Report of the Committee on the Law of Defamation

Presented by the Lord High Chancellor to Parliament
by Command of His Majesty
October 1948

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LIST OF MEMBERS

The Right Honourable the Lord Porter (Chairman)
The Right Honourable Mr. Justice Birkett
John William Bowen, Esquire, C.B.E.
Master Richard Frank Burnand, C.B.E.
Bertram Christian, Esquire
William Charles Crocker, Esquire, M.C. (1)
Edward Morgan Forster, Esquire, LL.D.
Oswald Squire Hickson, Esquire (2)
Sir Valentine Holmes, K.C. (1)
The Right Honourable the Viscount Kemsley (3)
Frederick James Mansfield, Esquire (2)
Richard O'Sullivan, Esquire, K.C.
Sir Reginald Ward Lane Poole, K.C.V.O. (2)
The Right Honourable the Viscount Ridley, C.B.E. (4)
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Sir George Sutton, Baronet (2)
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Emlyn Capel Stewart Wade, Esquire, LL.D.

(1) Appointed 1945.
(2) Died since appointment of Committee.
(3) Resigned May, 1939.
(4) Resigned 1945.

NOTE.—The estimated cost of the preparation of this Report (including the expenses of the Committee) is £323 16s. 1d. of which £129 10s. 0d. is the estimated cost of printing and publishing this Report.

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COMMITTEE ON THE LAW OF DEFAMATION

REPORT

TO THE RIGHT HONOURABLE THE VISCOUNT JOWITT, LORD HIGH CHANCELLOR OF GREAT BRITAIN

1. As a consequence of a promise made upon the second reading of the Law of Libel (Amendment) Bill, 1938, we were appointed by Your Lordship's predecessor, the Right Honourable Viscount Maugham, on 8th March, 1939, with the following terms of reference:—

"To consider the Law of Defamation and to report on the changes in the existing law, practice and procedure relating to the matter which are desirable."

We started our sittings in the month of April, 1939, and had held 16 meetings before the outbreak of war. Our activities were suspended during the Second World War and were not resumed until the month of May, 1945. Since that date, we have held a further 54 meetings.

Owing to pressure of other public work, Lord Kemsley resigned from the Committee in May, 1939, and Lord Ridley resigned in 1945. The vacancy caused by the resignation of Lord Kemsley was filled by the appointment of Sir George Sutton, Bart.

We record with profound regret the death of four of our members; Sir Reginald Lane Poole and Mr. Oswald Hickson, who died during the European War, Mr. F. J. Mansfield, who died in 1946, and Sir George Sutton, Bart., who died in 1947. Two of the vacancies caused by their deaths were filled by the appointment of Mr. William Charles Crocker on 25th January, 1945, and of Sir Valentine Holmes, K.C., on 30th October, 1945. Before the date of his appointment, Sir Valentine Holmes had, at the request of the Committee, given evidence as a witness.

2. Written Memoranda of Evidence were submitted to the Committee by the following persons and representative organisations, of whom those marked with an asterisk tendered oral evidence in amplification of their written Memoranda.

Sir Alan Herbert, M.P.*
Mr. Collin Brooks.*
The National Association of Local Government Officers.
The Haldane Society.*
The Newspaper Society.*
The National Council for Civil Liberties.
Professor P. H. Winfield, K.C.
Mr. Cecil Binney.
Mr. A. L. Innes.*
Messrs. Faber & Faber.*
The British Broadcasting Corporation.*
Serjeant Sullivan, K.C.*
Mr. Oswald Cox.*
Mr. Kenneth Henderson.*
Rt. Hon. Brendan Bracken, M.P.
The Newspaper Proprietors' Association.*
The National Association of Wholesale Newsagents.*
The British Federation of Master Printers.*
His Honour Judge Richard A. Willes.*

Mr. J. H. Critchley.*
The Library Association.*
The National Federation of Retail Newsagents, Booksellers and Stationers.*
The Publishers Association of Great Britain and Ireland.*
The Institute of Journalists.*
The Critics Circle.*
The Incorporated Society of Authors, Playwrights and Composers.*
Rt. Hon. Lord Rankeillour.*
Rt. Hon. Lord Goddard, Lord Chief Justice of England.
Rt. Hon. Lord Justice Tucker.
Mr. Henry W. Wicks.
Mr. George D. Slow.
Mr. A. C. Mason.
Mr. Theodore Instone.
Mr. P. Harrington Edwards.
The Council of the Empire Press Union.
Mr. Arnold Keith Maplesden.
Mr. H. Wilson Harris, M.P.
The National Union of Journalists.*
The Board of Deputies of British Jews.*
Mr. C. H. Norman.
Associated Newspapers Limited.
Master Sir Douglas Gibbon, M.C.*
The National Association of Trade Protection Societies.
"Practical Banking."
Messrs. Jacobson Ridley (for clients).
Messrs. Easton & Gregory (for clients).
Mr. Maurice Ernest, Ll.D.
Mr. D. W. Nevens.
The Ministry of Agriculture and Fisheries.
The Board of Trade.
The Royal Institute of British Architects.
The National Association of British & Irish Millers Limited.
The World Jewish Congress.

3. At the request of the Committee, notes upon the law of defamation under other systems of law were prepared for us as follows:—

British Dominions and Colonies by Dr. Glanville Williams, Reader in English Law in the University of London.

United States of America by Professor P. H. Winfield, K.C., F.B.A., Emeritus Rouse Ball Professor of English Law in the University of Cambridge.

European Countries by Professor H. C. Gutteridge, K.C., Emeritus Professor of Comparative Law in the University of Cambridge, and Dr. K. Lipstein.

Scotland by Mr. A. L. Innes of the Scottish Office.

We desire to express our deep appreciation of these studies from which we have derived great assistance in the preparation of our Report.

4. We wish to record our thanks to Mr. A. R. W. Low, M.P., who was our Secretary in 1939 during the early part of our deliberations, and to Mr. Kenneth Diplock, K.C., who became our Secretary in 1945. We desire to express our high appreciation of their work, and particularly to pay tribute to the industry and efficiency with which Mr. Diplock performed his duties, particularly in connection with the preparation of this Report.

5. As is apparent from the list of those who submitted Memoranda and gave oral testimony before the Committee, by far the greater part of the evidence was tendered on behalf of persons whose avocations are such as to be likely to involve them in the risk of being sued for libel, and whose experience of the law of defamation has thus been almost exclusively in the capacity of defendants. Authors, critics, journalists, book-publishers, newspaper proprietors, printers and newspaper distributors are particularly liable to become defendants in actions for defamation and the criticisms of the existing law from their point of view were submitted with skill, lucidity and moderation by their respective representative organisations. Plaintiffs in actions for defamation, on the other hand, are drawn from all sections of the community, and naturally no professional or trade organisation exists representative of their interests. We have had, it is true, some evidence given by individuals and bodies not personally interested either as potential plaintiffs or defendants, but in an endeavour to ensure that any disproportion in the volume of evidence given between the representatives of those interested as plaintiffs and those likely to be sued, we have been compelled in preparing our Report to draw upon the practical knowledge and experience of members of the Committee, whether they represent the public in general or particular elements in it, or practise the law as barristers or solicitors, or act in a judicial capacity.

A. GENERAL CRITICISMS OF THE EXISTING LAW

6. The general criticism of the existing law of defamation which has been expressed by witnesses may be briefly summarised in non-technical language as follows:—

The law and practice in actions for defamation are said to be:—

(*a*) unnecessarily complicated;

(*b*) unduly costly;

(*c*) such as to make it difficult to forecast the result of an action both as to liability and as to the measure of damages;

(*d*) liable to stifle discussion upon matters of public interest and concern;

(*e*) too severe upon a defendant who is innocent of any intention to defame; and

(*f*) too favourable to those who, in colloquial language, may be described as " gold-digging " plaintiffs.

