicted of criminal libel for the same publication, the judge in passing sentence would take into consideration the damages already recovered as a portion of the penalty; and where the libeller has already satisfied the criminal law, a jury in a civil action would not ordinarily award punitive damages. In all cases of libels upon individuals it would seem that a single remedy, civil or criminal, would satisfy the demands of justice. According to the English practice, any person applying for a criminal information against another for a libel must forego his civil remedy; and if he has already commenced an action for damages the information will not be granted. Upon similar principles it would seem that neither the rights of the individual nor of the public would suffer if it were allowed the defendant in a civil action for libel to show as a bar to the action that he has already suffered conviction upon an indictment for the same libel found at the instance of the person appearing as plaintiff in the civil suit. On the other hand, it would seem that it should be permitted the defendant at his trial upon an indictment for libel to plead in bar that he had already satisfied a civil judgment for punitive damages on account of the same defamatory publication. This, however, is not the law as it is in this country, but as, in the opinion of the writer, it should be.

CHAPTER IV.

LIBELS AS CONTEMPTS OF COURT.

HAVING considered libels in their various ordinary relations as private wrongs and as crimes, it remains to consider them in their occasional aspect as contempts of court. The latter is, indeed, a branch of the criminal law; but the mode of appeasing offended justice by proceedings in contempt is so radically different from the proceedings by indictment, that the subject may well be independently treated.

Courts are said to possess an inherent power to punish not only contempts of their rules and orders, but also any conduct tending to disturb them in their proceedings or to impair the respect due to their authority, and legislative bodies possess the same powers as courts in this respect.[1] But "the courts have unquestioned power to decide upon the validity of a commitment for contempt by a legislative body, *i. e.*, to pass upon the question whether the Legislature acted within its jurisdiction in the particular case."[2]

In its issue for Sunday, February 27, 1887, the San Antonio *Express* published a somewhat uncomplimentary description of the members of the Twentieth Texas Legislature.

[1] Wharton's Criminal Law, vol. II., § 1613.
[2] Rapalje on Contempts, p. 4.

It has been the custom of Capital artists to photograph the previous bodies which have drawn the people's money in these kalsominal halls. Before the dread vision of the Twentieth they have fallen back appalled. Retreating foreheads, tousled hair, unshaven faces, soiled shirts, guiltless of collars, white-seamed coats, pants that bag at the knees with a terrible bagginess, shoes which are fashioned on the generous principle of the room-for-one-more street-car, shocking bad hats and a general air of that uncleanliness which is next to the devil; lips stained with tobacco saliva; teeth which are not; bulge-knuckled hands, whose symmetry is among the sweet might-have-beens that may not be; and, high over all, first and foremost always, accentuated by wagging heads and their own involuntary movement, long drawn out and ponderous ears, whose slow, swaying pendulosity marks the intellectual status of their owners, are too much, — yes, yes, entirely too much. . . .

For thus "holding the mirror up to nature," Mr. Canfield, Austin correspondent of the *Express*, was on the following day expelled from the Representative Chamber, under a resolution, which, after numerous whereases, read as follows: —

Resolved, That H. S. Canfield, who is understood to be the writer of such libellous articles, be excluded from the reporters' tables and the hall, and that the doorkeeper and sergeant-at-arms be instructed to refuse him admittance.

This resolution was adopted by a vote of 61 to 24. Speaker Pendleton ruled that it debarred the correspondent entrance to the lobby. Some days later, on entering the lobby, he was ejected by Assistant Sergeant-at-Arms Montgomery by order of the speaker. Thereupon Mr. Canfield swore out warrants for the arrest of Pendleton and Montgomery for assault. While the trial was in progress, the justice who issued the war-

rants, and the officer who served them, together with the correspondent, were all summoned to the bar of the House for contempt. The justice and the constable were discharged, but Mr. Canfield was sent to jail for forty-eight hours, by a vote of 59 to 21. It was argued, on behalf of the respondents, that the speaker and sergeant-at-arms were not arrested while the House was in session, and that their arrest did not impede legislative business. Mr. Canfield has sued the fifty-nine members who voted for his imprisonment, and the sergeant-at-arms, for damages aggregating $110,025. The act of contempt for which he was imprisoned was not the libellous publication, but the prosecution instituted by him against officers of the House.

The power of courts to punish for contempts, where it has not been restricted by statute, has generally been held to extend to the punishment by summary process of reporters, editors, and publishers of newspapers, for the publication of matter which in the opinion of the Court tended to corrupt the sources of justice, or to diminish public respect for its administration. The power of inferior courts to punish for contempt does not generally extend beyond contempts committed in their immediate presence; but in the higher tribunals the power is very broad. As a general rule, no court can review an adjudication of a contempt by another court of competent jurisdiction. Owing to the exceptional character of this power, however, the principles of law governing its exercise are somewhat ill-defined, and the decisions conflicting.

As will be seen in the chapter on Privileged Publications, the press is granted immunity from responsibility for fair, accurate, and impartial reports of pro-

ceedings held in open court, and for comments of an editorial nature upon such proceedings and upon the manner of administering justice, provided the comments are made fairly and in good faith. If the editor, however, criticises the court or any of its officers unjustly or intemperately, or if the reporter publishes a false or unfair report, during the pendency of an action, tending to prejudice the public or the jury in the case, the editor or reporter would be guilty of contempt.

It has also been claimed as a prerogative of the courts at common law to determine whether proceedings before them should be published; but in modern times such publication is rarely prohibited. A publication in defiance of such prohibition would be a contempt of court.[1] "So recently as 1867 a justice of the Superior Court of the city of New York prohibited the publication of proceedings had before him, and his course was approved by the other justices of that court."[2] Under the following section of the New York Penal Code, it would seem, such a prohibition would now be inoperative: —

§ 143. — A person who commits a contempt of court, of any one of the following kinds, is guilty of a misdemeanor: . . . 7. — Publication of a false or grossly inaccurate report of its proceedings. But no person can be punished as provided in this section, for publishing a true, full and fair report of a trial, argument, decision or other proceeding had in court.

During a divorce trial in the Superior Court in San Francisco the *Examiner* published full reports of the testimony, although the hearing was held with closed

[1] Bishop on Criminal Law, vol. II., § 259.
[2] Townshend on Slander and Libel (1877), § 231, *note*.

doors. The judge issued strict orders to the officers of the court and to the witnesses not to divulge any of the proceedings. The *Examiner* continued to report the trial in full. Felix J. Zeehandelaar, who was writing the court proceedings for the *Examiner*, was cited to appear, and was asked where he got his information. He refused to answer the questions, and was adjudged guilty of contempt of court, and was remanded to the custody of the sheriff. A writ of *habeas corpus* was then taken out, and the matter argued before Judge Maguire, who also remanded the reporter. The case was then taken to the Supreme Court, and an order was made setting aside the commitment. The chief reason given for the discharge was that the questions Zeehandelaar refused to answer were not pertinent to any matter involved in any issue then before the court, therefore his refusal to answer did not constitute a contempt.[1]

In the Federal courts the power to punish contempts, according to section 725 of the Revised Statutes, "shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice." Justice Baldwin, of the Circuit Court of the United States, during the trial of a manslaughter case in Philadelphia in 1842, in which great public interest was manifested, held that under the statute, which at that time was in substantially the same form as at present, the Court had no power to punish as for contempt the publication of testimony pending the trial. The judge intimated, however, that the Court could regulate the admission of persons to the room where

[1] The *Journalist*, Nov. 13, 1886.

the trial was in progress, and the representatives of the Philadelphia newspapers took the hint. "The reporters expressed their acquiescence in this order of the Court," adds the author of the report, "and the most respectful silence on the part of the press prevailed during the whole trial." [1]

The cases are comparatively rare where reporters have been in contempt for publishing judicial proceedings in defiance of an order of the Court. Much more frequent are the cases of contempt where newspaper writers have cast reflections on the conduct of witnesses, parties, counsel, jurors, or judges during the pendency of a case, or in other ways have seemed to the Court to seek unlawfully to influence the administration of justice.

A famous case of this character was that involving the impeachment of Judge Peck, of the United States District Court for the District of Missouri. Luke Edward Lawless was an Irishman, and had fought in the French army at Waterloo. He was practising law in St. Louis in 1826, and was counsel for the Soulard heirs in a land case against the United States. Judge James H. Peck, in March of that year, published in the *Missouri Republican* an elaborate opinion upon the case favorable to the defendant. Mr. Lawless then published in the *Inquirer*, under the signature "Citizen," a respectful criticism of the opinion, in which he pointed out what he deemed errors in the decision, but without inpugning the motives of the judge. Judge Peck ordered the editor of the *Inquirer*, and later Mr.

[1] United States *v.* Holmes, 1 Wallace, Jr., 10. See also the case of the State *v.* M. C. Galloway *et al.* (Memphis *Avalanche*), 5 Coldwell (Tenn. 1868), 326.

Lawless, to be brought into court on an attachment for contempt, and the unfortunate lawyer was sentenced to twenty-four hours' imprisonment and to be suspended from practice as an attorney for eighteen months, on the ground that the publication would tend to prejudice other land cases, which were still pending. Mr. Lawless was released on a writ of *habeas corpus* before his term of imprisonment expired, and subsequently preferred charges against Judge Peck before the Judiciary Committee of the House of Representatives at Washington. The committee, after hearing testimony upon the case, voted unanimously to report articles of impeachment against the judge. Mr. Buchanan, chairman of the committee (afterwards President), said in presenting the articles to the House: —

"When an individual, elevated to the high and responsible rank of a judge, forgetting what he owes to his own dignity, to his country, and to the liberties of the people, shall by arbitrary and oppressive conduct prostrate the rights of a citizen of this republic, it is fit and proper that he should be held up as an example and made a victim to the offended majesty of the laws. It is my deliberate conviction that such has been the conduct of Judge Peck, and I may add that similar sentiments were held by every member of the Judiciary Committee."

In conclusion, Mr. Buchanan argued that if Mr. Lawless' act had been unlawful he should have been tried before a jury, whereas Judge Peck had combined "in his own person the offices of the prosecutor, the grand jury, the petit jury, and the judge." The impeachment was voted by the House, April 24, 1830, and tried by the Senate in December, the arguments at the trial occupying several days, and engrossing public at-

tention to a remarkable degree. The vote stood upon the question of conviction, twenty-one "guilty," and twenty-two "not guilty," and the judge was acquitted. It was urged on behalf of the respondent that the statutes of the United States placed no limitation upon the power of the Federal courts to punish for contempt, but this defect was immediately remedied, in consequence of the trial, by the passage of the act already referred to,[1] which was approved March 2, 1831.[2]

The Supreme Court of Montana has recently ruled that this act does not apply to the Territorial courts. James A. Murray was accordingly fined $500 for securing the publication of the following despatch in the Helena *Independent*, January 11, 1887 :—

> Cannon and Murphy, real estate agents, to-day made a wager of $500 that, owing to the influence of some surface claimants on the Smoke-House lode, the Supreme Court would reverse their former decision in the Smoke-House case.

Murray was a party to certain lawsuits, some of which had already been decided in his favor, and others of which were pending. It was charged that he sought by means of the despatch to influence the Court to adhere to its former line of decision. No money had, in fact, been wagered.[3]

Messrs. Steinman and Hensel were editors of the Lancaster *Daily Intelligencer*, and were also both attorneys. They published, January 20, 1880, the following comment on a case in the Court of Quarter Sessions :—

[1] See p. 103.

[2] See the *Nation*, June 4, 1885; Hudson, Journalism in the United States, p. 745; Report of the Trial of James H. Peck, by Arthur J. Stansbury (592 pp., Boston, 1833).

[3] Territory *v.* Murray *et al.*, 15 Pacific Reporter, 145.

Logically, the last acquittal, like the first, was secured by a prostitution of the machinery of justice to serve the exigencies of the Republican party. But as all the parties implicated, as well as the judges, belong to that party, the Court is unanimous — for once — that it need take no cognizance of the imposition practised upon it, and the disgrace attaching to it. — Eds. *Intelligencer.*

Neither of the editors admitted the authorship of the libel, but both accepted the responsibility as editors, claiming, however, that the article was a privileged publication, and that, having been published out of court, the Court had no power to punish them by summary process. Judge Patterson of the Court of Quarter Sessions found the two respondents guilty of misbehavior in their office as members of the bar, and ordered their names stricken from the roll of attorneys. The Supreme Court, however, on reviewing the case, ordered that the two editor-lawyers be restored to the bar. Chief Justice Sharswood, in delivering the opinion of the Court, held that the article was a gross libel on its face, but that an attorney can only be disbarred for misconduct respecting his professional character, and that it would be unconstitutional to deprive him of his office because of the publication of a libel respecting any matter which was a proper subject for investigation.[1]

The publication of disparaging comments upon the court or its officers, pending a trial, is in most States a contempt. The Chicago *Evening Journal* published the following editorial, October 16, 1872:—

THE CASE OF RAFFERTY. — At the time a writ of *supersedeas* was granted in the case of the murderer, Chris. Raf-

[1] *Ex parte* A. Jackson Steinman and William U. Hensel, 95 Pa. State Reports, 220.

ferty, the public was blandly assured that the matter would be examined into by the Supreme Court and decided at once; that possibly the hanging of this notorious human butcher would not be delayed for a single day. . . . We have no hesitancy in prophesying clear through to the end just what will be done with Rafferty. He will be granted a new trial. He will be tried somewhere, within a year or two. He will be sentenced to imprisonment for life. Eventually he will be pardoned out. And this in spite of all our public meetings, resolutions, committees, virtuous indignation and what not. And why? Because the sum of fourteen hundred dollars is enough nowadays to enable a man to purchase immunity from the consequences of any crime. . . . The courts are now completely in the control of corrupt and mercenary shysters — the jackals of the legal profession — who feast and fatten on human blood spilled by the hands of other men. All this must be remedied. There can be found a remedy, and it must be found

The Supreme Court held that the publication was a contempt, and that a disclaimer of any such intent was no defence. Charles L. Wilson, the proprietor of the *Journal*, was fined $100 and costs, although he was not aware that the editorial had been written until after it was published, his ignorance of the fact being accepted in mitigation, and Andrew Shuman, the managing editor, was fined $200 and costs. The Court, which stood four to three for conviction, said in passing sentence, "Our object will be accomplished if we show to the press that it cannot be permitted to attempt to influence the decision of cases pending in the courts." [1]

In the case of the Chicago *Evening Journal* the publication was held to be a contempt independently of

[1] The People *v.* Wilson *et al.*, 64 Ill. 195. See also William C. Sturoc's case (Newport *Argus and Spectator*, Sept. 6, 1867), 48 N. H. 428.

statute. In a somewhat similar case in Arkansas [1] the publication was declared a contempt *in spite of* statute. The Legislature of the State expressly enacted that the power of a court to punish for contempts should be "confined" to contemptuous behavior "in its immediate view and presence." The Supreme Court, however, maintained that it had the power, which could not be taken from it except by abolishing the court itself, to punish a newspaper publisher for charging it, during a session, with bribery. And in a comparatively recent case in West Virginia the Supreme Court of Appeals said: "In this country, where the courts are, in the divisions of power by the constitutions of the several States, constituted a separate and distinct department of government, clothed with jurisdiction and not expressly limited by the constitution in their powers to punish for contempt, the inherent power that is thus necessarily granted them cannot be taken away by the legislative department of the government." [2] This case in West Virginia grew out of an editorial published in the Wheeling *Intelligencer*, June 18, 1884. The first paragraph of the editorial was as follows: —

> The State campaign seems to be shaping itself. It leaks out that the Supreme Court of Appeals is to be brought to the rescue in a decision affirming the constitutionality of the Exemption Act, and declaring the supplemental assessment order to be lawful and right. This is, in effect, what was promised by the three Supreme Court judges to the Democratic caucus before the order was issued.

This editorial was declared by the learned judges to be an attempt to affect the decision of the Court in a

[1] State *v.* Morrill (Des Arc *Citizen*, March 24, 1855), 16 Ark. 404.

[2] State *v.* Frew and Hart, 24 W. Va. 416, 457. See also the State *v.* Cheadle (Frankfort *Banner*), 110 Ind. 301.

case then pending, and in voluminous opinions by three of the four judges constituting the court, one of the publishers and the chief editor of the *Intelligencer* were pronounced guilty of contempt. John Frew was fined $25 and costs, although he knew nothing of the contemptuous editorial until after it was in print. Charles Burdett Hart, the writer of the libel, was fined $300 and costs. Green, J., read a dissenting opinion in so far as the sentences were concerned. "In my judgment," said he, "this defendant, Hart, ought to be imprisoned as well as fined."[1]

A more liberal view was taken by the High Court of Errors and Appeals in Mississippi in an earlier case. Walter Hickey, editor of the Vicksburg *Sentinel*, published, June 10, 1844, during a term of the Circuit Court, the following article: —

JUDGE COALTER AND THE MURDERER OF HAGAN. — We have information, from the most undoubted authority, that immediately after the grand jury of Warren county brought in a true bill against Adams, for murder in the first degree, for killing Dr. James Hagan, District Attorney Walker, obedient to his sworn and solemn duty, twice demanded of Judge Coalter that Adams should be committed to prison, both of which demands the judge disregarded, and Adams is still at large. Having disregarded his oath of office, and failed to execute the laws, Judge Coalter deserves to be hurled from a seat he desecrates, and brought as a criminal abettor of murder to the bar to answer for his crimes. . . .

The editor admitted the publication, and was ordered to pay a fine of $500 and costs, and to be imprisoned in jail for five months. On the following day he was discharged by the sheriff on a pardon from the gov-

[1] 24 W. Va. 489. See also the *American Journalist*, July, 1884.

ernor. The pardon was granted on the ground that the alleged contempt was not committed within the presence of the Court, and that the sentence was excessive of the authority granted to the Court by the constitution and laws. The Circuit Court the next day ordered that, as "the said Walter Hickey has by some means escaped from said jail," the sheriff should again confine him under the order for contempt. Mr. Hickey was brought up on the following day before the High Court of Errors and Appeals on a writ of *habeas corpus*. This tribunal held that under the statute of the State, which provided that no act was contempt unless committed in the presence of the Court, Mr. Hickey's publication was not a contempt, but only a libel on the judge independently of his judicial character. The pardon was accordingly valid.[1]

The conviction of one Abrahams in the Circuit Court of Iowa in November, 1857, and the subsequent proceedings in the case, called forth the following article in the Burlington *Daily Hawkeye*: —

> In the malicious prosecution pending against J. F. Abrahams, under the rulings of the Court, he was convicted of leasing his house for improper purposes, and fined by Judge Claggett, $100. Upon his appearing and offering to appeal to the Supreme Court, Judge Claggett fixed the bail at *fifty thousand dollars*. What do our readers think of the fairness and impartiality of a judge who is guilty of this extortionate demand, in direct violation of the eighth amendment to the Constitution — "excessive bail shall not be required"? . . .

A writ was served upon C. Dunham, editor and proprietor of the *Hawkeye*, ordering him to show cause

[1] *Ex parte* Walter Hickey, 4 Smedes & Marshall, 751.

why he should not be punished for a contempt. Before the determination of the proceedings Mr. Dunham published the following (November 10, 1857): —

THE FIRST ATTEMPT IN IOWA TO MUZZLE THE PRESS. — Waiting no longer for the decision of the Court, we shall to-morrow publish a correct, and so far as we can make it, full and complete report of the arrest and trial of C. Dunham, in violation of his constitutional rights, and his privileges of trial by jury, for daring to speak of the doings of Judge Claggett and the Circuit Court. We shall give a full account of this high-handed assault upon the liberty of the press by a vindictive and august judge. . . .

These articles, and others published November 11, again caused the arrest of Mr. Dunham upon an information filed by Judge Claggett, and this action of his Honor called forth the following editorial, November 13: —

MORE CONTEMPT. — . . . Judge Claggett constituted himself judge and jury, and would have added the character of executioner, if he had dared. His attempted censorship of the press, as it appeared in our forcible arrest and trial, never had a color of law, and was not a cause pending in any fair sense of the word. It was an outrage — it was a mockery — it was anything, rather than a cause pending in any legal and proper sense. . . . It is Judge Claggett's second effort to deprive us of our rights, and prevent his arbitrary and tyrannical acts from becoming known through the medium of the press.

For this publication the editor was charged a third time with contempt, this time upon the information of the prosecuting attorney of Des Moines county. He was tried on the three charges, discharged under the first, and found guilty under the second and third, and

fined $50. He carried the case before the Supreme Court, where the judgment of conviction in the Circuit Court was reversed. The Supreme Court held that a power to punish for contempt in the case of publications made out of court is not necessary, either for the protection of the Court or the public. The Court said that it did not sanction the editor's course, but added: "If his attack were libellous, then it seems to us that he and the judge assailed should be placed on the same grounds, and 'their common arbiter should be a jury of the country.' No Court can or should hope that its opinions and actions can escape discussion or criticism." [1]

"Long" John Wentworth was editor of the Chicago *Morning Democrat* from 1836 to 1861. May 7, 1840, while he was serving as a member of a petit jury in the trial of a capital case, he published in the *Democrat* the following paragraph: —

ANOTHER WHIG VICTORY. — Why has the editor of this paper been a Harrison man for the last three days? Because he has been under keepers, and allowed to express no sentiments, and answer no questions.

For furnishing this and other articles for publication, while under the charge of officers of the court, Mr. Wentworth was criticised by the Chicago *Daily American*. The Circuit Court deemed the comments of the *American* to be a contempt, and fined William Stuart, the editor, $100 and costs. The case was carried before the Supreme Court on a writ of error, and the judgment was reversed. "An honest, independent, and intelligent court," said the judge who rendered the opinion,

[1] The State *v.* Dunham, 6 Clarke, 245.

"will win its way to public confidence in spite of newspaper paragraphs, however pointed may be their wit or satire, and its dignity will suffer less by passing them by unnoticed than by arraigning the perpetrators, trying them in a summary way, and punishing them by the judgment of the offended party."[1]

As already stated, courts of inferior jurisdiction do not generally possess the power to punish for "constructive" contempts, or contempts not committed in their immediate presence. A Connecticut coroner, however, ruled that Frank H. Alford, editor of the Middletown *Daily Herald*, was guilty of contempt in publishing the following in the *Herald*, March 25, 1887: —

A PRETTY HOW D'YE DO. — Chief Justice Lovell Hall is holding court and investigating the cause of the death of Mellick Connors. In this court Hall acts as attorney, judge, clerk, messenger, officers, and in fact manages to scoop in all of the fees. A witness, who is in a neighboring town, was wanted by Judge Hall. A warrant for his arrest was issued and given to an officer, but the court had no money, the judge penniless, and in fact no one connected with the court had sufficient money to pay the officer's expenses. So the evidence of this important witness will not be heard before this high tribunal.

Mr. Alford was sentenced by Coroner Hall to pay a fine of one dollar and to be imprisoned one day in jail. A motion for a writ of error was denied.[2] Every attorney in the county, as well as a large number of citizens, signed a petition for the removal of the coroner from office; but the judges who appointed him decided to

[1] The People *v.* Stuart, 3 Scammon, 405.

[2] See the Middletown *Herald* and Middletown *Constitution*, March 29, 1887.

allow him to serve out his term, with the assurance that he should not be reappointed. A few months earlier Mr. Alford had been declared to be in contempt by an associate judge of the City Court of Middletown, who took exception to the expression "Lime-Kiln Club," as applied to his court. The editor was allowed to purge himself of contempt by filing a written apology and paying costs.[1]

The question has been raised, whether a grand jury can of their own motion "take official action against the proprietors of public journals for the publication of articles which, in their judgment, reflect unwarrantably upon themselves or upon the Court." This question was propounded to the Court of Quarter Sessions in Philadelphia by the grand jury, and answered by Judge Ludlow by a reference to the statute of 1836, cited in part below.[2] Judge Ludlow stated that the party aggrieved, whether a member of the grand jury or other court officer, had under the statute ample redress by civil or criminal proceedings against the publisher of the article, exactly as any other person who is libelled. "I would rather," said he, "suffer unjust and even imprudent criticism than violate a great principle, for I know that sooner or later an act of injustice will be rectified by an enlightened public opinion, while a violation of a principle not only inflicts a mortal wound upon the cause of the liberty of the press and of the citizen, but that wound would be inflicted by the arm sworn to protect and defend both."[3]

An editorial, supposed to have been written by

[1] See the *Journalist*, Aug. 7, 1886.

[2] See p. 126.

[3] Grand Jury *v.* the Public Press, 4 Brewster (1869), 313.

Horace Greeley, was published in the New York *Tribune*, April 14, 1864, pending the trial of one Nixon in the Court of Oyer and Terminer. The editorial was headed, "A Judicial Outrage," and was deemed an unjust reflection upon the conduct of the judge presiding at the trial. Mr. Greeley was ordered to show cause why he should not answer for a contempt of court, and was ordered to answer certain interrogatories regarding the authorship of the editorial and the responsibility for its publication. The Court disclaimed any complaint as to editorial comments, relying upon the charge that the article was a grossly inaccurate report of the proceedings of the court. Mr. Greeley filed the following statement: —

Horace Greeley, in the above-entitled proceedings referred to, protesting against the jurisdiction of this court over his person, and over the proceedings now being taken, and insisting that they are irregular and without warrant of law, and further insisting that he ought not to be asked, and cannot legally be compelled, to answer questions upon a charge which is in its nature criminal, and for which he may be exposed to indictment, both as a misdemeanor for a contempt as well as for a libel, and further insisting that the said article, in the order to show cause in these proceedings referred to, is not a report of the proceedings of a court, but, on the other hand, is simply an editorial criticism, based upon a report of such proceedings contained in a newspaper called the *Evening Express*, published two days before said editorial article was published, to wit, on the 12th day of April instant: —

For answer to the interrogatories filed and served on him, says that he is now, and ever since its foundation has been, the principal editor of the newspaper called the *Tribune*, and is one of its proprietors, by being a stockholder of the

corporation that publishes the same; that as such editor and proprietor he is subject to all the responsibilities that justly pertain to that relation. Believing that this avowal is a substantial answer to all the interrogatories propounded to him, he most respectfully declines to answer any questions that may expose any of his associates in the editorship and publication of said newspaper to the discipline of this tribunal, preferring to abide the consequences, be they what they may.

"The Court, being satisfied that no disrespect was intended, discharged Mr. Greeley."[1]

The disclaimer of an intention to show disrespect for the Court was held in the case of the People *v.* Charles L. Wilson, cited above, to be no defence in proceedings for contempt. In Mr. Greeley's case, however, and in the case of B. F. Moore *et al.*, in North Carolina,[2] the intent was deemed material. Mr. Moore and one hundred and seven others, members of the bar, published in the Raleigh *Daily Sentinel*, April 19, 1869, under their own names, "a solemn protest of the bar of North Carolina against judicial interference in political affairs," in which they said:—

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.

This protest was held by the Court to be libellous, but the respondents were "excused," not "acquitted," upon disavowing under oath any intention of committing a contempt of court, or of impairing the respect

[1] Townshend on Slander and Libel, p. 407.
[2] In the matter of B. F. Moore *et al.*, 63 N. C. 397.

due to its authority. The Court expressly distinguished between a contempt proceeding and an indictment for libel, the actual intention of the respondent being material in the former case, though not in the latter.

In an early case in New York, disavowal of bad intent was held to be only a matter of mitigation. Samuel Freer was committed for contempt for publishing in the Ulster *Gazette* in August, 1803, certain unfavorable comments on the conduct of the case of Harry Croswell, who was on trial for libelling President Jefferson.[1] The editor disclaimed all wrongful intent, and was discharged on payment of a fine of ten dollars.[2]

Generally speaking, a libel will be construed as a contempt of court only when its publication will tend to obstruct the court in the administration of the law. This principle is shown in the case of the People *v.* Wilbur F. Storey.[3] The grand jury had returned four indictments against Mr. Storey, March 13, 1875, three for libel and one for publishing an obscene newspaper. Mr. Storey subsequently published several articles in the Chicago *Times*, reflecting upon the action of the grand jury, questioning its integrity as a body, and attacking the moral character of some of its members. For this he was sentenced in contempt to imprisonment in the county jail, but the Supreme Court reversed the judgment of the lower court, on the ground that, the indictments having been already found, the articles had no tendency to impede the grand jury in the discharge of its duties. "It is not advisable under our constitution," says Judge Scholfield in rendering the opinion of

[1] See *ante*, p. 20.

[2] The People *v.* Freer, 1 Caines, 485, 518.

[3] 79 Ill. 45. See also the State *v.* Anderson (Keokuk *Daily Gate City*), 40 Iowa (1875), 207.

the Court, "that a publication, however libellous, not directly calculated to hinder, obstruct, or delay courts in the exercise of their proper functions, shall be treated and punished summarily as a contempt of court." The editor would, however, be liable in such case, civilly or criminally, for the libel upon the individual jurymen.[1]

Similarly, the Supreme Court of Indiana held that newspaper comments, however stringent or libellous, having relation to proceedings which are past and ended, are not in contempt of the authority of the court to which reference is made. In this case a circuit judge had fined the editor of the Frankfort *Banner* fifty dollars and costs for publishing an article entitled "A Joke on a Judge," December 12, 1885, in which the judge was charged with having lost his temper during a criminal trial, which was then at an end. The judgment of the Circuit Court was reversed.[2]

Allen O. Myers, a Cincinnati journalist and politician, was indicted in December, 1887, for complicity in certain election frauds in 1885. The treatment which he received in Columbus and Cincinnati newspapers provoked him to the point of writing a long letter to the Cincinnati *Enquirer*. In this letter he used some rather severe language regarding Judge Pugh, of the Court of Common Pleas, and the grand jury by whom he was indicted: —

> Let us see who first dragged politics into the tally-sheet cases and howled for a Democratic victim. Dave Pugh, the judge on the bench in this case, is the creature of C. D. Firestone, the Columbus Buggy Company fanatic. Pugh

[1] See the case of Martin *v.* Byers, *ante*, p. 50.

[2] The State *v.* Joseph B. Cheadle, 110 Ind. 301.

was chairman of the Republican Central Committee of Franklin county. As such, he visited the Ohio penitentiary in the dark and unholy hours of night, with that creature, Cyrus W. Huling, the present persecutor, and like a jackal prowling around the corpse of justice, Pugh, the present judge, was present when the convicts were feasted and fixed to perjure themselves and swear away the reputation and liberty of innocent Democrats. Was this politics? . . . A special grand jury was called in the month of December for a special partisan purpose. That grand jury was "salted." It was never honestly drawn from the box. . . . The honest, impartial, upright judge lifted his "sweet boy face" to heaven and refused to be a party to such a transaction, but ordered the clerk to draw a Huling-Firestone Columbus Buggy Company jury from the box. . . .

This letter was written in Cincinnati, February 20, 1888, but it was published in the *Enquirer*, March 3, under the date line, "Columbus, March 2," and signed "Pickaway." For this letter Myers was arrested in open court in Columbus, charged with contempt. Judge Pugh read an opinion in the case, May 3, the opinion occupying forty minutes in its delivery. The result of the case was thus stated in the *Enquirer*, in the headlines of its report, May 4:—

DEAD — THE FREEDOM OF THE PRESS IN OHIO. — *Allen O. Myers Found Guilty of Contempt Under the Common Law of England — For Writing an Article in Cincinnati about the Transaction of a Judge at a Former Term of Court — And Sentenced to Ninety Days in Jail and a Fine of Two Hundred Dollars.*

Sentence was suspended, and the prisoner paroled, pending a hearing on the case in the Supreme Court on a writ of error. The case is the first of its kind ever

presented to that court, and the author ventures the prediction that the judgment of the lower court will be overruled. The statutes of Ohio grant authority to the courts to "punish summarily a person guilty of misbehavior in the presence of or so near the court or judge as to obstruct the administration of justice," but it is not believed that authority can be found under the Ohio statutes for the judgment of guilty in this case, or a precedent for so severe a sentence.

As this book is going through the press, J. T. Hawke is writing editorial correspondence to his paper, the Moncton, N. B., *Transcript*, from Fredericton jail. His term is two months, and his offence, contempt. He indiscreetly stated in the *Transcript* that certain of the New Brunswick judges were addicted to habits of intoxication while on the bench. The Minister of Justice, in the Dominion Parliament, expressed approval of the judgment of conviction.[1]

Discussing "The Press and the Law," in an address before the Florida Bar Association, Judge Emory Speer lately used the following language with regard to publications designed to influence the courts in the administration of justice: —

"I affirm with all the solemnity of the profoundest conviction that of late a portion of the influential press have invaded the temple of justice itself, and, with the commendable purpose to hasten punishment upon what seems great municipal and public wrong, have aimed blow after blow which tended to shatter, as with the hammer of Thor, the foundation, aye, the corner-stone of the administration of the law, and to destroy and nullify that wise, benign, humane, and Christian principle, that the presumption of innocence

[1] Montreal *Herald*, May 15, 1888.

shall clothe the accused as with a garment until destroyed by legal proof, produced on a fair trial, before an unprejudiced court and an impartial jury. . . . Every lawyer and judge will know that I allude to the newspaper attempt to insure the conviction for bribery of the New York aldermen and of Jacob Sharp. . . . The remedy for the injudicious encroachments of the press cannot be, must not be, the Old World proceeding for contempt against the editor; but, when it is made to appear that the inflamed temper of the public will render a fair trial impossible, the cause must not be tried. It must be passed to the next term, and the next if need be, until the returning sense of justice in the leaders and directors of public opinion will permit that calm, deliberate and impartial action so essential to the administration of justice."[1] . . .

In an address before the State Bar Association of New York, at Albany, January 17, 1888, Daniel Dougherty, of Philadelphia, discussed at length the same subject. "Is trial by newspaper to be substituted for trial by jury?" he asked, and he called upon the press to publish, if they like, as the law expressly permits, "true, full, and fair reports," but to forbear comment until the trial is over and judgment entered. He advocated the postponement of cases where newspaper publications have tended to prejudice the public, but then, if the comments are renewed, his policy would be to "punish severely by fine and imprisonment, and the more conspicuous the offender, the more impressive the example."[2]

[1] New York *Sun*, Feb. 12, 1888.

[2] *American Law Review*, March–April, 1888. It is the practice of English courts to restrain by injunction publications which would tend to affect the administration of justice. (Odgers on Libel and Slander, second English edition, p. 337.) English courts also have power to grant injunctions restraining the further publication of anything which a jury has found to be an actionable libel. (Odgers, as above, p. 340.)

The refusal of a reporter to disclose the sources of information upon which he has based a report, when ordered to do so in a criminal court, has also been held in some cases to be a contempt.[1] John Dennis, Jr., a reporter on the Rochester *Democrat and Chronicle*, was subpœnaed before the grand jury in that city, and asked who had given him certain facts which he had published, regarding the alleged bribing of a jury by certain city officials. He declined to give the desired information, and was committed to the Monroe county jail, January 29, 1885, for contempt, by Justice Rumsey, of the Supreme Bench. "At the jail Mr. Dennis held a levee all the afternoon. Lawyers, business men, physicians, clergymen, and others, called on him, and his apartment was strewn with remembrances from personal friends. At 5 P. M. a majority of the journalists of the city assembled at the jail, and being granted the use of the sheriff's parlors, held a meeting, with Isaac D. Marshall, managing editor of the *Post-Express*, as chairman. Resolutions approving Mr. Dennis' position and criticising a law that would condemn an innocent man to incarceration, without bail, for refusing to divulge sources of information while engaged in the work of exposing corruption, while many men here, recently charged and indicted for high crimes, and tried, have never been deprived of their liberty, and also pledging him their hearty support, were adopted."[2] Mr. Dennis was discharged from imprisonment on the following day by Justice Macomber, but his Honor assigned no reason for this action.

John T. Morris, a Baltimore *Sun* reporter, obtained the

[1] This is, of course, however, quite aside from the subject of newspaper libels.

[2] The *Journalist*, Jan. 31, 1885.

facts relative to the indictment of a man charged with crime, and they were published in advance of the grand jury's report. He was summoned before the grand jury and questioned regarding the sources of his information, and, declining to answer, was committed for contempt. After seventeen days, the term of the grand jury having expired, he was released on a mandamus.[1]

In a similar case in Massachusetts, Judge Blodgett, of the Superior Court, ruled that recalcitrant witnesses could not be compelled to divulge the sources of their information. James P. Frost, city editor of the Boston *Globe*, and Daniel J. Saunders, a reporter on the same paper, were subpœnaed before the grand jury and asked from whom certain facts had been obtained which were embodied in a news article regarding a certain murder case. The two gentlemen declined to disclose the name of their informant, and after a protracted hearing, the Court decided that they could not be compelled to do so.[2] This case is distinguished from that of Mr. Dennis by the fact that the grand jury in the case of Messrs. Frost and Saunders were simply seeking to ascertain who had disclosed certain secrets of the district attorney's office or police department, and were not endeavoring to obtain evidence to be used in a criminal trial.

Still another class of contempts, of especial interest to members of the press, is thus provided for by statute in Alabama: —[3]

> The printer or proprietor of any newspaper, hand-bill, advertisement or libel, the publication of which is punishable

[1] Philadelphia *Press*, Jan. 9, 1887.
[2] See the Boston *Globe*, Dec. 5, 1884.
[3] Criminal Code, § 3774.

under the preceding sections, who refuses, when summoned, to appear and testify before either the grand or petit jury, respecting the publication of such newspaper, hand-bill, advertisement or libel (not having a good excuse, to be determined by the Court), is guilty of a contempt, and also of a misdemeanor; and on conviction for such misdemeanor must be fined not less than twenty nor more than three hundred dollars, and may also be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than six months.

Under a similar statute in Georgia,[1] A. W. Burnett, publisher of the Atlanta *Defiance*, was sentenced to pay a fine of fifty dollars, and to be imprisoned ten days in the common jail. His offence was a refusal when summoned as a witness to give the name of the author of a paragraph in which the prosecuting witness was called an "old skunk," or indeed to testify at all. His refusal to testify was based upon the fact that he had been indicted for the same offence, and that his testimony would tend to criminate himself. This, the Court ruled, would not excuse him from testifying, though he would be protected in refusing to answer any specific question having such tendency.[2]

In a case in Tennessee the Supreme Court held that a judgment of conviction for contempt is not subject to revision by any other court, by appeal, writ of error, or otherwise; but there are many contrary decisions in other States. In this case Messrs. Galloway and Rhea of the Memphis *Avalanche* had been sentenced to fine and imprisonment for publishing an editorial denouncing one of the judges as guilty of official corruption in

[1] Code, § 4522.