7. Such a classification of criticisms is practical rather than scientific. Many of the criticisms which have been expressed are not peculiar to the law of defamation, but represent the natural reaction of the layman when brought as a litigant into personal contact with English legal procedure. Any action in the High Court may well seem complicated; it is seldom inexpensive; and, to a party who before the trial appreciates only one side of the case, the result may often seem unduly difficult to predict. Further, even where such criticisms are particularly or exclusively applicable to the law of defamation, the causes which give rise to them are almost invariably more complex than would at first sight appear, and, we may add, this difficulty is not merely one of accurate legislative drafting. The great variety of circumstances in which actions for defamation may arise makes it impossible to envisage them all and thus to legislate for them separately in detail. It is equally impossible to describe them adequately in general terms so as to enable them to be dealt with comprehensively without grave danger of causing injustice.

8. While, therefore, we have thought it right to record the broad complaints which have been directed against the existing law of defamation, their classification is not one which forms a convenient starting point for a consideration of the matters which fall within our terms of reference. It is necessary to examine more closely and scientifically, first, the scope of the existing law of defamation, next, the substantive law, and finally, the current practice and procedure, in order to ascertain the real basis of the complaints, the extent to which they are justified, and the way in which those which are justified and capable of being remedied may be met by changes in the existing law, practice or procedure.

9. Before, however, these various matters are dealt with in detail, one suggestion originating in the discussions of the Committee itself must be considered, viz.—whether it is practical and desirable to codify the law of defamation.

10. Under the Anglo-Saxon system of law, general codification has never been adopted. A number of branches of the law of contracts have indeed been codified, the Sale of Goods Act, the Marine Insurance Act and the Bills of Exchange Act may be cited as examples. In every such case, however, the topic so dealt with is a very limited portion of the law and is concerned with matters which have been the subject of much litigation and have reached a stage in which the leading principles and much of the detailed provisions have been settled, so that they may be said to have become ripe for codification.

11. The law of contract involving the duties undertaken by parties entering into voluntary relationship one with another affords a basis upon which a satisfactory code can be built, at least in certain of its aspects where that relationship has been the subject of a carefully worked out system evolved from the case law which has settled its principles.

12. Codification of the law of torts, on the other hand, where the parties are brought into relationship not by mutual agreement but under a general obligation emanating from the social duties which the well-being of a community requires, is a different matter; and we know of no instance where it has been adopted in this country or in any country subject to or influenced by the Common Law of England.

13. It is true that Sir Frederick Pollock drafted a Code of Torts for India, but it was never enacted. Moreover, that portion which deals with defamation is couched, and, we think, necessarily couched, in very general language. Even the definition of defamation which is taken from Section 499 of the Indian Penal Code is framed in terms so wide as to be of little assistance in simplifying the law or making its principles more exact or definite, nor do the four explanations or ten exceptions set out in that Section obviate these difficulties.

14. Similar criticisms may be made of the language of foreign codes which are apt to treat the law of tort upon broad and vague lines.

15. One attempt to state the law of defamation more fully in a series of propositions is contained in the American Restatement. Undoubtedly that is a valuable and impressive work, but its explanations and examples occupy considerable space and we doubt whether it would simplify or shorten proceedings or enable practitioners or the public more easily to understand the law and calculate the chances of success or failure. Nor do we think it would lessen the expense of litigation.

16. After a careful consideration of the advantages and disadvantages of codification in this realm of the law, we see no reason to recommend so radical a change. On the contrary, in a matter covering such wide and variable circumstances in which, in our view, it is desirable to retain as much flexibility as possible, we fear the rigidity of a code and prefer to leave a wide scope to judges and juries, within the principles as laid down in the decided cases, in exercising the duty of solving the very varied problems which claims for libel and slander provide.

17. As indicated above, even an exact definition of defamation is a matter of difficulty owing to the extensive range of considerations involved. Many expressions have been used in the numerous cases scattered throughout the reports to convey or explain the ideas involved in the words "libel" and "slander," e.g. that quoted to clarify the principle involved in what we later call "unintentional defamation"—

> "Does the matter complained of tend to lower the plaintiff in the estimation of right thinking men or cause him to be shunned or avoided or expose him to hatred, ridicule or contempt?"

But this language does not cover all the required elements, nor do any of the definitions hitherto employed in the books.

18. On the whole, therefore, we think it better to leave the position as it is rather than to recommend a change to fresh language which may well involve the bringing of a series of actions and the obtaining of a number of decisions before the bounds of the fresh definition have been clearly determined.

19. With these preliminary observations, we turn to the task which has been given us.

B. SCOPE OF THE LAW OF DEFAMATION

20. The law of defamation at present embraces—

(1) Criminal proceedings for libel;

(2) Civil proceedings—

(*a*) for libel;

(*b*) for slander;

With these are usually classified—

(3) Certain actions on the case, namely—

(*a*) slander of title;

(*b*) slander of goods;

(*c*) other false statements made maliciously and calculated to cause and actually causing pecuniary damage.

21. In the case of civil proceedings, whether for libel or slander, the matter complained of must be defamation of an identifiable legal person, i.e. a natural person or a corporation, and that person must continue to be in existence when the action is concluded.

22. In the case of criminal proceedings for *libel*, mere defamation of the dead is not sufficient, but a prosecution will lie if the defamatory words are published with intent to injure and bring contempt upon the family of the deceased and so provoke them to a breach of the peace. Prosecutions of this kind, however, appear to have become obsolete. The lack of any remedy by civil action is dealt with below.

23. It has been suggested by various witnesses that the law of defamation ought to be extended so as to bring within its scope, either as the subject of criminal proceedings or a civil action, three specific matters, namely—

(1) The invasion of privacy,

(2) The defamation of the dead,

(3) The defamation of groups or classes of persons, such as those distinguishable by race, colour, creed or vocation.

(1) *Invasion of Privacy*

24. The complaint which is summarised in the expression " Invasion of Privacy " consists in the alleged practice upon the part of representatives of certain organs of the Press, of which evidence was tendered to us, of intruding upon those who have suffered bereavement, or cross-questioning those who are related to or otherwise incidentally connected with persons who have committed crimes or attained notoriety, and of publishing in sensational form details of the private lives and affairs of such persons.

25. In so far as the complaint relates to the actual seeking of interviews either in person or by telephone, the matter clearly bears no relation to the law of defamation, although this kind of conduct would automatically cease if the type of " news " which it is designed to secure were not published. In so far as the complaint relates to the publication of details of the private lives and affairs of persons who have no desire for such publicity, the matter so published, however offensive it may be to good taste, is not normally defamatory. If it is, and is also untrue, it is actionable under the existing law.

26. We are satisfied on the evidence of representatives of the journalists' profession and by newspaper proprietors themselves, that the practice is one which is strongly deprecated by all reputable journalists and newspapers. Moreover, it does not appear to us that this abuse, in so far as it exists, properly falls within the scope of the law of defamation, or is one for which a suitable remedy could be found by an extension of the existing law. We think that there are great difficulties in formulating an extended definition of criminal or civil libel which, while effective to restrain improper invasion of privacy, would not interfere with the due reporting of matters which are of public interest. It appears to us, however, that the difficulties which confront this Committee should not form an obstacle to action by the press itself or prevent it from dealing with the problem as one of internal discipline to be regulated by an understanding between the proprietorial and journalistic organisations. The offence is primarily one against good taste, and if a legal remedy has to be created, it must, we think, lie in a sphere which is outside our terms of reference.

(2) *Defamation of the Dead*

27. Under the existing law, statements about the dead, however false and malicious they may be and however much distress they may cause to friends and relatives of the deceased, do not form the subject of a civil action, nor—except to the limited extent mentioned above—of a criminal prosecution. The essence of civil proceedings for defamation is the damage caused to the reputation of the plaintiff. It is, therefore, difficult to see any logical basis upon which to found a proposal that the relatives of a deceased person should be entitled to bring an action for statements defamatory of the deceased alone. If such statements are also defamatory

of the living, they are, of course, actionable under the existing law. It would be equally difficult to find any sufficient justification for granting such right of action to the personal representatives of the deceased. The basis for a right of action on the part of personal representatives is the injury suffered by the estate of the deceased; and his estate cannot normally be damaged by defamatory statements made after his death.

28. The essentially personal character of a man's right to his good reputation and of the action for defamation which exists for its protection was recognised in 1934 in the Law Reform (Miscellaneous Provisions) Act, 1934, which excepted actions for defamation from those categories of personal actions which survive for the benefit of the estate of the plaintiff. We do not think that a sufficient case has been made out for a departure from this principle.

29. Similar objections do not exist in the case of criminal proceedings for libel of the dead; but there are practical disadvantages in so extending the existing law which satisfy us that it is not in the public interest that such an alteration should be made. Historians and biographers should be free to set out facts as they see them and to make their comment and criticism upon the events which they have chronicled. But to produce the strict proof of the statements contained in their writings which the English law of evidence requires, becomes increasingly difficult with the lapse of time. If those engaged in writing history were compelled, for fear of proceedings for libel, to limit themselves to events of which they could provide proof acceptable to a Court of law, records of the past would, we think, be unduly and undesirably curtailed.

(3) *Group Defamation*

30. A considerable body of evidence has been tendered to us dealing with what may conveniently be described as Group Defamation—that is to say, false statements vilifying not identifiable individuals, but groups or classes of persons distinguishable by race, colour, creed or vocation. Under the existing law, such statements cannot form the subject of civil proceedings for libel or slander. If they are made with intent to incite persons to commit any crime, to create a disturbance, to raise discontent or disaffection among His Majesty's subjects, or to promote ill-will and hostility between different classes of such subjects, they may amount to the crime of seditious libel; but prosecutions for seditious libel, save in the most flagrant cases, may easily present the appearance of political prosecutions which the English tradition tends to view with disfavour.

31. The most widespread and deplorable examples of Group Defamation at the date at which we commenced our sittings were directed against the Jews; but complaints were also made to us of unfounded vilification of particular trades. It is, we think, symptomatic of Group Defamation that the subject matter varies with current internal and external political trends. Much as we deplore all provocation to hatred or contempt for bodies or groups of persons with its attendant incitement to violence, we cannot fail to be impressed by the danger of curtailing free and frank—albeit, hot and hasty —political discussion and criticism. No suggestion has been made to us for altering the existing law which would avoid the prohibition of perfectly proper criticisms of particular groups or classes of persons. The law of seditious libel still exists as an ultimate sanction and we consider that the law as it stands affords as much protection as can safely be given.

32. We do not, therefore, recommend any general change in the existing law to deal with Group Defamation.

C. THE SUBSTANTIVE LAW OF DEFAMATION

I. The Assimilation of Libel, Slander and Actions on the Case

33. The existing law draws a distinction of great practical importance between libel and slander actionable *per se* on the one hand, and ordinary slander and actions on the case on the other. Whereas all libels (i.e., defamatory statements communicated by written words or in some other relatively permanent form) are actionable without proof that special damage (i.e., actual pecuniary loss) has thereby been caused to the plaintiff, slanders (i.e. defamatory statements communicated by spoken words or in some other transitory form, whether audible or visible) which do not fall within certain limited and somewhat arbitrarily defined classes of statements, and all non-defamatory falsehoods, whether written or spoken, made maliciously and calculated to cause pecuniary damage, are not actionable unless the plaintiff is able to prove that actual pecuniary loss has directly resulted.

34. It is, in practice, difficult to prove special damage in any action for defamation. A man's reputation as a private individual or in the way of his calling may have suffered grievous harm without its being possible to prove any direct pecuniary loss. His friends may shun him, his professional earnings or his business takings may decrease. But loss of such society does not amount to special damage within the eye of the law, and it is seldom possible to call witnesses to give evidence at the trial that they ceased to deal with the plaintiff because of some slander which had come to their ears. The plaintiff, indeed, is often the person least likely to be told the reason by those who, in such circumstances, have ceased to deal with him.

35. In the result, actions for slander are seldom brought unless the defamatory statement falls within one of the limited categories of statements actionable *per se;* while actions for slander of title or slander of goods or for other false but non-defamatory statements made maliciously and calculated to cause damage are rarely found in the judicial calendar.

(A) *Slander actionable per se and other slanders*

36. The justification for the distinction between slander and libel is said to lie in the impermanence of the spoken word and the limited audience which it can reach. That there were some classes of defamatory statements whose gravity was such as to justify a departure from the general rule that slander should not be actionable without proof of special damage has, for more than three centuries, been recognised by the common law; and the following classes of statements are, at common law, actionable *per se*:—

(*a*) words imputing a crime for which the plaintiff may be made to suffer corporally, i.e., by punishment with at least imprisonment in the first instance;

(*b*) words imputing to the plaintiff certain contagious or infectious diseases;

(*c*) words spoken of the plaintiff in the way of his office, profession or trade and naturally tending to injure or prejudice his reputation therein.

37. Those categories, based upon social conditions and public opinion current more than three hundred years ago, are well settled and, it has been held, are no longer capable of extension by judicial decision. The common law in this field is fixed and rigid. Any further extension or amendment requires

Parliamentary action. This was last taken in 1891 when the Slander of Women Act of that year added to the three common law categories, a fourth class of slanderous statement actionable *per se*, namely—

(*d*) words imputing adultery or unchastity to a woman or a girl.

38. Arbitrary and illogical as the present law is, it does not seem to us that the true solution lies either in abolishing slander actionable *per se* entirely or in assimilating slander to libel and making *all* defamatory statements actionable without proof of special damage. Slander is often trivial, not infrequently good-tempered and harmless, and in that form commonly enough a topic of conversation. If all slander were actionable *per se*, the scope for trivial but costly litigation might be enormously increased. So far as slander in ordinary conversation is concerned, it is not normally taken seriously by speaker or listener, and, in the great majority of cases, does little or no harm.

39. The present exception to the general rule that actions for slander to be successful require proof of special damage has, indeed, no logical basis or principle upon which to rest, but it exists and forms a not unsatisfactory compromise which gives adequate protection in the common run of cases, whilst avoiding the encouragement of trivial complaints. As a working rule, it is not amiss.

40. It is true that, in Scotland, no differentiation is made between libel and slander. All statements which would be actionable in written form are equally actionable if spoken. We understand that, in practice, no serious disadvantages have been suffered, nor any excessive litigation experienced. Nevertheless, the development of the law and the historical background of the two countries are different and a change of the law in England and Wales at the present date would, we think, be likely to encourage frivolous actions which would, and do, receive short shrift in a country with a continuous experience of a law under which libel and slander are treated alike.*

41. There are, however, two respects in which we think that a strong case has been made out for an amendment of the existing law. These relate to broadcasting and to the re-definition of certain of the common law categories of words actionable *per se*.

(1) *Broadcasting*

42. A defamatory statement transmitted over the radio in a broadcast, reaching, as it may, an audience of many millions, is calculated to cause as much, if not more, damage than a written report in a newspaper however large its circulation. The existing law as to defamatory broadcasts is not wholly clear and has not been the subject of any English decision. The view generally accepted in this country is that a broadcast which is read from a written script—as is the practice in the great majority of broadcasts—amounts to libel, while a broadcast spoken *extempore* amounts only to slander. For so artificial a distinction, there can be little justification.

43. We consider that all defamatory broadcast statements should be treated as libels and we accordingly recommend that statements or images broadcast by radio-transmission and capable of reception by means of radio-receivers should be deemed to be published in writing by the person, firm or corporation responsible for the broadcasting of such statements or images.

* Two members of the Committee (Mr. Richard O'Sullivan, K.C., and Professor E. C. S. Wade) favour the assimilation of the law of slander with that of libel. They consider that no adequate reason now exists for perpetuating a distinction which originated by an accident of English legal history, finds no place in Scots law, and has led to a confusing volume of case-law. They point out that for more than one hundred years, there has been a substantial body of legal opinion in favour of assimilation.