[2] The State *v.* Pledger, 3 Southeastern Reporter (1887), 320. The Court held that the words above quoted were libellous.

admitting to bail a certain prisoner, who had been indicted for a felony. The respondents had been refused a discharge on a writ of *habeas corpus*. The Supreme Court held that the writ of *habeas corpus* offers the only redress to a person convicted for contempt, but that where a judge grants or refuses to grant a discharge on a writ of *habeas corpus* there is no appeal to any higher court. It was further held that where a respondent has been committed for contempt, and the case is reviewed on a writ of *habeas corpus*, the judge hearing the *habeas* cannot examine the evidence upon which the prisoner was convicted to see whether the evidence sustains the judgment of commitment, but can only determine whether the judgment is proper in form, and whether the Court committing the prisoner had jurisdiction of the case [1] In some States (New Jersey, for instance) the courts of last resort are given statutory power to review contempt proceedings had in courts of limited jurisdiction both on the law and the facts.

Some of the States have by statute restricted the power of the courts to punish for contempts. In Pennsylvania, by the statute of June 16, 1836,[2] it is provided that —

> No publication, out of court, respecting the conduct of the judges, officers of the court, jurors, witnesses, parties, or any of them, of, in or concerning any cause depending in such court, shall be construed into a contempt of the said court, so as to render the author, printer, publisher, or either of them, liable to attachment and summary punishment for the same.

[1] The State *v.* M. C. Galloway *et al.*, 5 Coldwell (1868), 326.

[2] It will be observed that the case of Steinman and Hensel, cited above, was a disbarment proceeding, and not a proceeding for contempt.

In a number of other States the power of the courts to punish contempts by attachment and summary process has been restricted by statute in general terms to misbehavior in the presence of the Court and disobedience of its process. These statutes, however, are subject to such construction as the Court itself may see fit to place upon them, and in one case it was even held that a publication tending to scandalize the Court was an act done in the presence of the Court, although the publication took place in another city.[1] Where the power to punish for contempts is thus limited by statute, the proper remedy of the judge or other party aggrieved is a civil action to recover damages or a criminal prosecution for libel; and in States where publications out of court may be punished as contempts by summary process, this punishment is in every case a penalty in addition to the usual civil action and indictment, and not a substitute for them.

The Federal courts have held that the constitutional guaranty of the right of trial by jury in criminal prosecutions does not extend to proceedings for contempt. William Duane published in the Philadelphia *General Advertiser* (commonly called the *Aurora*), May 20, 1801, an article headed "The Age of Revolutions," in which the verdict in a certain case is called "most infamous," and severe reflections are cast upon the plaintiff, and upon the judges who presided at the trial. He was refused a jury trial, and was sentenced to imprisonment for thirty days.[2] Similar decisions have been made in New York, New Jersey, Minnesota, Iowa, New

[1] The People *v.* Charles L. Wilson *et al.*, cited above.

[2] Levi Hollingsworth *v.* William Duane, John B. Wallace's U. S. Circuit Court Reports, 77.

Hampshire, and Arkansas. The power of courts to punish for contempt without the intervention of a jury is much restricted in Kentucky, Virginia, and West Virginia, by statute, but in most of the other States no provision is made for the submission of questions of contempt to juries. The offence is not bailable.

On account of its arbitrary character, the power of the courts in matters of contempt has always been looked upon with great jealousy in the United States. In some cases there is a limited power of revision by a higher court, where the power to commit for contempt has been abused; but the only other remedy is by impeachment of the judges by the Legislature. There is a growing sentiment in favor of such legislation as that cited above from the statutes of Pennsylvania, but its growth is too slow in many of the States to keep pace with the requirements of modern journalism. The newspaper has become such an important factor in business and society, that its interests are identified with those of the public; and the interests of neither the press nor the people at large are subserved by the summary punishment of an editor or newspaper writer for the publication of facts or opinions which happen to be distasteful to a judge. This power of the judges to inflict summary punishment for contempts is a relic of the early judicial system when the king himself sat in judgment. At that time an act of contempt of court was an offence against the person of the sovereign, and the sovereign's power to punish the offender was absolute. It is necessary to the existence of the courts that they possess power to compel obedience of their process and enforce order in their actual presence, but it is not required for the maintenance of their authority that they

possess the power summarily to fine and imprison a newspaper writer for publications out of court, — to condemn, without indictment by the grand jury or trial by a petit jury, and without the right of bail, at the will of one man, and he the injured party. "This power," said William E. Potter, arguing on behalf of a client who had been adjudged guilty of contempt,[1] "violates the fundamental principle that no judge shall try a cause in which he has a personal interest. It makes the judge, who is the injured, and therefore the offended party, at once the person who makes the accusation, defines the crime, furnishes the evidence, decides as to its sufficiency, convicts and fixes the term and degree of punishment, which is without limit, except in his own discretion, and may extend to entire confiscation of property and imprisonment for life."

[1] *In re* John Cheeseman, 49 N. J. Law Reports, 115. Mr. Cheeseman had been tried for assault and battery, but the jury disagreed. He then published in his paper, the *New Jersey Patriot*, of Bridgeton, N. J., Jan. 30, 1885, a paragraph clipped from an exchange, which tended to cast discredit on the members of the grand jury which had indicted him, upon the sheriff, and upon the judge who presided at his trial and who would preside at his next trial. The Court of Oyer and Terminer fined him $100 for contempt, and the judgment was affirmed by the Supreme Court.

CHAPTER V.

PUBLICATION.

UNLESS a defamatory writing is published, it is not actionable, for it causes no injury. If it is published, all who in any wise participate in the publication are both civilly and criminally liable. This liability extends to the writer of the libel, the proprietor, editor, and printer of the newspaper, and to the news agent who aids in circulating copies of the paper.[1] The writer is liable as publisher if he actually or constructively requests or procures another to publish the matter, and this responsibility is shared by one who makes orally a defamatory statement to a reporter with a view to its publication. It is shared also by all such organizations as the Associated Press and their agents, if they are the means of disseminating false and defamatory matter. "He who prints and publishes what was given to him in manuscript has to answer for by far the greatest part of the mischief that the statement has occasioned."[2] But this responsibility is moral rather than legal, for before the law each publisher, including in the term writer, printer, and dealer, is liable for all the ensuing damage.

The proprietor of a newspaper may be sued without

[1] See *ante*, pp. 52–54.

[2] Folkard's Starkie on Slander and Libel, p. 385.

joining the writer of the libellous article as a defendant,[1] and his responsibility is not diminished by the fact that the libel was accompanied by the name of the author. In the Troy *Northern Budget*, November 15, 1808, was published the following: —

> I now, sir, publish you to the world as a man destitute of honor, destitute of courage, and destitute of every moral principle and feeling which renders a man valuable in society.
>
> G. D. YOUNG.
>
> TROY, 15th November, 1808.

The Supreme Court held that an action could be maintained against Lyon, the editor of the *Budget*, although the libel was published under the signature of the author, and a verdict for $150 was sustained.[2]

An action can be maintained against the proprietor of a newspaper even if the libel was published as a paid advertisement.[3] In the Sheffield, Eng., *Daily Telegraph* was published an advertisement headed, "The Press Trampling on the Rights of Labour," in which the publisher of the Sheffield *Times* and *Daily News*

[1] Ludwig *et al. v.* Cramer *et al.* (Milwaukee *Evening Wisconsin*), 53 Wis. (1881), 193.

[2] Dole *v.* Lyon, 10 Johnson (N. Y.), 447. The following provisions are made by statute in Texas for cases of criminal libel: "The editor, publisher, or proprietor of a public newspaper may avoid the responsibility of making or publishing a libel by giving the true author of the same, provided such author be a resident of this State and a person of good character, except in cases where it is shown that such editor, publisher, or proprietor caused the libel to be published with malicious design."— (Penal Code, art. 626.) "No person shall be convicted of libel merely on evidence that he has made a manuscript copy of a libel or has performed the manual labor of printing it, unless it be shown positively that such person was actuated by a malicious design against the person defamed. But the person for whose account or by whose order it was printed shall be presumed to have known the intent of the publication, and shall be liable for the offence."— (Penal Code, art. 627.)

[3] Perret *v.* the New Orleans Times Newspaper, *ante*, p. 24.

was called "one of those unscrupulous employers who think that they have a right to dictate to those in their employ any terms their caprice or selfishness may suggest," and in which reference was made to the "detestation" in which he was held by those who knew him, and to his "highly disreputable" conduct. The Court held that the advertisement was libellous, and that the publisher of the *Telegraph* was liable for its publication, even though the publisher of the *Times* and *News* was suing the advertiser at the same time.[1] The plaintiff recovered a verdict against the *Telegraph* for £500.

The responsibility of the party inserting the advertisement is complete, and where it was written by the agent of a corporation, under express or implied instructions from the officers of the corporation, the company is answerable in damages. C. C. Souder, a former agent of the Howe Machine Company, brought suit against the company for the publication of an advertisement inserted by an agent in the Columbus, Ga., *Inquirer*, August 7, 1874, in which the plaintiff was called "a diminutively insignificant and contemptuously unreliable, indolent, and dishonest fellow." A verdict in the plaintiff's favor for $1,500 was affirmed.[2]

If a libellous article is copied from one newspaper into another, the publisher of the newspaper in which it is reprinted, and the exchange editor who cut it out for the purpose, are liable civilly and criminally; but the fact that it was so copied, if done in good faith, may reduce the amount of damages. The addition of comments, or the nature of the heading given to the reprinted libel, may tend to increase the damages by

[1] Harrison *v.* Pearce, 1 Foster & Finlason (1858), 567.
[2] Souder *v.* Howe Machine Co., 58 Ga. 64.

showing actual malice, or to decrease the damages by disproving actual malice. The addition of comments may in some cases even destroy the libellous character of the publication altogether. In a somewhat noted case in England, the libel consisted in the following paragraph published in the *True Sun*, December 18, 1832: —

RIOT AT PRESTON. — *From the Liverpool Courier.* — It appears that Hunt pointed out Counsellor 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!

Mr. Hunt, who was a member of Parliament, brought suit for libel against the editor of the *True Sun*, and pleaded his own case. The defendant's counsel maintained that the word "Fudge!" which formed no part of the reprinted paragraph, but which was added by the editor of the *True Sun*, was added for the purpose of discrediting the story; but the plaintiff claimed that it was added solely with a view to relying upon it in defence in case suit were brought against the editor. It was not disputed that the publication without the word "Fudge!" would be libellous. Lord Lyndhurst said in his charge to the jury: "If the word 'Fudge!' was only added for the purpose of making an argument at a future day, then it will not take away the effect of the libel." He held that the only question was that of the defendant's motive, and that that question was one for the jury to decide. A verdict in the plaintiff's favor for one farthing was returned.[1]

[1] Hunt *v.* Algar *et al.*, 6 Carrington & Payne, 245.

The proprietor of a newspaper is ordinarily responsible for the entire contents of the paper, including the editorial, news, and advertising departments. He is responsible, criminally as well as civilly, even though he had no knowledge of the libellous matter until after it was published.[1] On the trial of a newspaper publisher, however, on a criminal charge of libel, if the truth of the defamatory matter is established, the prosecution "must show that the defendant in a legal sense actually participated in or authorized the publication, and that he did this with an actual malicious intention,"[2] and generally, in a criminal court, negligence or blame must in some way be shown in order to secure the conviction of the defendant. A presumption of criminality, however, is easily raised, and can hardly be disproved save by evidence that the defendant has been a victim of fraud on the part of his employees.[3]

A proprietor convicted and fined on a criminal charge, or mulcted in damages in a civil suit, cannot compel the editor to reimburse him for his loss, even though the libel was inserted by the editor without the proprietor's knowledge. The proprietor and the editor are in such case considered joint wrong-doers, and one of two joint wrong-doers cannot, under any circumstances, compel the other to indemnify him partially or wholly for a fine or verdict which he is required to pay.[4] In this case the proprietor's wrong-doing con-

[1] Commonwealth *v.* Albert Morgan *et al.* (Boston *Saturday Evening Express*, Sept. 11 and 18, 1870), 107 Mass. 199.

[2] Commonwealth *v.* Robin Damon (Salem *Evening News*, May 18, 1883), 136 Mass. 449.

[3] See *ante*, p. 66.

[4] Hiram Atkins (Montpelier *Argus and Patriot*) *v.* James N. Johnson, 43 Vt. 78. (See *ante*, p. 57.)

sists in failing to exercise proper vigilance and care in the selection of a reliable editor.

Even though a libel was published in the proprietor's absence and without his knowledge, by an agent to whom he had given express instructions not to publish it, still the proprietor would be liable in a civil action if the agent disregarded his instructions and published the libel. Major John P. Dunn, editor of the *Political Beacon*, an Indiana paper, started for New Orleans, leaving the paper in charge of his foreman. Before going, he stated that E. W. Jackson would hand in an article for publication, and especially cautioned the foreman to strike out anything exceptionable, personal, or abusive, in Mr. Jackson's manuscript. In the next issue of the *Political Beacon*, which bore the date of March 17, 1843, appeared a long article under Mr. Jackson's signature, denouncing John B. Hall, publisher of the *Democratic Register*. The following extract sufficiently indicates the tone of the article : —

> I now charge the nasty tool with being a gambler, drunkard, fool and coward; a slanderer, and a poor insignificant liar.

In conclusion, Mr. Hall was charged by implication with the crimes of seduction and infanticide. Presumably the foreman failed to catch the defamatory drift of the article. At all events Mr. Dunn, on his return from the South, was sued for libel, and compelled to pay a verdict of $500.[1]

The case of Hall *v.* Dunn was a civil action. In a criminal court, on the contrary, it has been held that an editor or publisher is not answerable where the libel-

[1] Hall *v.* Dunn *et al.*, 1 Ind. 344.

lous matter was inserted by some one without his order and against his will.[1]

The liability of the proprietor grows out of the ruling doctrine in the law of agency that a principal is responsible for the acts of his agent within the general scope of the authority which he has conferred upon the agent. The proprietor of the newspaper "may be compared to one who keeps a dangerous animal, and who is bound so to keep it that it does no harm; if harm ensues he must answer for it."[2]

It has been held in Massachusetts that a publisher may plead in defence that he was not aware, at the time the alleged libel was published, that it had reference to any individual, the writer alone in such case being liable,[3] but this decision will be found to be directly in conflict with many others.

If a single copy of the newspaper containing the libel is published (*i. e.*, sold or circulated) in the State, even though it was printed in another State, civil or criminal proceedings can be maintained against the author or publisher in either the State where the paper was printed, or where the one copy was circulated, or in both States.

During the summer of 1886 the towns of El Paso, Texas, and Paso del Norte, Mexico, frowned at each other across the Rio Grande, while the two republics

[1] Commonwealth *v.* Abner Kneeland (Boston *Investigator*, Dec. 20, 1833), Thacher's Criminal Cases, 346. By statute in Maine (Revised Statutes, chap. 129, sec. 3), the proprietor, editor, printer, or publisher of a newspaper "is responsible for any libel printed or published therein, unless he proves on trial that it was printed and published without his knowledge, consent, or suspicion, and that, by reasonable care and diligence, he could not have prevented it."

[2] Townshend on Slander and Libel, p. 167, *note*.

[3] Reuben Smith *v.* David F. Ashley (Springfield *Tri-Weekly Post*), 11 Metcalf (1846), 367. (See this case cited at length in Chap. IX. on Defences.)

grew angry and shook metaphorical fists across the same shallow stream. This international coolness grew out of the editorial gymnastics of one A. K. Cutting. Cutting, a citizen of the United States, but a resident of Mexico, was the editor and publisher of the El Paso *Sunday Herald* and the Paso del Norte *Centinela*. A Mexican named Medina had issued a prospectus of a newspaper to be established by him in Paso del Norte. Thereupon Cutting published in the English department of *El Centinela*, June 6, 1886, a statement to the effect that Medina had not a pound of type or a dollar to buy any with, and that his scheme to establish a newspaper was a myth. Medina deemed this a libel, and carried the case into the Mexican courts. Cutting went into court and made a formal retraction, and the parties there signed an "act of reconciliation." Cutting then republished the defamatory statement in the El Paso *Sunday Herald*, a paper circulated on both sides of the international stream, and for this he was arrested on the Mexican side of the river by an officer of the State of Chihuahua. The United States consul reported to the State Department that the prisoner was arrested for a libel published in the United States, and Secretary Bayard demanded of the Mexican government his immediate release. Mr. Bayard was quoted in an interview as saying, "My countrymen . . . will never consent that one of their fellow-citizens shall be tried by a foreign power for any offence committed in this country."[1] The Mexican court ruled that the republication of the defamatory paragraph in Texas constituted a continuation of the original offence committed in Mexico, in defiance of the formal "act of

[1] Boston *Globe*, Aug. 9, 1886.

reconciliation." Evidence was also received of the circulation in Paso del Norte of more than ten copies of the *Sunday Herald* containing the republished libel. Cutting refused to defend himself at the trial, and was adjudged guilty. He was sentenced to imprisonment at hard labor in the penitentiary for one year and to pay a fine of $600, and to serve an additional term of one hundred days in case the fine was not paid. Troops meanwhile were enrolled by thousands in Texas and other Southwestern States in anticipation of war, and all on account of the erroneous popular supposition that an American citizen had been arrested in a foreign country for a crime committed in the United States, the public ignoring the fact that the crime was committed in every State and country where the libel was circulated. A little more than two weeks after receiving his sentence Cutting was released from imprisonment by order of the Supreme Court of the State of Chihuahua. The Supreme Court approved the decision of the inferior tribunal, but discharged the prisoner for the reason that Medina had waived his right to a civil suit.[1]

Every sale of a copy of the libel constitutes a distinct offence, and an action can be maintained if there is only proof that one copy was sold, even if that was sold to an agent of the plaintiff with a view to bringing the action.[2] The distribution of copies of a newspaper by carriers or other agents constitutes publication by the proprietor.[3]

[1] Associated Press despatch, Aug. 24, 1886. See also the State *v.* Wm. J. Kountz (Allegheny, Pa., *Evening Mail*), 12 Mo. Appeal Reports (1882), 511.

[2] Duke of Brunswick *v.* James Harmer, 14 Adolphus & Ellis (Eng. Queen's Bench, 1849), 185. (See this case cited at length in Chap. IX. on Defences.)

[3] Respublica *v.* Benjamin Davis, surety for William Cobbett (*Porcupine's Gazette*), 3 Yeates (Pa. 1801), 128.

A news agent is responsible for any libel contained in such copies of the paper as he aids in circulating. Marie Prescott, the actress, brought suit against the American News Company for the circulation of the following libel: —

No friend with the needful coming forward, they cast the ineradicable stigma of bastardy on two innocent and helpless little children, left broken-hearted the actress mother, and recorded of the woman herself, who was then struggling hard to support all three, that she had become a certain man's mistress.

This libel was contained in a dramatic weekly called *Nym Crinkle*, August 6, 1881, and it was shown that the news company had circulated two hundred and forty copies of the paper. The jury at the trial term of the Superior Court awarded the plaintiff $12,500 damages.

A news agent's liability for damages, however, is not established by evidence merely that some one had an *opportunity* to read the libel in a copy of the paper circulated by him. Thus, in the case just cited, it was not shown that any person had read any one of the two hundred and forty copies of *Nym Crinkle* circulated by the American News Company, and it was accordingly held at the general term of the Superior Court that there was not sufficient evidence of publication to sustain an action against the news company, for a libel is not published in a legal sense until it is communicated to some one other than the plaintiff. The judgment of the trial term was, therefore, reversed.[1]

The *Mascot*, April 22, 1882, contained a cartoon representing Watson Van Benthuysen as a juggler ma-

[1] Marie Prescott *v.* Sinclair Tousey, president, etc., 50 N. Y. Superior Court Reports (1884), 12; 52 N. Y. Superior Court Reports (1885), 87.

nipulating the city council of New Orleans in the interest of the railroads of which he was president, and in the letter-press the paper attributed bribery to him. Van Benthuysen brought suit against Charles E. Staub, a newsdealer, for libel, basing his claim for damages upon the sale of a copy of this issue of the *Mascot* by a boy in Staub's employ. Staub in defence did not allege or prove ignorance of the fact that the paper contained libellous matter. The Supreme Court of Louisiana held that one who, personally or by his agent, sells a libellous newspaper, is responsible, civilly and criminally, as if he had written the libel. Van Benthuysen was awarded $50 and costs.[1]

Every newsdealer is legally presumed to know the contents of every publication which he handles, even if the interval between the time when he receives the paper from the office of publication and the time of his delivery of it to the purchaser is so short as to negative conclusively the possibility of actual knowledge of the contents. He is liable even in his absence, where the paper containing the libel is received and sold by his employee, unless it is proved that the paper was sold against his orders or secretly, or that some deceit was practised upon him, or that he was absent under such circumstances that the presumption of his connivance in the sale is conclusively rebutted.[2] A similar responsibility is borne by every one who even gives away a copy of the libel, unless he was ignorant of its contents; and the burden of proof lies upon him to prove his ignorance.[3]

[1] Van Benthuysen *v.* Staub, 36 La. Annual Reports (1884), 467.

[2] Folkard's Starkie on Slander and Libel, p. 429.

[3] Odgers on Libel and Slander, p. 160. "If a newsboy were rich, it would be unsafe for him to sell papers without first employing a lawyer to decide whether

Efforts have at different times been made to secure legislation relieving news companies of responsibility for libels contained in newspapers the contents of which they did not know, and which they aid in circulating. Such a bill was introduced in the New York Legislature in 1884, but failed of passage. The *Journalist*, April 12, 1884, said: —

The passage of this bill is vital to the liberty of the press. As the law stands at present, the American News Company are compelled to be censors of the press in their own defence. They have sometimes thrown back whole editions of papers which they conceived to contain libels for which they might be made to suffer.

Mr. Greenleaf, discussing the rule that one who disperses a libel is criminally guilty, even though he is ignorant of its contents, says: "The apparent severity of this rule, and of that which renders the owner of a shop responsible as the publisher of libels sold therein without his knowledge, is justified, on the score of high public expediency or necessity, to prevent the circulation of defamatory writings, which otherwise might be dispersed with impunity." [1]

Where a newspaper is owned or published by copartners, a suit or criminal proceedings for libel may be maintained against either one or all of the members of the firm; and all the partners are responsible for the express malice of one of them. It was so held in the case of Rev. Charles D. Lothrop *v.* Charles H. Adams *et al.* of the Springfield *Republican*.[2] In this case a verdict in favor of the reverend plaintiff for $1,000 was

the contents were libellous. He escapes now because he is irresponsible." — The *Journalist*, April 18, 1885.

[1] Greenleaf on Evidence, vol. III., § 171.

[2] Lothrop *v.* Adams *et al.*, 133 Mass. 471.

sustained by the Supreme Judicial Court, the suit having been brought on account of the publication of the following matter in the Amherst correspondence of the *Republican*, September 12, 1876:—

The trial of Rev. Mr. Lothrop for cruelty to his family was begun before the First Church in secret session last evening, the accused not being present. The testimony covered the training of the three daughters from their infancy up, and was of the most revolting character, involving brutal horse-whippings for trivial offences, systematic starving, feeding of rotten meat, and positive dishonesty and faithlessness in his family relations.

A corporation which publishes a newspaper may be sued for libel, precisely as an individual. It has sometimes been held that punitive damages cannot be recovered against a corporation; but generally actual malice on the part of the officers of the company will sustain a claim of punitive damages. A joint-stock association may likewise be sued for libel,[1] but the treasurer of a joint stock association, who owns a majority of the stock, is not as such personally liable. John H. Mecabe brought suit against George Jones, of the New York *Times*, for a libel. It appeared that the *Times* was published by a joint-stock association, of which Mr. Jones was treasurer; that he owned a majority of the stock and exercised some supervision over the articles which appeared in the paper, but did not exercise a controlling influence, and had no knowledge of the matter complained of prior to its publication. It was held that the complaint should have been dismissed, because the defendant was neither proprietor,

[1] Henry Van Aernam *v.* Charles W. McCune, president of the Buffalo Courier Co., 39 N. Y. Supreme Court Reports (1884), 316.

publisher, editor, nor printer, and not liable as principal of those having directly to do with the publication.[1]

Where a newspaper establishment has been assigned as security for a debt, the property remaining in the sole charge of the assignor, the assignee is not liable to an action as a proprietor of the paper.[2]

A receiver of a partnership or corporation, appointed to manage a newspaper published by the corporation or firm, is personally responsible for any libellous matter contained in the paper while under his charge.[3] The receiver may not be sued, however, inasmuch as he is an officer of the court; but the party aggrieved should present a petition for redress to the court appointing the receiver. Through a blunder on the part of the receivers of *Stubbs' Weekly Gazette*, the name of a solvent firm was published in a list of bankrupts. The Court refused to allow the libelled firm to proceed at law against the receivers, but directed the clerk of the court to inquire and certify the amount of damages resulting from the libel. The clerk awarded the petitioners £10, and the Court sustained the award, ordering the damages to be paid out of the estate, but the costs to be paid by the receivers personally, since the libel was a result of their negligence.[4]

The mere writing of a libel is not always actionable. The libel must be communicated to some one other than the person defamed, and such communication is called publication. While, however, writing a libel does not amount to publication, it is nevertheless evidence from which publication may be inferred. Thus,

[1] Mecabe *v.* Jones, 10 Daly (N. Y. Common Pleas, 1881), 222.
[2] Andres *v.* Wells (Troy *Gazette*), 7 Johnson (N. Y. 1810), 260.
[3] Marten *v.* Van Schaick *et al.*, 4 Paige (N. Y. 1834), 479.
[4] Stubbs *v.* Marsh, 15 Law Times, new series (Eng. 1866), 312.

if a libel has been published in a newspaper, and a copy of the same libel in the defendant's handwriting is introduced in evidence, the burden of proof will be thrown upon the defendant to show that he is not responsible for the publication. The defendant may be proved to be the author of the libel by the testimony of penmanship experts, based upon a comparison of the defendant's handwriting with the copy furnished to the newspaper. In the Charleston, S. C., *Mercury* was published the following notice: —

OBITUARY. — Departed this life, on the 2d day of April, at Hickory Hill, in Prince William's Parish, Mrs. Rebecca McBride, in the 95th year of her age. The editor will publish the above obituary, and oblige the subscriber.

Respectfully, W. BOWERS.

APRIL 4th, 1853.

It appeared that Mrs. McBride was living, although at no such advanced age as indicated in the obituary notice. Suspicion regarding the authorship of the notice was directed against Daniel H. Ellis, Mrs. McBride's next-door neighbor at Hickory Hill, and suit was brought against him by the libelled woman and Burwell McBride, her husband. Ellis denied having written the obituary, but the manuscript was proved to be in his handwriting, and a verdict for $30 against him was recovered.[1]

Although it is not actionable merely to write defamatory matter, still, if the writing is afterward published, even if it is taken from the author by force or fraud, he will be liable to either indictment or civil action. The reason for this apparently harsh doctrine is, that the writing and preserving of the libel were in themselves

[1] McBride *et ux. v.* Ellis, 9 Richardson's Law Reports, 313.

wrongful acts, for the proximate consequences of which the author is responsible. He cannot excuse himself by showing the wrongful act of another.[1] Even if the libel is published through an accident, the publisher is liable, provided he has been guilty of any negligence. Thus, in an English case, the name of a solvent firm was inserted under the head, "First Meetings Under the Bankruptcy Act," in making up the forms of the *Bookseller*, instead of being inserted under the head, "Dissolutions of Partnerships." The plaintiff was given a verdict for £50.[2]

To prove responsibility for the libel against the writer, it is necessary to produce the original manuscript, or account for its absence.[3] Copy, however, is not generally long preserved in newspaper offices, and, accordingly, if the manuscript cannot be found, or if, being in the defendant's hands, he refuses to give it up, a copy of the newspaper containing the libel may be introduced in evidence. Such copy, with proof that the defendant composed the libel, and gave or sent it to the editor for publication, is sufficient evidence of publication by the writer.[4] Before an alleged libel can be submitted to the jury, a *prima facie* case against the defendant as author of the libel must be made out; but it is sufficient to show that the defendant threatened to write the libel.[5] Liability may be established by proving that the defendant paid the publisher of the newspaper for the

[1] Townshend on Slander and Libel, p. 159. But see Odgers on Libel and Slander, p. 160.

[2] Shepheard *v.* Whitaker, English Law Reports, 10 Com. Pleas (1875), 502.

[3] Schenck *v.* Schenck (Somerset *Messenger*), Spencer (N. J. 1843), 208.

[4] Samuel Woodburn *v.* Robert Miller (Columbia, S. C., *Times*), Cheves' Law Reports (1840), 194.

[5] Bent & Cottrell *v.* T. H. Mink *et al.* (*Cedar Post*, Chicago *Journal*, Chicago *Inter-Ocean*, Davenport *Democrat*), 46 Iowa (1877), 576.

insertion of the defamatory matter;[1] and generally, every one who requests or procures another to publish a libel is answerable as though he published it himself; and a request may be inferred from his conduct, as where he sends the libel to the editor of a newspaper, even though he makes no formal request that it be published.

In an action against the writer of a libel, it is no defence that the libel was not printed exactly as it was written, provided the alterations or omissions did not tend to aggravate its defamatory character.[2] One who writes an article and employs another person as his agent to translate it into another language and publish it, will be liable if the article as translated and published is libellous, although the translation is inaccurate. This is under the general rule in the law of agency, already referred to, that the principal is responsible for the acts of his agent within the general scope of his authority.[3]

A person who makes a defamatory statement to a reporter, intending it for publication, is liable both civilly and criminally, and his liability is, of course, shared by the reporter and all others who aid in publishing the libel to the world. One Cassius M. Clay gave to a reporter for the Streator, Ill., *Pioneer* the facts regarding an alleged assault. The report was written up under the heading, "Brutality—Two Young Women Maltreat Their Mother." After the matter was in type, it was read to Mr. Clay from a proof. He said, "It was a

[1] Schenck *v.* Schenck, cited above.

[2] Benjamin T. Snyder *v.* Cassius M. Strader *et al.* (Macomb *Eagle*), 67 Ill. (1873), 404.

[3] Wilson *v.* Noonan (*Banner and Volksfreund*), 23 Wis. (1868), 105; 27 Wis. (1871), 598.

little rough, but it was true"; and "Let it go." He was indicted for libel, convicted, and fined $300 and costs.[1]

Where two distinct publications are made of the same libel, a defendant who was only concerned in the first publication would not be liable for damages which resulted solely from the second. John Clifford had been appointed architect for the new city hall of San Francisco. The Chicago *Times* published a report of an interview with John C. Cochrane, another architect, in which the latter was quoted as saying that Clifford was insane, and that his appointment would be a public calamity. This interview was copied from the *Times* into the San Francisco *Chronicle*, and, as Clifford claimed, it resulted in his bondsmen withdrawing as sureties on his bond, whereby he was forced to resign. Clifford then sued Cochrane for $50,000, alleging as special damage the loss of his position. The Appellate Court held that the language was actionable *per se*, but that the claim of special damage could not be sustained, because the claim was based upon the publication in the *Chronicle*, for which Cochrane was not responsible. "It would seem," said the Court, "both on principle and authority, that no liability attaches to the author of the libel for such reproduction, unless it is made by his authority or consent, either express or implied."[2]

[1] People *v.* Clay, 86 Ill. (1877), 147.
[2] Clifford *v.* Cochrane, 10 Bradwell (Ill. 1882), 577.

CHAPTER VI.

LANGUAGE WHICH IS LIBELLOUS.

SAYS Christian in his notes upon Blackstone's "Commentaries":[1] "The words 'scoundrel,' 'rascal,' 'villain,' 'knave,' 'miscreant,' 'liar,' 'fool,' and such like general terms of scurrility, may be used with impunity, and are part of the rights and privileges of the vulgar." The vulgar should, however, bear in mind that they must exercise their rights and privileges in this respect with the tongue and not with the pen, for all of these terms of abuse are actionable if employed in writing or in print.[2] It has repeatedly been held that words which would not be actionable if spoken may be so if printed,[3] on account of the greater deliberation which is presumed to have accompanied the writing of a libel, and on account of its permanence and wider dissemination. On the other hand, all matter which, if spoken, is slanderous, is libellous if written or printed.

Any publication imputing to a person disgraceful or dishonest conduct, or which is injurious to his reputation or business credit, or exposes him to hatred, contempt, or ridicule, or causes him to be shunned by his neighbors, is libellous.[4] The action can, however, be

[1] Book iii., p. 125.

[2] See Townshend on Slander and Libel, § 177.

[3] Benajah Johnson *v.* Columbus Stebbins (*Spirit of the West*), 5 Ind. 1854), 364.

[4] Language which in this chapter is said to be libellous is only *prima facie*

maintained only on the ground of injury to the reputation, and injury to the feelings alone is not enough to sustain it.[1] Words are equally libellous if used ironically or disguised in satire or cipher, or if ungrammatical or ambiguous, or if the object of attack is not named, but only hinted at; it is only necessary that the true meaning of the libel be understood by some person other than the author and the person who claims that it is defamatory of himself. A publication is not libellous, however, unless it is possible to identify the person or persons defamed. Thus, it is not actionable to publish a charge that every lawyer is a thief, or that every physician is a quack. If the plaintiff can show that the publication was designed as an attack upon him, and that readers so understood it, he has a good right of action.

A publication may be actionable although it does not charge a crime. In the New York *Sunday Mercury*, October 13, 1867, was made the following "assault upon the King's English": —

STRANGE BUT TRUE. — *The Moffatt mansion in a new light.* . . . — Click, click, click, the sound of the sewing-machine, the sharp jerk, the incessant whir of the instrument, is heard from early morning till late in the evening — heard, too, as proceeding from the garret of a boarding-house on University Place. . . . In this garret, or attic, live, or at least breathe, two females, the one a very nice old person, evidently by birth and education, if not by present position, a lady; the other younger, but looking as old, if not more elderly, than her companion. . . . And yet these poor, hard-working people are ladies born and bred, women who once

actionable, being subject, of course, to the defences of truth, privilege, etc. (See Chapters VII. and IX.)

[1] Samuel Samuels *v.* The Evening Mail Association, 13 N. Y. Supreme Court Reports (1875), 5.

lived in an almost palace. Females whose near relatives are at this moment living in affluence upon the wealth, a portion of which, at least, is in honor and feeling to nature, if not in the technicalities of the law, their own. In other words, these women are the mother and sister of Dr. Moffatt, recently deceased, the millionaire physician, whose Life Pills and Phœnix Bitters had in their day a world-wide popularity, netting the inventor millions. . . .

In a suit by Maria Moffatt against William Cauldwell *et al.* for this publication, the defendants having demurred to the complaint, the Court held that the article was libellous, as tending to hold the plaintiff up to ridicule, and it was declared to be no defence that the article contained no charge save that of poverty, and that "poverty is no crime." [1]

A patent-medicine concern secured the publication in the Atlanta *Constitution* of an interview which purported to have taken place between a *Constitution* reporter and one Louise Stewart, in which Miss Stewart related how her mother had been bitten by a cat. Miss Stewart was quoted as glibly telling how her mother had suffered great pain after receiving the bite, and had acted like a cat, purring and mewing and assuming the attitude of a cat in the effort to catch rats. The interview concluded in the usual way by a statement of a remarkable cure effected by the advertiser's patent medicine. Miss Stewart sued the medicine concern for libel, alleging that the interview was altogether false. The Supreme Court held on demurrer that if false, the publication was libellous, as exposing the plaintiff to contempt and ridicule. It was said that the article would "tend to lower her reputation as a

[1] Moffatt *v.* Cauldwell *et al.*, 10 N. Y. Supreme Court Reports, 26.

sensible, modest, and dutiful daughter, because she furnished for publication such foolish and ridiculous conduct of her mother."[1]

William Black sued John Dick, the publisher of *Bow Bells*, for printing in that magazine in November, 1886, a biographical notice of the novelist, which included the following statement: —

> Lately an appeal was made to him to assist an aunt who had done much for him when he was young. She had a small income of her own, and only needed two shillings and sixpence a week to keep her out of the poorhouse, but Mr. Black would not pay it.

Mr. Black proved that the charge was false, and that he never had an aunt, and he was given a verdict for £100.[2]

It is said that both the daughters are illegitimate children of the adopted father's intimate friend, and were raised by him in a spirit of philanthropy.

This paragraph, published in the New York *Sun*, December 2, 1882, was held to be libellous *per se*, at the suit of one of the daughters referred to.[3]

The principle is generally maintained that "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 make him contemptible and ridiculous."[4] Howard Paul, at a dinner given by the Clover Club in Philadelphia, told a story of Dickens' second visit to America, when he was accompanied by a "strong, vigorous, able-bodied compatriot named

[1] Louise Stewart *v.* Patent Medicine Co., 76 Ga. (1886), 280.

[2] Philadelphia *Press*, Jan. 8, 1887.

[3] Mary H. Shelby *v.* the Sun Printing and Publishing Association, 38 Hun (N. Y. Supreme Court), 474.

[4] Folkard's Starkie on Slander and Libel, p. 157.

Dolby." He quoted Dickens as saying of Dolby: "'He possessed unlimited capacity for eating and drinking, and had noble digestive powers. When anybody called on me and suggested a drink, I gently deputed Dolby to do it for me. When I was asked out to dinner and could n't conveniently attend, Dolby turned up as my representative and occupied my place.'" Mr. Paul said in conclusion: "Shortly after this I met Dolby at a club, and he was relatively a wreck. The incessant gorging and cocktailing, whiskey souring, champagning, liquoring, and other alcoholic frivolities, had done their fell work." Mr. Paul's speech was published in the Philadelphia *News* and copied into the London *Tit-Bits*, whereupon Mr. Dolby sued the proprietor of *Tit-Bits* for libel. Mr. Justice Stephen charged the jury adversely to the defendant, and a verdict in favor of Mr. Dolby for £100 was returned.[1]

In a criminal case, the Supreme Court of Ohio declared the following language to be libellous:—

On Saturday, we are informed, the house of T. S. Collins, where the stolen goods were supposed to be secreted, was searched, but no trace was found.

"No one could read the article set out," said the Court, "assuming its statements to be true, without regarding it as seriously reflecting on the character of Collins. It directed public attention to the fact that the circumstances implicating him in the larceny, or in receiving and secreting the goods stolen, were sufficiently suspicious to justify a search of his house for their recovery."[2]

The Court held in the case of Edward B. Wesley, of

[1] Philadelphia *News*, March 9, 1887.

[2] The State *v.* Smily, 37 Ohio State Reports (1881), 34.

the New York *Times*, *v.* James Gordon Bennett, of the New York *Herald* (tried in 1857), that where language is not ambiguous it is to be construed in its ordinary sense, without reference to the manner in which it was either understood or intended; and ambiguity will not protect the writer or publisher if the readers are justified in construing it in a libellous sense. It was further held that where the words have two meanings, one harmless and the other defamatory, the case should go to the jury on the question of the effect produced by the libel, whether injurious or not.[1]

Where an alleged libel is ambiguous, it may be explained by witnesses, and its defamatory character may be established by their testimony. Lawrence Quenzer published in the New York *Demokrat*, April 14, 1856, an article concerning Conrad Wachter, for which a suit for libel was brought. The article was in German, and an English translation was introduced in evidence. It charged Wachter with having "made himself invisible on account of too much borrowing and not paying." The writer went on to say: —

> It is a fine thing if a man can pass anywhere and show, if demanded, his bare back, but there are people who dare not very well show it, because there would be found the Swiss gallows upon it.

The Court allowed the plaintiff to show in evidence that the expression "Swiss gallows" is commonly understood by Germans as implying that the person with whose name it is coupled had been branded on the bare back with a hot iron for some criminal offence. A verdict for $2,000 was sustained by the Court of Appeals.[2]

[1] Wesley *v.* Bennett, 5 Abbotts' Practice Reports, 498.
[2] Wachter *v.* Quenzer, 29 N. Y. 547.

One James L. Arnott sought reappointment as postmaster of Thompsonville, Conn. This fact provoked the Bridgeport *Standard* to say that Senator Eaton would not recommend "a thief, a jail-bird, or a sneak like Arnott" for the position. Thereupon a jury was charged with the task, as literary critics, of deciding whether these words implied that Arnott was a thief, jail-bird, and sneak, or whether they amounted merely to the charge of being a sneak. The defendant undertook to prove the truth of the latter charge, and denied having made any other, claiming that the word "and" would have been used instead of "or" if it had been intended to call the postmaster by all three names. The jury found for the defendant, and the plaintiff appealed.[1]

In case the language is ambiguous, and the name of the person who claims to have been defamed is not published, his acquaintances may state in evidence their understanding of the meaning of the libel, and may testify that it refers to the plaintiff. For writing the following "fable," which was published in the *Tunxis Valley Herald*, Martin L. Parsons, first selectman of the town of Farmington, Conn., was made a defendant in the Superior Court: —

A FABLE. — A certain pompous toad, whose own estimate of himself was greatly in excess of his true value, imagined himself a lawyer, and, procuring a bondsman, got himself appointed by a Court of Probate administrator on a certain estate; but desiring to build a pedestal to raise himself to great political distinction he spent the money of the estate for one of straw, which was totally inadequate to support so great a statue; the result being his inability to pay up the allowances of the court. His bondsman had to be notified,

[1] Waterbury *American*, Feb. 10, 1888.

and the dishonest toad had to be disbarred from the practice of his profession.

Moral. — A toad will be a toad in spite of his croakings, and notwithstanding his surroundings.

John F. Wynne, of Unionville, Conn., showed that the fable referred to him, but that the defamatory charges contained in it were false. He recovered a verdict for $1,100.[1]

Where the libel refers to the plaintiff by name, it cannot be shown in defence that some other person was intended. A Detroit *Free Press* reporter found upon the Police Court record a statement that "John Finnucan" had been arrested for stealing a coat. In the *Free Press* the next morning it was stated that "John Finnegan" had been so arrested. The Detroit directory contains the names of several "John Finnucans," and also the name of Ex-Alderman "John D. Finnegan." The ex-alderman, the only John Finnegan in Detroit, brought suit for $10,000, and an intelligent jury gave him a verdict for $1,500 for the libel. An appeal was taken to the Supreme Court.[2]

It is quite immaterial what meaning the writer intended his words to convey. Every person is legally presumed to intend the natural consequences of his own acts. The tendency of the publication, the manner in which readers understand it, is alone in issue; but the absence of wrongful intent will work mitigation of damages. When, however, the alleged libel is subject to the law of privileged publications, the question of intent, or malice, becomes important, for a privileged publication is not actionable, even if false, unless it

[1] Hartford *Times*, Feb. 10, 1888.
[2] Detroit *Free Press*, March 11, 1888.

appears that the writer or publisher was actuated by express malice or ill-will.

When either pecuniary loss or loss of reputation follows a defamatory publication as a *necessary consequence*, the language is said to be libellous *per se*, and in such case no proof of actual or special damage need be presented to sustain either civil or criminal proceedings. When, on the other hand, such loss follows as a *natural* and *proximate*, but not as a *necessary* consequence, evidence of actual damage must be adduced to sustain the action. If loss is neither a necessary nor a natural and proximate result of the publication, the language is under no circumstances libellous.[1] The actual, or, as it is usually termed, "special," damage must be a loss of some material temporal advantage.[2] Wherever an action cannot be maintained without proof of special damage, there is no criminal liability.

There was published in *Bradstreet's Daily Sheet of Changes*, January 15, 1878, the following line: —

CHATTELS. — Newbold & Sons to J. R. Burns.

James F. Newbold *et al.* brought suit against J. M. Bradstreet & Son for libel, claiming that the few words quoted implied that they had given a chattel mortgage — an implication which would tend to injure their credit. They maintained that, as a matter of fact, they had only released a chattel mortgage which they had held. The Court ruled that the words were not libellous *per se*, and that hence they were not actionable without proof of special damage.[3] The Messrs. Newbold could only sustain their action by

[1] Townshend on Slander and Libel, p. 217.
[2] Townshend, p. 318.
[3] Newbold *et al. v.* The J. M. Bradstreet & Son, 57 Md. 38.

evidence of actual losses in their business growing out of the publication.

In a case where the language is not libellous on its face, the plaintiff must not only show special damage, but he must show that the defendant knew the injurious character of the words at the time when they were published. Joseph W. Caldwell brought suit against Henry J. Raymond *et al.* for the publication of the following notice in the New York *Times* : —

MARRIED. — Joseph W. Caldwell to Elizabeth Ehle, late of New York.

Mr. Caldwell denied the truth of the notice, asserting that the Ehle woman was a notorious prostitute. He failed to show that the defendants had actual knowledge of the woman's bad character at the time of publication, and for this reason his complaint was dismissed. In rendering its opinion, the Court said : " A publisher may be liable for a publication of an article clearly libellous, which was inserted in his paper without his knowledge or consent; but not when he is not shown and cannot be presumed to have known that the article was intended to bear an injurious meaning." [1]

A letter to the editor, from the widow of Lieut.-Col. Kimball, was published in the New York *Herald*, containing the following words : —

Among the papers referred to as returned to me are my own private letters, scattered indiscriminately among the others, and returned to me after having been in the hands of a prostitute. . . . She is, I understand, under the patronage or protection of a Mr. More, agent of the Central railroad, who has also employed the orderly of my late husband.

[1] Caldwell *v.* Raymond *et al.*, 2 Abbotts' Practice Reports (1855), 193.

The Court of Appeals, at the suit of Mr. More, held that the language was libellous, without its being alleged in the complaint that the woman was under his patronage or protection for an immoral purpose.[1]

To constitute language libellous *per se*, that is, actionable without proof of special damage, "the nature of the charge itself must be such that the Court can legally presume he [the plaintiff] has been degraded in the estimation of his acquaintances or of the public, or has suffered some other loss either in his property, character, or business, or in his domestic or social relations, in consequence of the publication." Such was the ruling of the Court in the case of James Fenimore Cooper *v.* William L. Stone. This was one of a remarkable series of libel suits brought by the irascible novelist, in consequence of political differences, against a number of Whig editors.[2] Cooper had obtained judgment for

[1] John H. More *v.* James Gordon Bennett, 48 N. Y. (1872), 472 (reversing 33 Howard's Practice Reports, 177, and 48 Barbour, 229.)

[2] Mr. Cooper always appeared in court as his own counsel, and he generally disproved by his success the trite aphorism that "a man who is his own lawyer has a fool for a client."

"He next sued Thurlow Weed, and obtained a verdict for $400 damages. Mr. Weed incautiously began at once to taunt the novelist in view of the small sum allotted him. He described Cooper's character as worth just $400 under this decision, repeated the offence, which was in saying that Cooper was despised, and professed himself ready to respond in another suit for $400 more. It was immediately entered, and Mr. Weed continuing to bluff his adversary in his paper, suits were multiplied until they reached seven in number. Cooper won one after another of them also. Though the amount of damages was not always large, the expense of defending them was considerable, they all carried heavy costs of court against the defendant, and the annoyance they occasioned became unbearable. Mr. Weed was brought to cry 'enough,' to retract all he had said, and withdraw every charge made. . . . Mr. Weed had written an account of the first trial in the suit of Mr. Cooper against him for the New York *Tribune*, of course colored to suit himself. For this Cooper sued Horace Greeley as editor. Mr. Greeley concluded to meet Mr. Cooper in court himself. It was the editor against the novelist at the bar, Mr. Greeley defending his own case. But he was no match for his antagonist, and he lost it. He published an account of the

$300 in a suit based on a libel published by Stone in the New York *Commercial Advertiser*.[1] Colonel Stone then published in the New York *Spectator*, of which he had become editor, the following (July 6, 1842) regarding the award : —

Mr. J. Fenimore Cooper need not be so fidgety in his anxiety to finger the cash to be paid by us towards his support. It 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. Wait patiently. There will be no blacksmith necessary to get at the ready.

For this latter publication the novelist began a new action, and recovered a verdict for $250. The Court of Errors, however, reversed the judgment, holding that the Court could not legally presume that a charge of putting money into Wall Street "for shaving purposes" would degrade any one, or cause him to suffer loss.[2]

A similar result was reached in a case where the elder Bennett was the plaintiff. Mr. Bennett was a defendant in many libel suits, including some of the most interesting and important ever tried in this country, but he rarely brought suit for libels upon himself. In 1848, however, he was provoked by a publication in the New York *Sunday Dispatch* to the point of bringing an action. John Tryon established the *Sunday Courier* in New York, in 1834. It was one of the first Sunday papers

trial in the *Tribune*, which Mr. Cooper did not like, and he sued Mr. Greeley again. Mr. Greeley this time gave the case into the hands of William H. Seward, to act as his counsel. It was never tried, Mr. Cooper dying before it could be reached." — Boston *Herald*, April 17, 1887.

[1] See this case cited at length, *post*, p. 200.

[2] 2 Denio, 293.

published in the metropolis, and was not remarkably successful. In an article in the *Sunday Dispatch* on this venture, Amor J. Williamson, the editor, stated that Mr. Bennett purchased the *Courier* of Mr. Tryon, giving his note for a portion of the purchase money, but that Bennett "not having the ability to make a Sunday paper go, it died off." The article continued:—

> When the note became due, Bennett could not pay, and begged the holder of the note to wait. The man did wait, and, some years after, Bennett having got on, the note was sued, but Bennett pleaded the statute of limitations, and got off scot-free.

The Court held that, there being no charge of dishonesty, the publication was not libellous.[1] In other words, it is not actionable to charge one with taking advantage of the statute of limitations.

Mr. Bennett assigned a different cause for the suspension of the *Sunday Courier:* "The project was rather premature, and we declined prosecuting it, in order to engage in other avocations."[2] As an illustration of Mr. Bennett's indifference to personal defamation, the following partial list of epithets directed against him by Park Benjamin in the New York *Signal*, without provoking a libel suit, may be given: "Obscene vagabond," "infamous blasphemer," "loathsome and leprous slanderer and libeller," "profligate adventurer," "nuisance," "venomous reptile," "pestilential scoundrel," "habitual scoffer," "venal wretch," "daring infidel," "infamous Scotchman," "foreign vagabond," "polluted wretch," "habitual liar," "prince of darkness," "veteran blackguard," "contemptible libeller,"

[1] Bennett *v.* Williamson *et al.*, 4 Sandford, 60.
[2] New York *Herald*, July 29, 1844.

"caitiff," "monster," "ass," "rogue." This abuse was published during a "moral war" which was waged against the *Herald* by the other New York newspapers in 1840.[1]

To call a lawyer a "shyster" is *per se* libellous,[2] and it is also libellous *per se* to charge that a county attorney had failed, "purely out of political fear," to prosecute a person suspected of having committed a crime.[3] But it is not libellous *per se* to call a lawyer a "crank." Late in 1886, Albert H. Walker, a Hartford, Conn., lawyer, published a pamphlet on "The Payne Bribery Case and the United States Senate." In an editorial paragraph the Chicago *Tribune* characterized the work as "plainly the effusion of a crank," and Mr. Walker brought suit for $20,000 damages. The Tribune Company demurred to his declaration, and Judge Blodgett, of the United States District Court, sustained the demurrer. The Court held that the word "crank" is not *per se* libellous, and that in the absence of proof of special damage the action could not be sustained. "It was not a word which, by its common meaning in the English language, imported that a person had been guilty of a crime, or exposed him to hatred, contempt, ridicule or obloquy. . . . It was urged in a brief filed by plaintiff, that since the assassination of President Garfield by Guiteau, the word 'crank' had obtained a definite meaning in this country, and was understood to mean a crack-brained and murderously-inclined person, and was so used by the public press. Judge Blodgett

[1] Hudson's Journalism in the United States, p. 459.

[2] Edwin Gribble *v.* Pioneer Press Co., 34 Minn. (1885), 342. A verdict for $1,000 was sustained.

[3] Frank D. Larrabee *v.* Minnesota Tribune Co. (Minneapolis *Daily Tribune*, May 26, 1883), 36 Minn. 141. The plaintiff recovered $1,250.

said he did not think so short a term of use would give to such a word a libellous sense or meaning without an allegation or innuendo as to the sense in which it was used by the defendant." [1]

The *Daily Nebraska Press*, published in Nebraska City, contained this news article, July 12, 1873:—

AN INHUMAN STEP-MOTHER. — *She beats her child over the head with a club.* . . . — . . . Last night Mrs. Geisler beat her little step-daughter most unmercifully with a club as large as a man's wrist, striking her over the head and making the blood flow freely. . . . It is time that Geisler and his brutal wife were put under bonds not to whip that girl, and it is time some one took care of the little girl, who is not over nine years of age. . . .

Mrs. Geisler brought suit for damages, but the Court held on demurrer that the words were not actionable *per se*, and that, as no special damage was alleged, the plaintiff could not recover.[2]

The late New York *Truth*, one day in March, 1881, published the following regarding a certain "Philistine" named Charles W. Fuller:—

And it came to pass that as the man watched, he did behold Jeanne go forth with the Philistine into a strange tent which standeth in the way, the same which is called Thirty-seventh Street, and they did remain there together a long time, and Solomon's soul was filled with woe and his head bent down with grief as he cried out that Jeanne and the Philistine had committed an abomination in the sight of the Lord.

Judge Cowing, in rendering the opinion of the

[1] Chicago *News*, Feb. 15, 1887; 29 Federal Reporter, 827.

[2] Clara Geisler *v.* William A. Brown, 6 Neb. 254. Mr. Bigelow, in his notes upon Odgers on Libel and Slander (p. 25), calls the ruling of the Court in this case "a shocking doctrine."

Court, held that the language was not libellous *per se*, in the absence of an innuendo showing what was meant by the word "abomination." He quoted the dictionaries as defining an abomination as "anything wicked," and said: "They may have sat down and, with great relish, eaten a savory pork tenderloin, which would be considered by some to be 'an abomination in the sight of the Lord,' but I apprehend that no one would consider such a charge to be a criminal libel as against the complainant."[1] A demurrer to the indictment was sustained.

A long article was published in the Rochester *Democrat and Chronicle*, of which the following is an extract: —

A NARROW ESCAPE FROM BEING BURIED ALIVE. — *A well-to-do farmer found stiff and cold by the roadside. — 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.* — . . . 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; 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.

Hiram J. Purdy, the coroner referred to, brought suit for libel, but the Court of Appeals held that the article was not susceptible of an actionable construction, as it only referred to the plaintiff in his official capacity, and showed him to be vigilant in the performance of the duties of his office.[2]

Speaking of a banquet of the Ancient and Honorable

[1] People *v.* Isaacs, 1 N. Y. Criminal Reports, 148.

[2] Purdy *v.* The Rochester Printing Co., 96 N. Y. (1884), 372.

Artillery Company in Faneuil Hall, the Boston *Budget* said: —

> 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 better.

In a suit brought by the caterer, it was held by the Supreme Judicial Court that the language was not actionable *per se*, for it did not appear that the caterer violated any agreement, or charged more than the dinner was worth.[1]

Language may be libellous which is not defamatory of a person, but which impairs the value of his property. This is called "slander of title." To render such language actionable, it must be published without lawful excuse, and pecuniary loss must be a natural and proximate consequence of its publication. The burden of proof rests upon the plaintiff to show that he has suffered such loss, and that the publication was false. The New York *World* published an illustrated article, describing various saloons at Coney Island as exerting a bad influence. One of the cuts represented the interior of a saloon, and was entitled "In Kennedy's." Joseph Kennedy brought suit for damages, but the Supreme Court held that the article did not charge him with conducting his saloon improperly, but only with keeping one of a number of saloons which were a resort of improper characters. It was accordingly a libel on the place and not on the person, and was not actionable in the absence of express proof that the owner had suffered pecuniary loss as a natural consequence of the publication.[2]

[1] James Dooling *v.* Budget Pub. Co., 144 Mass. (1887), 258.

[2] Kennedy *v.* Press Pub. Co., 41 Hun (N. Y. Supreme Court, 1886), 422. See

In an old English case the cause of action was the following, published in a newspaper called the *Oracle*: —

TIMES VERSUS TRUE BRITON. — In a morning paper of yesterday was given the following character of the *True Briton*,—that "it was the most vulgar, ignorant, and scurrilous journal ever published in Great Britain." To the above assertion we assent, and to this account we add, that the first proprietors abandoned it, and that it is the lowest now in circulation; and we submit the fact to the consideration of advertisers.

Lord Chief Justice Kenyon held that no action was maintainable for the assertion that the *True Briton* was "the most vulgar, ignorant, and scurrilous journal ever published in Great Britain," but that the subsequent words, alleging that it was the lowest paper in point of circulation, were actionable, since they tended to affect the profits to be made from its publication.[1]

While it is libellous falsely to underrate the circulation of a particular newspaper, it is not actionable to claim in general terms that "this paper has the largest circulation in the United States," although the proprietors of another newspaper may be able to show that their paper has a larger circulation than the one making the claim.

The San Francisco *Chronicle*, November 30, 1876, charged the publisher of the *Call* and *Bulletin* of that city with selling their editorial influence to the Central Pacific Railroad Company, and the result was a libel suit. The defendants pleaded that the publication was not libellous, as the opinions of a newspaper were properly merchantable; and they were sustained by the

also M. D. Wilson *v.* C. H. Dubois (Minneapolis *Saturday Evening Spectator*), 35 Minn. (1886), 471.

[1] Heriot *v.* Stuart, 1 'Espinasse's Cases (1796), 437.

Superior Court. The Supreme Court, however, in January, 1885, reversed the ruling of the court below, holding that the charge was libellous. Judge Myrick, who read the opinion of the Court, said: "If readers of newspapers are at all honest in their own sentiments, proprietors of newspapers owe to them the duty of being sincere. It would not be sincere to do that which is charged in the article set out in the complaint. The tendency of the course charged would be to lessen the confidence of readers, and thus to diminish their number or change them as to character; in either event it might expose the proprietors to loss."[1]

Language especially affecting one in his office, profession, or trade, provided the employment is a lawful one, and provided it is one which yields, or may yield, pecuniary benefit, may be actionable where the same language would not be actionable in the case of any other person. Thus it would be libellous to publish of a physician that he did not know the difference between a case of scarlet fever and a case of surgical instruments, while the same words might be used with impunity regarding a shoemaker. Where dishonesty or incapacity is falsely imputed to one in his trade or calling, an action can be maintained without proof of actual malice or special damage, unless the defamatory article is protected by the law of privileged publications;[2] but privilege is no defence where the publication is malicious and false. A corporation or partnership,

[1] George K. Fitch *v.* Michel H. DeYoung *et al.*, 66 Cal. (1885), 339. The case subsequently went before a jury and resulted in a verdict for one dollar in favor of the plaintiff, after a trial lasting a month. (See the San Francisco *Morning Call*, April 21 to May 21, 1887. The report of the case from day to day in the *Call* filled more than one hundred columns.)

[2] See Chap. VII.

charged with dishonesty or incapacity, stands upon the same footing as an individual.

In an article on the noted "Chisholm massacre," published in the Vicksburg *Herald* in May, 1877, under the heading, "Rash Southerners and Philanthropic Northerners," the writer said: —

> The accident of Miss Chisholm's death, caused by malpractice, and not by her slight wound, adds tenfold to the deplorable consequences.

Dr. John D. Kline, who attended Miss Chisholm, brought suit against George W. Rodgers *et al.*, of the *Herald*, for libel, but the Supreme Court was of opinion that words regarding one in his profession are not actionable where they charge him with want of skill or neglect in a particular transaction, unless the charge be of such gross want of skill as to imply general unfitness for his calling. The Court refused to interpret the word "malpractice" in its technical sense of professional misconduct, and a verdict for $500 in favor of the doctor was set aside.[1]

A case in Wisconsin, in which a decision was rendered by the Supreme Court in March, 1885, sustains the same doctrine. The cause of action was an article headed "A Serious Case," in which statements were made which, if true, would show that the plaintiff, Dr. E. T Gauvreau, had failed to discover the presence of diphtheria in a case under his care until long after he should have done so. The article continued: —

> We think it high time that the community should understand the facts in the case, . . . and should suffer no more either by the ignorance or negligence of any of its physicians. Inability to make a diagnosis should not be a suffi-

[1] Kline *v.* Rodgers *et al.*, 56 Miss. 808.

cient excuse, for the responsibilities of assumed knowledge cannot be avoided by a plea of ignorance.

The Court held that where the words are such as fairly to impute gross ignorance and unskilfulness they are libellous; whereas, if they only impute such want of skill as is compatible with the ordinary or general knowledge and skill in the same profession, they are not actionable *per se*. The Court considered that the article in question imputed gross ignorance and unskilfulness, and it was held to be *per se* libellous.[1]

A publication regarding an individual in respect of an unlawful business in which he is engaged is not libellous. The Supreme Court of California affirmed this well-established doctrine in the case of Eben Johnson *v.* the San Francisco *Daily Evening Bulletin*, where the alleged libel had reference to the "swill milk" business, and was in the following language: —

A week ago Officer Stone was detailed by Chief Burke to watch the Black Point milk ranches. He found on E. Johnson's ranch about one hundred and twenty cows feeding on a thin, sour slop, coming by flumes from the distillery tank. . . . In a few days, therefore, we shall see whether a practice that is as deadly as the assassin's steel or lead to the infants who suffer from it can be carried on with impunity. . . .

Judgment for the defendants was affirmed.[2]

Language which is ironical has sometimes been held to be libellous. The following was published in an English newspaper: —

An Honest Lawyer. — A person of the name of Charles Boydell, an attorney in Devonshire Street, Queen Square,

[1] Gauvreau *v.* Superior Publishing Company, 62 Wis. 403.

[2] Johnson *v.* J. W. Simonton *et al.*, 43 Cal. (1872), 242.

was severely reprimanded by one of the Masters of the Queen's Bench the other day for what is called sharp practice in his profession.

The Court held that the heading, "An Honest Lawyer," which the plaintiff claimed to be ironical, was libellous [1] And in a case in New York, where the defendant maintained that the libel was a satirical reply to an article published by the plaintiff in the course of a newspaper controversy, the defence was held to be bad. The libel in question was published in the Canandaigua *Ontario Messenger*, and was as follows: —

It is with unfeigned grief we inform our readers that Southwick, the late editor of the Albany *Register*, has become insane; the progress of his malady has been observed for some time past, and at length, much to the regret of his friends and his adversaries, it has resulted in a confirmed lunacy. The friends of the unfortunate, we understand, have confined him to his former editorial closet, and have consigned the management of his paper to a needy Irishman who wears straw in his shoes. Although this deplorable event has been expected by many for some time, yet decisive evidence of the disease having arrived at its last stage did not exist till the 24th inst., when the Albany *Register* exhibited such unequivocal proofs of the insanity of its editor that the friends and creditors of the establishment, we are told, shut up the poor maniac, put him into a strait-jacket, shaved his head, and confined him to bread and water.

Mr. Southwick was the State printer of New York, and the president of a bank. He claimed that the article, although ironical, exposed him to ridicule, and was awarded a verdict for $640, which verdict was sustained [2]

[1] Boydell *v.* Jones, 4 Meeson & Welsby (1838), 446.
[2] Southwick *v.* Stevens, 10 Johnson (1813), 443.

It is libellous to credit an article containing treasonable sentiments to a newspaper which had not published it. The Albany *Register* copied such an article from the New York *Public Advertiser*, but by mistake credited it to the New York *Evening Post*. The fact that the wrongful credit was given by mistake was held to be no defence, and a verdict for $1,500 in favor of the editor of the *Evening Post* was sustained.[1]

An imputation in the form of a question may be actionable. The following language, copied into the Oswego County *Whig* from the Chicago *American*, was held to be libellous : —[2]

> Is Miles Hotchkiss, Esq., . . . the individual who broke jail at Albany in the State of New York, while confined there on a charge of forgery? Does he now keep a ball alley and a loafer grocery at Oswego?

Where a libel is a result of the bad penmanship of the plaintiff himself, it is not actionable. Andrew J. Shakespeare, of the Kalamazoo *Gazette*, was sued by Dr. Hervey Sullings for the publication of a statement that Dr. Sullings had removed a "patty tuber" from the "hypogastrium" of a patient. Dr. Sullings claimed that the publication tended to bring him into ridicule and contempt; but Mr. Shakespeare asserted in defence that the error was caused by the illegibility of the doctor's own handwriting, and the Court held that the action could not be maintained.[3]

Often the heading given to a report by a news editor is of a libellous character, where the report itself is either privileged or not defamatory. Recently in Flor-

[1] Coleman *v.* Southwick, 9 Johnson (N. Y. Supreme Court, 1812), 45.
[2] Hotchkiss *v.* Oliphant, 2 Hill (N. Y. 1842), 510.
[3] Sullings *v.* Shakespeare, 46 Mich. (1881), 408.

ida, the publishers of the Jacksonville *News-Herald* suffered an adverse verdict for $10,000 at the suit of E. H. Lewis, in the United States Circuit Court, for the publication of articles regarding the death of Hattie F. Lewis. Foul play on the part of certain members of the dead girl's family was suspected. "The basis for these libel suits was found in the head-lines of the articles, which very naturally were made up of stronger terms, and were constructed in order to catch the eye of the reader." [1] A report of proceedings in a court was headed "Shameful Conduct of an Attorney." It was held that the report was privileged; but that the heading, not being a part of the proceedings, was not privileged and was actionable.[2] And in a case in Minnesota, the Court remarked: "Even if every fact stated in the body of the publication should be established as indisputably true, this might not amount to a justification, unless the defendant also justified the prefix or heading, 'culpable neglect'; for all the facts stated in the body of the article might be true, and yet not constitute culpable neglect on the part of the plaintiff." [3]

In the Colchester, Eng., *Gazette*, August 23, 1828, was published a laughable story concerning one A. Cook, in which it was related that Mr. Cook had been mistaken for Jack Ketch, the hangman. Mr. Cook sued E. J. Ward, editor of the *Gazette*, for libel, and the latter defended on the ground that the story was one which the plaintiff had told of himself a few days before. The Court held that the publication was libellous, inas-

[1] Jacksonville *News-Herald*, April 11, 1888. Suits against a number of Boston papers for the publication of the same articles are now pending.

[2] Lewis *v.* Clement (*Observer*), 3 Barnewall & Alderson's Reports (Eng. King's Bench, 1820), 702.

[3] Daniel L. Pratt *v.* St. Paul Pioneer Press Co., 30 Minn. (1882), 41.

much as it tended to make the plaintiff an object of ridicule, and that it was no defence that the plaintiff had previously told the same story to a party of friends. A verdict for the plaintiff for £10 was sustained.[1]

It is libellous maliciously to publish an obituary notice of a living person.[2] It is libellous accidentally to publish the name of a solvent firm in a list of insolvent business houses.[3] A newspaper writer has a right to publish the fact that a person has been arrested, and to state the charge upon which his arrest is based, but he has no right to assume the guilt of the prisoner.[4]

It is mildly libellous to call a newspaper reporter "Deputy Grand Ink Slinger 'Arry Kerrison," and for so doing in the Boston *Evening Record*, April 13, 1886, the Advertiser Publisher Company was compelled to pay a verdict of one dollar.[5] For the same amount the *Daily Arkansas Gazette* called a supervisor of internal revenue a "self-convicted liar" and a "stupid ass," and stated that he was "in the pay of the St. Louis tobacco manufacturers."[6] A fine of the same amount was imposed upon Robert B. Crossman of the Clayton, Mo., *Star Republican*, upon conviction for publishing this sentence: "The ring's organ is not satisfied with robbing by and with the consent of the county clerk."[7]

Whether language is libellous or not is in criminal

[1] Cook *v.* Ward, 6 Bingham, 409.

[2] McBride *et ux. v.* Ellis (Charleston *Mercury*), cited *ante*, p. 144.

[3] For such a mistake, the editor of the New York *Herald* was convicted of criminal libel in 1837, and fined $500. (Hudson's Journalism in the United States, p. 753.) See *ante*, p. 145.

[4] Usher *v.* Severance (*Kennebec Journal*), 20 Maine, 9. (See Chap. VII. on Privileged Publications.)

[5] Boston *Journal*, May 7, 1887.

[6] McDonald *v.* Woodruff *et al.*, 2 Dillon (U. S. Circuit Court, 1871), 244.

[7] The State *v.* Crossman, 15 Mo. Appeal Reports (1884), 585.

cases a question for the jury alone to decide, but in civil cases the practice varies in different States. In Massachusetts and some other States, the English practice is followed in civil cases, the Court defining the term "libel," and leaving the question to the jury whether the language comes within the definition. In New York, Pennsylvania, Indiana, and some other States, on the other hand, the Court decides, when the words are free from ambiguity, whether they are libellous, and instructs the jury accordingly.[1]

In conclusion, the following extracts from newspaper articles may be quoted, all of which have been held to be libellous: —

This great king, in whose veins courses the blood of the ancient viking, has turned into an enormous swine, which lives on lame horses. — [Peterson *v.* Solverson (Oconomowoc *Local*), 64 Wis. (1885), 198.

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 (*Connecticut Journal*), 3 Conn. (1820), 325.

Mr. Cooper will have to bring his action to trial somewhere. He will not like to bring it in New York, for we are known here, nor in Otsego, for *he is known there.* — [J. Fenimore Cooper *v.* Horace Greeley *et al.* (New York *Tribune*), 1 Denio (N. Y. 1845), 347.

The transaction alluded to was the appointment of an inspector of pork by Governor Seward, for which appointment Thurlow Weed received $5,000 in cash. A fair business transaction! — [Weed *v.* Foster *et al.* (*Day Book*), 11 Barbour (N. Y. 1851), 203.

[1] Odgers on Libel and Slander, p. 94, *note.*

THE HURRICANE VOTE. — Again we have to chronicle most atrocious corruption, intimidation, and fraud in the Hurricane Island vote, for which Davis Tillson is without doubt responsible, as he was last year. — [Tillson *v.* Levi M. Robbins (Rockland, Me., *Opinion*, Sept. 15, 1876), 68 Me. 295.

Mr. Shattuc [general passenger agent of the Ohio and Mississippi railroad] has grown rich by making his local ticket agents, or some of them, divide their commissions with him. — [W. B. Shattuc *v.* Daniel McArthur *et al.* (*Railway Register*, May 16, 1885), 25 Federal Reporter (Mo.), 133; 29 do. 136.

He is as versatile as the famous Monroe Edwards [a notorious forger] in circumventing the law of right; but the *Sentinel*, in its better and more honorable days, would not have consented to be the tool of a person of so desperate a character. — [Josiah A. Noonan *v.* William E. Cramer (Milwaukee *Daily Wisconsin*, Nov. 11, 1853), 4 Wis. 231.

It is said that the French government have a spy in every nation on earth. . . . If this be the case, who is the spy? . . . The county of Rensselaer, I am told, does harbor such a one, who . . . traitorously betrayed the secrets of his own government. — [Verdict for $200 sustained. — Genet *v.* Mitchell (*Republican Crisis*, March 26, 1807), 7 Johnson (N. Y.), 120.

Early this week he started between two days for the city, with McCollum's cattle. Soon an officer was put on the trail; said trail grew exceedingly hot along here, and the cattle and Myrick were all overtaken and captured near Riley McCrary's. Such is the unadorned tale as it reached our reporter's ears. — [Myrick *v.* Bain (Martinsville *Republican*, March 17, 1881), 88 Ind. 137.

The people who, under the guise of assumed respectability, resort to low commercial jugglery to foist a valueless, not to say dangerous, article upon unsuspecting manufac-

turers and jobbers, and thereby probably cause their ruin, are no better than the "stool pigeons" of a low Chatham Street dive. — [Judgment for $3,306.88 (damages and costs) affirmed. — Isaac Rosenwald *v.* Oscar Hammerstein (*U. S. Tobacco Journal*, Feb. 11, 1882), 12 Daly (N. Y. Common Pleas), 377.

A disreputable pettifogger named Remington, who recently ran for district attorney and was defeated, has, we understand, again sued us for libel. This man Remington is a very miserable fellow; no man in this community would say that it is possible for us to injure him to the extent of six cents. The community could hardly despise him worse than they do now. — [Verdict for $300 sustained. — Henry W. Remington *v.* Beriah Brown *et al.* (Madison *Daily Argus and Democrat*), 7 Wis. (1859), 462.

A fawning sycophant, by the name of David Thomas (a misrepresentative in Congress, and a major-general by commission), has fixed his eye upon the office. . . . It was hoped that the Legislature would frown this creeping sycophant, this grovelling office-seeker, back to his duty at Washington; that they would spurn at his impudent attempt at reaching after blessings. — [Verdict for $400 sustained. — David Thomas *v.* Harry Croswell (*Republican Crisis*, Feb. 2, 1808), 7 Johnson (N. Y.), 264.

Was not the envenomed simpleton, who professes to be the editor of that paper [the *Freeman's Journal*], deprived of a participation of the chief ordinance of the church to which he belongs, and that too by reason of his infamous and groundless assertions? Were it not for the lenity of some, this public pest would long since have been silenced; but the day is not far distant when the deep-toned bell will toll the exit of his paper. — [Verdict for $500 sustained. — McCorkle *v.* Binns (*Democratic Press*, Sept. 9, 1808), 5 Binney (Pa.), 340.

It is said that his marking against Tukey [one of the

parties in a case before a jury, of which the prosecuting witness was a member], from which he declared with em phasis he would not budge, was $499.99, but he did budge from it for this reason: he agreed afterwards with one other juryman, who had marked differently, to stake the decision upon a game of draughts with him. It was so staked, and the game going against Clark, he was obliged to concur with a lower marking. — [Commonwealth *v.* Elizur Wright (Boston *Daily Chronotype*, May 14, 1847), 1 Cushing, 46.

Elnathan L. Sanderson, extra-radical candidate for Assembly from the Third, Fourth, and Eleventh wards of Brooklyn, did a good thing, in his sober moments, in the way of collecting soldiers' claims against the government, for a fearful percentage. The blood-money he got from the "boys in blue" in this way is supposed to be a big thing, and may elect him to the Assembly on the "loyal" ticket, although the soldiers and sailors are out in full force against him. — [Verdict for $5,000 sustained. — Sanderson *v.* William Cauldwell *et al.* (New York *Sunday Mercury*), 45 N. Y. (1871), 398.

The Hunterdon county Democracy must admire political filth. They certainly placed an admirable specimen of the corrupt and dirty in politics in the field for State senator on Saturday. John Carpenter, Jr., is a ringster of the worst sort. His record is black with the work of the bosses. He has always been in the market. He will bribe and be bribed. The place for John Carpenter, Jr., is Clinton. Trenton does n't want him. He will disgrace both the Legislature and the party. Keep him at home. — [The State *v.* Lawrence S. Mott (Trenton *Times*), 45 N. J. Law Reports (1883), 494.

I shall prove that while he was acting (or pretending to act) upon a committee appointed by the people of Monroe county to investigate the Masonic outrage [the abduction of Morgan], he furnished money to enable at least one of the kidnappers to escape from justice. I shall then prove that

he has deliberately and solemnly sworn that he utterly disapproved of the whole outrage, and that he had no agency in it before or after its commission. — [Signed] THURLOW WEED. — [Verdict for $400 sustained. — Jacob Gould *v.* Thurlow Weed (Rochester *Anti-Masonic Enquirer*, Oct. 27, 1829), 12 Wendell, 12.

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 Obadiah Huse 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. . . . — [Huse *v.* Inter-Ocean Pub. Co., 12 Bradwell (Ill. 1883), 627.

Detective Swan holds, at present, some one and a half tons of rubber picked up at the wreck of the steamer Rhode Island. . . . The question is, What did Detective Swan leave this city for and go to the scene of the wreck? Did he go to protect the property from thieves, and assist in its saving, or did he go for the purpose of scooping in what he could lay his hands upon? It don't seem probable that citizen taxpayers would sanction the idea of paying a man $3.50 per day to go on a wrecking cruise and keep all the spoils he could get. . . . — [The State *v.* Alonzo Spear *et al.* (Providence *Sunday Morning Transcript*, Dec. 26, 1880), 13 R. I. 324.

THE TRUE HISTORY OF A GREAT MINING ENTERPRISE [the notorious Emma mine]. — . . . Mr. Silas Williams, it seems, is admitted by Mr. Park to be about the best man in his acquaintance to prepare a mine, and Mr. Williams was sent for. In the month of September, the number of men working on the mine was reduced from a hundred to a dozen. No one was allowed to go into the mine without a

written order, and armed men were stationed as guards at the entrances, while Mr. Silas Williams occupied himself in plastering and engrafting silver ore on to the limestone rock. . . . — [Silas Williams *v.* Edwin L. Godkin *et al.* (the *Nation*, Dec. 18, 1873), 5 Daly (N. Y. Common Pleas), 499.