(2) *Categories of statements actionable per se*

44. The well settled common law rule that words imputing a crime punishable corporally are actionable *per se* does not seem to us to call for amendment or comment. It has not worked unsatisfactorily in practice and has given rise to few anomalies.

45. The same cannot be said of the category of words imputing to the plaintiff an infectious or contagious disease. This category was created before the institution of the present system of public health and the compulsory notification and isolation of infectious cases. The basis of the rule appears to have been that such a defamatory statement would, of its nature, cause the plaintiff to be avoided or shunned. It is anomalous to-day that it should be actionable *per se* to say of a person that he is suffering from a contagious disease, while it is not actionable *per se* to say that he is insane or suffering from *delirium tremens;* but we are unable to recommend any alternative classification of diseases which would prove satisfactory. We do not, however, suggest a complete abolition of this category of defamatory statements actionable *per se*. Very few actions for slander are, in fact, brought under this head, but the present category does include both venereal disease and such contagious skin complaints as are often caused by personal uncleanliness. These are types of diseases in respect of which we consider that an action for slander without proof of special damage ought still to lie, and we think that any attempt to alter the existing law by amending the definition might lead to as great anomalies as the existing common law definition without any corresponding public advantage.

46. To alter the common law rule would, in any event, give rise to considerable litigation before the limits of the new definition were precisely defined by judicial decision.

47. By far the most important category from the practical point of view is the third, namely—

> Words spoken of the plaintiff in the way of his office, profession or trade and naturally tending to injure or prejudice his reputation therein.

In order to establish a right of action without proof of special damage, it is an essential condition that the words should be spoken of the plaintiff in the way of his office, profession or trade. If the words, although attributing to the plaintiff such habits as immorality or insobriety and the like, which would be extremely harmful to his reputation in his calling, are spoken of him, not in the way of his calling, but in relation to his private life, he has no remedy.

48. Thus, to say of the headmaster of a boy's preparatory school that he has committed adultery outside school hours is not actionable without proof of special damage, although the statement is obviously calculated to cause him injury in his profession. This distinction has, in practice, given rise to anomalies, and, in our view, to serious injustices.

49. We recommend that the common law definition should be amended by statute so as to abolish the requirement that the words complained of must actually be spoken of the plaintiff in the way of his calling. Any words naturally tending to injure or prejudice the reputation of the plaintiff in his office, profession or trade, should be actionable without proof of special damage, whether or not they are spoken of him in the way of his office, profession or trade.

(B) *"Actions on the Case"*

50. Actions on the case, by which are meant, in the words of Bowen L.J. in *Ratcliffe* v. *Evans* (1892, 2 Q.B. 524) "actions for written or oral falsehoods not actionable *per se* or even defamatory, where they are maliciously published, and are calculated in the ordinary course of things to produce and do produce actual damage" require, as their definition shows, proof of special damage if they are to succeed. In this category are included actions for slander of title, slander of goods and other false, but non-defamatory, statements of fact made maliciously and calculated to cause damage.

51. The necessity of furnishing proof of special damage has rendered this type of action rare in the extreme; but statements of these kinds may cause very serious damage which, owing to technical rules of evidence, it is impossible to prove strictly as special damage. In the result, the injured person is left without any remedy for the loss which he has suffered. In our view, this constitutes an injustice which should be righted by an amendment of the existing law.

52. In such actions, no distinction is at present drawn between written and spoken words. Consequently, if the law were amended merely by eliminating the necessity for proof of special damage, it would indirectly effect a partial amendment in the existing law as to slander, since a plaintiff would have a remedy upon the case for a false statement, whether defamatory or not, spoken maliciously and calculated to cause damage, whereas an ordinary action for slander does not lie for a false defamatory statement so spoken unless it falls within one of the special categories of slanderous statements actionable *per se*.

53. For the reasons given in paragraphs 38 to 41, we do not regard such an amendment of the law of slander as desirable, and in order to avoid it, we think that a distinction—which is analogous to that which, if our previous recommendation is accepted, will exist in the case of slander—should also be drawn in actions on the case, namely between false statements which are calculated to cause damage to the plaintiff in his office, profession or trade, and false statements which, although calculated to cause damage to the plaintiff, are not calculated to do so in his office, profession or trade. The former should be actionable without proof of special damage, irrespective of whether they are written or spoken; the latter should be actionable without proof of special damage only when they are written. Proof of express malice would, of course, remain a necessary ingredient of the cause of action and no action would lie except in respect of words having a natural tendency to cause actual pecuniary damage.

54. We therefore recommend that the existing law as to actions on the case for slander of title, slander of goods and other malicious falsehoods, should be amended so as to provide that an action should lie without proof of special damage—

(*a*) for any false statement of fact made maliciously and calculated to cause actual pecuniary damage to the plaintiff otherwise than in his office, profession or trade, if such false statement is published in such manner as would constitute, if the words were defamatory, the publication of a libel; and

(*b*) for any false statement of fact, however published, made maliciously and calculated to cause actual pecuniary damage to the plaintiff in his office, profession or trade.

II. Unintentional Defamation

55. In an action of defamation, the question whether the words complained of are defamatory of the plaintiff is determined by an objective test:— "Is the matter complained of defamatory, i.e. does it in fact tend to lower the plaintiff in the estimation of right-thinking men or cause him to be shunned and avoided or expose him to hatred, ridicule or contempt?"

56. In ascertaining the meaning of the words, the criterion is not: "What did the defendant intend the words to mean?" It is: "What would the words reasonably be understood to mean in the light of the surrounding circumstances as known to the persons to whom they were published?"

57. That is the common law rule. A considerable body of criticism has been directed against it. This is only to be expected in view of the fact that in the past, heavy damages have been awarded in libel actions against defendants who had no idea that the words published would be defamatory of any existing person and, in some cases could not, by the exercise of any reasonable care, have ascertained that they would be. This result offends one's sense of justice.

58. A facile remedy for the injustice which may result from the application of the common law rule would be to alter it by legislation and to substitute a subjective for an objective test, that is to say, to determine the question whether words are defamatory by the answer to the question "What did the defendant intend the words to mean?" instead of the answer to the question "What would the words reasonably be understood to mean in the light of the surrounding circumstances as known to the persons to whom they were published?"

59. This remedy has simplicity to commend it. It would undoubtedly be welcomed by writers, publishers and printers who, as the law stands, may find themselves involved in a liability for damages for a wholly innocent act. On the other hand, it is unquestionable that there are cases (although it is possible to exaggerate their number) where a person who has a really genuine grievance would be left without any kind of redress if the common law rule were simply reversed. It would not seem right that a person whose reputation had been seriously affected by a defamatory statement should have no opportunity to claim to have his reputation vindicated in our Courts merely because no one had intended to defame him.

60. The types of defamatory statement in respect of which authors, publishers and printers have suggested that protection from liability for damages is most needed fall into two classes:—

(1) Statements not *intended* to refer to the plaintiff at all, e.g.

(*a*) statements intended to refer to a fictitious character, but in fact defamatory of an existing person:—

Example: "Whist! There is Artemus Jones with a woman who is not his wife, who must be, you know—the other thing"—where Artemus Jones is intended to be a fictitious character, but is, in fact, the name of a real person. (*Hulton* v. *Jones* 1910 A.C. 20.)

(*b*) statements truthfully made of an existing person but in fact, defamatory of another existing person:—

Example: "Harold Newstead, 30 year old Camberwell man who was jailed for nine months, liked having two wives at a time"—where there are two persons named Harold Newstead living at Camberwell, one of whom—not the plaintiff—was convicted of bigamy. (*Newstead* v. *London Express Newspaper Ltd.* 1940 1 K.B. 377.)

(2) Statements intended to refer to an existing person which, although *ex facie* harmless are, by reason of facts unknown to the author or publisher, defamatory either of the person intended to be referred to, or of some other person.