CHARACTERISTIC OF HIM. — The sneaking innuendo thrown out by the *Chronicle* last week at ex-Gov. Robinson and Col. Glick is characteristic of the hypocritical puppy who wrote it. Both gentlemen alluded to by our subterranean contemporary are too well known and too highly esteemed to be affected by cowardly insinuations coming from a source so notoriously unreliable as the *Chronicle*. Coarse insinuation is the favorite weapon of the poltroon, and this accounts for the constabulary organ's use of it. . . . The editor of the *Chronicle* has been intoxicated on several occasions, and that, too, after he was elected to the Legislature as a champion of prohibition. — [The State *v.* James and June B. Mayberry (Burlingame, Kan., *Osage County Democrat*), 33 Kansas (1885), 441.

WAS HIS A GRAVEYARD CASE? — *Suspicions aroused by the recent death of John F. Downing. — The father's story.* — The death of John F. Downing, who was buried on Tuesday, has revived the matter of graveyard insurance. It is reported that several men had policies on his life, knowing when they were issued that he was suffering from consumption, which policies, it is alleged, were obtained through a fraudulent physical examination by Dr. Hennessey. The father of the deceased . . . had been informed that policies on his son's life were held by Dr. Hennessey, Edward Driscoll, Jr., W. J. Hurley, Patrick Gillan, William Barlow, Stephen Broderick, and Patrick Riley. . . . — [William J. Hurley and Patrick Gillan *v.* Fall River Daily Herald Publishing Co., 138 Mass. (1885), 334.

We are in receipt of a letter from King Kalakaua, in which, after wishing the *Progress* success the coming year, he says in pure Hawaiian: "Ka makua mana loa maita mai

ia makou E haltai aku rel we ka haan au E wau ka waluhia O rei pac aiua wai hawaua hiihau malolo o kou maloua." As many of our readers may not be posted in this language, we translate this to be: "Never go into a lawsuit with Arch McGinnis so long as he may be the owner of those books that beat Sutherland, Jim Ryan, Cookerly, and whoever they might be brought up against, for McGinnis is chiefest among ten thousand, and the one altogether lovely — on the swear. . . . If Beecher is really desirous of laying out Theodore Tilton, in his suit now in progress in New York City, let him send for our friend McGinnis." — [Verdict for $500 sustained. — McGinnis *v.* Gabe (Bloomington *Progress*, Jan. 13, 1875), 68 Ind. 538.

A GIGANTIC FRAUD. — *How the First ward registry has been corrupted. — A list of the illegal voters. — Over two hundred false names already found. — Bogus Polack names used. — Details of the boldest attempt ever made to corrupt the election. — Mike Kraus' list of Polish names.* — When Mike Kraus, the partner of P. V. Deuster [in the publication of the Milwaukee *Seebote*, a German newspaper], came before the Board of Registration of the First ward with a list of 250 Polack names for registration, the suspicions of the Republicans were aroused. . . . Even under the infamous Tweed dynasty in New York Democratic politics there was never any fraud as bold as this attempted. . . . We now present the history and facts of the case, and leave it with the voters of Milwaukee to say whether the man in whose interest this gigantic fraud has been perpetrated shall represent this community in Congress. — [Kraus *v.* the Sentinel Co. (Milwaukee *Republican Sentinel*, Nov. 4, 1882), 60 Wis. 425.

CHAPTER VII.

PRIVILEGED PUBLICATIONS.

In a certain class of cases, wherein the interests of the public are more immediately involved, the press is given especial protection. These cases are called privileged publications, and include reports of judicial and legislative proceedings, comments upon the policy of the government, the conduct of public men, and other matters which concern the public welfare, and criticisms of theatrical and musical performances, and works of art and literature. In such cases the usual assumption of law, that every defamatory publication is prompted by malice, does not apply, and if the report or criticism is made fairly and in good faith, no legal responsibility, either civil or criminal, attaches to the publication. The matter published must be confined to its legitimate limits, for a claim of privilege will never protect personal abuse; but if so confined, the publication, although false and defamatory, is not actionable.[1]

Publicity is almost the only safeguard of the proper administration of justice; hence the full and free publication of proceedings in open court is privileged. "The policy of the law is to encourage full reports of judicial

[1] The law upon this subject is thus defined in the Penal Code of New York (§ 244): "The publication is excused when it is honestly made in the belief of its truth and upon reasonable grounds for this belief, and consists of fair comments upon the conduct of a person in respect of public affairs, or upon a thing which the proprietor thereof offers or explains to the public."

proceedings in the daily press. In this way public attention is given to litigated issues, and important evidence frequently elicited; the people generally are practically instructed in the law of the land, and a large auditory secured, by which the decorum of bench and bar is in no small degree subserved. To these great public ends the occasional private inconveniences of individuals must yield."[1] The report must not, however, be published in defiance of a prohibition by the Court,[2] nor would the privilege attach to any indecent or blasphemous matter contained in a true report. Richard Carlile read to the jury at his trial the whole of Paine's "Age of Reason," for selling which he had been indicted. It was held that the privilege did not attach to an accurate account of the trial, published by his wife, wherein was incorporated the whole of the "Age of Reason" as a part of the proceedings.[3] The report must also be fair, accurate, and impartial, and the writer is not at liberty to impute falsehood to a witness, or add comments of his own tending to give false color to the testimony.

The New York Code of Civil Procedure thus states the law upon this subject substantially in accordance with the decisions of the courts in the other States: —

§ 1907. — An action, civil or criminal, cannot be maintained against a reporter, editor, publisher, or proprietor of a newspaper, for the publication therein of a fair and true report of any judicial, legislative, or other public and official

[1] Wharton's Criminal Law, vol. II., § 1639.

[2] See *ante*, p. 102.

[3] The King *v.* Mary Carlile, 3 Barnewall & Alderson (1819), 167. Richard Carlile was sentenced to pay a fine of £1, 00, to be imprisoned for three years, and to find sureties for his good behavior throughout the remainder of his life. In 1825, five years after receiving his sentence, he was still a prisoner in Dorchester jail. (Odgers on Libel and Slander, second English edition, p. 444.)

proceedings, without proving actual malice in making the report.

§ 1908. — The last section does not apply to a libel contained in the heading of the report, or in any other matter added by any person concerned in the publication, or in the report of anything said or done at the time and place of the public and official proceedings which was not a part thereof.

A "true report," within the meaning of the New York Code of Civil Procedure, and according to the decisions of American courts, is one which correctly represents the proceedings as they took place, and not of necessity one wherein the reported testimony itself was truthful. A condensed report may be published, if prepared fairly 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.[1] So the occurrence of slight errors would not destroy the privilege, if they do not materially change the impression which the report would make on the mind of the ordinary reader. And if the report involve matter defamatory of persons not parties to the proceedings, it is still privileged if accurate and impartial.

The privilege extends only to reports of proceedings actually had in court. The defence for any portion of a report exceeding that limit must be that it was true or that it was not defamatory. It has also been said that the privilege "does not apply when the court has no jurisdiction, nor when the publication relates to a matter not pertinent to the issue."[2] Privilege is frequently

[1] Ida E. Salisbury *v.* Rochester Union and Advertiser Co., 45 Hun (N Y. Supreme Court, 1887), 120. See, also, an article by Seymour D. Thompson, in the *Central Law Journal* (St. Louis), Jan. 6, 1888, on "Civil Responsibility for Words Spoken or Written in Legal Proceedings."

[2] Wait on Actions and Defences, vol. IV., p. 309.

sacrificed by the defamatory character of the heading given to a report by the news editor. Thus the New York *Evening Express* published a report stating that one Edsall had been dismissed from the police force of New York City. The report itself would have been privileged, but it was headed, "Black-mailing by a Policeman," and the Court held that this heading destroyed the claim of privilege.[1]

A report is not privileged which gives the speeches of counsel, wherein reflections are cast upon individuals, but which does not state the evidence or explain in any way the defamatory remarks of the attorney. The Bethlehem, Pa., *Times* published the following as a portion of the argument of one of the counsel in a civil action which was pending in one of the courts: —

The plaintiff in this case, Mr. Aaron 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. . . .

In affirming a verdict of guilty, found against the publishers of the *Times*, the Court said: "The speech of counsel in a judicial proceeding does not afford matter for a privileged publication, and if it contain scandalous and defamatory matter, a prosecution for libel will be maintained."[2] The defendants were sentenced to pay a fine of nominal amount.

[1] Isaac W. Edsall *v.* James Brooks *et al.*, 17 Abbotts' Practice Reports (1864), 221.

[2] Commonwealth *v.* Godshalk *et al.*, 13 Philadelphia Reports (1877), 575.

If the report was prepared by a writer regularly employed upon the paper, it is presumed that it was published without malice, and the burden of proving malice would rest upon the plaintiff; whereas, if a party to the litigation or one of the attorneys sent it for publication, the jury would start with a presumption that the report was biassed and unfair.[1]

Comments upon proceedings in courts of justice are privileged, if fairly made and in good faith, on the ground that such proceedings are matters of public interest which may be temperately discussed with impunity. Comments of this sort, however, should not be published as a part of the news report, or be incorporated into the heading, for in such case a presumption of malice would much more easily arise. The place for such comments is in the editorial columns. It has been said that if a report of judicial proceedings is accompanied by defamatory comments, "the comments, being libellous, infect the legitimate portion of the publication and destroy its privilege."[2]

The decisions are conflicting upon the question whether the rule of privilege extends to *ex parte* preliminary proceedings, such as affidavits used to secure the arrest of a person charged with crime. In the case of George W. Stanley *v.* James Watson Webb, of the New York *Courier and Enquirer*,[3] it was expressly held that a report of such proceedings before a police magistrate is not privileged, and in the case of Charles L. Timberlake *v.* the Cincinnati Gazette Company,[4] the

[1] Odgers on Libel and Slander, p. 256.

[2] W. L. Murfree, Sr., in an article on "Privileged Publications, Legislative and Judicial," in the *Central Law Journal*, Nov. 27, 1885.

[3] 4 Sandford (N. Y. 1850), 21.

[4] 10 Ohio State Reports (1860), 548.

Court was of the same opinion. In the latter case the libellous report was as follows: —

SWINDLING. — Amongst the arrests at the Ninth Street station-house yesterday, appeared the name of C. L. Timberlake, who is charged with petty larceny; he having, according to the statement made, bought a land warrant of a lady for ninety-five dollars, and when the lady had signed the documents making the warrant over to him, he gave her seventy-six dollars, and would give her no more.

Mr. Timberlake received a verdict for $500, which was sustained.

It was charged in the Jersey City *Evening Journal* that Allan L. McDermott, an attorney, had falsely personated a constable, and as such had read a warrant, which he pretended to execute. This charge was based on statements made to a reporter by a justice, to whom an application had been made for a warrant for McDermott's arrest. The statements were substantially those of the persons applying for the warrant, but they were not made to the justice under oath, and were no part of judicial proceedings. The Court held that the publication was libellous and not privileged.[1]

On the other hand, the following report, published in the New York *Times*, October 21, 1871, was held to be privileged: —[2]

SINGULAR COMPLICATIONS IN A DIVORCE CASE. — On Wednesday last, John T. Burleigh, of No. 23 Dey Street, appeared before Judge Shandley at Jefferson Market Police Court, and stated that several important letters and a check for thirty dollars were stolen from his safe by a private detective named A. A. Ackerman. . . .

[1] McDermott *v.* Evening Journal Association, 43 N. J. Law Reports (1881), 488.

Ackerman *v.* Jones, 37 N. Y. Superior Court Reports, 42.

A marked advance was made in the interpretation of the law upon this branch of the subject of privilege by the English Court of Common Pleas in 1877. An engineer named Usill brought suit for the publication of the following in the London *Daily News*, *Standard*, and *Morning Advertiser*: —

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 offence 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 not privileged, inasmuch as it was a report of an *ex parte* application to a magistrate who had no jurisdiction over the case, and against one who had no means of answering the charges made against him; but the Court held that it was a privileged publication.[1]

The decision in this case was fully approved by the Court of Appeals of Maryland, in 1878. The Baltimore *American* published the following, September 25, 1875: —

A RUFFIAN CAGED. — For several weeks past the police of the North-Western District have been endeavoring to make the arrest of a man named William McBee, who has occasioned considerable trouble in various neighborhoods.

[1] Usill *v.* Hales *et al.*, 3 Com. Pleas Division, 319.

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 yesterday 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.

It appeared that the facts as published were furnished to the reporter by Justice McCaffray. McBee was tried for indecent exposure and acquitted, and he then brought suit for damages against C. C. Fulton *et al.*, of the *American*. In the Circuit Court it was held that the publication was privileged, if it was a correct account of the charges preferred against McBee in the course of an official inquiry before a justice of the peace, and this opinion was approved by the Court of Appeals, the cases of Stanley *v.* Webb and Timberlake *v.* the Cincinnati Gazette Company, cited above, being expressly disapproved. It was declared immaterial whether the hearing which was reported was *ex parte* or not, and whether the proceedings resulted in the discharge or committal of the prisoner.[1]

The weight of authorities is in favor of extending the privilege to reports of arrests, so long as such reports do not assume the guilt of the accused and are not defamatory in other respects. Thus it has been held in Maine that a report that a certain person has been arrested for drunkenness does not amount to an assertion that he was drunk, and proof that he was so arrested, even if the arrest was unwarranted, would be

[1] McBee *v.* Fulton *et al.*, 47 Md. 403.

a good defence.[1] On the other hand, if the writer goes beyond the mere fact of the arrest, and assumes that the prisoner is guilty of the offence charged against him, the publication would not be privileged, as in the case of the following paragraph published in the *Kennebec Journal*, November 5, 1834 : — [2]

POST-OFFICE 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, a letter with a $500 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 $500 bill and removed the deposit to his own pocket.

In a similar case in Louisiana a verdict for one thousand dollars was recovered for the publication in the *Crescent* of a report of the plaintiff's arrest for piracy, to which report was added the following description of the prisoner : — [3]

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."

The proceedings of every court, whether of a justice of the peace or a court of last resort, may be reported under the same privilege, provided the court is held

[1] George G. Stacy *v.* the Portland Pub. Co. (*Daily Press*, Sept. 24, 1875), 68 Maine, 279.

[2] Samuel Usher *v.* Luther Severance, 20 Maine, 9.

[3] Frederick Tresca *v.* Joseph H. Maddox, 11 Louisiana Annual Reports (1856), 206.

with open doors and the proceeding is not *ex parte*. Where a preliminary examination is not *ex parte*, that is to say, where it is conducted in the presence of the accused, a report would be privileged; and where the hearing is *ex parte*, provided it ends in the discharge of the accused, the publication would also be privileged, on the ground that the proceedings are at an end, and that the report would produce no hostile effect upon the minds of a future jury.

A report of proceedings before a grand jury, prior to the presentation of the indictments and "no bills" in court, has been held not to be privileged,[1] for the reason that such proceedings are preliminary and *ex parte*, and that their publication would often tend to thwart the ends of justice. An aged couple named Wilson had been murdered at Winetka, near Chicago, early in 1884, and the case was engaging the attention of the officials at the State attorney's office. It so happened that the assistant State attorney, Baker, one day had nothing for his clerk, Pean, to do, and accordingly directed him to draw up an indictment against J. Appleton Wilson, who was a nephew of the murdered couple, and a harmless real-estate agent. Pean, supposing that Wilson had been indicted by the grand jury then in session, allowed Gramer, a reporter on the Chicago *Tribune*, access to the papers. The managing editor of the *Tribune* sent Gramer back for confirmation, and he got the names confirmed. The reporter was also sent to see Mr. Wilson, but apparently did not find him. The libellous statement that Wilson had been indicted was accordingly published, March 14, 1884, but

[1] McCabe *v.* Cauldwell (New York *Sunday Mercury*), 18 Abbotts' Practice Reports (1865), 377.

upon the mistake being discovered, a full retraction of the charge was promptly and publicly made. Nevertheless Mr. Wilson sued the *Tribune* for $100,000 damages. After a trial lasting five days and a half, a jury gave him a verdict for $250. In charging the jury, Judge Collins said: "It is no defence to an action for libel in any case that the alleged libel is a faithful report of proceedings of a grand jury, or that the defendant believed the same so to be, the indictment not having been returned into court."[1]

A report of the execution of a criminal does not come within the privilege. Warren Wood, who had been sentenced to death for murder in New York, made a speech upon the scaffold in which he falsely charged one Sanford, who had been his counsel, with mismanagement of his defence. The New York *Herald* published, January 25, 1854, an account of the execution, together with the speech of the condemned man, which was clipped from the *Greene County Whig*. A jury awarded Mr. Sanford $250 in his suit against the proprietor of the *Herald*.[2] It has also been held that a newspaper is not privileged to publish the contents of a petition for the disbarment of an attorney prior to a hearing in open court upon the petition. In this case the petition was filed in the office of the clerk of courts, February 23, 1883, but after the publication of its contents by the Boston *Herald*, the petition was withdrawn from the files of the court, and was never acted upon. Judge Oliver Wendell Holmes, Jr., in delivering the opinion of the Supreme Judicial Court, stated that papers filed in the clerk's office are not open to public inspec-

[1] See the Chicago *Tribune*, April 19, 1885.
[2] Sanford *v.* Bennett, 24 N. Y. 20.

tion, and that no privilege attaches to their publication. "It would be carrying privilege farther than we feel prepared to carry it," says Judge Holmes, "to say that by the easy means of entitling and filing it in a cause a sufficient foundation may be laid for scattering any libel broadcast with impunity." [1]

In the Superior Court of Detroit it was decided that newspapers are not privileged to publish reports of declarations or complaints filed in court on the commencement of suits. The defendant, the *Free Press* had published a synopsis of a bill for divorce filed by a Mrs. Rowe, wherein she charged her husband with adultery, and the decision of the Court required the defendant to justify itself by proving the truth of Mrs. Rowe's charges.[2] The *Free Press* was subsequently compelled by the jury to repair the innocent husband's reputation at an outlay of six cents in damages.

Reports of the transactions of either house of Congress, or of the State legislatures and their committees, are privileged in the same manner as reports of judicial proceedings.[3] This privilege is of comparatively recent date, a Federal court having decided in 1814 that a defendant in a suit for libel might plead in mitigation of damages that the alleged libel was copied from the journals of Congress, but not in defence.[4] A report of testimony taken before an investigating committee of Congress has been held to be privileged.[5] The matter

[1] Charles Cowley *v.* Royal M. Pulsifer *et al.*, 137 Mass. 392.

[2] James Rowe *v.* the Detroit *Free Press*, Washington *Law Reporter*, Oct. 31, 1885.

[3] See *ante*, p. 23.

[4] Romayne *v.* William Duane *et al.* (the *Aurora*), 3 Washington's Circuit Court Reports, 246.

[5] J. Randall Terry *v.* J. Q. A. Fellows *et al.*, 21 La. Annual Reports (1869), 375

charged in this case with being libellous was published in the New Orleans *Times*, and was as follows: —

> 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.

No privilege attaches, however, to reports of the doings of a legislative body, if the sessions are held with closed doors. The Galveston *Daily News* published, with the consent of the attorney-general of Texas, extracts from the testimony of witnesses before a legislative committee empowered to collect evidence regarding alleged land frauds. One of the witnesses in the published testimony charged the plaintiff, T. L. Wren, with forgery, and Mr. Wren recovered a verdict for $7,500 against A. H. Belo & Co., proprietors of the *News*. In sustaining the verdict and judgment of the lower court, the Supreme Court said: "There may be cases where a preliminary and *ex parte* proceeding would be privileged, but as to this we do not decide; but when to these two conditions is added the fact that the proceeding is conducted in secret, we know of no principle in the law of libel that will protect the publication." The Court remarked that the committee had neither legislative nor judicial powers, and that the attorney-general ought not to have given the testimony to the public.[1]

The proceedings of a town council may be reported under the protection of privilege. The Houma, La.,

[1] Wren *v.* Belo *et al.*, 63 Texas (1885), 686.

Courier published the following, October 8, 1881, as part of a report of a town council meeting: —

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 thirty dollars. "There is something rotten in Denmark." "More whitewash needed."

The jury found that it was a substantially true report of the proceedings of the town council, and the Court ruled that as such it was privileged.[1] The jury, however, after rendering their verdict, presented a paper to the Court, which concluded with the following somewhat remarkable finding: —

Said article, though not libellous, is ungentlemanly in tone, and beneath the dignity of correct and honorable journalism.

The publication of defamatory matter is privileged, as has been seen, where it occurs in a true and impartial report of judicial or legislative proceedings; but whether this exemption from liability extends to reports of political or other public meetings is a question not entirely settled. In a noted case in New York it was held that a report of proceedings at a public meeting, assembled for the purpose of nominating a candidate for governor, was not privileged,[2] but in a similar case in Pennsylvania the contrary has recently been main-

[1] H. M. Wallis, mayor, etc., *v.* B. F. Bazet, 34 La. Annual Reports, 131.
[2] Lewis *v.* Few, 5 Johnson (1809), 1.

tained.[1] In respect of public meetings the law in England is in advance of the American statutes and decisions. The following extract from the English "Newspaper Libel and Registration Act, 1881," [2] is submitted as a suggestion to the law-makers of the several States: —

Sect. 2. — Any report published in any newspaper of the proceedings of a public meeting shall be privileged, if such meeting was lawfully convened for a lawful purpose and open to the public, and if such report was fair and accurate, and published without malice, and if the publication of the matter complained of was for the public benefit; provided always, that the protection intended to be afforded by this section shall not be available as a defence in any proceeding, if the plaintiff or prosecutor can show that the defendant has refused to insert in the newspaper in which the report containing the matter complained of appeared, a reasonable letter or statement of explanation or contradiction by or on behalf of such plaintiff or prosecutor.

Numerous defects have, indeed, been found in this section of the act. "It has been decided by the Queen's Bench Division of the High Court of Justice that under the Newspaper Libel Act of 1881, the report of a public meeting is not privileged if anything reported to the detriment of an individual is not a matter of common interest. Under this ruling, newspapers are grievously hampered, for reports received just before going to press cannot be reviewed with care sufficient to weed out all libellous allusions without the exercise of supernatural discretion. Either copy must be

[1] Briggs *v.* Garrett, 111 Pa. State Reports (1886), 404. (These cases are cited at length in Chap. VIII. on Political Libels.)

[2] 44 & 45 Vict. c. 60. In the following year the Legislature of Ontario passed a similar act.

mangled beyond recognition, or suffered to retain expressions that a jury might adjudge to be uninteresting to them, and therefore libellous." [1] Under the construction of the courts, the protection of the act does not extend to reports of meetings at which the public are present merely as spectators; in other words, a meeting is only "public" when the citizens at large may actively participate — speaking and voting if they choose.[2]

Not only are comments and criticisms upon public affairs privileged, but the privilege also extends to a large class of projects of a semi-public character which are dependent on public favor or confidence. Thus 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. When an individual or organization invites public attention in any way, public criticism is challenged; as by a politician who accepts office or candidacy for office,[3] an artist, public writer, lecturer, show-man, dealer in patent medicines, or advertiser of any business enterprise.

Where the libel consisted of a charge that the plaintiff had been an accomplice of John Brown, in Virginia, and that, in order to avoid arrest, he had feigned insanity and taken refuge in a lunatic asylum, it was held that it was no defence to show that the plaintiff was a public lecturer, the publication not coming within the

[1] Boston *Advertiser*, Aug. 16, 1887.

[2] Odgers on Libel and Slander, second English edition, London, 1887, chap. XIII. A bill is now before Parliament, entitled the "Law of Libel Amendment Act, 1888," designed to remedy these defects in the earlier act. (The *Journalist*, May 12, 1888, quoting the London *Daily Telegraph*.) A similar amendatory act failed of passage in 1887.

[3] See next chapter.

bounds of privilege.[1] But where the plaintiff was a professor of surgery, and the libel charged him with seducing a patient, the publication was held to be privileged, unless it was shown to be false and malicious. The jury found that it was false, and that it was published "for sensation and increase of circulation," and this the Court held to constitute malice. The defendant paid a verdict of $20,000.[2]

The question of privilege seems often to partake of the nature of a lottery. The Detroit *Evening Journal*, July 29, 1885, published an article headed "Unwarrantable Outrage," charging a deputy sheriff with arresting peaceable and innocent men as tramps merely to get the fees allowed by law for such service. This was held by the Supreme Court of Michigan to be libellous *per se*, and not to be privileged. The Court (Judge Morse) remarked: "The reason for the privilege, which is supposed to be the accomplishment of the public good by a certain liberty of discussion and publication, cannot be applied to cases where the effect of the exercise of the privilege must necessarily result in public evil as well as private injury." Judgment for the plaintiff in $300 was affirmed.[3] But assuming that the article was true, the publication would not "necessarily result in public evil"; on the contrary, the highest public good would be accomplished by calling attention to the abuse of authority on the part of a public officer. This is the true test of the question of privilege in such a

[1] Gerrit Smith *v.* the Tribune Company, 4 Bissell (U. S. Circuit Court, Northern District of Illinois, 1867), 477.

[2] Donald Maclean *v.* James E. Scripps (Detroit *Evening News*), 52 Mich. (1883), 214. (See this case in Chap. X. on Damages.)

[3] Michael Bourreseau *v.* Detroit Evening Journal Co., 30 Northwestern Reporter, 376.

case: Would the publication, if true, tend to promote the public good? Then, if false, but published without malice, it should be protected by the law of privilege. The author submits the opinion that the law of the Supreme Court of Michigan in this case is as bad as its rhetoric. The decision practically nullifies in that State the whole law of privilege.

It has been held that a member of a religious association who secures the adoption and publication in denominational papers of resolutions withdrawing fellowship from a member of the association pending a hearing upon charges of "untruthfulness, deception, and creating disturbance among the churches," is not liable in damages. In the absence of proof of malice, the publication would be privileged.[1] In a like discharge of public duty the Boston *Daily Advertiser* published, under the head "History Repeated," a charge that Edward Crane had brought the Boston, Hartford and Erie Railroad Company to bankruptcy, and was attempting to involve the New York and New England Railroad Company in a similar fate. Judge Lowell, of the United States Circuit Court, held on demurrer that the publication was privileged.[2] In his opinion Judge Lowell remarked: "Inasmuch as the project was one which affected a long line of road, as yet only partially built, and the consolidation of several companies, it assumes public importance." On the other hand it has been held in the Supreme Court of California that a trustee of a mining corporation is not a public officer whose conduct may be publicly criticised under the protection of privilege.[3]

[1] David Shurtleff *v.* Alfred Stevens, 51 Vt. (1879), 501.
[2] Crane *v.* Waters, 10 Federal Reporter (1882), 619.
[3] Wilson *v.* Fitch *et al.* (San Francisco *Bulletin*), 41 Cal. 363.

The Montreal Amateur Athletic Association sued the Montreal *Post* for the publication of charges that members of its lacrosse team had sold a game which had been played with the Cornwall team. Mr. Justice Davidson, in charging the jury in the Superior Court, said that newspapers were privileged to criticise, if done without malice, lacrosse matches or any other performances to which the public are admitted upon the payment of an admission fee. The plaintiff association had a verdict for twenty-five cents.[1]

Among affairs of a semi-public nature which may be discussed and criticised in the press with impunity, so long as the discussion and criticism are in good faith, are dramatic, musical, and literary works, and works of art. Here, as throughout the whole range of privileged publications, the writer must avoid personal defamation, and actual malice must be proved against the writer or publisher to render him liable. The playwright, author, and artist, by the public presentation of their works, invite criticism, and they cannot complain if the criticism is hostile. As Lord Ellenborough said in a noted case: "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."[2] If, however, the playwright or actor confines himself to private 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 are not even of a semi-public nature, and not being dependent on public

[1] Montreal *Post*, Feb. 1, 1888.

[2] Tabart *v.* Tipper (*Satirist or Monthly Meteor*), 1 Campbell (Eng. 1808), 350.

favor, the public have no such interest in their discussion as will sustain a claim of privilege.

The New York *Herald* published a series of eleven articles from November 3, 1848, to February 11, 1849, in which the conduct of Edward P. Fry, as a manager of Italian opera, was severely commented upon. It was charged that Mr. Fry had employed critics to defame the female members of his company in hired newspapers; that Madame Pico was insulted and discharged from the company, and that she had sued the manager; that Fry had packed the Astor Place Opera House with loafers and hirelings to hiss Benedetti off the stage; that the manager appeared before the audience and "sustained his favorite character of an ape, by no means for the first time"; that he was a "half-starved musical adventurer"; that the opera season was a history of ridiculous blunders, disgraceful brawling, and broken promises; that Mr. Fry's opera in Philadelphia had collapsed; that, but for the patronage of public gamblers at the opera, the manager could not sustain himself a week, etc., etc. Mr. Fry brought suit for libel against James Gordon Bennett, in February, 1849. Mr. Bennett maintained in defence that the articles were true; that he believed them to be true when he published them; that he published them without malice; and that, therefore, they were privileged. After more than fourteen years of litigation, the Court of Appeals, in September, 1863, held that the bounds of privilege had been exceeded, and a verdict for the plaintiff for $6,000 was sustained.[1] In such a case an editor is responsible for the truth of what he alleges

[1] Fry *v.* Bennett, 5 Sandford, 54; 4 Duer, 247; 3 Bosworth, 201; 28 N. Y. 324.

to be facts, but his comments upon facts which are either admitted or proved would be privileged.

A writer is not at liberty to make a criticism of a work of literature or art an occasion for personal defamation. Col. William L. Stone published the following in the New York *Commercial Advertiser*, June 8, 1839, in the course of a criticism of J. Fenimore Cooper's "Naval History of the United States": —

> 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.

Col. Stone was required to pay an arbitrators' award of $300 for this article.[1]

Charles Reade brought suit against the publishers of the *Round Table* for criticisms, published in 1866, upon his novel "Griffith Gaunt." The alleged libels denounced the novel as "one of the worst stories that had been printed since Sterne, Fielding, and Smollett defiled the literature of the already foul eighteenth century," and said that the book "is not only tainted with this one foul spot, it is replete with impurity, it reeks with allusions that the most prurient scandal-monger would hesitate to make." Finally the writer questioned Reade's claim to the authorship of the novel. Judge Clarke said in his charge to the jury: "The critic can say of the player that he 'mouths 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';

[1] Cooper *v.* Stone, 24 Wendell, 434. The criticism was written by President Duer, of Columbia College.

but he cannot abuse him as 'a robustious, periwig-pated fellow,' and recommend that he should be 'whipt for o'erdoing Termagant.'" The judge held, as a matter of law, that the criticisms were libellous on their face, and not within the rule of privilege. The suit was brought to recover $25,000, but the jury gave Mr. Reade a verdict for only six cents, perhaps for the reason that he had already been sufficiently compensated by the advertising which his book had received.[1] It was proved at the trial that 60,000 copies of the novel had been sold after the publication of the libel.

Another curious case where the bounds of privilege were exceeded, but where the damages were only nominal, is that of Whistler *v.* Ruskin.[2] Mr. Whistler, the artist, took umbrage at an article written by John Ruskin on the pictures in the Grosvenor Gallery, and brought suit for libel. He was awarded one farthing, without costs. The defamatory words, as published in *Fors Clavigera*, were as follows: —

> 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 flinging a pot of paint in the public's face.

The famous "Cardiff Giant" was once involved in a libel suit, though not as an unlucky defendant or (as is generally the case) an equally unfortunate plaintiff. The giant was rapidly losing his prestige as a nine-

[1] Reade *v.* Sweetzer *et al*, 6 Abbotts' Practice Reports (new series), 9, *note*.

[2] See Odgers on Libel and Slander, p. 49, citing the London *Times* for Nov. 26 and 27, 1878.

days' wonder, when the Boston *Sunday Herald* published, November 13, 1873, the following story: —

> 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 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. . . . Not long afterwards the man who brought the colossal monolith to light confessed that it was a fraud, and the learned gentlemen, who had endorsed its authenticity, were left as naked as the statue itself.

Calvin O. Gott, the owner of the giant, brought suit against the publishers of the *Herald*, under the law relating to slander of title,[1] claiming $30,000 damages on account of the alleged loss of an opportunity to sell the giant for that sum. The jury found for the defendants, but a new trial was granted on account of an error in the judge's charge, and the case was finally settled out of court. Chief Justice Gray (now of the United States Supreme Court) said in the opinion: "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. . . . But such an intention may be inferred by the jury from false statements, exceeding the limits of fair and reasonable criticism, and recklessly uttered in disre-

[1] See *ante*, p. 164.

gard of the rights of those who might be affected by them." [1]

In the Philadelphia *Press*, July 13, 1883, was published a reporter's interview with Sylvester N. Stewart regarding Stewart's "School for Reporters." The article was headed "How Col. Stewart Proposes to Manufacture City Editors," and in it the propr etor was treated with ridicule, and his school with more or less contempt. Stewart brought suit for damages, and recovered judgment for $1,200 in the Court of Common Pleas.[2] Judge Peirce in this court instructed the jury that while the occasion of the article was privileged, actual malice might, nevertheless, be inferred from the tone of the article itself; but the Supreme Court, after hearing the case twice argued, decided that since the article was privileged, the malice necessary to sustain the action must be shown independently of the article, and final judgment in favor of the Press Company was entered.[3]

This decision of the Supreme Court of Pennsylvania practically overrules the decision of the same court in the case of Daniel O'Niell *v.* John W. Pittock *et al.*, of the Pittsburg *Sunday Leader*.[4] In the latter case it was held that a report of judicial proceedings might contain intrinsic evidence of malice. Malice, in the case of a privileged publication, cannot be proved by showing the falsity of the publication, but it may be done by showing that the defendant had been in the

[1] Calvin O. Gott *v.* R. M. Pulsifer *et al.*, 122 Mass. 235.

[2] Philadelphia *Press*, Nov. 20, 1885.

[3] Philadelphia *Press*, April 10, 1888. See also the Philadelphia *Inquirer*, Feb. 9, 1887.

[4] 63 Pa. State Reports (1869), 253. To the same effect the case of John Baxter *v.* Rolfe S. Saunders *et al.* (Knoxville *Sunday Whig and Register*), 6 Heiskell (Tenn. 1871), 369.

habit of libelling the plaintiff, or that the article complained of was violent and exaggerated.

Any matter published for the protection of one's own person, property, or reputation, is privileged, in the absence of express malice. One Saturday, in 1847, a pilot of the port of New York boarded an incoming packet ship off Long Island. The captain of the ship was a bearer of very important despatches for all the New York papers. The pilot asked for those for the *Herald*, intending to reach the shore in his boat and carry the despatches by land post-haste to the city, thereby gaining several hours. The captain, however, refused to deliver the *Herald* despatches unless the pilot would agree to take also those for the other papers and deliver all at once. Finally the pilot consented. He reached New York Sunday morning, delivered the parcel addressed to the *Herald*, and then went home to breakfast. After a bath and change of clothing, he walked down town and left the remaining press despatches on a table in the post-office. The other papers received their parcels in the usual course of business, Monday morning, but the *Herald* had meanwhile published an extra Sunday afternoon, containing a great foreign "exclusive." The *Express* commented severely on the conduct of the pilot, without, however, using his name, and charged him with a grave breach of confidence The pilot brought suit for damages, but the Court ruled at the trial that if the editorial in the *Express* was published in the assertion of a right, or for the protection of its own interests, the plaintiff could not recover, and the jury found a verdict for the defendant.[1]

[1] Lyons *v.* Townsend, 2 Edmonds' Select Cases, 452.

In the course of a business controversy, R. B. Chaffin, of the firm of R. B. Chaffin & Co., real-estate agents, stated in the Richmond *Dispatch* that David H. Lynch had attempted to decoy away their customers. Lynch replied in the same paper by characterizing Chaffin's statement as "a contemptible, cowardly, and malicious lie." Chaffin then published a card (March 12, 1884), in which he referred to Lynch's "known character as a liar," and said that any person who was "scoundrel enough" to act as he had done "would be unprincipled enough to deny it when charged with it." Lynch thereupon brought suit for libel. The Circuit Court held that Chaffin's final card was not privileged, and the plaintiff had a verdict for $1,500; but the Supreme Court of Appeals decided that the occasion of Chaffin's card was privileged, inasmuch as the card was published for the protection of his own interests. Accordingly, it should have been left to the jury to say whether the defendant had abused his privilege, and had acted with malice. A new trial was granted.[1]

A person seeking to protect his own interests is not justified in sending a letter to a newspaper for publication, with regard to the conduct of another person, unless there is no way involving less publicity in which he can protect his rights. But the fact that the letter was published in a newspaper and was read by some who were not interested in the subject-matter, does not necessarily take away the privilege. Finally, the style or temper of such a letter may raise a presumption of malice which would destroy the writer's exemption from liability.

An advertisement in a newspaper warning the public

[1] Richmond *Dispatch*, April 15, 1887; 1 Southeastern Reporter, 803.

against negotiating certain notes is privileged.[1] So also is an advertisement announcing that a certain person has left the employment of the advertiser, and that he is no longer authorized to collect bills.[2]

The *Mercantile Agency Notification Sheet*, November 5, 1884, contained this statement: —

New Jersey. Red Bank. Patterson, Emma. Chattel mortgage, Samuel Ludlow, $1,385. Clothing.

This was understood as intimating that Emma Patterson had given a chattel mortgage, a fact which would tend to impair her credit as a clothing dealer. She brought suit against Anthony J. King *et al.* for the libel. The Court of Errors and Appeals held, by a vote of nine to five, that communications of a mercantile agency are not privileged when they are so made that they fall into the hands of persons to whom the agency owes no duty to inform them of the standing of any certain dealer.[3] On the other hand, where the communication is made in good faith to a subscriber who has an interest in learning the facts concerning the financial condition of another person, and where it is made under circumstances of reasonable caution as to its being confidential, it is privileged even though the statements are untrue.[4]

In conclusion, it may be repeated that a privileged publication is only one the occasion of which rebuts the *prima facie* presumption of malice, and throws upon

[1] Commonwealth *v.* Featherstone *et al.* (Philadelphia *Evening Bulletin*), 9 Philadelphia Reports (1872), 594.