Example: A caption under a newspaper photograph: "Mr. M. C. the racehorse owner and Miss X. whose engagement has been announced"; where Mr. M. C., who himself gave the information to the newspaper, is in fact already married to Mrs. C., plaintiff in the the action. (*Cassidy* v. *Daily Mirror Newspapers Ltd.* 1929 2 K.B. 331.)

61. It was urged by a number of witnesses that in these three classes of cases, which for convenience, we refer to as cases of "unintentional defamation" the lack of any intention to defame, at any rate, if coupled with the absence of any negligence on the part of the defendant, should constitute a complete defence to any action for defamation. To accept so drastic a proposal, however, would leave the equally innocent victim of the defamatory statement not merely without any reparation of the injury sustained to his reputation, but also without any means of clearing his name publicly. The defamer might be willing to publish an apology; but to do so would be an act of grace on his part. There would be no method of compulsion, nor would there be any control over the form of the apology or of the publicity given to it.

62. While, in our view, some amendment of the existing law is required to deal with cases of "unintentional defamation" it is essential that any such amendment should ensure that all reasonable steps are taken to clear the reputation of the injured person by a correction and apology which should be given publicity appropriate to the circumstances of the original defamatory publication. If these steps are taken, we think that practical justice will be done without the award of monetary damages.

63. What is the appropriate form of the correction and apology and what is suitable publicity to be given to it must depend upon the circumstances of the particular case. It is impossible to generalise. No doubt in the commonest case, namely, of an unintentional libel published in a newspaper or periodical, a correction and apology published in one or more subsequent issues of the same newspaper or periodical would be proper. In the event of an unintentional libel contained in a book, its recall, together with a correction and apology published as an advertisement in a local or suitable national newspaper, might meet the case. But we do not recommend that this method of dealing with unintentional libels should be limited to libels published in newspapers, periodicals and books. It should apply to all classes of "unintentional defamation" as, for example, unintentional libels contained in private correspondence, where an apology to which wide publicity was given would be unnecessary and might, indeed, be harmful.

64. We do not recommend that the publication of a suitable correction and apology should absolve from liability for damages a defendant who has *not* taken all reasonable precautions to ensure that what he proposes to write, publish or print is not defamatory. If there has been a want of reasonable care on the part of the defendant in publishing defamatory matter, he should be subject to the ordinary common law liability.

65. The principle which we recommend is easy to state. Its practical and procedural application presents difficulties. There will, no doubt, be cases which the defendant will contend are cases of "unintentional defamation"

but which the plaintiff will contend are not, either because of an actual intention to defame, or, more often, because of a lack of reasonable care on the part of the defendant.

66. If a plaintiff, after accepting a correction and apology, were allowed to continue his action on the chance of establishing either an intention to defame or a lack of reasonable care on the part of the defendant, our proposal would fail of its practical object. We therefore recommend that while, on the one hand, a defendant should not be entitled to force an unwilling plaintiff to accept a correction and apology, on the other hand, a plaintiff who elects to accept such correction and apology should be debarred from proceeding with an existing action or bringing any further action against the defendant in respect of the same words. If the plaintiff does not accept the offer by the defendant of a correction and apology, he should be permitted to continue his action, but the fact that such offer has been made should be a defence to the action unless at the trial it appears that the defendant was guilty of an intention to defame or of lack of reasonable care.

67. This proposal, however, would lose much of its practical efficacy unless there were some simple and expeditious way of determining what is the proper form of the correction and apology in any particular case, and what is the proper method of giving publicity to it. If the parties can agree on this—so much the better. But if they cannot, we think it should be open to either party to apply by Summons to a High Court Judge sitting in chambers to settle the form of the correction and apology and the manner in which it is to be published. The Judge's decision should be final; there should be no right of appeal.

68. The correction and apology, if it is to serve its purpose, should be made promptly. It should be offered by the defendant as soon as practicable after he has been given notice of the libel by the person defamed. Normally, such notice would be given by letter, but there may be exceptional cases—where, for example, an injunction might be appropriate if the defendant were unwilling to cease further publication of the libel—in which the plaintiff is justified in issuing a writ forthwith. In such a case, the writ would constitute the notice upon receipt of which the defendant should make his offer to publish a correction and apology; but the practice of issuing a writ which is not preceeded by an ordinary letter giving notice of the libel should not be encouraged. When it is done unnecessarily, it can be dealt with under our proposals for dealing with the costs.

69. As a rule, where a case of " unintentional defamation " is disposed of by a published correction and apology, the person defamed will incur some legal costs—although these will be trivial in comparison with the costs of an ordinary action. We think that normally the reasonable costs of the person defamed should be met by the person responsible for the defamatory statement. Generally, no doubt, their amount will be agreed at the same time as agreement is reached as to the form and manner of publication of the correction and apology; but in order to avoid the possibility of inflated claims for costs, there should be a right to apply to have them taxed in the ordinary way by a taxing master. If the action has already been started by a writ before the offer of a correction and apology is made and accepted, it will be necessary to take out a Summons in the action to stay all further proceedings upon the publication of the correction and apology. The question of costs, including the costs of the writ and proceedings in the action prior to the stay, can then be dealt with upon the Summons. If the Judge in Chambers is of opinion that, in the circumstances, the issue of a writ was unnecessary, he can, in his discretion, disallow the costs thereof.

If no writ has been issued, but an application to the Judge in Chambers is made by originating summons owing to the inability of the parties to reach agreement either as to the form of the correction and apology or as to the manner and extent of its publication, the costs of such Summons and of the procedure leading up to it will be in the discretion of the Judge, who should be entitled to deprive the person defamed of the whole or part of his costs if he had acted unreasonably in refusing to reach an agreement.

70. The above proposals under which the publication of a correction and apology or the offer to publish one would amount to satisfaction of a cause of action for defamation should, in our view, apply only to cases which fall within the classes which we have described as " unintentional defamation " and to such cases only where the publication of the defamatory statement was made without any want of reasonable care on the part of the person responsible therefor. The right of a defendant in other classes of cases to publish an apology—with or without an admission of liability and with or without the consent of the plaintiff—and to rely upon the apology in mitigation of damages, if any, would not be affected. It would, however, be necessary for the defendant, when offering to publish an apology, to make it clear to the plaintiff whether the offer is made in satisfaction of his claim under the statutory provision which will be necessary to implement our proposal, or whether it is an ordinary offer of an apology in mitigation of damages.

71. There is often more than one person who, if sued, would be liable for a defamatory publication. A common example is that of the writer of a newspaper article and the editor, the publisher and the printer of the newspaper in which the article appears. In some cases, each of these persons may satisfy the conditions necessary to bring the defamatory statement, so far as he is concerned, within the classes which we have described as " unintentional defamation." In other cases, one or more of such persons may have been guilty either of an intention to defame or want of reasonable care, and so fall outside the scope of our proposals, while the rest, although jointly responsible for the publication, may have been innocent of any such intention or want of care, and ought to be entitled to the benefit of them. We recommend at a later stage in this Report that the existing rule of joint liability in actions for defamation should be altered so as to abolish the liability of a defendant whose liability under the existing law arises solely as a result of the state of mind, i.e., malice, of a person other than himself who is jointly responsible with him for the publication complained of. It is accordingly necessary to make our proposals as to " unintentional defamation " consistent with this principle.

72. If all the persons who, if sued, would under the existing law be jointly liable for that defamatory statement fulfil the conditions necessary to make the defamatory statement, so far as each of them is concerned, a case of " unintentional defamation " it would not be reasonable to allow the plaintiff to require the publication of a separate correction and apology by each of them. If they are given notice in time to do so, they should be entitled to offer to join in publishing a joint correction and apology, and if such offer is accepted, to rely upon the correction and apology as a bar to any further proceedings against any of them in respect of the defamatory publication complained of. If any of the persons jointly liable under the existing law for the publication complained of does not receive notice of the defamatory statement in time to enable him to offer to join in the correction and apology, or if his offer to join is rejected by the plaintiff, he should be entitled, nevertheless, to rely upon the publication of the correction and apology, not as a

bar to further proceedings against him by the plaintiff, but as a defence in such proceedings if he is able also to establish that he in fact fulfils the other condition necessary to bring the defamatory statement within the class of " unintentional defamation."