[2] George W. L. Hatch *v.* Elias N. Lane (Taunton *Daily Gazette*), 105 Mass. (1870), 394.

[3] 49 N. J. Law Reports (1887), 417.

[4] Trussell *v.* Scarlett, trading as R. G. Dun & Co., 18 Federal Reporter (1882), 214.

the plaintiff the burden of proving actual malice or personal ill-will. The law upon the subject is reasonably well settled, but its application to particular cases is often attended with difficulty. The privilege does not grow out of the fact that the publication is made through the columns of a newspaper, for members of the newspaper profession do not enjoy any immunities which are not equally shared by every individual. Writers for the press are, however, generally allowed greater latitude by juries. The press has constantly sought to secure greater freedom for itself, in view of the impossibility for reporters and editors to verify all matters of news during the short interval before the paper goes to press; but the courts have resisted all attempts to extend the limits of privilege. It is only through the channel of legislation that any material advance can be made.

CHAPTER VIII.

POLITICAL LIBELS.

AMONG the various publications which are protected by the law of privilege, as stated in the preceding chapter, are those respecting public men and candidates for political office. To receive the benefit of this protection, the publication must be made without actual malice; it must be fair and temperate, and the motives and conduct of persons under discussion must not be wantonly impugned. It is no defence that the writer believed his charges to be true, if they were published recklessly and without reasonable grounds; whereas, if the charges are based upon some foundation in fact, written in a tone of moderation, and published in good faith, the publication is privileged, even though it contains false imputations upon the integrity of persons whose conduct is being considered.[1]

Only the *public* conduct of a public man may be dis-

[1] In Pennsylvania, under the constitution of 1874 (art. I., sec. 7), where the publication relates "to the official conduct of officers or men in public capacity, or to any other matter proper for public investigation or information," it is not necessary, in a criminal case, to prove the truth of the charge in defence, provided the defendant is guilty of no malice or neglect. See Commonwealth *v.* W. M. Singerly (Philadelphia *Record*), 15 Philadelphia Reports (1881), 368. The Revised Statutes of Maine (chap. 129, sec. 4) provide that the truth shall be a complete justification in criminal prosecutions for "publications relative to the official conduct of men in public capacities, or the qualification of candidates for popular suffrages, or where the matter published is proper for public information." In other prosecutions for libel in that State, the truth is only a justification where a malicious motive for the publication is not shown to exist.

cussed under this protection, and the critic must not attack his private character or follow him into his domestic life. Such is the rule as generally laid down; but, as stated by Judge Cooley in his work on "Constitutional Limitations" (p. 440), "the radical defect in this rule consists in its assumption that the private character of a public officer is something aside from, and not entering into or influencing, his public conduct." It would seem that the private character and conduct of a public officer or candidate are very material in determining his fitness for office, but learned jurists have undertaken to draw the distinction here made.

Despotic governments are always intolerant of criticism. The Court of Star Chamber punished political discussion with especial severity. In 1631, "Wrennum, for traducing and scandalizing the Lord Chancellor Bacon, in a book delivered to the King, was sentenced by that court to be perpetually imprisoned, to pay a fine of £1,000, to be twice pilloried, and to lose both his ears. Leighton, for his publication, intituled, 'An Appeal to Parliament, or Sion's Plea against Prelacy,' was sentenced to pay a fine of £10,000, to be whipped at the pillory twice, to lose both his ears, to have his nose slit and face branded, and to be imprisoned in the Fleet during life." [1] With the gradual growth of popular liberty in England, however, the right of free discussion of political affairs became better established.

[1] Folkard's Starkie on Slander and Libel, p. 61. In contrast with the intolerance of an arbitrary monarchy stands the intolerance of a theoretically perfect republic; thus Sir Thomas More, in his "Utopia," makes the discussion of political affairs punishable with death, for the reason that any change in the nature of the government would be a change for the worse. (Folkard's Starkie, p. 39.)

When the American colonies united under a republican form of government, the writers for the press in this country considered all restraints removed, and for a time the acts and motives of political opponents were attacked with a degree of bitterness which has never since been equalled. "Nothing in the history of the time is so striking as its coarseness and cruelty, its venomous vigor of invective, its contempt for all that should be sacred in political warfare and in private life. . . . Editors exchanged fraternally even more touching amenities, so that suits for slander, — wherein, sometimes, the defendant had only to read aloud in court the plaintiff's own writings to be acquitted, — street brawls with fists and pistols, duels, and murders, were not at all infrequent."[1]

An instance of the bitter invective of the party press of the time is afforded in the columns of the *Aurora*, a leading Republican paper published in Philadelphia by Benjamin Franklin Bache, a nephew of Benjamin Franklin. March 5, 1797, just after the retirement of Washington from the executive chair, the *Aurora* published the following regarding the distinguished ex-President: —

> The man who is the source of all the misfortunes of our country is this day reduced to a level with his fellow-citizens, and is no longer possessed of power to multiply evils upon the United States. If ever there was a period of rejoicing, this is the moment. Every heart in unison with the freedom and happiness of the people ought to beat high with exultation that the name of Washington from this day ceased to give a currency to political iniquity and to legalized corruption.

[1] Benjamin Ellis Martin on the "Transition Period of the American Press," in the *Magazine of American History*, April, 1887.

Philadelphia was at that time the capital of the Union, and the residence of many men who had fought under Washington in the Revolution. A party of these veterans, angry at the article published in the *Aurora*, attacked the office of the paper, threw its type into the street, and otherwise expressed their indignation.[1]

The bitter hostility of the opposition newspapers led, in 1798, to the enactment by Congress of the Alien and Sedition Laws. The Sedition Law was designed to curb the license of the party press, but its effect was to excite still greater hostility in the Republican party, and even to estrange some of the newspaper writers among the Federalists. There were about two hundred newspapers in the country at that time, and many of the editors were aliens themselves, — political exiles and emissaries of foreign governments. The legislatures of Virginia and Kentucky declared the Alien and Sedition Laws unconstitutional, but the administration proceeded to enforce them with the utmost vigor.

The first fruit of the Sedition Law was the prosecution of Matthew Lyon, a member of Congress, for the publication in the *Vermont Journal* of a letter written with intent "to stir up sedition, and to bring the President and government of the United States into contempt." The letter was written in Philadelphia, July 7, 1798, one week before the Sedition Law was passed, but it was not published in Windsor, Vt., until July 23, 1798, and accordingly came under the statute. In this letter was used the following language regarding the administration of John Adams: —

As to the Executive, when I shall see the efforts of that power bent on the promotion of the comfort, the happiness,

[1] Hudson's Journalism in the United States, p. 210.

and accommodation of the people, that Executive shall have my zealous and uniform support; but whenever I shall, on the part of the Executive, see every consideration of the public welfare swallowed up in a continual grasp for power, in an unbounded thirst for ridiculous pomp, foolish adulation, and selfish avarice; when I shall behold men of real merit daily turned out of office, for no other cause but independency of sentiment; when I shall see men of firmness, merit, years, abilities, and experience, discarded in their applications for office, for fear they possess that independence, and men of meanness preferred for the ease with which they take up and advocate opinions, the consequence of which they know but little of — when I shall see the sacred name of religion employed as a state engine to make mankind hate and persecute one another, I shall not be their humble advocate.

For the publication of this letter, and of another, said to have been written by a diplomatic character in France, Mr. Lyon was indicted, October 5, 1798, arrested on a bench warrant, and tried October 7, at Vergennes, in the Circuit Court of the United States for the district of Vermont. He pleaded the unconstitutionality of the Sedition Law, but the plea was rejected by the Court. He then undertook to prove the truth of the publication, but, after deliberating an hour, the jury brought in a verdict of guilty, and the prisoner was sentenced to four months' imprisonment and to pay a fine of $1,000 and costs.[1] Mr. Lyon entered Congress in 1797, and while confined in jail under the Sedition Law, was re-elected. Upon his return to Philadelphia, at the assembling of Congress in 1799, a motion was made to expel him on account of the seditious libel which he had published;

[1] United States *v.* Lyon, Wharton's State Trials of the United States, p. 333. The subject of seditious libels is considered in Chap. III. See *ante*, pp. 19 and 74.

but, though forty-nine members voted in favor of the motion and only forty-five against it, the motion was lost, the necessary two-thirds not having voted in favor of expulsion. Mr. Lyon afterward removed to Kentucky, and represented a district of that State in Congress for four terms. He died in 1822, in his seventy-eighth year. Eighteen years later (July 4, 1840) tardy justice was done him, when Congress passed an act repaying to his heirs, with interest, the fine which he had paid in 1798.

The Sedition Law expired by its own limitation, March 3, 1801. A large proportion of the suits and prosecutions for libel in this country have ever since been a result of political controversy.

"The fact of one being a candidate for an office or for employment, in many instances affords a license or legal excuse for publishing language concerning him as such candidate, for which publication there would be no legal excuse did he not occupy the position of such a candidate."[1] Isaac Marks was city treasurer of Mankato, Minn., and a candidate for re-election. The Mankato *Free Press*, April 2, 1880, contained a charge that Mr. Marks had, as treasurer, failed to account for certain city funds. The Court held that although the charge was not in fact true, it was nevertheless privileged if made in good faith, for the reason that free discussion in the press of the fitness of candidates for elective offices is essential to good government.[2]

A mayor was to be elected in San Antonio, Tex., January 8, 1883. On the day before the election, the San Antonio *Express* published the following regarding one of the candidates: —

[1] Townshend on Slander and Libel, p. 287.

[2] Marks *v.* Baker *et al.*, 28 Minn. 162.

As Mr. Copeland is a candidate for mayor, and as that officer has the general management of our finances, it is a legitimate question for the people to ask how he has managed affairs of others heretofore placed in his hands. . . . In 1881, T. P. Aplin died, and Mr. Copeland was appointed administrator of his little estate, the total value of which was $2,579.90. The administration closed November 23d, and the report shows the total expense of administering on the estate of $2,579.90, to have been $882.28, and the administrator was allowed to retain the balance of the estate, $1,777.62, subject to the order and instruction of the heirs. What such retention cost the heirs we do not know, but, from the charges of administration, it was doubtless a pretty heavy sum. . . .

Mr. Copeland thereupon brought suit for $25,000 against the *Express*, and recovered a verdict for $2,500. In setting the verdict aside, and ordering a new trial, Judge Watts, of the Supreme Court, said: "It may be asserted as a sound principle, and one supported by authority, that when a person consents to become a candidate for public office conferred by popular election, he should be considered as putting his character in issue so far as respects his qualification for the office." [1]

But there is a limit to the political writer's privilege in commenting upon the fitness of candidates for office, and this limit varies greatly in different States and different courts. "His talents and qualifications mentally and physically for the office 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

[1] Copeland *v.* the Express Printing Co., 64 Tex. 354.

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." Such was the language of the Supreme Court of Appeals of West Virginia in the case of James W. Sweeney *v.* Lewis Baker *et al.*, of the Wheeling *Daily Register*, decided in 1878.[1] Mr. Sweeney had recovered a verdict for $8,000 in the Circuit Court, and the judgment was affirmed by the higher tribunal. The libels upon which the suit was based were the following: —

The laboring men are taught to believe that a certain candidate, who never did an honest day's work, is their especial champion and friend. . . . A professional gambler, he preaches morality; and a confessed ignoramus, he argues that intelligence should control the election. —[Oct. 15, 1873.

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. Go to the polls and vote for Pannell. . . . It is as much the duty of the citizen to vote against Jimsweeney as it would be to deodorize against the cholera. . . . —[Oct. 16, 1873.

In New York the courts have been especially illiberal in the construction of the law of privilege, in so far as it relates to publications affecting public officers and candidates for office. The New York *Tribune*, September 26, 1860, published regarding Dewitt C. Littlejohn, ex-speaker of the Assembly, that he was "prominent in the corrupt legislation of last winter." The Supreme Court held that the language was libellous, and that it

[1] 13 West Va. 184.

was not privileged, although the ex-speaker was a candidate for re-election to the Assembly.[1] And in an earlier case in the same State it was held that a publication affecting the character of a candidate for public office is not a privileged publication, relieving the defendants from the necessity of proving the truth of the charges.[2] In this case judgment for $1,400 was affirmed, the libel consisting in the following language, published in the New York *American*, August 25, 1824: —

LIEUTENANT-GOVERNOR ROOT. —. . . We speak only what we saw, and as it is a matter of some public concern that the presiding officer of our Senate should not continue to be what Mr. Root is. . . . Lieutenant-Governor Root, holding on to each arm of his chair, looked round with inflamed face, with bloodshot eyes and half-open mouth, and with an expression altogether so stolid and drunken as, in any other situation and under other circumstances, could not have failed to excite the derision of all present. . . . An object, from his appearance and manner, we will venture to say, of loathing and disgust to every unprejudiced man among them; unwashed, unshaven, haggard, the tobacco juice trickling from the corners of his mouth, to be wiped away by his coat sleeve; with unsteady footing, this second officer of the great State of New York commenced his address to the Senate. . . .

Chancellor Walworth, in rendering the opinion of the Court in this case, said: "It is, however, insisted that this libel was a privileged communication. If so, the defendants were under no obligation to prove the truth of the charge, and the party libelled had no right to recover unless he established malice in fact, or showed that the editors knew the charge to be false. The

[1] Littlejohn *v.* Greeley, 13 Abbotts' Practice Reports, 41.
[2] Root *v.* King *et al.*, 7 Cowen, 613; 4 Wendell, 113.

effect of such a doctrine would be deplorable. . . . The only safe rule to adopt in such cases is to permit editors to publish what they please in relation to the character and qualifications of candidates for office, but holding them responsible for the truth of what they publish." The Supreme Court of Texas, in the case of Copeland *v.* the Express Printing Company, cited above, remarks: "In New York, comments and discussions relating to public officers and candidates for official positions are placed upon the same footing as comments and discussions concerning the private character of other persons. The tendency in the English courts is more liberal in protecting the freedom of the press, and the holding there is in accord with the conclusions announced in this opinion, and which we believe to be well founded in reason, and more nearly in accord with constitutional liberty and free republican institutions." [1]

A Florida court ruled that it is libellous *per se*, and not privileged, falsely to publish of a candidate for an elective political office that he is "a retail liquor dealer, and, we are informed, is under indictment for not cancelling the stamps on empty liquor casks, the contents of which he had sold." [2]

Daniel Wilcox, of the Quincy, Ill., *Whig*, a political opponent of Frederick Rearick, who was a candidate for the office of police magistrate, published charges against Mr. Rearick, April 15, 1875, alleging dishonesty and corruption, and asserting that if elected he would improve "every opportunity for peculation that might, by

[1] The rule laid down in the case of Root *v.* King *et al.* is sharply criticised in an article on "Newspaper Privilege," by Gideon D. Bantz, of St. Louis, in the *Central Law Journal* for July 31, 1885.

[2] J. F. Townsend's adm'x *v.* Jones, Varnum & Co. (Jacksonville *Florida Times-Union*, March 20, 1883), 21 Fla. 431.

possibility, attach to the office." Mr. Rearick brought suit, and was awarded a verdict for twenty-five dollars, but he appealed on account of the inadequacy of the damages. The Supreme Court granted a new trial, holding that evidence that the libel was published amid the excitement of a political campaign could not be received in mitigation of damages, and remarking that "the character and reputation of appellant was as sacred and as much entitled to protection when a candidate for office as at any other time."[1]

A fusion candidate for Congress, in Michigan, in 1882, was charged by the Big Rapids *Current* with forgery and with defrauding the depositors in a bank. He brought suit for libel, and the Supreme Court passed upon the question of privilege involved. "To hold that false charges of a defamatory character," said Judge Champlin, "made against a candidate are privileged as matters of law, if made in good faith, and that the party making them is absolutely shielded against liability, it seems to me, is a most pernicious doctrine. It would deter all sensitive and honorable men from accepting the candidacy to office." The Court held that evidence that the charges were made in an honest belief in their truth, after proper investigation, would tend to mitigate the damages recoverable.[2] Thomas M. Cooley, one of the foremost law text-writers in this country, and for twenty years a judge and chief justice of the very court whose opinion Judge Champlin was reading, does not, however, regard as "most pernicious" the doctrine to which Judge Champ-

[1] Rearick *v.* Wilcox, 81 Ill. 77.

[2] Stephen Bronson *v.* Valorus W. Bruce, 59 Mich. (1886), 467. In the later case of Wheaton *v.* Beecher (Detroit *Evening News*), 33 Northwestern Reporter (1887), 503, the Court affirmed the same doctrine.

in referred. In his work on "Torts" (page 217), he concludes a discussion of the subject in these words: "There should, consequently, be freedom in discussing in good faith the character, the habits, and mental and moral qualifications of any person presenting himself, or presented by his friends, as a candidate for public office, either to the electors or to a board of officers having power of appointment."

The law of privilege is based upon the principle that any publication, made in good faith, is lawful when it is necessary for the protection of private interests or of the public welfare. Therefore the immunity granted by this principle of law is sacrificed when the publication is given greater publicity than the occasion requires. Thus where an officer is to be elected by popular suffrage, a publication regarding the qualifications of a candidate may be made through the medium of a newspaper, for by no other means can the electors be readily reached; but where an appointment to office is to be made by a board of limited number, communications alleging the unfitness of a candidate should be made to the appointing power alone, and not to the public at large. The New York *Herald* published the following, April 11, 1845, regarding James Hunt, who was a candidate for a police justiceship: —

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 should do it again? Did he not tell his honor, the

recorder, in the most positive manner, that he was both an attorney and a counsellor in the Superior 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? . . .

It was held by the Court of Appeals that this article, being published to the world at large, was not privileged. The power of appointment of the police justice was vested in the common council, and the communication should have been made to that body alone.[1] A verdict for $1,000 was affirmed.

Under the same principle of law an action for libel was maintained against James E. Scripps, of the Detroit *Evening News*, by Dr. George B. Foster, one of the city physicians of Detroit.[2] The libellous article was, in part, as follows: —

> James Connelly . . . died last night from the effects of an operation performed upon him some two weeks ago by Dr. Foster. The operation was vaccination; the instrument, the trocar. . . . The common council should immediately take this matter in hand. . . .

In the opinion of the Court, if the editor thought that the council should take the matter in hand, he should have brought it to the attention of the council alone, or else have been prepared to prove the truth of the charge which the article implied.

Law writers have sometimes questioned the soundness of the principle which holds that newspaper publications respecting candidates for appointive public offices are not privileged. It is difficult, indeed, to see

[1] Hunt *v.* Bennett, 4 E. D. Smith's Reports, 647; 19 N. Y. 173.

[2] Foster *v.* Scripps, 39 Mich. (1878), 376.

sufficient ground for the distinction between candidates for appointive and for elective offices. In both cases the officers are chosen by the people, only in the former case the people do not act directly, but by their representatives. There are none too many safeguards for good government; and often the members of boards vested with the power to appoint public officers would feel greater responsibility for the character and ability of men appointed by them if they were conscious that the public, their constituents, had been informed whether the successful candidates were worthy of the offices conferred upon them.

The same privilege which protects publications regarding candidates for public offices within the limits above defined, is extended also to publications respecting public officials, and for the same reason — that the cause of good government requires freedom in the discussion of affairs of interest to the general public. The following article appeared in the Detroit *Post and Tribune*, June 23, 1881, concerning John Miner, a police justice of that city: —

MORE OF MINER. — A few days since a complaint was made before Justice Miner against a Chinaman. Without the assent of the 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 offence. 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 offence, Miner bound him over for trial under heavy bonds. Judge Swift, on the facts coming to his knowledge, released this 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 the multitude 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 in their judgment 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. . . .

In setting aside judgment in favor of Justice Miner, obtained in the Superior Court, Judge Cooley, of the Supreme Court, used the following language: "Few duties can be plainer than to challenge public attention to the official disregard of the principles which protect public and personal liberty. I know of nothing more likely to encourage the license of a dissolute press than to establish the principle that the discussion of matters of general concern, involving public wrongs, and the publication of personal scandal, come under the same condemnation in the law; for this inevitably brings the law itself into contempt, and creates public sentiment against its enforcement." [1]

A claim of privilege was made on behalf of the following article, published in the Pittsburg *Post*, February 16, 1874: —

An Impostor. — A man who resides in Allegheny City, named W. D. Moore, and who subscribes himself as chairman of the Democratic County Committee, appeared in yesterday's Sunday papers in a card addressed to the Democratic voters of the city of Pittsburg, for the writing of which he was paid a fee by the ring, and the publication of which was paid for out of the corruption fund of the McCarthy-Magee-Snodgrass ring, in which the impudent im-

[1] Miner *v.* the Detroit Post and Tribune Co., 49 Mich. 358.

postor attempts to dictate to the Democratic voters of this city. This man Moore is in the pay of the ring, and the fact does not surprise us in the least when we reflect that he 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 and criminal courts. . . .

James P. Barr *et al.*, of the *Post*, in defending the suit for libel brought against them by Mr. Moore, claimed that Mr. Moore was chairman of the county committee of a political party during a bitter campaign, and that, inasmuch as the alleged libel referred to his official conduct, it was privileged, as being legitimate discussion of a public question. The Supreme Court, however, ruled that the article was libellous, and that it was not privileged.[1] A verdict in favor of the plaintiff for $10,000 was set aside on the ground that it was excessive; a second verdict for $3,000 was set aside on the ground that evidence had been wrongfully admitted, and finally the case was settled out of court by the defendants paying the plaintiff's costs.

Joseph H. Farrow was a State senator in Maryland. The Hagerstown *Herald and Torchlight*, in the course of an article on legislative affairs, February 8, 1882, published charges against Senator Farrow, stating that although elected as a Republican, he was under the control of a corrupt Democratic ring; that he aided the defeat of a bill for repealing the act authorizing the publication of the laws in newspapers, and by so doing proved a traitor to his party; and that he had been given a State contract to furnish stone because he "had a vote to give in the Senate." The article con-

[1] Moore *v.* Barr *et al.*, 87 Pa. State Reports, 385.

cluded as follows: "The fruits of the contract to furnish stone to lengthen locks on the canal are appearing. Look out for more." In sustaining a verdict for $3,000, recovered in the lower court against Peter Negley *et al.*, of the *Herald and Torchlight*, the Court of Appeals said: "If one goes out of his way to asperse the personal character of a public man, and to ascribe to him base and corrupt motives, he must do so at his peril, and must either prove the truth of what he says, or answer in damages to the party injured. The fact that one is the proprietor of a newspaper entitles him to no privilege in this respect not possessed by the community in general."[1]

It has been held in New York that a true report of the proceedings at a public meeting, assembled for the purpose of nominating a candidate for governor, the report being signed by the defendant as chairman, and published by order of the meeting, is not as such privileged.[2] Col. William Few was defeated in the case in question in a suit for libel brought against him by Governor Morgan Lewis, the libellous article being the following, published in the *American Citizen*: —

We solemnly complain against the present governor, and object to his re-election, for his want of attachment to Republican principles, and for his having formed a coalition with a certain portion of our political adversaries, for the purpose of retaining power, and dividing among themselves the principal and most lucrative offices of the State, . . . for pursuing a system of family aggrandizement, . . . for his attempts to destroy the liberty of the press, by vexatious and repeated prosecutions, while papers under his own immediate influence,

[1] Farrow *v.* Negley *et al.*, 60 Md. 177.

[2] Lewis *v.* Few, 5 Johnson (1809), 1. (See *ante*, pp. 193, 194.)

or the direction of his supporters, abound with infamous, licentious, and almost unparalleled scurrility. . . .

Col. Few vainly maintained in his defence that he was acting under the orders of a public meeting of citizens, of which he was chairman, and that the article was privileged on the ground that Governor Lewis was a candidate for re-election. The decision in this case has been strongly criticised by recent law writers,[1] but it is frequently cited as an authority in the courts.

A similar case was more recently adjudged in Pennsylvania, and more liberally. Amos Briggs was, in 1882, a candidate for re-election as associate judge of the Court of Common Pleas for the county of Philadelphia. At a public meeting of the Committee of One Hundred, October 16, 1882, Philip C. Garrett, chairman of that committee, directed the secretary to read a letter from a certain reputable citizen, in which the following words occurred: "The Hart Creek Sewer steal of $200,000 was only made possible by Judge Briggs' charge to the jury." Reporters were present at the meeting, and the letter was published at length in the newspapers the following day. Judge Briggs brought suit against Mr. Garrett for libel, and showed in evidence that he did not charge the jury in the case in question. He was nonsuited in the Court of Common Pleas, on the ground that, in the absence of malice, the action of Mr. Garrett was privileged, and the judgment of nonsuit was affirmed by the full bench of the Supreme Court, three of the seven judges dissenting. Speaking of the individual hardship suffered by Judge Briggs, the Court said: "This is the sacrifice which the individual must make for the public good, just as the soldier is

[1] Cooley on Constitutional Limitations, p. 438.

shot down in battle to preserve for others the blessings of free government."[1] Any one of the reporters who were present, or the proprietor of any newspaper represented at the meeting, would have enjoyed the same immunity as the chairman if suit had been brought against them by Judge Briggs.

This decision is sharply called in question in the case of the State of Tennessee *v.* the Nashville Banner Publishing Company *et al.*[2] The Nashville *Banner*, January 26, 1885, in an article entitled "The Tennessee Tewksbury," charged the superintendent, warden, and physician of the penitentiary with gross abuses and mismanagement. In the court below the defendants were convicted and severally fined fifty-one dollars. The Supreme Court declared that neither the press nor individuals can discuss the conduct or character of officers and candidates for office without incurring liability, civil or criminal, for defamatory utterances published, although such publications may be made without malice and upon probable cause. Judgment was affirmed. The rule here laid down is precisely the same which prevails in cases where there is no question of privilege involved.

Shortly before the presidential election in 1868, some department clerks from Washington, who were returning to their homes in the North for the purpose of voting, were assaulted while passing through Baltimore. In its report of this occurrence, October 14, 1868, the Baltimore *American* used the following language: —

A young man on the Washington train, who is engaged in selling papers, and who takes every occasion to insult Re-

[1] Briggs *v.* Garrett, 111 Pa. State Reports (1886), 404. Judge Briggs failed to be re-elected.

[2] 16 Lea, 176.

publican passengers, appears to have been in collusion with the ruffians. On approaching the city, he went around to take a vote of the passengers, the object being evidently to spot the Republicans, that the assailants might know who were their friends and who their opponents. The scheme was successful, and on passing through the city, an ex-police officer of Washington pointed out the victims who had unwittingly proclaimed their political predilections in favor of Grant and Colfax.

The libelled news agent was George Snyder, and he brought suit against Charles C. Fulton *et al.*, of the *American*, for $10,000. The Court held that the publication was not privileged,[1] and the news agent was awarded a verdict for $250.

An act regarding libels upon candidates for political offices was passed by the Legislature of Minnesota at its session in 1887. This act provides that punitive damages shall not be recoverable against the publishers of a libel where it appears at the trial that the article was published in good faith, and that a fair retraction was promptly published —

Provided, however, that the provisions of this act shall not apply to the case of any libel against any candidate for a public office in this State unless the retraction of the charge is made editorially in a conspicuous manner at least three days before the election.

The Legislature of Ontario passed a similar statute two months later.

Political libels, as in this chapter discussed, are only a subdivision of the general class of privileged publications treated in the preceding chapter. Many political articles, of a more or less defamatory character, become the subject of libel actions without the question

[1] Snyder *v.* Fulton *et al.*, 34 Md. 128.

of privilege being raised. Such a case was reported in the Albany *Law Journal* for May 26, 1888. The case resulted from an article published by F. B. Kampf, of the *Auglaize County Democrat* of Wapakoneta, Ohio, regarding a person by the name of Settlage. The character of the charges is sufficiently indicated in the opinion of the Court of Common Pleas. Unfortunately, the judge of that court is entitled to more distinction as a humorist than as a jurist, for his ruling would hardly be sustained in most courts of last resort. The opinion was quoted as follows: —

If defendant meant that plaintiff was a liar in its worst sense, — that he is a common, every-day, all-the-time, wilful and malicious liar, that he deliberately and designedly falsifies in material matters in all the relations of life, in his business, social, religious, and political relations, — the charge is *per se* a libel. But if he meant that he was unreliable in a political sense, or in a particular personal matter, or that he advocated false doctrines in theology or politics, it would not be so. A traitor is one who violates or disregards his allegiance. It may mean a man who commits treason by betraying his country into the hands of its enemies, or one who has thrown off his allegiance to a political organization. To falsely charge the first would be a libel, while to charge the latter would, in some cases, be to exalt, glorify, and popularize the person charged. Here "political traitor" is alleged in the petition. An "official recalcitrant" is an officer who kicks backward, one who objects, shows repugnance, and refuses to follow. He may be a disagreeable kind of a fellow, but not infamous. . . . "Nincompoop" means a silly fellow, a blockhead. It is the opposite of a philosopher, and is only one way of saying the plaintiff is not a statesman. Of course, it is very annoying and inconvenient not to be a statesman, but there is nothing in it that has a tendency to disgrace and degrade. . . .

CHAPTER IX.

DEFENCES.

In proceedings for libel, it may be shown in defence that the language complained of is not defamatory, or that it is true, or that it is privileged by the nature of the occasion upon which it was published. Other defences may also be pleaded, but these are the principal ones.

It is, of course, a complete defence to show that the words do not bear a defamatory meaning. If the words are seemingly defamatory, their actionable character may be modified by evidence of other matter published in the same newspaper, which qualifies the apparent meaning of the alleged libel.

As has been seen, comments upon public affairs, the conduct of government officers and other public men, and on the policy of the government, as well as criticisms of dramatic, musical, literary, or artistic productions, and reports of judicial and legislative transactions, are privileged, and cannot afford grounds for civil or criminal proceedings, in the absence of proof of actual malice on the part of the writer or publisher.[1] It is within the province of the judge alone to decide whether the publication is of a privileged character, and for the jury to determine whether the plaintiff or prosecution has sustained the charge of actual malice. If the Court

[1] See Chap. VII. on Privileged Publications.

rules that the occasion was privileged, and the jury find that the charge of actual malice is not sustained, the defence is complete.

Perhaps the most frequent ground of defence in libel proceedings is the claim that the alleged libel is true. At common law, evidence of the truth was no defence in cases of criminal libel, the publication of an unpleasant truth being frequently deemed a greater provocation than a publication of falsehood, and therefore more likely to bring about a breach of the peace. It was this construction of the law which gave rise to the notorious aphorism, "the greater the truth, the greater the libel." Since the beginning of this century, the common law has been changed in this respect in every State in the Union. In Arkansas, Connecticut, Georgia, Indiana, Maryland, Mississippi, Missouri, New Jersey, North Carolina, Tennessee, and Vermont, and in Texas (subject to certain limitations), the truth may be proved in complete defence in criminal prosecutions as in civil actions for libel.[1] "But this, it is conceived, is to be understood of libels defamatory of the person, and not to scandalous libels of a more general character."[2] In Massachusetts, the truth is declared a sufficient justification, "unless malicious intention is proved."[3] This statute throws the burden of proving actual malice upon the prosecution. In all the remaining States, it is believed, the general rule prevails that a criminal libel is justified by proof of its truth, provided the publication was made "with good motives and for justifiable ends." In these cases the defendant must

[1] See the constitutions and statutes of the various States; see also Greenleaf on Evidence, vol. III., § 177.

[2] Greenleaf on Evidence, vol. III., § 177.

[3] Public Statutes, chap. 214, sec. 13.

not only sustain the burden of proving the truth, but must also affirmatively show that his motive in making the publication was good and the end justifiable.

In civil actions for libel, the truth is generally a complete defence. The Legislature of Massachusetts qualified this rule by a statute passed in 1855, providing that in both civil and criminal proceedings the truth "shall be deemed a sufficient justification, unless malicious intention is proved." In the other States, with possibly one or two exceptions, even if the motive of the writer or publisher of the libel is shown to have been malicious, the truth is, in civil actions, a complete defence. This rule is based upon the just and equitable principle that a man is not entitled to damages for injury inflicted upon a reputation to which his true character did not entitle him. If a man is a knave and an impostor, the fact that he has succeeded in masquerading as an honest man should give him no right to recover damages from one who, even though maliciously, exposes his true character. It is difficult to see why he should be protected by the law more than the confessed knave whose reputation deceives no one. Under the Massachusetts statute, however, if the plaintiff sustains the burden of proving actual malice on the part of the defendant, the latter will not be allowed to justify himself by evidence that what he published was the truth.[1] The burden of proof is upon the defendant to show that the charges are true, for if the words are defamatory they are deemed in law to be false until the contrary is shown.[2]

[1] Public Statutes of Massachusetts, chap. 167, sec. 80. See also the case of Francis A. Perry *v.* Edward F. Porter, 124 Mass. (1878), 338.

[2] The subject of the truth in defence in civil and criminal cases is fully discussed in the case of P. B. Castle *v.* D. W. Houston (Leavenworth *Daily Commercial*), 19 Kan. (1877), 417.

If the defendant undertakes to show that the charges are true, but fails fully so to do, the evidence may still be received in mitigation of damages.[1] An unsustained allegation that the charges are true is not proof of malice, unless the jury find that as a matter of fact the defence was set up with malicious intent and with knowledge of its falsity.[2]

When the defendant justifies the publication on the ground that it is true, proof of the truth must be as broad as the charge. Thus where the charge was of smuggling "during the late war," it was held that it was not sustained by proof of one act of smuggling committed before the war.[3]

The following was published as correspondence in the Chenango, N. Y., *Union*: —

Joseph F. Bennett, a somewhat notorious character, whose presence in this village [Sherburne] was a blessing too much disguised to be at all apparent, is holding revival meetings, and preaching Rev. Mr. Earle's sermons, in various rural districts of this State. We know for a certainty that his object is a mercenary one. . . . As Bennett is apt to assume an alias, we give a short description of him. . . .

Evidence was given of the truth of some of the charges, but no proof was offered of the charge that "Bennett is apt to assume an alias." It was held that the only question for the jury was the amount of damages to be awarded the plaintiff.[4]

A series of charges were published in the Denver

[1] James Hunt *v.* James Gordon Bennett (New York *Herald*, April 11, 1845), 4 E. D. Smith, 647; 19 N. Y. 173.

[2] James Aird *v.* the Fireman's Journal Co., 10 Daly (N. Y. Common Pleas, 1881), 254.

[3] Stilwell *v.* Barter (Ogdensburg *Times*), 19 Wendell (N. Y. 1838), 487.

[4] Joseph F. Bennett *v.* Walter G. Smith *et al.*, 30 N. Y. Supreme Court Reports (1880), 50.

Tribune, December 27 and 29, 1873, against one Downing, a probate judge. In the course of the articles occurred the following passages: —

J. Downing has been guilty of forgeries enough to confine him in the penitentiary not less than 200 years. . . . Boss Tweed said he was a statesman previous to being locked up as a felon. Wonder what Jack Downing would give as his occupation in the event of a similar contingency, which is far from unlikely? . . .

MORE FACTS OF JACK DOWNING'S "REIGN." — *How the property interests of Denver were "led to the altar."*

My conscience hath a thousand several tongues,
And every tongue brings in a several tale,
And every tale condemns me for a villain.
Perjury! foul perjury!! in the highest degree;
Murder! stern murder!! in the direst degree;
All several sins, all used in each degree,
Throng to the bar, crying all, Guilty! guilty!
Richard III.

And yet Jack Downing affects to laugh with a low guttural sound, Ha! ha!! ha!!!

The forgery charged against Mr. Downing consisted in alterations in a memorandum book kept by a public officer for his own convenience, not required by law to be kept, and the entries in which could not affect any legal rights. The Supreme Court held that such alterations did not amount to forgery under the statute, and that accordingly, the proof not being as broad as the charge, the plaintiff was entitled to recover.[1]

A defendant's evidence in justification must relate to the identical matter charged in the libel, and not to some matter which is distinct though similar. The play called "Pique" was produced by Augustin Daly in

[1] Jacob Downing *v.* Henry C. Brown, 3 Col. 571.

New York in December, 1875, and it was announced as written by Mr. Daly. Charles A. Byrne thereupon published a statement in the *Dramatic News*, to the effect that Mr. Daly had wrongfully appropriated a play called "Flirtation," which the author, a woman, had left with him to read three or four years before, and that this play, under the name "Pique," was the one which Mr. Daly was producing as his own composition. Mr. Daly brought suit for damages, and the Court held that Mr. Byrne could not be allowed to give evidence in defence that Mr. Daly had wrongfully appropriated a play called "Mock Marriage" and produced it under the name of "Pique."[1] A verdict for $2,689.73 against Mr. Byrne was sustained by the New York Court of Appeals.[2]

In a well-known English case the libel complained of was the following, published in the *Medical Times* in 1849, regarding an inquest at which the plaintiff presided as coroner: —

> There can be no court of justice unpolluted which this libellous journalist, this violent agitator and sham humanitarian, is allowed to disgrace with his presidentship.

The defendants showed that a certain surgeon recovered a verdict for £100 against the coroner on account of a libellous publication in the *Lancet* in 1828. Baron Parke, in delivering the opinion of the Court, said: "I am perfectly satisfied that the words 'libellous journalist' do not mean that the plaintiff has been guilty, upon one occasion only, of having merely published a libel, but that he has been guilty of gross misconduct as a journalist, by the habit of libelling others."

[1] Daly *v.* Byrne, 1 Abbott's New Cases (1876), 150.
[2] 77 N. Y. (1879), 182.

A verdict against the editors of the *Medical Times* for £350 was sustained.[1]

A communication was published in the Oshkosh *Times* in October, 1876, under the heading, "Kimball Selling Post-Offices," in which appeared the following query: "How will honest people relish sending back to Congress a man who makes appointments a source of personal revenue?" Hon. A. M. Kimball brought suit for libel against D. W. Fernandez *et al.*, publishers of the *Times*. At the trial, it was held that allegations in defence that Congressman Kimball, as a candidate for re-election, spent large sums of money in corrupting the electors of his district, and charging him generally with incompetence for the office of representative, were altogether irrelevant.[2]

It is necessary for the defendant to show the truth of the whole libel. Where a report of a lawsuit, containing a single charge of extortion, was headed, "How Lawyer Bishop Treats his Clients," it was held that it was not sufficient to show the truth of that one charge, but the heading, which implied general bad treatment of clients, ought to be justified.[3] Proof that one of a number of charges is true is never a complete defence; but if the charges are distinct, and some are proved true and others not, the plaintiff will only recover damages in respect of the portion which is not justified. If a charge or charges constituting the gist of the libel are proved true, it is immaterial that slight inaccuracies

[1] Wakley *v.* Cooke *et al.*, 4 Exchequer Reports, 511. In Missouri it was held that if the defendants falsely charged that the plaintiff had been convicted of libel, and his punishment assessed at imprisonment, the publication was libellous *per se*. Boogher *v.* Knapp *et al.* (*Missouri Republican*), 76 Mo. (1882), 457.

[2] Kimball *v.* Fernandez *et al.*, 41 Wis. 329.

[3] Bishop *v.* Latimer (*Daily Western Mercury*), 4 Law Times (Eng. 1861), 775.

occur in some details, provided the inaccuracy does not aggravate the libel.[1] It is often, however, a difficult question to determine what inaccuracies will be deemed material and what immaterial, as will be seen by the case of Daly *v.* Byrne, cited above.

Where the plaintiff is charged in the alleged libel with a crime, but upon his trial for the offence has been acquitted, the writer or publisher is not precluded from proving in defence that the plaintiff is in fact guilty of the offence, despite his acquittal.[2] It has been held, where the libellous charge is to the effect that the plaintiff has been guilty of a crime, that the defendant may in a civil action justify the publication by showing by a *preponderance* of evidence that the charge is true; but in a criminal prosecution the charge must be sustained by proof *beyond a reasonable doubt*.[3] It has, indeed, been decided in many cases that even in a civil action for libel, where the publication imputes a criminal offence, the charge must be proved as strictly as upon the trial of an indictment, but these cases are somewhat exceptional to the general rule. In England, if the alleged libel amounts to a charge of felony, and the jury find that the charge is sustained, the plaintiff in the action for libel may at once be placed upon trial for the offence without being indicted by the grand jury;[4] but it is not believed that this rule has been adopted anywhere in the United States.

A writer in the San Francisco *Evening Bulletin*, November 3, 1863, speaking of the dealings of certain

[1] Odgers on Libel and Slander, p. 170.

[2] William McBee *v.* C. C. Fulton *et al.* (Baltimore *American*), 47 Md. (1878), 430.

[3] Hugh S. Peoples *v.* the Evening News Association, 51 Mich. (1883), 11.

[4] Odgers on Libel and Slander, p. 178.

parties with reference to a mine, said, "The chief owners believe that they have been outrageously swindled." Now, if such was the belief of the chief owners, the writer stated simply that which was the truth; but at the suit of John Downs Wilson *v.* George K. Fitch *et al.*, proprietors of the *Bulletin*, it was held that the defence would be bad unless it was shown that what the chief owners are said to have believed was in fact true.[1] It was even held in this case that the belief of the owners in the truth of the charge was no mitigation, and judgment for $7,500 in favor of the plaintiff was affirmed. In most courts, however, evidence that the person responsible for the libel believed it to be true will be received in mitigation of damages, as disproving actual malice.

It is no defence to show that the publication is based upon common rumor, if the rumor is false and defamatory, nor is it a defence to show that it was copied from another newspaper,[2] nor that the alleged libel purports merely to be the statement of a correspondent. Any such evidence will, however, generally be received in mitigation. An Indiana newspaper, called the *Spirit of the West*, published, January 18, 1854, the following paragraph: —

> Some one writing to us from Taylorsville . . . says that the house in which the post-office is kept is of such a low character that a decent lady dare not enter. We know nothing of the matter, save by the representations of our correspondent; but should his statement prove true, it is high time that the post-office was in the hands of others.

The postmaster sued the editor, and the Court ruled

[1] Wilson *v.* Fitch *et al.*, 41 Cal. 363.

[2] Sanford *v.* Bennett (New York *Herald*), 24 N. Y. (1861), 20.

that the editor could not avoid responsibility by quoting his correspondent.[1]

By some courts, it has been held to be a good defence to show that the plaintiff has published libellous matter regarding the defendant, but such publication by the plaintiff must have been recent in point of time. "Where two parties engage in a newspaper controversy and hurl abusive epithets at each other, they are both in the wrong, and neither of them should receive damages from the other." Such was the ruling of the Court in the case of Mark F. Bigney, editor of the New Orleans *City Item*, against Watson Van Benthuysen and the *States* newspaper.[2] The suit was brought on account of the publication in the *States*, January 23, 1882, of the following article:—

M. F. BIGNEY. — 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. Any one having respect for the opinions of others would adopt some other course of action. This creature, having no respect for anything, has no such conception of duty. It, therefore, becomes necessary to brand him thus publicly, that his infamous character may be known to all. The *States* is authorized to furnish the name of the writer. * * *

This article, written by Van Benthuysen, was provoked by another, published in the *City Item*, January 21, 1882, in which Bigney denounced Van Benthuysen as an "irate swaggerer," "bulldozer," "arrogant blus-

[1] Benajah Johnson *v.* Columbus Stebbins, 5 Ind. 364.

[2] 36 La. Annual Reports (1884), 38.

terer," and as ignorant "how to couch his ideas in polite and gentlemanly language." The Court held that this language constituted such provocation for Van Benthuysen's article in the *States* as to destroy Bigney's right of action for libel, "in spite of the truism that one wrong does not justify another." In the lower court, a verdict was rendered in favor of the plaintiff for $4,750, but the Supreme Court set this verdict aside, and ordered judgment for the defendant with costs.

In an earlier case, in Massachusetts, it was decided that where the publication by the plaintiff is so recent as to afford a reasonable presumption that the libel by the defendant was published under the influence of the passions excited by it, it may be given in evidence in mitigation of damages, but not in defence.[1] In this case, a verdict in the plaintiff's favor for $500 was set aside and a new trial granted.

The defendant may prove, in mitigation of damages, that the plaintiff's reputation was already so bad at the time when the libel was published, that the publication could not make it materially worse. While evidence of the plaintiff's general bad character will be received in mitigation of damages, it will not be received as a complete defence where the libel refers to a particular matter. In June, 1882, the Kernersville, N. C., *News* published the following: —

'Squire Davis, after his style of dispensing justice, converts the case into an assault and battery, and discharges the offender by all decency and law upon payment of

[1] David L. Child (*Massachusetts Journal*) *v.* James L. Homer *et al.* (Boston *Gazette*, July 10 and 13, 1829), 13 Pickering, 503. (See *post*, p. 263.)

costs, which was thirty dollars. We presume that Mr. Davis had an eye to the costs; that if this grave offender was bound over or committed to jail, he (Davis) would lose a handsome fee, and accordingly rendered his decision to suit his own convenience.

Both criminal and civil proceedings were instituted against T. A. Lyon and another, editor and publisher respectively of the *News*, on account of this publication. In the criminal case, the defendants offered to show in defence that 'Squire Davis bore a bad general reputation as an officer, but the Court held that the defence should refer to the particular matter contained in the charge, and the defendants were convicted.[1] In the civil action, the defendants showed habitual abuse of authority on the part of the 'Squire, as charged in the libel, and a verdict in their favor was recovered and sustained.[2]

If the words are libellous on their face, the defendant will not be allowed to plead that he did not intend to defame the plaintiff. "Where the wrong done consists in a libel, — which can never be accidental, — the publishing is always imputed to a wrong motive, and that motive is called malicious."[3] But the haste incident to issuing the paper, the time at which the libellous article was handed in, and the sufficiency of the force employed on the paper for gathering news and editing it, may be considered as bearing on the question of the publishers' negligence.[4]

[1] The State *v.* T. A. Lyon *et al.*, 89 N. C. 568.

[2] Joseph A. Davis *v.* T. A. Lyon *et al.*, 91 N. C. 444.

[3] The Court in Donald McArthur *v.* the Detroit Daily Post Co. and Daily Free Press Co., 16 Mich. (1868), 447.

[4] Cornelius J. Reilly *v.* James E. Scripps (Detroit *Evening News*), 38 Mich. (1878), 10.

In a case in Massachusetts, decided in 1846, it was held that an action for libel cannot be maintained against the publisher of a newspaper if he has no knowledge at the time of the publication that the article complained of is libellous.[1] The suit was brought on account of the publication in the Springfield *Tri-Weekly Post* of an article, which the editor, who received the manuscript from the writer, and the publisher, David F. Ashley, who was the defendant in the case, both believed to be a purely fictitious narrative. The article was not apparently defamatory, but the plaintiff, Reuben Smith, proved that the article was defamatory, and he showed that he was the object of attack by evidence of certain facts coinciding with facts stated in the libel, and by evidence of the existence of certain reports concerning him corresponding with statements contained in the libel. The Court, in rendering its decision, said: "If the defendant had no knowledge that the article published was libellous, he has been guilty of no wrong, and he is not responsible by law, although the plaintiff has thereby been injured. If the article was libellous, his remedy is against the writer."

A case somewhat similar to that of Smith *v.* Ashley, but resulting differently, is the case of Nightingale *v.* Williams *et al.*, growing out of the publication of "Cape Cod Folks," a novel by Sally Pratt McLean, issued in 1881. Miss McLean had passed a winter as a school teacher at Cedarville, otherwise known as Cedarswamp, a village in Plymouth, Mass., and made Cedarswamp the scene of her novel. She also employed the Cedar-

[1] Smith *v.* Ashley, 11 Metcalf, 367. See also the case of Caldwell *v.* Raymond *et al.*, cited *ante*, p. 157.

swampers of her acquaintance as the characters in the story, and, in the innocence of her heart, even neglected to substitute fictitious names for those of her friends in the village. The novel attracted general attention, and shortly after it appeared, a copy strayed into Cedarswamp. That village was shaken from centre to circumference at having its obscurity and the obscurity of its citizens thus changed into almost world-wide fame. Five or six libel suits were brought by people characterized in the story, and many more suits were threatened. Meanwhile, two editions of the work having been exhausted, the publishers issued a third, in which "Cedarswamp" became "Wallencamp," "Lorenzo Leonard Nightingale" became "Benney Leonard Cradlebow," Grandpa and Grandma "Fisher" became, respectively, Grandpa and Grandma "Spicer," and other changes were made in the remaining characters, care being taken to select names of corresponding length, in order to facilitate the work of correction of the electrotype plates. The changes in the names had no effect upon the demand for the book, and edition after edition was issued as fast as the presses could supply them.

A. Williams & Co., publishers of the novel, had at the outset been unaware that the names of the characters were not fictitious, and when it was learned that the names were real, and that Cedarswamp was indignant at the intrusion upon its obscurity, a lawyer was despatched to the Cape to appease the angry Cedarswampers. Settlements were effected in about forty cases; the damages paid ranging from $200 down to a plug of tobacco, in proportion to the prominence of the character and the degree of the individual's

indignation. Lorenzo Leonard Nightingale, however, would not be conciliated. He sued for damages, one count in his declaration being for the first and second editions of the work, and a second count for the third and subsequent editions, in which he figured as "Cradlebow." The case was tried in February, 1884. The judge charged the jury that if the first edition was libellous, the third was also libellous, and the jury returned a verdict in favor of Mr. Nightingale in the sum of $1,090. The defendants' exceptions were argued before the Supreme Court in October, 1884, but before the Court rendered its opinion, the case was finally settled by the payment to Mr. Nightingale of $500.[1]

It is no defence in either civil or criminal proceedings for libel that the publication was made in jest, or that the writer or publisher was intoxicated at the time of the wrong-doing, or that he was a minor. Insanity, however, is a complete defence.[2] It is no defence that others have published the same matter and have not been sued or prosecuted. An employee cannot exonerate himself by showing that he acted under his employer's orders, and if he is required to pay a verdict or a fine, he cannot recover indemnity from his employer, even if the latter has expressly agreed in writing to indemnify him in case a verdict were obtained against him. If, however, the employee occupies such a subordinate position as a carrier or pressman, and can show that it was no part of his duty to know the contents of the paper, and that, in fact, he did not read the libel and had no reason to suppose that the paper

[1] See the Boston *Evening Record*, April 1, 1885.

[2] Townshend on Slander and Libel, p. 476. As Olivia says in "Twelfth Night," "There is no slander in an allowed fool." — Act I., scene 5.

contained libellous matter, he will not be liable either civilly or criminally.[1]

It may be shown in defence that the prosecution or claim of damages is outlawed by the statute of limitations.[2] But the sale, within the statutory period, of a single copy of the newspaper containing the libel, will take the case out of the operation of the statute, and will, in a civil action, revive the right of the person libelled to recover damages for the entire injury caused by the original publication by the party selling the copy of the paper.

James Harmer, editor of the *Weekly Dispatch*, published in that paper, September 19, 1830, certain charges against Duke Charles of Brunswick, alleging oppressive conduct and misgovernment on the part of the duke while reigning sovereign of Brunswick prior to his enforced abdication, September 7, 1830. The duke took no notice of the publication for more than seventeen years, and meantime the period prescribed by the statute of limitations for libel actions had expired. But in 1847 the *Weekly Dispatch*, which was still edited by Mr. Harmer, again attacked the character of the duke. The latter then sent an agent to the office of the *Weekly Dispatch*, and, at the agent's request, a copy of the paper for September 19, 1830, was hunted up and sold to him. Thereupon the duke commenced an action of libel against Mr. Harmer on account of the original publication. The Court held that such sale of a single copy of the libel — although the copy was purchased expressly with a view to reviving the cause of action — amounted to a fresh publication of the libel, and en-

[1] Odgers on Libel and Slander, p. 359.
[2] See p. 60.

titled the plaintiff to such damages as he might have recovered if he had brought the action before the expiration of the statutory period. The jury awarded the duke £500 damages.[1] After the conclusion of this suit, Mr. Harmer published in the *Sun*, of which he had become proprietor, comments upon the case, in the course of which he said: —

> Unless he may be solicitous to proceed, as upon a rather profitable speculation, in his attacks upon the liberty of journalism, we would suggest to the ex-Duke of Brunswick the propriety of withdrawing into his own *natural* and sinister obscurity, which he had better hide in their sinister obscurity than continually bring them before the public in the shape of actions. For two reasons this would be advisable. First, because he will find it little short of an impossibility to vilify still more his already sufficiently vilified reputation; and secondly, because the effort would be as futile as ablutions to an Ethiopian.

His litigious highness then brought another suit for libel against Mr. Harmer, and appeared as his own counsel. He argued that the word "natural," which was printed in italics, implied a disgraceful charge, but the jury returned a verdict in favor of the defendant.[2]

Where an action is brought for a libel concerning one in respect to his occupation, it is a good defence to show that the occupation is an unlawful one; but even if the plaintiff's occupation is unlawful, he may still recover damages for a libel concerning him independently of his occupation. The Louisiana State Lottery Company, through its manager, Maximilian A. Dauphin,

[1] Duke of Brunswick *v.* Harmer, 14 Adolphus & Ellis' Queen's Bench Reports, 185.

[2] Duke of Brunswick *v.* Harmer, 3 Carrington & Kirwan's Queen's Bench Reports (1850), 10.

commenced a suit for $100,000 against Postmaster-General Gresham for his interference with the use of the United States mails by the lottery company for the transmission of lottery circulars, tickets, etc. In an editorial commenting upon this suit, the Philadelphia *Times* (July 26, 1883) used the following language: —

> Mr. Dauphin will fail in his attempt to recover damages from a cabinet officer for the offence of honest fidelity to honest laws, but the lesson is worthy of the study of the nation. It is the dying shriek of one of the most stupendous public robberies of our history, and it will shed exceptional lustre upon the character of Postmaster-General Gresham, who is honored with the last ebullition of malignity of a long omnipotent, but now overthrown, organized crime.

For this publication Mr. Dauphin sued the Times Publishing Company, claiming $100,000 damages for injury to his business as manager of the lottery company. The Times Publishing Company filed a demurrer to Mr. Dauphin's declaration, claiming that, as Dauphin's business was an unlawful one under the laws of Pennsylvania, he could not maintain an action, and this demurrer was sustained in the United States Circuit Court. Dauphin appealed from this decision to the United States Supreme Court, but the appeal was dismissed, April 29, 1887, by consent of the appellant.[1]

The defence is complete if it is shown that the plaintiff has already recovered damages from the same defendant for the same cause of action; but if the same matter be printed a second time, the second publication would give a new right of action. So, too, as has been seen, every sale of a copy of the newspaper containing the libel is a fresh publication of the libellous matter.

[1] 122 U. S. 645.

Accordingly, a cautious publisher, upon discovering that any matter contained in the paper is libellous, would immediately stop all further sale of copies of that issue.

A previous recovery may be pleaded in defence, even if it was a recovery from another party, provided the two defendants were jointly concerned in the publication, as in the case of partners. Articles were published in the Jersey City *Journal*, charging Joseph M. Woods, a coal dealer, with selling coal by short weight. Mr. Woods obtained judgment against one Hilton for $1,000 on account of such charges, contained in three separate articles. He then brought suit against Zebina K. Pangburn *et al.*, on account of these three libels, for which they were liable jointly with Hilton, and on account of two others of later date, for which Hilton was not liable. Judgment for $4,000 was recovered against Pangburn *et al.*, but meanwhile Hilton paid the judgment which had been obtained against him. Pangburn *et al.* then moved that judgment against them be set aside. The Court of Appeals of New York held that the satisfaction (payment) of the first judgment was a satisfaction of so much of the second as was for the same three libels, and the case was sent back to have the damages for the two later libels estimated by a jury.[1] If, instead of being jointly liable, two defendants are severally liable, as, for instance, the writer and the publisher, a previous recovery against one is no defence in an action against the other. Each defendant is liable for all the ensuing damage.

It is no defence to a civil action that the defendant has already been criminally prosecuted for the same

[1] Woods *v.* Pangburn *et al.*, 75 N. Y. (1878), 495.

libel, for in the one case the proceeding is brought on behalf of the public, on account of the danger that the libel will provoke a breach of the peace, and in the other it is brought to recover for injury to an individual. Neither is it a bar to criminal proceedings to show that the defendant has already been required to pay a verdict in a civil action.

William Lloyd Garrison, in the *Genius of Universal Emancipation*, November 20, 1829, published this typographical curiosity: —

THE SHIP FRANCIS. — This ship, as I mentioned in our last number, sailed a few weeks since from this port with a cargo of slaves for the New Orleans market. . . . I have stated that the ship Francis hails from my native place, Newburyport, (Massachusetts,) is commanded by a Yankee captain, and owned by a townsman named FRANCIS TODD. Of captain Nicholas Brown I should have expected better conduct. It is no worse to fit out piratical cruisers, or to engage in the foreign slave trade, than to pursue a similar trade along our own coasts; and the men who have the wickedness to participate therein, for the purpose of heaping up wealth, should be SENTENCED TO SOLITARY CONFINEMENT FOR LIFE; *they are the enemies of their own species — highway robbers and murderers;* and their final doom will be, unless they speedily repent, *to occupy the lowest depths of perdition.* . . .

The great emancipator was fined fifty dollars and costs in the City Court of Baltimore for this publication, and was imprisoned seven weeks in default of payment. A verdict for $1,000 was subsequently recovered against him in a civil suit brought by Francis Todd for the same libel.[1]

[1] A Brief Sketch of the Trial of William Lloyd Garrison, published by Garrison & Knapp, Boston, 1834.

A defendant, finally, may show accord and satisfaction in defence; that is to say, he may prove that an agreement for indemnity made out of court has been fulfilled. But a bare expression of satisfaction, where a retraction and apology have been made, would not amount to a release of the right of action.[1]

It is competent, of course, for the defendant to show that he did not participate, either actually or constructively, in the publication; but the editor, publisher, or proprietor of a newspaper will not be permitted to defend himself in a civil action by showing that he knew nothing of the libel until after it was published. This is according to the legal doctrine of *respondeat superior*, under which a principal is held responsible for all acts performed by the agent within the scope of the authority given him by the principal.[2] In a prosecution for criminal libel, however, the editor, publisher, or proprietor may show in defence that the libel was published against his express orders, or in his absence, provided circumstances rendered it impossible for him to prevent the publication; or he may show in defence that the subordinate who caused the libellous publication was acting out of the course of his employment, or that he practised some deceit or fraud upon his employer.[3]

[1] Tresca *v.* Maddox (the *Crescent*), 11 La. Annual Reports (1856), 208.
[2] See pp. 53, 136.
[3] Greenleaf on Evidence, vol. III., § 178.

CHAPTER X.

DAMAGES.

INJURY is a presumption of law where a suit for libel is based upon a publication which is false and defamatory; accordingly it is not generally necessary for the plaintiff to show that he has suffered any actual injury, and the jury may award substantial damages even if there is no evidence of loss either to the plaintiff's property or to his reputation. It is necessary, however, for the plaintiff to allege in his declaration the amount which he claims to have been injured, and he cannot recover a larger sum in damages than the amount so alleged. Plaintiffs generally take care to make their claim of damages sufficiently large, a tendency which is illustrated by the case of James Fisk, Jr., referred to in Hudson's "Journalism in the United States":[1] "He opened with a libel suit for $100,000 against Mr. Bowles of the Springfield *Republican*, and he quickly followed it up by another against Mr. Greeley, of the *Tribune*, for a like sum; then against Mr. Norvell, of the *Times*, claiming another $100,000, and finally against Mr. Raymond for the snug amount of a round million." So long as the amount of damages claimed by the plaintiff is not exceeded, the damages which may be awarded are limited only by the discretion of the jury, subject to the granting of a new

[1] Page 747.

trial if the jury return a verdict for punitive damages in a case where such damages are not legally recoverable, or if they award damages which are grossly excessive.

While injury is a presumption of law, the same injury is not presumed in the case of a person of disparaged fame as in the case of one of good standing in the community. In the case of William H. Whitney *v.* the Janesville, Wis., *Gazette*, the Court remarked: "The defendants may show that the plaintiff's reputation has sustained no injury, because he had no reputation to lose." In this case the suit was based upon an article published January 24, 1871, and headed "A Desperate Assault on a Peaceable Citizen." The plaintiff was referred to in this article as a professional swindler. In spite of the privilege which the Court gave to the defendants, of showing that Mr. Whitney had no reputation to lose, the jury awarded the latter $1,100.[1]

It does not follow, because the plaintiff has utterly lost his reputation, that evidence of such loss is a complete defence. The evidence can only be received in mitigation. In every case where the language is false and not privileged, and where it is *prima facie* libellous, the plaintiff is entitled to at least nominal damages. It does not matter that the plaintiff has lost his good reputation unjustly; he has no right to more than nominal damages against one who has not contributed to his loss.[2] Where evidence is given of the plaintiff's bad reputation, it must refer strictly to the time of the libellous publication. If evidence were admitted of his reputation at a later time, it might be that his impaired

[1] Whitney *v.* Janesville *Gazette*, 5 Bissell's U. S. Circuit Court Reports, 330.
[2] Odgers on Libel and Slander, p. 305, *note*,

reputation at that time was a result of the very libel for which he sued.

Whether it can be proved that the plaintiff enjoyed high social standing, for the purpose of enhancing damages, is a question not entirely settled. It has been held that such evidence is admissible in Pennsylvania, Ohio, Illinois, Missouri, Iowa, Maine, and Georgia, but the contrary is maintained in New York.[1] In an earlier New York case, however, it was held that evidence of the public character of the plaintiff as an officer of the government might go to the jury for the purpose of increasing the damages.[2] The libel in this latter case was an article published in the *Republican Watch Tower*, July 17, 1805, referring to "the conniving of a secretary or treasurer of the State, or any higher official character, at the bribing of no inconsiderable portion of the Legislature." The jury awarded the plaintiff $800. While in many States the plaintiff's social standing may be proved for the enhancement of damages, the plaintiff cannot give evidence of his general good character with a view to increasing the damages, unless the defendant has attacked his character, for there is a legal presumption that his character is good until the contrary is shown, but there is no such presumption in the case of his social standing.

In the case of Alice A. Early *v.* Wilbur F. Storey, of the Chicago *Times*,[3] the Court held that where the facts do not warrant the award of punitive damages, the jury have no right to consider the wealth and standing of the defendant as affecting the amount of

[1] Marie Prescott *v.* Sinclair Tousey, president, etc., 50 N. Y. Superior Court Reports (1884), 12.

[2] Tillotson *v.* Cheetham, 3 Johnson, 56.

[3] 86 Ill. (1877), 461.

the verdict. But where the damages may be punitive, and not merely compensatory, evidence may be given of the defendant's wealth;[1] otherwise the jury could not determine what amount of damages would carry a just degree of punishment. The defendant cannot, however, give evidence of his poverty in mitigation of damages.

Where the libel warrants only compensatory damages, the question for the jury is, how much had the plaintiff been injured by it. In the case of Marie Prescott *v.* Sinclair Tousey, of the American News Company, for circulating a libel published in *Nym Crinkle*, the judge, in charging the jury, said that a good way for them to determine the amount of damages to award was to determine what sum they would consider fair compensation for a similar libel published against themselves. The Court at general term held that this instruction was error: the only question was, how much *the plaintiff* had been injured, for the same libel might injure one of the jurymen more or less than it did Marie Prescott.[2]

A libel which contains several defamatory charges may be justified in part by showing the truth of some of the charges, and such partial justification will tend in mitigation of damages. And where the libel consists in a charge of crime, if the defendant fails strictly to establish the truth of the charge, evidence tending to show that the charge was well founded will, nevertheless, be received in mitigation. On the other hand, an unsuccessful attempt at justification of the libel has, in

[1] Eliza P. Buckley *v.* John Knapp *et al.* (St. Louis *Republican*), 48 Mo. (1871), 152.

[2] Prescott *v.* Tousey, 50 N. Y. Superior Court Reports (1884), 12.

many cases, been held to be an aggravation of the offence, tending to enhance the damages, as showing actual malice.[1] But this is a point upon which the courts are not altogether agreed, and in some States, by statute, an unsustained plea of justification is not proof of malice, and will not furnish grounds for punitive damages.

It has even been held that the damages may be enhanced by the language used by the defendant's counsel during the trial, if defamatory of the plaintiff. Charles Readly, a young Englishman, died in his bed at a hotel in Antwerp, March 30, 1865, from a gunshot wound. His step-father, Risk Allah Bey, was arrested and tried on a charge of murdering the boy. It appeared in evidence that under the terms of the marriage contract with his late wife, Risk Allah would come into possession of £5,000 in case of the death of the boy during his minority. The defence undertook to show that the boy died by his own hand, and the prisoner was acquitted. The London *Daily Telegraph* published letters from its correspondent at Brussels, during the trial, and an editorial at its close, in which the verdict of acquittal was impugned and charges of forgery and fraud made against the prisoner. Risk Allah thereupon brought suit for libel. At the trial of the libel action the plaintiff was rigidly cross-examined, with a view to show that, despite his acquittal, he was in fact guilty of the murder. The Court held that such cross-examination aggravated the libel and warranted increased damages. A verdict for £960 was rendered.[2]

[1] Jacob Downing *v.* Henry C. Brown (Denver *Tribune*, Dec. 27, 29, 1873), 3 Col. 571.

[2] Risk Allah Bey *v.* Whitehurst *et al.*, 18 Law Times Reports (new series, 1868), 615.

The Toronto *Mail*, December 8, 1884, contained an article entitled "Improved Methods," in which Hon. Rudolphe Laflamme, ex-Minister of Justice, was charged with tampering with ballot-boxes at an election in 1878. His suit against the *Mail* was defended on the ground that the charge was true. The defendant also pleaded that while the plaintiff "held the office of Minister of Justice, he was grossly incompetent for said office, and signally failed in the discharge of his duties in respect to such office, and in fact grossly neglected the same, and rendered himself, by drunkenness, dissipated habits, and otherwise, unfit for the discharge of his duties as Minister of Justice for the Dominion of Canada." A supplementary demand for damages was entered on account of this plea, and the case went to trial. The jury returned a verdict in favor of the plaintiff for $6,000 on account of the libellous article in the *Mail*, and a further verdict for $4,000 on account of the language contained in the defendant's pleadings.[1]

Under the decisions of the courts, punitive damages may be awarded wherever there is evidence of actual malice on the part of the defendant toward the plaintiff. But even where there is evidence that the publisher of the libel was actuated by express malice, it is for the jury and not for the Court to determine whether punitive damages shall be paid.[2] Actual malice may be inferred from the nature of the libellous words themselves. Malice is conclusively shown by evidence that the writer or publisher of the libel knew that the charge was false, and it is inferred if he had no reason to be-

[1] See the Montreal *Herald*, Jan. 19, 1886.

[2] W. H. Hope *v.* L. & W. Neeb (Pittsburg *Freiheits Freund*, Jan. 20, 1883), 111 Pa. State Reports, 145.

lieve that the charge was true. Where no actual malice is shown, gross negligence on the part of the proprietor of a newspaper in the conduct of his business will tend to aggravate the damages. If suit is brought against two defendants, the actual malice of one will not increase the damages against the other; nor will the actual malice of an employee or agent generally sustain punitive damages against the employer or principal.

In a suit against the publishers of the Milwaukee *Evening Wisconsin*,[1] the Court held that if the publication of a libel in a newspaper was without actual malice, the publisher cannot be held responsible for the hatred or malice of a person not in his employ from whom the reporter who wrote the libellous article obtained his information. And in an earlier case against the same defendants, it was held that where malice is shown against an employee only, the publishers are not liable in punitive damages.[2] The latter case grew out of the publication, May 27, 1878, of the following: —

HE WANTED FEES. — *Some charges of irregularity alleged against the ex-sealer of weights and measures.* — . . . It is charged against Eviston that he deliberately made a practice of tampering with the weights of scales in order to swell the fees of the office. . . .

The jury having awarded a verdict for $2,000, which was in excess of the actual damages proved, a new trial was granted.

The Pittsburg *Commercial Gazette* published in its column of "Editorial Etchings," February 1, 1882, the following paragraph: —

David D. Bruce, Esq., informs reporters that he con-

[1] Bradley *v.* Cramer *et al.*, 66 Wis. (1886), 297.
[2] Eviston *v.* Cramer *et al.*, 57 Wis. (1883), 570.

siders it unprofessional for him to open his mouth, except he sees or smells a fee somewhere. The query naturally arises in the mind of the reader, Who pays him for his lengthy disquisitions in Council? He must realize a splendid income from that source if he carries out his principles there as sedulously as he assumes to do with reporters. Fortunately for the public, there are other lawyers whose views of professional etiquette do not coincide with those of Mr. Bruce.

The editor who wrote the libellous "etching" was a Dr. Palmer, and he was discharged by the publishers for writing it, and died before the trial. The publishers also published a retraction on the day after the libel appeared. At the trial, the Court charged the jury that if the defendants (the publishers) had no personal knowledge of the article before it was issued, and afterwards, in good faith, did what was reasonable to make amends, it was not a case for punitive damages. The jury awarded a verdict for $270. The Supreme Court granted a new trial, on the ground that the jury were wrongly instructed, and that the plaintiff was entitled to punitive damages.[1] This case, and that of Eviston *v.* Cramer, are manifestly in conflict. The two cases represent the extremes between which the decisions of different courts will be found.

Whether subsequent publications in the paper in which the libel appeared can be introduced in evidence for the purpose of showing actual malice and securing punitive damages, is a question not altogether settled. It was held in the case of William McBee *v.* the Baltimore *American*[2] that such evidence is admissible, but the

[1] Bruce *v.* Reed *et al.*, 104 Pa. State Reports, 408.

[2] William McBee *v.* C. C. Fulton *et al.*, 47 Md. (1878), 427. See also the case of Edwin Gribble *v.* Pioneer Press Co., 34 Minn. (1885), 342.

contrary was maintained in a case in Tennessee.[1] In the latter case, the libel was contained in a speech published in the Knoxville *Sunday Whig and Register*, September 4, 1870. Mr. Baxter, the plaintiff, had been complainant in a case against Gen. Joseph A. Mabry, in the Chancery Court. At the trial in chancery, Gen. Mabry began to deliver a speech bitterly denouncing Mr. Baxter and his family, but he was interrupted by the chancellor, who refused to allow him to continue. The general thereupon had his speech published in the *Whig and Register* as an advertisement, and for this publication Mr. Baxter brought suit against both Gen. Mabry and the publishers of the newspaper. After these suits were begun, the *Whig and Register* published the following: —

ANOTHER UNFORTUNATE EDITOR. — From the article we copy below from the Cincinnati *Enquirer*, it will be seen another editor has put his foot in it for $50,000 damages, and the fund will now swell to $400,000!!! The *Enquirer* of Monday says: —

A Col. Baxter of Tennessee had a considerable amount of character to dispose of and managed to get himself libelled. He has brought suit against the following papers and persons: Nashville *Banner*, $50,000; *Union and American*, $50,000; Athens *Post*, $50,000; Sweet Water *Enterprise*, $50,000; Knoxville *Whig and Register*, $50,000; Joseph A. Mabry, $50,000. If Col. Baxter gets paid for the amount of his damages, he will have $350,000 — a very comfortable sum. But if he has any character left, he had better keep it. He cannot afford to dispose of much more even at the highest market price.

At the trial in the Circuit Court, this publication in the *Whig and Register* was admitted in evidence, as

[1] John Baxter *v.* Rolfe S. Saunders *et al.*, 6 Heiskell, 369.

tending to show actual malice, and the jury returned a verdict in favor of Mr. Baxter for $27,000. The Supreme Court set this verdict aside, and, in granting a new trial, said that a subsequent publication cannot be received in evidence unless it be an explanation or confession, or an express admission of the malicious intent of the defendant. In other words, evidence that the defendant entertains a feeling of actual malice now is not evidence that he was actuated by express malice a month ago. It is the general rule in other States, however, that evidence of subsequent publications may be introduced to prove malice, when the later publication relates to the earlier; but such later publication is admitted only for the purpose of showing that the earlier was published with a malicious motive, and inasmuch as the second publication, if libellous, may be the ground of a separate action, the jury should be cautioned not to award any damages on account of it.

Where a publication is libellous *per se*, and is proved to be false, punitive damages may be awarded without further evidence of malice. The New York Court of Appeals so held in the case of Rudolph Bergmann *v.* George Jones, a suit growing out of the publication in the New York *Times*, March 12, 1881, of a report of an officer's search in the cellar of a grocery in Guttenberg, N. J. The report concluded as follows: —

> 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.

Bergmann sued for $25,000, and recovered a verdict for $500, which was sustained.[1]

Evidence of previous libels against the plaintiff published by the defendant, or of the repetition of the libel upon which suit is based, may be received to enhance damages, or to show malice where the defendant claims that the publication is privileged. The plaintiff cannot, however, show actual malice on the part of the defendant by evidence that the latter has published libels upon others, unless such libels are closely connected with the libel for which suit is pending. This is the law upon this subject as generally maintained; but in a case tried in the United States Circuit Court in Ohio, it was held that libellous matter published in the same paper, and referring to other parties, may be put in evidence to prove that the management of the paper showed want of care in guarding its columns against the insertion of such matter, and that such evidence will warrant punitive damages.[2]

By statute in Connecticut,[3] "unless the plaintiff shall prove either malice in fact, or that the defendant, after having been requested by him in writing to retract the libellous charge in as public a manner as that in which it was made, failed to do so within a reasonable time, he shall recover nothing but such actual damage as he

[1] 94 N. Y. 51. At the annual meeting of the Michigan Press Association, May 31, 1888, it was resolved that it would be unjust to the press to support any candidate for the Legislature who would not pledge himself to support a bill providing, among other things, that, in libel actions, "malice, in the sense of a desire or design to commit injury, shall be proved, or a probable ground for its existence established by evidence, before any question of exemplary damages will lie." See the Detroit *Journal*, June 1, 1888.

[2] Gibson *v.* the Cincinnati *Enquirer*, 2 U. S. Courts Reports (Sixth circuit, 1877), 121.

[3] General Statutes, p. 445, sec. 2.

may have specially alleged and proved." Statutes, in some respects similar, have been passed in Minnesota, Michigan, Virginia, West Virginia, and Alabama. "Actual damages" are defined by statute in Michigan and Minnesota as including "all damages the plaintiff may show he has suffered in respect to his property, business, trade, profession, or occupation, and no other damages."

Mitigation may be shown by evidence that the libel was provoked by the plaintiff's own conduct, but such provocation must have been direct and immediate. It is also mitigation to show that the publication was made under a mistake, which was at once corrected, or that the charges were generally reported to be true, or that the libellous matter was copied in good faith from another paper, in belief of its truth.[1] Evidence that the plaintiff has the general reputation of being a common libeller, or that the loss sustained by the plaintiff by reason of the libel was small, may be introduced for the same purpose. Punitive damages may also be avoided by reading in evidence portions of the same publication which contains the libel, not relied on by the plaintiff to maintain his case, provided they qualify the libel in such manner as to disprove actual malice.

Ellis H. Roberts & Co., proprietors of the Utica, N. Y., *Morning Herald and Gazette*, were sued by Thomas E. Kinney on account of the publication, October 28, 1880, of an article charging Kinney, who was a candidate for county judge, with having been a Confederate spy during the Rebellion, and, as such, imprisoned fourteen months within the Union lines. The proprietors of the paper pleaded in mitigation of damages that the

[1] Greenleaf on Evidence, vol. II., § 424. George Hewitt *v.* St. Paul Pioneer Press Co., 23 Minn. (1876), 178.

charges were partially true, and submitted certain interrogatories to be answered by Mr. Kinney, with a view to learning his movements at a certain time during the war. The Court held, however, that to mitigate damages the facts must have been known to the defendants at the time of the publication.[1] And in a later case in Minnesota it was held that it was not admissible in mitigation of damages to show that it was the general opinion of the community that the libellous charge was true, unless such opinion had been believed in and relied on by the defendant in making the publication.[2] It is only where facts are introduced in evidence *in mitigation* that they must have been known to the defendant at the time when the libel was published. When the truth is pleaded as a complete defence, it is immaterial that the defendant supposed the matter to be false at the time when he published it.

In the course of a controversy regarding their relative circulation, between the *Daily Press* and the *Chronicle and Sentinel*, both of Augusta, Ga., charges and countercharges of theft, duplicity, and perjury were made by various employees of the two papers. Finally, the *Press* published the following regarding Jerry McCarty, who was employed in the mailing department of the other paper: —

> We have no reply to make to the statement of a lad who is convicted of perjury by the solemn oath of a gentleman whose veracity stands unimpeached and unimpeachable.