73. There is one question arising out of the above recommendations on which we have been unable to reach a unanimous conclusion. That is as to the onus of proof that the defendant had exercised reasonable care to ensure that what he wrote was defamatory of the plaintiff. On the one hand, it is a matter which is peculiarly within the knowledge of the defendant himself as to what precautions he in fact took. On the other hand, to place the onus on the defendant of proving that he took reasonable care would, in the view of some members of the Committee, weigh the scales unduly against him in jury actions. In the absence of unanimity, we prefer to leave

REPORT OF THE COMMITTEE ON THE LAW OF DEFAMATION

Cmd. 7536

ERRATA

Page 20, paragraph 73, line 4:—

" what he wrote was defamatory " *should read* " what he wrote was not defamatory ".

Page 49, Summary of Recommendations. (A) Substantive Law.

Paragraph (4) *Unintentional Defamation,* line 3:—

" aware " *should read* " unaware ".

LONDON: HIS MAJESTY'S STATIONERY OFFICE: 1948

(63107)

published. It was pointed out that, as the law now stands, there is nothing to prevent a newspaper from resuscitating and giving publicity to an isolated youthful lapse on the part of a person who, having long ago repented and made amends, has rightly acquired a high reputation in the eyes of his fellow men.

77. A hypothetical example is the case of a woman who, in her adolescence, bore an illegitimate child, but has since become a highly respected member of the community.

78. While we have great sympathy with this point of view, it seems to us that the hypothetical example given is one of those cases where sympathy with the individual may produce an inclination to adopt a rule of law which is detrimental to the interests of the community as a whole. If every true but defamatory statement were to be actionable unless its publication were in the public interest, the task of the author or the journalist would become impracticable. He would have to guess—and to guess rightly—in advance whether a Court would decide that the publication of the defamatory truth in question was in the public interest. He would be prudent to err upon the side of caution and his publisher and printer would, if necessary, enforce such prudence upon him. Public discussion might be stifled and honesty excised from contemporary literature. Furthermore, the test of public interest is

inapplicable to cases of defamatory statements contained, not in books, periodicals or newspapers, but—like so many defamatory statements—in private documents and correspondence. The evil which the proposal seeks to remedy must, in our view, be left, in the more serious cases, to be dealt with, as it can, under the existing criminal law and, in other cases, to the regrettably less efficacious sanction of good taste, and to the internal control by the press which we have suggested above.

Substantial Justification

79. Although, in order to succeed in the defence of "justification" it is only necessary to prove that the substance or sting of the libel is true, this must be done in respect of each separate charge contained in the libel, otherwise the defence of justification fails. It may well be that a libel contains a whole series of serious charges which the defendant succeeds in proving up to the hilt and one, quite minor, charge which he does not succeed in proving. In such a case, although, in view of the truth of the major charges, the minor charge which is false can have caused no appreciable damage to the plaintiff's reputation, the plaintiff is entitled to a verdict and to damages, and is normally awarded the general costs of the action.

80. Where a defendant knows in advance that he cannot prove some minor charge which is severable from the rest, it is open to him to admit liability in respect of that charge and to make a payment into Court in satisfaction. This presents the disadvantage that, if the plaintiff takes out the money paid in, he is entitled to his costs up to the date of payment in, and, in effect, obtains an undeserved whitewashing of his reputation, since he is in a position to say that he has recovered damages from the defendant for the libel of which he complains, although ninety-nine per cent. of the libel was, in fact, true.

81. In this respect, we think that the existing case law has in the course of its evolution, tended to encourage too close a dissection of each sentence, indeed of each phrase, in a defamatory statement and to overlook the real effect of the statement when read as a whole. Judged by first principles, a plaintiff should not be entitled to recover damages if the defendant proves that the main charge or gist of the libel is true, even though he fails to prove the truth of some minor charge, provided that such minor charge does not add appreciably to the injury to the plaintiff's reputation.

82. We accordingly recommend that the existing law should be amended so as to allow a defendant to succeed in a defence of "justification" if he proves that so substantial a portion of the defamatory allegations are true as to lead the Court to the view that any remaining allegation which has not been proved to be true does not add appreciably to the injury to the plaintiff's reputation.

IV. The Defence of "Fair Comment"

83. It is in relation to the defence of "fair comment" that the common criticism that the law of defamation is unduly technical appears to us to be based upon the firmest ground. That it should be a defence in an action for libel that the words complained of were "fair comment upon a matter of public interest" is an important practical safeguard of freedom of speech; and it is, in our view, in the public interest that this defence should be maintained in its original force.

84. Whereas the defence of " justification " is available in respect of both statements of fact and expressions of opinion, the defence of " fair comment " is available only in respect of expressions of opinion. If " justification " is pleaded in respect of expressions of opinion, the defendant takes upon himself the burden of satisfying the tribunal, not merely that the expressions of opinion are such as might be fairly and honestly held, but that they are correct. Thus, if it were stated of a politician " X's speech on the current situation was a piece of political chicanery," the defendant, if he pleaded justification, would have to satisfy the tribunal that the speech referred to was in fact a piece of chicanery. But if " fair comment " is pleaded, the defendant is entitled to succeed if he satisfies the Court that the opinion which he expressed, although it may be exaggerated, obstinate or prejudiced, was in fact honestly held by him. In the above example, the defendant would thus only have to satisfy the tribunal that he himself honestly thought the speech to be a piece of chicanery, although the Court might itself have taken a different view of the character of the speech referred to.

85. To this rule, there is a minor exception where the comment is not objective criticism but imputes corrupt or dishonourable motives to the plaintiff. In such a case, it is not sufficient for the defendant to establish that the comment expresses an opinion honestly held by him; he must show that it was also reasonably warranted by the facts. This exception does not appear to us to detract from the general value of the defence of " fair comment." It maintains a just balance between liberty of speech and licence to defame.

86. It is extremely rare for defamatory matter to consist solely of expressions of opinion. Normally, where the defence of fair comment should be available, the matter complained of consists partly of statements of fact and partly of expressions of opinion (i.e., comment) based either upon those facts alone or upon those facts in conjunction with other facts not necessarily expressed in the subject matter complained of. In this, which is the most common case, we think it is plain that, provided the matters dealt with are of public interest, the defendant ought to succeed in his defence if the gist or sting of the facts stated is true and the expressions of opinion are fair comment in the sense mentioned above, i.e., opinions which are honestly held by the defendant. If, however, they impute dishonourable or corrupt motives to the plaintiff, the defence should only be successful if the opinions expressed are also reasonably warranted by the facts.

87. The defence of " fair comment " has, however, in the course of judicial decisions during the last half-century, suffered greatly from what we may describe as over-refinement. It has been held that comment, in order to be " fair comment," must be based upon facts truly stated—a proposition with which, if taken broadly, no one would quarrel. But in practice, the rule has been applied with a continually growing rigidity, with the result that, where the libel complained of consists in part of statements of fact and in part of expressions of opinion, the defence of " fair comment " may fail *in limine* if one of the defamatory statements of fact contained in the alleged libel is incorrect in some minor and apparently unimportant detail.

88. The technical difficulties in the way of a defendant desiring to rely upon this plea do not end here. It is not always easy to distinguish between fact and comment. A particular statement may be regarded by some as fact, and by others as comment. It is, of course, for the Judge to rule whether a particular statement is capable of being regarded as fact or not, but subject to that ruling, the ultimate decision as to what is fact and what is comment lies with the jury. This presents an additional element of

uncertainty for a defendant relying upon the defence of "fair comment." This aspect of the matter is, however, more closely bound up with questions of practice and procedure, with which we deal in a later section of our Report. For the moment, we are concerned only with proposed changes in the substantive law.

89. In our view, the primary defect in the existing substantive law lies in the rigidity with which the rule is applied that the plea of "fair comment" must fail unless *all* the defamatory facts contained in the matter complained of and on which the comment is based are truly stated. So long as the gist or sting of any defamatory facts stated is true, and the comment is "fair" on the true facts, we think that the defence ought to succeed.

90. We accordingly recommend an amendment of the existing law analogous to that which we have recommended in relation to the defence of "justification," namely, that a defence of "fair comment upon a matter of public interest" should be entitled to succeed if (*a*) the defendant proves that so much of the defamatory statements of fact contained in the alleged libel is true as to justify the Court in thinking that any remaining statement which has not been proved to be true does not add materially to the injury to the plaintiff's reputation, and (*b*) the Court is also of opinion that the facts upon which the comment is based are matters of public interest and the comment contained in the alleged libel was honestly made by the defendant.

91. If the comment imputes corrupt or dishonourable motives to the plaintiff, the defendant should be obliged to satisfy the Court, as under the existing law, that the comment was not only honestly made, but was also reasonably warranted by the facts.

V. The Defence of "Absolute Privilege"

92. The defence of "absolute privilege" which is not liable to be defeated by proof that the defendant in publishing the defamatory matter complained of was actuated by malice, is available only in a strictly limited number of cases in connection mainly with Parliamentary and judicial proceedings. The actual statements made in the course of such proceedings are absolutely privileged, but the reports of such proceedings are not, except in the case of reports published by order of either House of Parliament and in the case of fair and accurate reports of judicial proceedings published contemporaneously in a newspaper. With the exceptions mentioned above, reports of such proceedings are the subject of qualified privilege, i.e., the defence is liable to be defeated by actual malice on the part of the defendant.

93. It does not appear to us that any extension of the categories of cases in which "absolute privilege" subsists would be justified, nor, indeed, has the evidence tendered to us disclosed any representative body of opinion in favour of such extension.

94. There is one aspect of the matter to which, however, we consider that attention should be drawn. Absolute privilege, in addition to attaching to statements made in the course of judicial proceedings before the ordinary Courts of Justice, also attaches to statements made in the course of proceedings before such other tribunals as have attributes similar to the attributes of Courts of Justice, when such tribunals are acting in a manner similar to that in which Courts of Justice act but not otherwise. The creation in growing numbers of administrative tribunals tends to blur the distinction between those tribunals which have attributes similar to those of Courts of Justice and follow principles similar to those upon which Courts of

Justice act, and those tribunals whose functions are primarily administrative. We respectfully draw attention to the importance, when fresh tribunals are set up by Act of Parliament, of defining their functions and methods of procedure with sufficient particularity so as to indicate clearly whether they are performing judicial or administrative functions, and thus make it easier to determine whether the privilege is absolute or not. We see no reason why the Acts creating them should not deal specifically with this matter.

VI. The Defence of "Qualified Privilege"

95. The defence of "qualified privilege" which is liable to be defeated by proof that the defendant in publishing the defamatory matter complained of was actuated by malice, exists partly at common law and partly as a result of statutory provisions.

96. Speaking very broadly "qualified privilege" at common law exists wherever the person publishing the defamatory statement (whether libel or slander) is under a duty to, or has an interest in, publishing it, and each person to whom it is published has a corresponding duty or interest in receiving it. In the course of the evidence submitted to us, little or no criticism has been directed towards this branch of the law of defamation—which is of vital everyday importance to all members of the community—and we do not recommend any change.

97. "Qualified Privilege" as a creation of Statute exists by virtue of Section 3 of the Parliamentary Papers Act, 1840, and the Law of Libel Amendment Act, 1888.

98. Section 3 of the Act of 1840, which extends its protection to all members of the public and is not limited to "newspapers" deals primarily with Parliamentary proceedings and Parliamentary papers. It appears to work satisfactorily in practice; it has not been the subject of any criticism in the evidence tendered to us, and we do not recommend any alteration.

99. The Law of Libel Amendment Act, 1888, applies only to "newspapers" as defined in that Act, and has been the subject of a considerable amount of comment and criticism. The criticism, however, has been directed not to the actual operation of the Act in those cases to which it applies, but to its limitations. The consensus of opinion is that the principles and procedure laid down are satisfactory. All the proposals which have been made relate to an extension of the provisions of the Act to classes of periodicals and to categories of reports which do not at present fall within its scope.

(1) *The Definition of "Newspaper"*

100. For the purposes of the Law of Libel Amendment Act, 1888, a "newspaper" is defined as—

> "any paper containing public news, intelligence, or occurrences, or any remarks or observations thereon printed for sale, and published in England or Ireland periodically, or in parts or numbers at intervals not exceeding twenty-six days between the publication of any two such papers, parts or numbers."

101. This definition, while it includes daily, weekly and fortnightly periodicals, excludes monthlies and quarterlies as well as annuals. The purpose of the Act as a whole is to provide protection for reports of current news of public interest which may be published before its accuracy can be ensured. In limiting the protection provided by the Act to periodicals published at less

than monthly intervals, it was, no doubt, assumed by Parliament in 1888, that monthlies and quarterlies would have sufficient opportunity to sift the accuracy of the facts contained in any reports published by them.

102. In our opinion, the changes in publishing methods since 1888, and the practice of monthly publications to include the most recent news falling within their sphere, have made it desirable that the protection of the Act should be extended to them. We understand that, for technical reasons in connection with dates of publication, there may at times be a five week's interval between two consecutive numbers of a monthly periodical.

103. We accordingly recommend that the protection given to a " newspaper " by the Law of Libel Amendment Act, 1888, should also be given to periodicals published at intervals not exceeding 36 days.

(2) *Reports entitled to Privilege*

104. Section 4 of the Law of Libel Amendment Act, 1888, grants qualified privilege to a fair and accurate report published in any newspaper of—

(*a*) a public meeting, i.e. any meeting *bona fide* and lawfully held for a lawful purpose, and for the furtherance or discussion of any matter of public concern, whether the admission thereto be general or restricted;

(*b*) any meeting (except where neither the public nor any newspaper reporter is admitted);

(i) of a vestry, town council, school board, board of guardians, board or local authority formed or constituted under the provisions of any Act of Parliament, or of any committee appointed by any of the above-mentioned bodies;

(ii) of any commissioners authorised to act by letters patent, Act of Parliament, warrant under the Royal Sign Manual, or other lawful warrant or authority;

(iii) of any select committees of either House of Parliament;

(iv) of justices of the peace in quarter sessions assembled for administrative or deliberative purposes.

The Act also extends qualified privilege to—

" the publication at the request of any Government Office or Department, officer of state, commissioner of police or chief constable of any notice or report issued by them for the information of the public."

105. Apart from the fact that such privilege is liable to be defeated by malice, the Act contains the further safeguard that the defence shall not be available to a newspaper if it is proved that the defendant has been requested to insert in the newspaper in which the report or other publication complained of appeared, a reasonable letter or statement by way of contradiction or explanation of such report or other publication, and has refused or neglected to do so.

106. The list of reports entitled to privilege which has been set out above reflects the matters which were of interest to the public at the close of the Nineteenth Century when the Law of Libel Amendment Act, 1888, was passed. It has been urged upon us on behalf of the Press that changes in social and administrative conditions since that date, and the increasing interest in foreign affairs, have rendered inadequate the categories of reports entitled to privilege, and that the time is now ripe for a considerable extension.

107. We agree with this suggestion. Moreover, we consider that the right to the insertion of a statement in contradiction or explanation—which corresponds to the *droit de reponse* existing under many Continental systems of law—is one which, though valuable in the case of reports of meetings of a local or limited character, is unsuitable and liable to abuse in the case of reports of such bodies as the United Nations or a foreign Parliament.