Jerry thereupon brought suit for damages, and at the first trial recovered a verdict for $5,000. This verdict was set aside upon appeal, and at the second trial the

[1] Kinney *v.* Roberts *et al.*, 33 N. Y. Supreme Court Reports, 166.
[2] Frank D. Larrabee *v.* Minnesota Tribune Co., 36 Minn. (1886), 141.

verdict was $2,500. A new trial was then granted by the Supreme Court, upon the ground that where the defamation is published in the course of a series of mutual libels, a plaintiff is entitled to nominal damages only.[1]

The case of Beardsley *v.* Maynard,[2] in New York, also grew out of a "newspaper war." Mr. Beardsley, who was United States district attorney for the Northern district of New York, conducted his side of the conflict for three months in the columns of the *Oneida Observer*, published at Utica, and Mr. Maynard carried on his campaign in the Utica *Sentinel and Gazette*. The district attorney, thinking perhaps that he was getting the worst of the fight, appealed to the courts, and recovered a verdict for $446, the Court holding that a defendant cannot give evidence of a previous defamatory publication against him by the plaintiff in mitigation, unless the libel upon which suit is based was published as a result of such previous publication and in answer to it. The libellous reply must also be close in point of time; and in this case it was held that where the defendant waited three days before publishing his reply, the delay was too long to entitle him to mitigation of damages on the ground of provocation. The proper remedy would be by cross action.

In a case against the Chicago *Times* it was held that the defendant might show in mitigation that he had received certain forged letters, purporting to have been written by reputable citizens, in which the same charges were made as were contained in the libel. The

[1] Jerry McCarty *v.* E. H. Pugh, 40 Ga. (1869), 444.

[2] 4 Wendell (N. Y. Supreme Court, 1830), 336; 7 Wendell (Court of Errors, 1831), 560.

receipt of such letters would tend to disprove actual malice.[1]

Retraction, if prompt and complete, may be shown in mitigation. The Chicago *Times*, September 8, 1868, published the following in a report of the sudden death of James Wallace in a fit caused by excessive drinking: —

> In 1861 he enlisted, and was absent three years. On his return he was astounded to find an infant child in his wife's arms — progeny which he could not father.

Mrs. Mary Wallace called at the *Times* office and asserted that she was the wife referred to, explaining that her husband had once been at home on a furlough, and that the legitimacy of the child was well established. She demanded of the city editor a retraction, and it was written, whereupon she said it was satisfactory, and the retraction was published. Notwithstanding this fact, Mrs. Wallace brought suit against Wilbur F. Storey *et al.* At the first trial she recovered a verdict for $3,850. A new trial was granted, at which the jury disagreed, and at the third trial the plaintiff recovered a verdict for $2,500. The judgment at the third trial was sustained by the Supreme Court, on the ground that a retraction only operates in mitigation of damages, and that an expression of satisfaction with a retraction, in the absence of an express agreement to that effect, does not release all claim for damages.[2]

Retraction after the commencement of the action does not operate in mitigation.[3] The question of the

[1] Alice A. Early *v.* Wilbur F. Storey, 86 Ill. (1877), 461.

[2] Wallace *v.* Storey *et al.*, 60 Ill. 51.

[3] James E. Tryon *v.* the Evening News Association, 42 Mich. (1880), 549. "The rule not to apologize after a suit has been begun is sound and wise. So is the other rule, which is always followed in the *Sun* office, to correct an error frankly and completely as soon as it is discovered, and before any threat is made." — New York *Sun*, May 29, 1887.

sufficiency of a retraction or apology, and whether it is full and ample and given as great publicity as the original libel, is always to be submitted to the jury and not decided by the Court.

Isaac W. Edsall brought suit against James Brooks *et al.*, of the New York *Evening Express*, for the publication of the following paragraph: —

BLACK-MAILING BY A POLICEMAN. — Isaac W. Edsall, of the Twenty-sixth precinct, City Hall police, has been dismissed from the police department by the commissioners, on charges of black-mail preferred against him by citizens in three distinct cases.

Mr. Edsall called at the office of the *Express* and requested the city editor to publish a retraction, but his request was denied. The Court held that such refusal, by the city editor of the paper, to publish a retraction did not tend to prove that the animus of the proprietors was malicious, and therefore did not enhance the damages.[1]

ST. JOSEPH. — Joseph Hermann, brickmaker, is in the hands of the sheriff.

The above notice, which happened to be untrue, was printed in *Bradstreet's*, August 5, 1882. A correction was published, but it was not published promptly, and the offer to make the correction was coupled with conditions with which Mr. Hermann was under no obligation to comply. The Court held that the words were *per se* libellous, and that the jury was at liberty to bring in a verdict for punitive damages.[2]

[1] Edsall *v.* Brooks *et al.*, 2 Robertson (1864), 414; 33 Howard's Practice Reports, 191. Bradley *v.* Cramer *et al.* (Milwaukee *Evening Wisconsin*), 66 Wis. (1886), 297.

[2] Hermann *v.* the Bradstreet Co., 19 Mo. Appeal Reports, 227.

A fellow styling himself John W. Lanius is travelling through the country soliciting subscriptions and receiving money on our account. We have no such agent, and it is unnecessary to say that none of the money collected by him finds its way to this office.

For this publication in the *National Druggist*, January 16, 1885, Mr. Lanius recovered a verdict for $2,000. In affirming the verdict, the higher court ruled that 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 and recklessness.[1]

Where the defendant was in any wise concerned in the publication of the libel, he cannot show in mitigation that he was not the author; neither can he show that an action is pending against others for publishing the same libel. It has also been held that in an action for defamation the defendant cannot introduce evidence of his own bad character in mitigation of damages,[2] although, if a newspaper has a bad reputation for truth and reliability, the injury caused by a libel contained in it would be small. Few newspaper publishers would be willing, however, to introduce such evidence in mitigation, even if it were admissible.

It is not admissible in mitigation to show that the libel was published amid the excitement of a political campaign.[3]

Courts will not grant new trials on the ground of excessive damages, unless the damages are so excessive as to furnish evidence of passion, prejudice, or corrup-

[1] Lanius *v.* Druggist Publishing Co., 20 Mo. Appeal Reports, 12.

[2] Hastings *v.* Stetson, 130 Mass. (1881), 76. This was an action for slander.

[3] Rearick *v.* Wilcox (Quincy *Whig*), 81 Ill. 77. (See *ante*, p. 217.)

tion on the part of the jury. Among many cases sustaining this position, is that of James W. Sweeney *v.* Lewis Baker *et al.*, of the Wheeling *Daily Register*.[1] In this case a verdict for $8,000 was sustained, the suit being based upon articles charging Mr. Sweeney, who was a candidate for the House of Delegates, with being a gambler and prize-fighter, and with being ignorant and dishonest.

Neither will a new trial generally be granted on the ground that the damages are inadequate. The Portland, Me., *Daily Press*, September 24, 1875, published the following: —

PERSONAL. — A responsible gentleman of Hallowell informs us that Secretary of State Stacy was recently arrested in that city for drunkenness and disturbance. A ten dollar note quieted the affair.

The Secretary of State brought suit for damages, and recovered a verdict for one dollar, whereupon he appealed, claiming that the damages were inadequate. The Supreme Court sustained the verdict,[2] the judge remarking, "The Court rarely interferes with a verdict in a case of this kind, whether moved against as too large or too small."

In a case in Wisconsin, however, where a jury returned a special verdict, finding facts which would warrant punitive damages, but awarding nominal damages only, the verdict was set aside as inconsistent. The libel was published in the Milwaukee *Evening Wisconsin*, November 26, 1875, and was as follows: —

The Roman Catholic voters spurn the appeals of this

[1] 13 W. Va. (1878), 158.
[2] George G. Stacy *v.* Portland Publishing Co., 68 Me. 279.

dirty reform politician. Cottrill now smells so badly that decent men avoid him when they pass him in the street.

It appeared that the plaintiff was a lawyer in high standing in his profession, and his character was unimpeached. The jury found "that the article was written and published in a spirit of pure wickedness, with express malice, and with the intent to injure the plaintiff," but they awarded the plaintiff only six cents damages and six cents costs, and a new trial was granted.[1]

A verdict for one cent or one dollar is frequently called an award of "contemptuous" damages An example of such damages is furnished by the case of Rev. W. W. Hicks, the spiritual adviser of Charles Julius Guiteau. Mr. Hicks brought suit against the Washington *Evening Star* for the publication of a charge that he had sold the assassin's body to the Army Medical Museum. The amount of Mr. Hicks' claim was $35,000, but his verdict was only one cent.[2] By statute in Indiana and Kentucky it is provided that "a new trial shall not be granted on account of the smallness of the damages in actions for an injury to the person or reputation."[3] Juries frequently award damages with a view to barely carrying the costs; but the cases are numerous where they have been rebuked by the judges for taking the question of costs into consideration.

The Indianapolis *Sun*, August 8, 1874, published the following: —

It is positively asserted that one Horrell, a city detective employed by the city, is a recently-released penitentiary convict.

[1] Cottrill *v.* William E. Cramer *et al.*, 43 Wis. 242; 59 Wis. 231.

[2] See the Washington *Evening Star*, Nov. 13, 1885. The *Canadian Law Times* (Toronto, July, 1886) mentions a libel case where a verdict was rendered for the plaintiff without damages.

[3] Revised Statutes of Indiana, § 560; Civil Code of Kentucky, § 341.

A jury brought in a verdict in favor of Albert J. Horrell for $800, and the defendant moved to set the verdict aside, on the ground that it was excessive in amount. The verdict was sustained.[1]

In the Cincinnati *Enquirer* was published the following paragraph: —

STILL ANOTHER. — The new city of Huntington, up the river, is now enjoying one of the juiciest *crim. con.* scandals of the day. The parties are one Gibson, a Republican editor, and the wife of a railroad official at Huntington, West Virginia, who were caught *in flagrante delicto* on the steamer Bostonia, and hustled ashore at midnight by Captain Bryson.

Mr. Gibson recovered a verdict for $3,875, which was sustained.[2]

Eliza P. Buckley recovered a verdict for $5,000 against the St. Louis *Republican* on the ground of a charge of unchastity, and the verdict was held to be not excessive.[3]

The Aroostook *Times*, of Houlton, Me., published a series of articles, January 13 and March 12 and 13, 1873, charging Llewellyn Powers, who was an attorney and collector of customs, with attempting to seduce a colored servant, and with dishonesty in business matters. One of the libels contained the following language: —

Clients have been cheated in ways so deft and adroit as to elicit from distinguished brother lawyers while commenting upon them the praiseworthy title of piracy.

In a suit against Theodore Cary, proprietor of the

[1] Horrell *v.* the Indianapolis Sun Co., 53 Ind. 527.

[2] Gibson *v.* Cincinnati *Enquirer*, 2 U. S. Courts Reports (Sixth circuit, 1877), 121.

[3] Eliza P. Buckley *v.* John Knapp *et al.*, 48 Mo. (1871), 152.

Times, it was held by the Supreme Court that a verdict for $5,508 was not excessive.[1]

An article under the following heading was published in the Detroit *Evening News*, September 11, 1882: —

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.*

Donald Maclean, professor of surgery in the university, brought suit for damages, although he was not named in the libel. He recovered a verdict for $20,000 against James E. Scripps, proprietor of the *News*, and the verdict was subsequently fully paid. For some unknown reason the question of excessive damages was not raised in the lower court by the counsel for the defendant, and in the Supreme Court, where the judgment was affirmed, the question of excessive damages could not be raised under the Michigan statute.[2] It is believed that no other case is to be found in the American law reports where so large a verdict has been recovered and paid.

In the New York *Herald*, October 31, 1881, was published a special despatch giving the details of a fire which nearly destroyed the village of Edgefield, S. C. The correspondent stated that the leading citizens of the place were of the opinion "that one Malloy, a white man, who some time ago was suspected of burning his own store for the purpose of obtaining the insurance, kindled the fire which resulted so disastrously," and concluded by saying that the supposed incendiary was to be summarily dealt with if caught. A jury awarded Mr. Malloy $20,000 damages, but a new trial was granted on the ground that the damages were excessive.

[1] Powers *v.* Cary, 64 Me. 9.
[2] Maclean *v.* Scripps, 52 Mich. 214.

Judge Wallace, of the United States Circuit Court, said: "The original publication, although its sensational character and flagrant mendacity were well calculated to outrage the feelings of the plaintiff, was so destitute of a color of truth that it could not seriously injure him in the estimation of the immediate community in which he lived."[1]

Daniel Leonard Pratt, a physician, sued the St. Paul *Pioneer Press* for the publication, July 6, 1881, of an article headed "Culpable Neglect," in which it was stated that he had allowed the dead body of a child to remain in a house where it had died while under his care until it had begun to decompose. A verdict in his favor for $2,000 was set aside on the ground that it was not justified by the evidence.[2] At a second trial the jury failed to agree; and at a third trial a verdict was returned in the doctor's favor for $5,000, but this was set aside as excessive.[3] The fourth trial resulted in a disagreement, and the fifth, in a verdict for the plaintiff for $4,275. Thereupon the defendant moved for a sixth trial. The Court ordered that if the plaintiff should accept judgment for $2,000 the defendant's motion should be considered as denied, otherwise it should be considered as granted. The plaintiff accepted judgment for the smaller sum, and the defendant appealed to the Supreme Court, where the order of the lower court was affirmed.[4] Thus after five years of litigation a somewhat remarkable case came to an end. It cost the *Pioneer Press* about $5,800 to publish its article on "Culpable Neglect."

[1] Malloy *v.* Bennett, 15 Federal Reporter, 371.
[2] 30 Minn. (1882), 41.
[3] 32 Minn. (1884), 217.
[4] 35 Minn. (1886), 251.

The Toronto *Irish Canadian* published the following in a letter regarding the warden of the Central Prison:—

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?

The Court ruled that the writer had exceeded the limits of privilege, but a verdict for $8,000 was deemed excessive, and was cut down to $1,000.[1]

Generally speaking, it is not necessary for the plaintiff in a suit for libel to allege or prove any "special damage"; that is to say, damage or injury is presumed by law to follow the use of defamatory language; and where one's reputation is injured, it is immaterial whether he has suffered pecuniary loss. There are certain cases, however, where special damage must be proved. Such is the case where the plaintiff has suffered loss as a natural and proximate consequence of the libel, but not as a necessary consequence of it.[2] In still another class of cases, where the plaintiff has not suffered in reputation, but where the direct result of the libel is injury to his pecuniary interests, the plaintiff must also allege and prove that he has suffered special damage. A case in point is that of Gott *v.* Pulsifer *et al.*, already cited.[3]

Where special damage is shown, the damage must not be too remote. In the case of Ashley *v.* Harrison[4] it was shown that by reason of the publication by the defendant of a libel on Gertrude Mara, a singer in

[1] Massie *v.* Toronto Printing Co., 11 Ontario (1886), 362.
[2] See *ante*, p. 156.
[3] See *ante*, p. 202; see also p. 164.
[4] 1 'Espinasse (Eng. 1793), 48.

oratorio, Mme. Mara had broken her engagement to sing at the plaintiff's concerts, fearing that she should be hissed. The manager of the concerts brought suit for damages against the publisher of the libel, alleging that the size of the audiences had diminished on account of the failure of Mme. Mara to take part at the concerts; but the Court held that the damages were too remote, the immediate cause of the plaintiff's loss being Mme. Mara's refusal to sing, and not the publication of the libel.

To aid in estimating damages, the circulation of the newspaper in which the libel was published may be shown, and a copy of the newspaper itself, in which a large circulation is claimed, may be introduced in evidence for this purpose.[1] Damages may be enhanced, not only by showing the large circulation of the paper, but also its character for reliability, as affecting the degree of credit which would be given to matter published in its columns.[2]

Each publisher of a libel, including the writer, is responsible for the whole damage caused by it, but this responsibility does not extend to a subsequent publication in another newspaper into which the libellous matter has been copied. Unless the writer or original publisher in some way caused the repetition of the libel in the second newspaper, the damage resulting from such repetition is too remote to be chargeable against him. As has been elsewhere shown, a defendant who has been required to pay damages for the publication of a libel cannot recover any portion of such damages from

[1] Edward P. Fry *v.* James Gordon Bennett (New York *Herald*, Nov. 3, 1848, to Feb. 11, 1849), 3 Bosworth, 201. The *Herald's* circulation at that time was about 20,000. See also the Nebraska statute quoted *ante*, p. 96, *note*.

[2] Alice A. Early *v.* Wilbur F. Storey (Chicago *Times*), 86 Ill. (1877), 401.

a person who was liable jointly with him, but who was not sued.[1] And where two defendants are jointly sued for the same libel, and separate verdicts are recovered against them, payment by one defendant operates as a satisfaction of the judgment against the other. "The reason is, that however numerous may be the doers of the tortious act, the act itself, as well as the damage caused by it, is but one single thing, for which one single payment, by whomsoever of the trespassers made, is a perfect satisfaction."[2]

The jury must assess the damages once for all, and a new action cannot be maintained for injuries accruing after the original action, growing out of the same libel. But, as has been stated, every sale of a copy of the newspaper gives a new right of action; and if the publisher continues to sell copies containing the libel, after he has once been sued, the same plaintiff can again bring suit, and recover a new verdict.

Damages which the writer has denominated "punitive" have been variously termed by law writers, "exemplary," "retributory," and "vindictive" damages, or "smart money." The word "vindictive" perhaps best describes such damages, for the power to award a verdict which shall at the same time compensate the plaintiff and punish the defendant, proves too often a ready means of gratifying spite on the part of a prejudiced jury. Indeed, the whole principle upon which punitive damages are based seems to be inherently wrong. The question of punishment is entirely foreign to the legitimate province of civil actions. The criminal courts

[1] See p. 56.

[2] Celia A. Breslin *v.* Charles F. Peck *et al.*, 22 N. Y. Weekly Digest (N. Y. Supreme Court, 1885), 377. (See *ante*, p. 247.)

are maintained for the sole purpose of punishing wrong-doing, and if a libel is of such character as to call for the imposing of a penalty, the district attorney should take cognizance of it, as of any other offence against the law. To countenance the award of "punitive" damages is to constitute every man a prosecuting officer, to grant to every such prosecuting officer the fines which shall be imposed, and to offer a high premium on litigation. Punitive damages are frequently "vindictive" in fact as well as in name, but when the law becomes an instrument of revenge, it ceases to be a means of justice. The proper field for civil, in distinction from criminal, law is the award of compensation for loss or injury; and where a person has been libelled, if a jury has awarded him compensatory damages, he has no further just claim.[1]

Among the fundamental rights of a defendant recognized by the criminal law, is that of being charged with the offence, either by indictment of the grand jury or by a sworn complaint, before being brought into court; but in a civil suit he may be required to pay punitive damages, which are in the precise nature of a fine, without having been previously charged upon oath with any offence. In a criminal court a defendant has a constitutional right to be confronted with the witnesses against him; but a claim of punitive damages may be sustained by the depositions of witnesses whom the defendant has never seen. In a criminal court, a defendant shall be acquitted unless his guilt is established *beyond a reasonable doubt;* but punitive damages

[1] The Rochester *Post-Express*, June 20, 1888, quoted a recommendation of the Chicago *News* that actual damages be recoverable by a plaintiff, but that punitive damages be made payable only to the State. This, it is believed, would put an end to most "speculative" libel suits,

may be awarded upon a mere *preponderance* of testimony. In a criminal court, finally, a defendant cannot be compelled to testify against himself; but a claim of punitive damages may be sustained by the defendant's own involuntary testimony.

Even if the defendant has already suffered punishment in a criminal court, punitive damages may be recovered against him; and it has been held that such damages are not in violation of the constitutional provision that no person shall be twice put in jeopardy of punishment for the same offence.[1] This rule is maintained in most of the States. In a New Hampshire case, however, it was held that where a civil action is founded upon a tort which is punishable also as a crime, compensatory damages cannot be increased by an award of punitive damages.[2] This doctrine has also been sustained in Massachusetts,[3] Indiana, Illinois, Georgia, Nebraska, and the District of Columbia, but it is believed that everywhere else throughout the United States the unjust principle is established that a defendant, after being punished in the criminal courts, may be compelled to pay a verdict for punitive damages in a civil action for the same offence; or, after paying punitive damages in a civil suit, may be sentenced to fine or imprisonment, or both, in a criminal court. The case of Fay *v.* Parker, above referred to, like most of those sustaining the more equitable and just doctrine upon this subject, was an action for an assault, and not for libel In the course of an exhaustive opinion in this case, Judge Foster said: "The true rule, simple and just, is to keep the civil and

[1] Brown *v.* Swineford, 44 Wis. (1878), 282.
[2] Fay *et ux. v.* Parker, 53 N. H. (1872), 342.
[3] Austin *et ux. v.* Wilson *et ux.*, 4 Cushing (1849), 273.

the criminal process and practice distinct and separate. . . . Punitive damages destroy every constitutional safeguard within their reach."

Another defect in the law is the absence of any well-defined limit to the power of juries in awarding punitive damages. The power of the courts in imposing fines for criminal libel is limited by law in most of the States; but in a civil suit, in every State save Michigan, the jury are empowered to find a verdict for punitive damages in any amount upon which they, in their wisdom or prejudice, may agree. In Michigan, under a statute passed at the session of the Legislature for 1885, the plaintiff can recover punitive damages, in addition to compensatory damages, in any sum not exceeding $5,000;[1] whereas, for a first offence of criminal libel in the same State the Court cannot sentence the offender to pay a fine exceeding $100, in addition to imprisonment in the county jail not exceeding ninety days. In none of the other States is the power of the jury to award punitive damages in civil actions for libel limited, save by the power of the Court to grant a new trial on the ground of excessive damages; and a new trial always means a longer bill of costs. Verdicts are rarely set aside on the ground that the damages are excessive, unless there is evidence of prejudice, partiality, or corruption on the part of the jury, and such evidence is very difficult to obtain. "The case must be very gross, and the damages enormous, to justify ordering a new trial on the question of damages."[2]

[1] SEC. 2. In any action or suit for the publication of a libel in any newspaper in this State, the plaintiff shall not be entitled to recover, in addition to actual damages, any greater sum than five thousand dollars. — Act No. 233, Public Acts of 1885.

[2] Townshend on Slander and Libel, p. 541.

In the few States where punitive damages are not allowed in suits for libel, the jury still have wide discretion in finding compensatory damages for the plaintiff's injured feelings or other intangible injuries; and it is comparatively immaterial to a defendant by what name damages are called which he is unjustly required to pay. Any improvement in the law will, of course, be slow, and, doubtless, the great-grandchildren of the present generation of newspaper writers and publishers will go on paying verdicts for punitive damages in civil suits for libel, as our ancestors in the profession have done ever since the art of making newspapers was invented. Mephistopheles, masquerading in the mantle of Faust, says to the student: "Laws are inherited like diseases"; and the law of libel, as we have inherited it, is a disease which has been too much neglected. A complete cure may require heroic treatment, but, nevertheless, a cure ought to be effected.

INDEX.

Abatement of action on death of party, 60.
"Abomination in the sight of the Lord," construed, 162.
Accident, libel published by, actionable, 145.
Accord and satisfaction in defence, 249.
Action for same libel against others, no defence, 266.
Actual damage, defined, 261. See special damage.
Addison County Journal, Vt., Knapp *v.* Fuller, 44.
Advance, Piedmont, Va., Edwin Barbour shot, 62, n.
Advertisement, libel contained in, 25, 131 ; if for protection of one's own interests, privileged, 205.
Advertiser, St. Paul and Minneapolis, Zier *v.* Hoflin, 52.
Advertiser, Daily, Boston, Crane *v.* Waters, 197.
Advertiser, Morning, London, Usill *v.* Hales, 186.
Affidavit to secure arrest, whether privileged, 184.
Agent, principal responsible for acts of, 136, 146.
Agreement for indemnity in defence, 249.
Alabama, statute regarding contempt, 124 ; statutes cited, 96, 261.
Alias, charge that one is apt to assume, libellous, 232.
Alien and Sedition Laws, 19, 74, 87, n., 211.
"Alleged," no modification of libel, 24.
Alterations in publishing libel, when not material, 146.
Ambiguity, may be explained, 48, 149, 153.
American, Baltimore, McBee *v.* Fulton, 186, 236, 257 ; Snyder *v.* Fulton, 226.
American, N. Y., Root *v.* King, 216.
American, Daily, Chicago, People *v.* Stuart, 113.
American Citizen, N. Y., Lewis *v.* Few, 193, 224.
American News Co., sued by Marie Prescott, 139.
Anti-Masonic Enquirer, Rochester, Gould *v.* Weed, 177.
Anti-Universalist, Boston, Commonwealth *v.* Batchelder, 70.

Apology no defence, 67.
Appointment, charge of selling, libellous, 173; candidate for, publications regarding, when privileged, 219.
Argus, Albany, Sumner *v.* Buel, 50, 70, 73.
Argus and Democrat, Madison, Wis., Remington *v.* Brown, 175.
Argus and Patriot, Montpelier, Gregory *v.* Atkins, 57; Atkins *v.* Johnson, 57, 134; State *v.* Atkins, 94.
Argus and Spectator, Newport, N. H., Sturoc's case, 108.
Arizona, penalty in criminal cases, 96.
Arkansas, statutes cited, 89, 96, 109, 230.
Arkansas Gazette, Daily, McDonald *v.* Woodruff, 172.
Aroostook Times, Houlton, Me., Powers *v.* Cary, 269.
Arrest, affidavits to secure, whether privileged, 184; report of arrest privileged, 187; report must not assume guilt of prisoner, 188.
Art criticisms, how far privileged, 198, 201.
Ashley *v.* Harrison, 51, 272.
Assignee, when not liable, 143.
Association, libel upon, 49.
Attachment of newspaper property, proposed exemption, 34.
Attempt to prove truth, unsuccessful, 44, 253.
Auglaize County Democrat, Wapakoneta, O., Settlage *v.* Kampf, 228.
Aurora, Philadelphia, Wm. Duane committed for contempt, 127; Romayne *v.* Duane, 191; office attacked for libel on Washington, 210.
Austin *v.* Wilson, 276.
Author. See writer.
Avalanche, Memphis, State *v.* Galloway, 104, 125.

Bad character of defendant no mitigation, 266.
Ballot-boxes, charge of tampering with, libellous, 255.
Bankruptcy. See insolvency.
Banner, Frankfort, Ind., State *v.* Cheadle, 109, 119.
Banner, Nashville, publishing company prosecuted, 65, 226; suit of John Baxter, 258.
Banner and Volksfreund, Wis., Wilson *v.* Noonan, 146.
Barnum, P. T., convicted of libel, 88.

Bennett, James Gordon, Sr., plaintiff, 159.
Bernard, Gov., libel upon inhabitants of Boston, 19.
Betraying government secrets, charge of, libellous, 174.
Black, William, *v.* John Dick, 151.
Black-mailing, charge of, libellous, 47, 183.
Blasphemous libels, 63, 84–86, 87, 181.
"Bogus proclamation," case of Joseph Howard, Jr., 79.
Bolton *v.* Deane, 39.
Bookseller, Eng., Shepheard *v.* Whitaker, 145.
Bow Bells, London, Black *v.* Dick, 151.
Boydell *v.* Jones, 168.
Bradlaugh, Charles, prosecuted for blasphemy, 85.
Bradstreet's, suit of Newbold & Sons, 156; Hermann *v.* the Bradstreet Co., 265.
Breach of the peace, danger of, ground of prosecution, 62, 87.
Breslin *v.* Peck, 274.
Bribery, charge of, libellous, 66, 140, 176, 252.
Briggs *v.* Garrett, 194, 225.
Brown *v.* Swineford, 276.
Budget, Boston, suit of James Dooling, 164.
Bulletin, Charleston, State *v.* Henderson, 73.
Bulletin, Evening, Philadelphia, Struthers *v.* Peacock, 60; Commonwealth *v.* Featherstone, 206.
Bulletin, Evening, San Francisco, Johnson *v.* Simonton, 168; Wilson *v.* Fitch, 197, 236.
Burden of proof, in civil actions, 59, 231; in criminal cases, 90, 230.
Business, unlawful, libel concerning, 245.

California, security for costs, 32; penalty in criminal cases, 96.
Candidates for elective offices, publications regarding, 213; candidates for appointment, 219.
"Cape Cod Folks," Nightingale *v.* Williams, 241.
Carelessness in conduct of paper may enhance damages, 256, 260, 266.
Carrier, liable for delivering libellous paper, 53, 243.
Cedar Post, Tipton, Ia., Bent & Cottrell *v.* Mink, 145.
Censorship of the press, 9, 12, 26.

Centinela, Paso del Norte, the Cutting case, 136.
Chairman of political committee, not a public officer, 223.
Changes in phraseology, when not material, 146.
Character of newspaper, effect on damages, 273.
Character of public man, publication respecting, 209, 214.
Chinese American, N. Y., Chin Fou Tip *v.* Wong Chin Fou, 48.
Chronicle, San Francisco, Clifford *v.* Cochrane, 147; Fitch *v.* De Young, 165.
Chronicle, Morning, and London Advertiser, King *v.* Horne, 83.
Chronotype, Daily, Boston, Commonwealth *v.* Wright, 176.
Circulation, libel published wherever circulated, 94; of another paper, actionable to underrate, 165; of any paper, effect on damages, 273.
Citizen, Des Arc, Ark., State *v.* Morrill, 109.
City Argus, Detroit, People *v.* Girardin, 87.
City governments, libels on, said to be indictable, 82.
Civil action of libel, 38–61; a "dangerous experiment," 26; an action of tort, 41; falsehood, malice, and injury essential, 41; who may be plaintiffs, 45; corporation may be plaintiff or defendant, 51; loss must be natural and proximate consequence, 51; who may be defendants, 52; indemnity not recoverable by defendant, 56; burden of proof, 59; statutes of limitations, 60; abatement of action, 60; truth in defence, 231; no defence that defendant has been indicted for same libel, 247, 276.
Class of persons, libel upon, 45, 49, 70.
Cleveland, President, on "newspaper lying," 29.
Colorado, penalty in criminal case, 96.
Comments, effect on libel, 133; on court proceedings, privileged, 184.
Commercial, Daily, Leavenworth, Castle *v.* Houston, 231.
Commercial Advertiser, N. Y., Cooper *v.* Stone, 46, 158, 200.
Commercial agency, publication by, when privileged, 206.
Commercial Gazette, Pittsburg, Bruce *v.* Reed, 256.
Common libeller, plaintiff's reputation of being, in mitigation, 261.
Compensatory damages, discretion of jury, 278.
Composition of felony, settlement out of court is not, 95.

Compositor liable for setting a libel, 53.
Condensed report of court proceedings, when privileged 182; but garbled report not privileged, 183.
Conduct of plaintiff may mitigate damages, 261.
Congregationalist, Boston, Shurtleff *v.* Stevens, 197.
Congress. See legislature.
Connecticut, damages, 260; statutes cited, 89, 96, 230.
Connecticut Journal, Stow *v.* Converse, 173.
Constitution, Atlanta, Stewart *v.* Patent Medicine Co., 150.
Construction, where words are ambiguous, 153; whether by court or jury, 173. See language which is libellous.
Contempt of court by publication, 99–129; of legislature, 99; of inferior courts, 101, 114; publication of court report may be prohibited, 102; power of Federal courts, 103; of State courts, 106; power to punish for publications not necessary for protection of court, 113; libels on grand jury, 115; how far intent is material, 117; libel must tend to obstruct the court, 118; abuses by the press, 121; reporter's refusal to disclose sources of information, 123; review of judgment of conviction, 125; power to punish restricted, 126; no right of jury trial, 127; or bail, 128; danger of judicial abuses, 128.
"Contemptuous" damages, 268.
Contract price for printing libel not recoverable, 56; contracts of book publishers, 59.
Conversation of defendant, may show malice, 44.
Convict, released, charge of being, libellous, 268.
Cooper, J. Fenimore, plaintiff, 46, 158, 173, 200.
Copied from another paper — the fact in mitigation, 261.
Coroner, commitment for contempt by, 114.
Corporation, may be plaintiff or defendant, 51; libel affecting credit of, 64; may be indicted, 65; liable for libel published by agent, 132; punitive damages recoverable against, 142.
Correction, conditional offer to make, 265.
Correspondent, no defence that libel was sent by, 237.
"Corrupt legislation, prominent in," libellous, 215.
Corrupting voters, charge of, libellous, 174.
Cost of defending libel suits, 31.
Costs, security for, 32; juries should not consider, 268.

Counsel for defendant, defamatory language used by at trial, in enhancement of damages, 254.
Courier, Buffalo, Van Aernam *v.* McCune, 142.
Courier, Houma, La., Wallis *v.* Bazet; 193.
Courier and Enquirer, N. Y., Stanley *v.* Webb, 184.
Court and jury, respective provinces, 18, 21, 22, 92, 173, 229, 255, 265.
Court reports, publication may be prohibited, 102; but not in Federal courts, 103; reports privileged, 180; exceptions, 181; "true report" defined, 182; various limitations, 182; comments on judicial proceedings, 184; *ex parte* hearings, 184; arrests, 187; all courts on same footing, 188; proceedings before grand jury, etc., 189.
Cowardice, charge of, may be libellous, 71.
"Crank," not libellous *per se*, 161.
Crediting wrongfully treasonable article, libellous, 170.
Crescent, New Orleans, Tresca *v.* Maddox, 188, 249.
Crime, libel need not charge, 149; charge of crime — nature of evidence in defence, 236; evidence in mitigation, 253.
Criminal libel, 62–98; what publications are criminal, 62; corporation may be prosecuted, 65; malice, 65; publisher's negligence, 66; libels on the dead, 69; on classes of persons, 70; need not convey charge of crime, 73; seditious libels, 74; blasphemous libels, 84; obscene libels, 86; truth in defence, 87, 230; general verdict may be returned, 92; evidence of publication, 93; precision in indictments, 94; penalty in case of conviction, 96; editor not liable if published against his will, 135; no defence that prisoner has paid damages in civil suit, 247, 276; editor or proprietor may show in defence that he could not prevent the publication, 249.
Criticism of works of art, etc., when privileged, 198.
Croswell, Harry, indicted for libelling Jefferson, 20, 38, 118.
Current, Big Rapids, Mich., Bronson *v.* Bruce, 218.
Cutting case, 136.

Dakota, definition of libel, 39; statutes cited, 60, 96.
Daly, Augustin, *v.* Byrne, 233.
Damages, 250–278; injury a presumption of law, 250; limit of damages, 250, 277; plaintiff's bad reputation in mitigation,

251; his social standing for enhancement, 252; partial or attempted justification, 253; malice, to sustain punitive damages, 255; mitigation, 261; retraction, 264; new trials, when granted, 266; "contemptuous" damages, 268; damages, whether excessive, 269; when special damage must be proved, 156, 272; effect of circulation, 273; damages assessed once for all, 274; punitive damages, injustice of, 274; damages held excessive, 55, 223, 256, 270–272; held not excessive, 47, 52, 269. See punitive damages.

Dauphin, Maximilian A., *v.* Philadelphia *Times*, 246.

Day Book, N. Y., Weed *v.* Foster, 173.

Dead, lib ls on the, 64, 69.

Defamatory, defence to show that words are not, 229; defamatory words deemed false till truth is shown, 231.

Defences, 229–249; that words are not defamatory, 229; privilege, 229; truth, 230; proof must be as "broad as the charge," 232; where the libel charges a crime, 236; common rumor, 237; mutual libels, 238; plaintiff's bad reputation in mitigation, 239; publisher's ignorance of defamatory character of the libel, 241; various defences, 243; statute of limitations, 60, 244; plaintiff's occupation unlawful, 245; previous recovery, 246; accord and satisfaction, 249; ignorance of the fact of publication, 249.

Defendant, who may be, 52, 130; his knowledge of the injurious nature of the words, when material, 157.

Defiance, Atlanta, case of A. W. Burnett, 125; State *v.* Pledger, 125.

Definitions of libel, 38, 63.

Democrat, Davenport, Ia., Bent & Cottrell *v.* Mink, 145.

Democrat and Chronicle, Rochester, case of John Dennis, Jr., 123; suit of Hiram J. Purdy, 163.

Democratic Press, Pa., McCorkle *v.* Binns, 175.

Democratic Standard, Concord, Palmer *v.* Concord, 71.

Demokrat, N. Y., Wachter *v.* Quenzer, 153.

Disbarment, case of Steinman and Hensel, 106; petition for, report not privileged, 190.

Dispatch, Richmond, Lynch *v.* Chaffin, 205.

Dispatch, St. Louis, suit of H. B. Johnson, 24.

Dispatch, Sunday, N. Y., Bennett *v.* Williamson, 26, 159.

Dispatch, Weekly, Eng., Duke of Brunswick *v.* Harmer, 60, 138, 244.
District of Columbia, statutes cited, 62, 89.
Divorce, bill for, report not privileged, 191.
Dougherty, Daniel, on "trial by newspaper," 122.
Dramatic criticisms, when privileged, 198.
Dramatic News, N. Y., Daly *v.* Byrne, 234.
Duke of Brunswick *v.* Harmer, 60, 138, 244.

Eagle, Macomb, Ill., Snyder *v.* Strader, 146.
Editor, liability of, 53; no defence that he knew nothing of the libel, 249.
Editorial influence, charge of selling, libellous, 165.
Elopement, charge of, may be libellous, 68.
Employee, sale of libel by, renders employer liable, 53, 93.
England, prevalence of libel actions, 30; injunctions to restrain libels, 122, n.; "Newspaper Libel and Registration Act," 194.
Enhancement of damages. See punitive damages.
Enquirer, Cincinnati, Allen O. Myers' case, 119; the Gibson case, 260, 269.
Enterprise, Sweet Water, Tenn., suit of John Baxter, 258.
Exaggerated language, may show malice, 44.
Examiner, London, Leigh Hunt's case, 84.
Examiner, San Francisco, case of Felix J. Zeehandelaar, 102.
Excessive damages, in general, 269–272; new trial on ground of, 266, 277; damages held excessive, 55, 223, 256; held not excessive, 47, 52.
Excitement of political campaign, no mitigation, 218.
Execution of criminal, report not privileged, 190.
Exemplary damages. See punitive damages.
Exemption from attachment of certain newspaper property, proposed, 34.
Exhibition of a libel involves liability, 54; criticism of things offered for exhibition, privileged, 198, 202.
Ex parte judicial proceedings, whether report privileged, 184, 189.
Exponent, Culpepper, Va., George Williams killed, 62, n.
Express, Buffalo, Mr. Matthews' libel experiences, 32, n.
Express, San Antonio, H. S. Canfield committed for contempt, 99; the Copeland case, 213, 217.

Express, Evening, N. Y., Edsall *v.* Brooks, 44, 183, 265; Lyons *v.* Townsend, 204.
Express, Saturday Evening, Boston, Commonwealth *v.* Morgan, 67, 134,

"False rumor law," N. Y., 64.
False swearing, charge of, libellous, 49.
Falsehood, charge of, libellous, 46.
Falsity, essential in civil action, 41; whether evidence of malice, 44, 255; defamatory words deemed false until truth is shown, 231.
Fay *v.* Parker, 276.
Federal courts, power to punish contempts restricted, 103.
Feelings, injury to, not sufficient to sustain action, 149.
Field, David Dudley, need of restrictions on the press, 28, 30.
Fireman's Journal, N. Y., suits of Dwyer and Ryer, 47; suit of James Aird, 232.
First American newspaper, 9.
First libel case tried in America, 15.
Fisk, James, Jr., plaintiff, 250.
Florida, statutes cited, 60, 96.
Florida Times-Union, Jacksonville, Townsend *v.* Jones, 217.
Forgery, charge of, libellous, 192, 218, 233.
Fors Clavigera, Whistler *v.* Ruskin, 201.
Fox's Libel Act, 18.
Franklin, James, imprisoned for libel, 13.
Free Press, Detroit, suit of Donald McArthur, 45, 51, 240; suit of John Finnegan, 155; suit of James Rowe, 191.
Free Press, Mankato, Minn., Marks *v.* Baker, 213.
Freedom of the press, 13, 26, 28; defined, 1, 27.
Freethinker, London, Queen *v.* Bradlaugh, and Queen *v.* Ramsey, 85.
Freiheits Freund, Pittsburg, Hope *v.* Neeb, 255.
Frivolous suits for libel, 31, 34.
Fry *v.* Bennett, 199, 273.
"Fudge!" its effect on a libel, 133.

Garrison, William Lloyd, prosecuted and sued, 248.
Gate City, Daily, Keokuk, State *v.* Anderson, 118.

Gauvreau *v.* Superior Publishing Co., 167.
Gazette, Boston, charged with libelling governor, 18; Child *v.* Homer, 239.
Gazette, Cincinnati, suit of Charles L. Timberlake, 184.
Gazette, Colchester, Eng., Cook *v.* Ward, 171.
Gazette, Janesville, Wis., suit of W. H. Whitney, 251.
Gazette, Kalamazoo, Sullings *v.* Shakespeare, 170.
Gazette, Providence, Commonwealth *v.* Blanding, 94.
Gazette, Troy, Andres *v.* Wells, 143.
Gazette, Ulster, People *v.* Freer, 118.
Gazette, Va., William Parks arraigned before Assembly, 18, n.
Gazette, *Daily*, Taunton, Hatch *v.* Lane, 206.
Gazette, *Saturday Evening*, Boston, proceedings by Prince & Peabody, 34.
General Advertiser, Philadelphia, Hollingsworth *v.* Duane, 127.
Genius of Universal Emancipation, Baltimore, case of William Lloyd Garrison, 248.
Georgia, statute regarding contempt, 125; statutes cited, 96, 230.
Globe, Boston, case of Frost and Saunders, 124.
Grand Army Journal, Washington, State *v.* Woody, 54.
Grand jury, take cognizance of contempt, 115; libels on, 118; report of proceedings before, when not privileged, 189.
Grand Jury *v.* Public Press, 115.
"Greater the truth, the greater the libel," 87, 230.
Greeley, Horace, answer to interrogatories in contempt, 116; his own attorney, 158, n.; defendant, 45, 173, 215, 250.

Hamilton, Alexander, counsel for Croswell, 21; definition of libel, 38.
Hamilton, Andrew, counsel for Zenger, 16.
Handwriting, comparison of, to prove authorship, 144.
Hangman, books and papers burned by, 9, 16.
Hastings *v.* Stetson, 266.
Hatchard *v.* Mège, 60.
Hawkeye, *Daily*, Burlington, State *v.* Dunham, 111.
Heading, of article may be libellous, 132, 170; of court report not privileged, 182.
Herald, Boston, on Cooper's libel suits, 158, n.; Cowley *v.* Pulsifer, 191; Gott *v.* Pulsifer, 201, 272.

Herald, Chicago, on the suppression of the *Times*, 82.
Herald, Fall River, suit of Hurley and Gillan, 178.
Herald, N. Y., Fleischmann *v.* Bennett, 46; Robertson *v.* Bennett, 47; Commonwealth *v.* Chambers, 73; the "bogus proclamation," 81; Wesley *v.* Bennett, 153; More *v.* Bennett, 157; Sanford *v.* Bennett, 190, 237; Fry *v.* Bennett, 199, 273; Hunt *v.* Bennett, 219, 232; Malloy *v.* Bennett, 270.
Herald, Vicksburg, Kline *v.* Rodgers, 167.
Herald, Daily, Middletown, Conn., Frank H. Alford in contempt, 114.
Herald, Sunday, El Paso, the Cutting case, 136.
Herald and Gazette, Morning, Utica, Kinney *v.* Roberts, 261.
Herald and Torchlight, Hagerstown, Md., Farrow *v.* Negley, 223.
Herald of Freedom, Danbury, Conn., P. T. Barnum's case, 88.
"Honest lawyer," may be libellous, 169.
Horne Tooke, convicted of seditious libel, 83.
Howard, Joseph, Jr., arrested for forging proclamation, 81.
Hudson, Frederick, on personalities in newspapers, 30.

Idaho, statutes cited, 60, 96.
Ignorance, of the law no excuse, 23; of the libel no defence, 53, 134; in criminal case, 66, 93; in contempt case, 108; the rule defended, 141; when ignorance may be pleaded, 241.
Illegibility of plaintiff's handwriting, when defence, 170.
Illegitimacy, charge of, libellous, 151.
Illinois, statutes cited, 44, 96.
Immorality. See unchastity.
Impeachment of Judge Peck, 104.
"Imprimatur," 12, 14.
Inaccuracies in libel, when immaterial, 235.
Inadequate damages, whether ground for new trial, 267.
Indemnity not recoverable by one who has been sued, 56, 58, 134.
Independent, Helena, Territory *v.* Murray, 106.
Indiana, no new trial on ground of smallness of damages, 268; statutes cited, 60, 89, 96, 230.
Indictment, precision required in, 94.
Individuals, defamation must be against, 45, 149.
"Infamous" crime, libel is not, 62, n.
Inferior courts, power to punish for contempt, 101, 114.

Ingratitude, charge of, may be libellous, 151.
" Inhuman step-mother," etc., not libellous *per se*, 162.
Injunction, not granted to restrain publication of libel, 27, 41, n.; granted in England, 122, n.
Injury, a presumption of law, 41, 250, 272.
Inquirer, Columbus, Souder *v.* Howe Machine Co., 132.
Inquirer, St. Louis, Luke Edward Lawless in contempt, 104.
Insanity, charge of, libellous, 147, 169; in defence, 243.
Insolvency, charge of, libellous, 55, 143, 145, 172, 265.
Intelligencer, Wheeling, State *v.* Frew and Hart, 109.
Intelligencer, Daily, Lancaster, *ex parte* Steinman and Hensel, 106.
Intent, how far material in contempt case, 117; of writer, when immaterial, 155; of defendant, immaterial if words *per se* libellous, 240.
Inter-Ocean, Chicago, Bent & Cottrell *v.* Mink, 145; suit of Obadiah Huse, 177.
Interpretation. See construction, and language which is libellous.
Interrogative form, libel may be in, 170.
Interview, libellous, person interviewed liable, 55, 94, 146.
Intoxication no defence, 243.
Investigator, Boston, Commonwealth *v.* Kneeland, 84, 136.
Iowa, statutes cited, 44, 60, 96.
Ireland's Liberator, N. Y., People *v.* Rellihan, 91.
Irish Canadian, Toronto, suit of Massie, 272.
Irishman, Queen *v.* Pigott, 83.
Ironical language, may be libellous, 168.
" It is said," no modification of libel, 24.

Jest, publication made in, no defence, 243.
John Donkey, Texas, State *v.* Hanson, 87.
Joint publishers of libel, recovery from one liquidates claim against the other, 247, 274.
Joint stock association, liability of, 142.
Journal, Boston, on malicious attachment of newspaper property, 36.
Journal, Evening, Chicago, People *v.* Wilson, 107, 127; Bent & Cottrell *v.* Mink, 145.
Journal, Evening, Detroit, suit of Michael Bourreseau, 196.
Journal, Evening, Jersey City, suit of Allan L. McDermott, 185; Woods *v.* Pangburn, 247.

Journal, Weekly, N. Y., case of John Peter Zenger, 15.
Journal of Commerce, N. Y., suppressed for publishing "bogus proclamation," 79.
Jury, determine the law and the fact, 22, 92; libel upon member of, 50, 118; in contempt case no right of trial by, 127; construe language when ambiguous, 153, 154, 173; discretion in matter of damages, 250, 255, 277. See court and jury.

Kansas, jury determine law, 22, n.; penalty for criminal libel, 96.
Kennebec Journal, Me., Usher *v.* Severance, 172, 188.
Kentucky, jury trial in contempt cases, 128; no new trial on ground smallness of damages, 268.
Kidd *v.* Horry, 41.
King *v.* Carlile, 181.
Knowledge, of the defamatory character of the words, when material, 157; of the falsity of the publication proof of malice, 255.

Labouchere, Henry, prosecuted, 69.
Lacrosse match, criticism of, privileged, 198.
Language which is libellous, 148–179; libellous words distinguished from slanderous, 148; need not charge crime, 149; words exposing to contempt or ridicule, 151; ambiguous words, 152; the question of intent, 155; words libellous *per se* — special damage, 156; slander of title, 164; words affecting one in his profession or trade, 166; ironical words, etc., 168; province of court and jury in interpretation, 172.
Larceny, charge of, libellous, 47, 155.
Later publication, whether evidence to show malice, 257.
Laws of the Twelve Tables, libel a capital offence, 10, n.
Leader, Sunday, Pittsburg, O'Niell *v.* Pittock, 203.
Lecturer, what language concerning is privileged, 195.
"Legal" malice, 65.
Legislature, libels on, not indictable unless seditious, 82; may punish for contemptuous publications, 99; cannot restrict power of courts to punish for contempts, 109; reports privileged, 23, 191; unless sessions held with closed doors, 192.
Leigh Hunt convicted of libel, 84.
Letter carrier, not liable for delivering libellous paper, 53.
Lewis, Morgan, *v.* Few, 193, 224.

Liability, civil and criminal, for same libel, 97.
Liar, charge of being, libellous, 46.
Libel, defined, 38; distinguished from slander, 39, 148; a tort and a crime, 41; must be against individuals, 45; plaintiff need not be named, 46; against a class of persons, 49; against a corporation, 51; loss a natural and proximate consequence, 51; who liable, 52; statute of limitations, 60; must be read by some one, 54, 139; when copied from another newspaper, 132, 147; published wherever circulated, 136; libels on others no evidence of malice, 260; no mitigation that defendant is not the author, 266.
Libel and slander, early Massachusetts statute, 10.
Libeller, common, plaintiff's reputation of being, in mitigation, 261.
"Libellous journalist," charge of being, actionable, 234.
Libellous *per se*, what language is, 156, 158; intent of defendant immaterial, 240.
Liberty of the press, 13, 26, 28; defined, 1, 27.
Lick, James, *v.* Owen, 42.
Limit of punitive damages, general lack of, 277.
Limitations, statutes of, 60, 244.
Literary criticisms, when privileged, 198, 200.
Local, Oconomowoc, Wis., Peterson *v.* Solverson, 173.
Loss, must be natural and proximate consequence, 51; if small, in mitigation, 261.
Louisiana, penalty for criminal libel, 97.

Maclean, Donald, *v.* Scripps, 196, 270.
Mail, Toronto, suit of Rudolphe Laflamme, 255.
Mail, Evening, Allegheny, State *v.* Kountz, 138.
Mail, Evening, N. Y., sued by Samuel Samuels, 149.
Maine, publisher's liability, 136, n.; publications regarding public officers, etc., 208, n.; statutes cited, 60, 96.
Malice, an inequitable assumption, 33; malice on the part of the plaintiff, 34; malice essential in libel proceedings, 41; defined, 41; "legal" malice, 65; when actual malice is material, 42, 44, 180; how shown to exist, 43, 203, 255–260; effect on damages, 45, 255; whether employer is liable for actual malice of employee, 45, 256; malice in case of criminal libel, 65;

liability for express malice of partner, 141; malice in the case of a corporation, 142; in the case of privileged publications, 180, 203; not inferred from unsustained allegation of truth, 232; where words are *per se* libellous, 240; actual malice of one defendant not increase damages against another, 256.
"Malpractice," held not libellous, 167.
Manuscript, when it must be accounted for, 145.
Marten *v.* Van Schaick, 143.
Maryland, statutes cited, 60, 89, 230.
Mascot, New Orleans, State *v.* Monroe, 27; Van Benthuysen *v.* Staub, 139.
Massachusetts, penalty for criminal libel, 97; truth in defence in criminal cases, 88, 90, 230; in civil cases, 231; statutes cited, 44, 60.
Medical Times, Eng., Wakley *v.* Cooke, 234.
Meetings, public, whether reports privileged, 193, 224.
Mercantile agency, publication by, when privileged, 206.
Mercantile Agency Notification Sheet, Patterson *v.* King, 206.
Mercury, Charleston, McBride *v.* Ellis, 144, 172.
Mercury, Daily, San José, Lick *v.* Owen, 42.
Mercury, Sunday, N. Y., Moffatt *v.* Cauldwell, 149; Sanderson *v.* Cauldwell, 176; McCabe *v.* Cauldwell, 189.
Messenger, Somerset, N. J., Schenck *v.* Schenck, 145, 146.
Michigan, narrow construction of law of privilege, 196; "actual damages" defined, 261; punitive damages limited, 277; statutes cited, 44, 60, 96, 270.
Michigan Press Association, proposed change in libel law, 260, n.
Mining corporation, words concerning trustee not privileged, 197.
Minnesota, libels on political candidates, 227; "actual damages" defined, 261; statute of limitations, 60.
Minority, no defence, 243.
Mississippi, statutes cited, 89, 230.
Missouri, statutes cited, 60, 89, 96, 230.
Missouri Republican, St. Louis, Boogher *v.* Knapp, 235.
Mistake, publication made by, mitigation, 261.
Mitigation of damages, in general, 261, 266; evidence of the truth in criminal case, 91; mitigation in cases of contempt, 108, 118; belief in the truth of the libel, 91, 218, 237; partial justification, 232, 253; libellous publications by the plaintiff, 239;

his bad reputation, 239, 251; facts in mitigation must have been known to defendant at time of publication, 262.
Mob, newspaper office atacked by, 72, 211.
Montana, penalty for criminal libel, 96.
Motive, truth defence in criminal libel where "good motives and justifiable ends," 21, 88, 230; motive immaterial if words *per se* libellous, 240.
Municipal corporations, libels on, said to be indictable, 82.
Musical criticisms, when privileged, 198.
Mutual libels, mitigation of damages, 262; instances of, 169, 238, 262.

Name of person libelled, need not be published, 46, 68, 154; if published cannot be shown that some other person was intended, 155.
Nation, N. Y., Williams *v.* Godkin, 178.
National Druggist, St. Louis, suit of John W. Lanius, 266.
National Editorial Association, proposed law regarding malice, 33.
National law of libel advocated, 30.
Natural and proximate consequence, loss must be, 51, 156.
Nebraska, statutes cited, 96, 273.
Nebraska Press, Daily, Nebraska City, Geisler *v.* Brown, 162.
Negligence, of editor or publisher in criminal case, 66; may enhance damages, 256, 260, 266.
Nevada, statutes cited, 60, 96.
New England Cataract, Pittsfield, Commonwealth *v.* Bonner, 90.
New England Courant, Boston, James Franklin imprisoned for libel, 13.
New Hampshire, statutes cited, 60, 72.
New Jersey, power of appellate courts in matters of contempt, 126; statutes cited, 60, 89, 230.
New Jersey Patriot, Bridgeton, John Cheeseman's case, 129.
New trial, on ground of excessive damages, 266; on ground of inadequate damages, 267; granted unless plaintiff accept reduced judgment, 271, 272.
New York, constitutional provision, 22, n.; definition of libel, 39; who chargeable with publication, 67; truth in defence in criminal case, 88; jury may not find special verdict, 92; penalty for criminal libel, 96; court reports may not be prohibited,

102; privileged publications, 180, n., 181; statutes cited, 60, 62, n.
News, Chicago, proposed law regarding punitive damages, 275, n.
News, Denver, Martin *v.* Byers, 50, 119.
News, Kernersville, N. C., State *v.* Lyon, 239; Davis *v.* Lyon, 240.
News, Philadelphia, Dolby's case, 151.
News, Daily, Galveston, Wren *v.* Belo, 192.
News, Daily, London, Usill *v.* Hales, 186.
News, Evening, Detroit, Reilly *v.* Scripps, 45, 240; Wheaton *v.* Beecher, 55, 218; Maclean *v.* Scripps, 196, 270; Foster *v.* Scripps, 220; suit of Hugh S. Peoples, 236; suit of James E. Tryon, 264.
News, Evening, Salem, Commonwealth *v.* Damon, 65, 134.
News, Morning, Toronto, Queen *v.* Sheppard, 70.
News, Weekly, Ireland, Queen *v.* Sullivan, 39, 78.
News-Herald, Jacksonville, suit of E. H. Lewis, 171.
News agent, liability of, 53, 93, 139.
Newsboy, liable for selling paper containing libel, 140.
Newspaper, criticisms of court by, 121; libel copied from one newspaper into another, 132, 147; newspaper writers and publishers enjoy no special immunities, 207.
"Newspaper Libel and Registration Act, 1881," 194.
"Newspaper war." See mutual libels.
Nominal damages, 268; in case of mutual libels, 263; where facts warrant punitive, verdict inconsistent, 267; instances of nominal damages, 51, 133, 166, n., 172, 191, 198, 201, 268, n.
North Carolina, statutes cited, 89, 230.
Northern Budget, Troy, Dole *v.* Lyon, 131.
Nym Crinkle, N. Y., Prescott *v.* Tousey, 139, 252, 253.

Obituary of living person, libellous, 144.
Obscene libels, 86, 87.
Observer, Eng., Lewis *v.* Clement, 171.
Occupation, libel concerning one in respect to unlawful, 168, 245.
Officers, of regiment, libel upon, 50, 70; of government, publications regarding, when privileged, 221.
Ohio, statutes cited, 60, 96, 121.
Ontario, statutes cited, 33, 194, 227.
Ontario Messenger, Canandaigua, N. Y., Southwick *v.* Stevens, 169.

Opinion, Rockland, Me., Tillson *v.* Robbins, 174.
Oracle, Eng., Heriot *v.* Stuart, 165.
Oral language, one who uses may be liable, 55, 146.
Oregon, statutes cited, 60, 96.
Osage County Democrat, Burlingame, Kan., State *v.* Mayberry, 178.
Oswego County Whig, N. Y., Hotchkiss *v.* Oliphant, 170.
Outlawed, time when action will be, 60, 244.
Owl, N. Y., People *v.* Parr, 62.

Packet, London, or New Lloyd's Evening Post, King *v.* Horne, 83.
Parliament, reports privileged, 22.
Partial justification in mitigation, 253.
Partners, all liable for the acts of one, 141; recovery from one liquidates claim against another, 247, 274.
Party to litigation, report by, whether privileged, 184.
Pecuniary loss, not generally necessary to show, 272.
Penalty in case of conviction, 96.
Pennsylvania, statute regarding contempt, 115, 126; publications regarding public officers, etc., 208, n.; penalty for criminal libel, 96.
People *v.* McDowell, 93.
Perry *v.* Porter, 231.
Per se libellous, what language is, 156, 158.
Personalities in the press, 28.
Picture may be libellous, 39, 78.
Pilot, Boston, Queen *v.* Pigott, 83.
Pioneer, Streator, Ill., People *v.* Clay, 55, 94, 146.
Pioneer Press, St. Paul, suit of Edwin Gribble, 43, 161, 257; suit of Daniel L. Pratt, 171, 271; suit of George Hewitt, 261.
Plaintiff, must show that the libel refers to him, 46, 149; need not be named, 46, 68; libels published by, in defence, 238; conduct of, may mitigate damages, 261.
Pleadings of defendant, if defamatory, may enhance damages, 255.
Political Beacon, Ind., Hall *v.* Dunn, 68, 135.
Political campaign, excitement of, no mitigation, 218.
Political libels, 208–228. See privileged publications.
Porcupine's Gazette, Philadelphia, William Cobbett's case, 75; Respublica *v.* Davis, 138.
Portfolio, Philadelphia, Respublica *v.* Dennie, 77.

Post, Athens, Tenn., suit of John Baxter, 258.
Post, Detroit, suit of Donald McArthur, 45, 51, 240.
Post, Montreal, suit of Amateur Athletic Association, 198.
Post, Pittsburg, Moore *v.* Barr, 222.
Post, *Tri-Weekly*, Springfield, Smith *v.* Ashley, 136, 241.
Post and Tribune, Detroit, suit of Judge Miner, 221.
Poverty, charge of, libellous, 150; of defendant, evidence not admissible in mitigation, 253.
Prescott, Marie, *v.* Tousey, 139, 252, 253.
Press, Philadelphia, suit of Sylvester N. Stewart, 203.
Press, *Daily*, Augusta, Ga., McCarty *v.* Pugh, 262.
Press, *Daily*, Portland, suit of George G. Stacy, 187, 267.
"Press and the Law," address by Judge Emory Speer, 121.
Press, its tone criticised, 28.
Pressman's liability, 53, 243.
Previous libels, by defendant to show malice, 260; by plaintiff in mitigation, 263.
Previous recovery in defence, 246.
Printer of libel may be sued, 52.
Private character of public man, publications not privileged, 209.
Privileged publications, 180–228; malice must be shown, 42; various classes, 180; limitations and exceptions, 87, 181–183; judicial proceedings, 180; *ex parte* hearings, 184; arrests, 187; proceedings before grand jury, etc., 189; legislative affairs, 82, 191; public meetings, 193, 224; various semi-public affairs, 195; test of the question of privilege, 196; criticism of works of art, etc., 198; how malice may be shown, 203; publications for protection of one's own interests, 204; publications by commercial agencies, 206; courts oppose extension of privilege, 207; political libels, 208–228; private character of public men, publications not privileged, 209; Court of Star Chamber, 209; political libels in last century, 210; Alien and Sedition Laws, 211; publications respecting candidates for election, 213; candidates for appointment, 219; public officers, 221; privilege pleaded in defence, 229.
Proclamation, bogus, case of Joseph Howard, Jr., 79.
Profession, language affecting one in his, 166.
Professor at university, what language concerning is privileged, 196.

Progress, Bloomington, Ind., McGinnis *v.* Gabe, 179.
Prohibition of publication of court proceedings, 102.
Proof of truth must be as "broad as the charge," 91, 232.
Property, language which impairs value of, 164.
Proposed changes in libel laws, 30–37, 98, 122, 128, 141, 194, 260, n., 275, n.
Proprietor, liability of, 134–136, 53, 93; liability in punitive damages for malice of employee, 45, 256, 265; may be sued without the writer, 130; no redress against editor or writer, 57, 134; liability for publications in his absence, 135; ignorance of the fact of publication, whether defence, 249; ignorance that individual was referred to, 136, 241.
Protection of one's own interests, publications privileged, 204.
Provocation for libel by plaintiff, when defence, 238; in mitigation, 261.
Public Advertiser, London, King *v.* Horne, 83.
Public meetings, whether reports privileged, 193, 224.
Public men. See privileged publications.
Public officers, publications regarding, when privileged, 221.
Publication, 54, 130–147; evidence of, in criminal case, 93; who liable as publishers, 130; proprietor's liability, 134; the libel published wherever circulated, 94, 136; not published till read by some third person, 139; news agent's liability, 139; publication by partners, 141; by corporation, etc., 142; the writer's liability, 143; two publications of same libel, 147; each sale a fresh publication, 244.
Publick Occurrences, Boston, first American newspaper, 9.
Publisher. See proprietor; see also publication.
Punitive damages, when recoverable, 255–260; in some States not recoverable, 276; in Minnesota, 227; limited in Michigan, 277; recoverable against corporation, 142; unsuccessful attempt to prove truth, 44, 253; wealth of defendant in evidence, 253; punitive damages wrong in principle, 274–278, 98; lack of limit to, 277.

Question, imputation in form of, libellous, 170.

Railroad company, words concerning officer of, privileged, 197.
Railway Register, Shattuc *v.* McArthur, 174.

Reade, Charles, *v.* Sweetzer, 200.
Reading libel to another involves liability, 54.
Receiver, liability of, 143.
Reckless publication, enhances damages, 266.
Record, Philadelphia, Commonwealth *v.* Singerly, 208.
Record, Evening, Boston, suit of John Henry Kerrison, 172.
Reform in libel laws. See proposed changes.
Refusal, by reporter to disclose sources of information, 123; by publisher to disclose name of author, 125; to publish retraction, whether it enhances damages, 265.
Regiment, libel on, 50, 70, 71.
Register, Albany, Steele *v.* Southwick, 48; Coleman *v.* Southwick, 170.
Register, Daily, Wheeling, Sweeney *v.* Baker, 215, 267.
Religious association, resolutions adopted by, privileged, 197.
Repetition of libel. See republication.
Report of court proceedings. See court reports.
Reporter, liability of, 53; refusal to disclose sources of information, 123. See writer.
Reprinting libel, gives new right of action, 246. See republication.
Republican, Martinsville, Ind., Myrick *v.* Bain, 174.
Republican, St. Louis, Buckley *v.* Knapp, 253, 269.
Republican, Springfield, Lothrop *v.* Adams, 141; Fisk *v.* Bowles, 250.
Republican Crisis, N. Y., Genet *v.* Mitchell, 174; Thomas *v.* Croswell, 175.
Republican Sentinel, Milwaukee, suit of Mike Kraus, 179.
Republican Watch Tower, N. Y., Tillotson *v.* Cheetham, 252.
Republication of libel, to show malice, 260; liability of original publisher, 147, 246, 273.
Reputation, injury to, the ground of libel actions, 148, 272; of plaintiff, if bad, in mitigation, 239, 251; of defendant, if bad, no mitigation, 266.
Resolutions of religious association, privileged, 197.
Restraint on the press, need of, 28.
Retraction, no defence, 67; with expression of satisfaction, no release of right of action, 249, 264; in mitigation, 264; refusal of, to enhance damages, 260, 265.
Rhode Island, penalty for criminal libel, 96.

Ridicule, publication exposing to, libellous, 73, 150.
Kisk Allah Bey *v.* Whitehurst, 254.
Rocky Mountain News, Denver, Martin *v.* Byers, 50, 119.
Root *v.* King, 216.
Round Table, N. Y., Reade *v.* Sweetzer, 200.
Rumor, no defence that libel based on, 237; in mitigation, 261.
Ruskin, John, sued for libel, 201.
Ryckman *v.* Delavan, 49.

"Salting" a mine, charge of, libellous, 177.
Satirist or Monthly Meteor, Eng., Tabart *v.* Tipper, 198.
School, criticism of, privileged, 203.
Seditious libels, 19, 74–84, 87, 211.
Seduction, charge of, libellous, 270.
Semi-public affairs, what comments are privileged, 195.
Sentinel, Vicksburg, *ex parte* Walter Hickey, 110.
Sentinel, Daily, Raleigh, the case of Moore *et al.*, 117.
Sentinel and Gazette, Utica, Beardsley *v.* Maynard, 263.
Separate right of action for every copy sold, 60, 138, 244.
Settlement out of court, not composition of felony, 95.
Several liability for a libel, 247.
"Shaving purposes," not libellous, 159.
Sheridan on the liberty of the press, 13, n.
"Sheriff, in the hands of," libellous, 265.
"Shyster," charge of being, libellous, 161.
"Skunk," charge of being, libellous, 125.
Slander, distinguished from libel, 39, 40, 148.
Slander of title, 164, 202.
Smallness of damages, when ground for new trial, 267.
Smith, Gerrit, *v.* Chicago *Tribune*, 196.
Smuggling, charge of, libellous, 232.
Social standing of plaintiff, whether evidence admissible, 252.
South Carolina, statute of limitations, 60.
Special damage, defined, 156; when it must be shown, 62, 272.
Spectator, N. Y., Cooper *v.* Stone, 158.
Spectator, Saturday Evening, Minneapolis, Wilson *v* Dubois, 165.
Speech, libellous, speaker liable, 55.
Speer, Judge, on "The Press and the Law," 121.
Spirit of the West, Ind., Johnson *v.* Stebbins, 148, 237.

Standard, Bridgeport, James L. Arnott's suit, 154.
Standard, London, Usill *v.* Hales, 186.
Star, *Evening*, Washington, suit of W. W. Hicks, 268.
Star Republican, Clayton, Mo., State *v.* Crossman, 172.
Star Chamber, Court of, punishment of political libels, 209.
State governments, libels on, indictable, 82.
State *v.* Smily, 152.
State *v.* Verry, 22.
States, New Orleans, Bigney *v.* Van Benthuysen, 238.
Statute, publication a contempt in spite of, 109.
Statute of limitations, 60, 244; charge of taking advantage of, not libellous, 160.
Story told by plaintiff of himself, libellous to publish, 171.
Stubbs' Weekly Gazette, Eng., Stubbs *v.* Marsh, 143.
Subsequent publications, to show malice, 43, 257. See republication.
Substantial damages, recoverable although no injury shown, 250.
Suit against two or more for same libel, 56, 266.
Sun, Baltimore, John T. Morris' case, 123.
Sun, England, Duke of Brunswick *v.* Harmer, 245.
Sun, Indianapolis, suit of Albert J. Horrell, 268.
Sun, N. Y., Giraud *v.* Beach, 49; suit of Mary H. Shelby, 151; on correction of published errors, 264, n.
"Swill milk" business, words regarding, not actionable, 168.
Swindling, charge of, libellous, 40, 237, 251.
Swine, charge of being, libellous, 173.

Tampering with ballot-boxes, charge of, libellous, 255.
Telegraph, *Daily*, London, Risk Allah Bey *v.* Whitehurst, 254.
Telegraph, *Daily*, St. John, Silver *v.* Dominion Telegraph Co., 55.
Telegraph, *Daily*, Sheffield, Eng., Harrison *v.* Pearce, 131.
Telegraph company, liability of, 55.
Telegraphic correspondent, liability of, 53.
Tennessee, statutes cited, 89, 230.
Test of question of privilege, 196.
Texas, statute for suppressing libels, 28, n.; seditious libels, 82, n.; publication of libel, 131, n.; statutes cited, 96, 230.
Theft, charge of, libellous, 47, 155, 188.

Third person, libel must be read by, 54, 139; and understood by, 149.
Thompson's Bank Note and Commercial Reporter, Shoe and Leather Bank *v.* Thompson, 51.
Times, Bethlehem, Pa., Commonwealth *v.* Godshalk, 183.
Times, Chicago, suppressed for seditious sentiments, 81; People *v.* Storey, 118; Clifford *v.* Cochrane, 147; Early *v.* Storey, 252, 263, 273; Wallace *v.* Storey, 264.
Times, Columbia, S. C., Woodburn *v.* Miller, 145.
Times, London, Wason *v.* Walter, 22.
Times, Manistee, Mich., Fowler *v.* Hoffman, 57.
Times, New Orleans, suit of L. C. Perret, 24, 131; Terry *v.* Fellows, 191.
Times, N. Y., George Jones and his libel suits, 32, n.; Mecabe *v.* Jones, 142; Caldwell *v.* Raymond, 157, 241; Ackerman *v.* Jones, 185; Fisk *v.* Norvell and Raymond, 250; Bergmann *v.* Jones, 259.
Times, Ogdensburg, Stilwell *v.* Barter, 232.
Times, Oshkosh, Kimball *v.* Fernandez, 235.
Times, Philadelphia, on "Frivolous Libel Suits," 31; Commonwealth *v.* McClure, 92; suit of Maximilian A. Dauphin, 245.
Times, Trenton, State *v.* Mott, 176.
Tit-Bits, London, Dolby's case, 151.
Tobacco Journal, N. Y., Rosenwald *v.* Hammerstein, 175.
Town councils, reports of proceedings privileged, 192.
Town Topics, N. Y., People *v.* Mann, 86.
Trade, language affecting one in his, 166.
Transcript, Moncton, N. B., J. T. Hawke's case, 121.
Transcript, Sunday Morning, Providence, State *v.* Spear, 177.
Translation, when author is responsible for, 146.
Treasonable sentiments, libellous to credit wrongfully, 170.
Trentonian, Weekly, Insurance Co. *v.* Perrine, 51.
Tribune, Chicago, suit of Albert H. Walker, 161; suit of J. Appleton Wilson, 189; suit of Gerrit Smith, 196.
Tribune, Denver, Downing *v.* Brown, 233, 254.
Tribune, Minneapolis, suit of Frank D. Larrabee, 161, 262.
Tribune, N. Y., Littlejohn *v.* Greeley, 45, 215; Horace Greeley's contempt case, 116; Cooper *v.* Greeley, 158, n., 173; Fisk *v.* Greeley, 250.

"True report" of judicial proceedings, defined, 182.
True Sun, England, Hunt *v.* Algar, 133.
Trussell *v.* Scarlett, 206.
Truth, in defence, 230; early law upon the subject, 17, 18, n., 21, 22, n.; in civil actions a full defence, 41, 231; in criminal cases, 21, 87–91, 230; "the greater the truth, the greater the libel," 87, 230; evidence of truth not received in cases of seditious, blasphemous, and obscene libels, 87; proof as "broad as the charge," 232–235; nature of evidence of truth, 237; unsuccessful attempt to prove truth, 44, 253; partial justification in mitigation, 232, 253; if true, immaterial that defendant supposed the charge false, 262.
Truth, London, Queen *v.* Labouchere, 69.
Truth, N. Y., People *v.* Isaacs, 162.
Tunxis Valley Herald, Conn., Wynne *v.* Parsons, 154.
Two publications of same libel, division of liability, 132, 147. See republication.

Unchastity, charge of, libellous, 264, 269.
Union, Chenango, N. Y., Bennett *v.* Smith, 232.
Union, Manchester, Barnes *v.* Campbell, 44.
Union and Advertiser, Rochester, suit of Ida E. Salisbury, 182.
United States *v.* Buell, 62.
United States *v.* Holmes, 103.
United States *v.* Marshall, 62.
Unlawful occupation, libel concerning, 168, 245.
Unsuccessful attempt to prove truth, effect on verdict, 44, 253.
Utah, penalty for criminal libel, 96.

Verdict, general, jury may find, 92; largest paid in America, 270.
Vermont, statutes cited, 60, 89, 230.
Vermont Chronicle, Shurtleff *v.* Stevens, 197.
Vermont Journal, Windsor, United States *v.* Lyon, 211.
Vindictive damages, 274. See punitive damages.
Virginia, statutes cited, 128, 261.
"Vulgar, ignorant, and scurrilous journal," not libellous, 165.

Wall Street Daily News, N. Y., People *v.* Keep, 64.
Washington, George, libelled, 210.

Washington Territory, statutes cited, 60, 96.
Wasp, Hudson, N. Y., Croswell indicted for libelling Jefferson, 20, 38, 118.
Wealth of defendant, as affecting amount of damages, 252.
Weed, Thurlow, *v.* Foster, 173; Weed defendant, 158, n., 177.
West Virginia, statutes cited, 128, 261.
Western Mercury, *Daily*, Eng., Bishop *v.* Latimer, 235.
Whig, Quincy, Ill., Rearick *v.* Wilcox, 217, 266.
Whig and Register, *Sunday*, Knoxville, Baxter *v.* Saunders, 203, 258.
Whistler *v.* Ruskin, 201.
Wisconsin, statutes cited, 44, 60, 96.
Wisconsin, *Evening*, Milwaukee, Ludwig *v.* Cramer, 131; Noonan *v.* Cramer, 174; Bradley *v.* Cramer, 256, 265; Eviston *v.* Cramer, 256; Cottrill *v.* Cramer, 267.
World, London, prosecution of Edmund Yates, 68.
World, N. Y., suppressed for publishing bogus proclamation, 79; Kennedy *v.* Press Pub. Co., 164.
Writer of libel, conclusive presumption against, 53; evidence against, 143–145; intent, when immaterial, 155.
Writing a libel, evidence of publication, 143.
Wyoming, penalty for criminal libel, 96.

Yates, Edmund, prosecuted for libel, 68.

Zenger, John Peter, tried for libel, 15.

NEWS IS NOT LIBEL.

What a New Jersey Judge Has to Say Concerning Newspaper Articles.

New York Graphic: The recent decision of Judge Ingraham, in the libel suit brought by Charles W. Hodges of Cranford, N. J., against the New York World, for libel, has established a principle which will relieve newspaper publishers from much annoyance. The World had published a news article concerning some of the transactions of Hodges. It consisted of a letter written by a man named Moncton to a friend named Mockerson, saying Hodges had so deceived him in a real estate transaction that he had lost $600, the earnings of a lifetime. This constituted the libel of which Hodges complained and on which he brought suit. The World justified the publication by producing evidence of the substantial truth of the assertions in the letter and of the bad reputation of Hodges. The publication was shown to have been made as part of the current news of the day, without malice towards Hodges.

Judge Ingraham held that there had been no libel and awarded the World $200 for counsel fees. It is thus established that the publication of news is not libel, and that the old doctrine that the greater the truth of a publication injurious to a man's character the greater the libel has lost its place in the changing relations of newspapers to the public. Judge Ingraham's charge was distinct and clear on this point. He said:

"The importance of the newspaper in the detection and prevention of crime cannot be over estimated. The schemes to enable men to obtain dishonestly the savings of a lifetime are numerous, and it is to the newspapers almost entirely that we must look for the detection of these crimes. If in this case the defendant can satisfy the jury that the published story is true substantially, he has committed no offense and is entitled to a verdict."

The decision is in accordance with recent rulings in several other states, and is the outgrowth of just appreciation of the position of newspaper publishers and editors, who under the menace of the old maxim have frequently been deterred from the exposure of rascals, which ought to have been made in the public interest.