108. Had not the practical difficulties proved insuperable, we should have desired to add to the list of reports entitled to qualified privilege, reports of proceedings in some foreign courts. But the legal systems of the different countries of the world vary considerably and drastic changes in the character of their judicial tribunals may occur with little previous warning. Legal proceedings may be of a political character, and may take place *in absentia.* We have found it impossible to put forward any criterion of general application which could be adopted to limit and define such foreign courts as maintain a standard of justice and a method of procedure which would justify our recommending that reports of their proceedings should be entitled to qualified privilege without any *droit de reponse* on the part of the person defamed. Equally, we feel that it would be objectionable to grant a *droit de reponse* in such cases since, in effect, this could lead to a " re-trial " of foreign legal proceedings in an English newspaper upon necessarily inadequate material and without any of the safeguards which legal proceedings should ensure. We have accordingly felt reluctantly compelled to omit reports of foreign legal proceedings from our recommendations for the extension of the classes of reports entitled to qualified privilege.

(3) *Recommendations*

109. We recommend that the classes of reports subject to qualified privilege should be extended, and that they should be re-classified into two categories, namely those in which there should be no obligation upon the newspaper to publish at the request of the person defamed, a letter or statement in contradiction or explanation, and those in which this *droit de reponse* should be a condition to be fulfilled by a newspaper relying on the defence of qualified privilege.

110. (A) The reports which, in our view, should be entitled to qualified privilege *without* placing upon the newspaper the obligation to insert, at the request of the plaintiff, any letter or statement by way of explanation or contradiction, are the following:—

(*a*) Any fair and accurate reports of any debate or proceedings in public—

(i) of a house of any legislature in the British Commonwealth and Empire;

(ii) of any body which is part of the legislature of a foreign Sovereign State or any federal unit of such Sovereign State, or of any body duly appointed by the legislature or executive of such Sovereign State to hold a public inquiry on a matter of public importance;

(*b*) Any fair and accurate reports of the proceedings held in public of any international body of which the Government of the United Kingdom is a member or to which it sends a representative, or of any Committee or Sub-Committee of any such body;

(*c*) Any fair and accurate report of the proceedings held in public of any international Court;

(*d*) Any fair and accurate report of the proceedings of any Court exercising jurisdiction over the whole territory of a member of the British Commonwealth or of any federal unit therein and of the High Court of a Colony;

(*e*) Any fair and accurate copy of or extract from—

(i) any register kept pursuant to Statute and which the public are entitled to inspect; or

(ii) any document which is, by law, required to be open to public inspection;

(*f*) any notice or advertisement published by or on the authority of a Judge or Master of the High Court of Justice.

111. (B) The reports which, in our view, should be entitled to qualified privilege, but only upon the condition that the defendant, if requested by the plaintiff, shall insert in the newspaper in which the report or other publication appeared, a reasonable letter or statement by way of explanation or contradiction of such Report, are:—

(*a*) Any fair and accurate report of the findings or decision of any Association as hereinafter defined in relation to any member of the Association over which it exercises control. The Associations in question are:—

(i) Any body of persons, whether incorporated or not, under whatever name, formed for the purpose of promoting or encouraging the exercise of or interest in any art, science, religion, or learning and empowered by their constitutions or rules to exercise control over, or to adjudicate upon, matters of interest or concern to the Association or the actions or conduct of any person subject to such control or adjudication.

(ii) Any body of persons, whether incorporated or not, formed for the purpose of promoting or safeguarding the interests of any trade, business, industry or profession or of the persons carrying on or engaged in such trade, business, industry or profession and empowered by their constitutions or rules to exercise control over, or adjudicate upon, any matters or the actions or conduct of any person connected with or taking part in any such trade, business, industry or profession.

(iii) Any body of persons, whether incorporated or not, under whatever name, formed and constituted for the purpose of promoting or safeguarding the interests of any game, sport or pastime and empowered by their constitution or rules to exercise control over any person connected with or taking part in any such game, sport or pastime, and to the playing or exercise of which game, sport or pastime members of the public are invited or admitted.

(*b*) Any fair and accurate report of the proceedings at a public meeting, namely, a meeting *bona fide* and lawfully held for a lawful purpose and for the furtherance of discussions on any matter of public concern, whether the admission thereto be general or restricted;

(*c*) Any fair and accurate report of the proceedings at a meeting not being a meeting to which both public and newspaper reporters were denied admission:—

(i) of the Council of any Local Government Authority or any Committee thereof;

(ii) of any Commissioners authorised to act by letters patent, Act of Parliament, Warrant under the Royal Sign Manual or other lawful warrant or authority;

(iii) of Justices of the Peace in Petty or Quarter Sessions assembled for administrative or deliberative purposes;

(iv) of any statutory tribunal or statutory board, committee or other statutory body formed or constituted and exercising its powers or duties under the provisions of an Act of Parliament.

(*d*) Any fair and accurate report of the proceedings at a general meeting of any Company constituted as a public Company under the Companies Act, or of any Company or Association constituted, registered or certified, as the case may be, under the provisions of an Act of Parliament or by Royal Charter;

(*e*) Any fair and accurate report of any notice or other matter issued for the information of the public by or on behalf of any Government Office or Department or any Local Government Authority, Officer of State, Commissioner of Police or Chief Constable, or statutory body administering any nationalised industry or undertaking.

VII. The Defence of "Innocent Dissemination"

112. The defence which is commonly referred to as "innocent dissemination" but which is, strictly, a defence of "never published" is open only to persons who have taken a subsidiary part in the publication of a libel. Generally speaking, it is of value to the newspaper distributor or bookseller who can prove that he did not know, and was not negligent in failing to know, that a newspaper or book sold by him contained the libel complained of. To succeed in this defence, such a defendant must establish that—

(*a*) he disseminated the work without knowing that it contained a libel; and

(*b*) there was nothing in the work or in the circumstances in which it came to him or was disseminated by him which ought to have led him to suppose that it contained a libel; and

(*c*) when the work was disseminated by him, it was not by any negligence on his part that he did not know that it contained a libel.

113. Since the defence is available only to those who play subsidiary part in the publication of a libel, the printer of libellous matter is not in a position to take advantage of it.

114. It has been urged upon us in the course of our proceedings by the British Federation of Master Printers that the law should be amended so as to entitle the printer of a libel to avail himself of the defence of "innocent dissemination."

115. While we appreciate the practical difficulty experienced by a printer in knowing whether matter which he is required to print is libellous or not, we do not consider that a sufficient case has been made out for the extension proposed. The printer can insist upon an indemnity or warranty from the person from whom he accepts the order to print. Even in the absence of such an indemnity, he would normally, if sued for libel, be entitled to obtain contribution from the person for whom the libel was printed, and under the Law Reform (Married Women and Tortfeasors) Act, 1935, such

contribution would, if the printer were not knowingly a party to the libel and were not negligent, probably amount to a complete or nearly complete indemnity. It is only where the person for whom the libel was printed is impecunious that the printer is necessarily put to personal loss. His remedy is to assure himself of the financial stability of his customer or to insure against the risk or to make certain that the matter which he prints is not defamatory. In some cases, a defence will be available under the proposed protection which we have recommended under the heading "Unintentional Defamation"; and we discuss another possible defence in the succeeding section of this Report.

VIII. Joint Tortfeasors in Actions for Defamation

116. Where defamatory matter is contained in a book, periodical or newspaper, there are normally a series of publications each of which constitutes a separate tort. First, there is a publication by the author to the publisher for which the author is solely liable. Secondly, there is the publication by the author and publisher jointly to the printer, for which the author and publisher are jointly liable. Thirdly, there is the publication of the printed work to the trade and the public, for which the author, publisher and printer are jointly liable. It is normally in respect of this last publication that proceedings for libel are brought, although it is open to the plaintiff to sue in respect of the separate publications set out above.

117. A plaintiff can bring an action in respect of a joint publication of a libel against any one or more of the persons jointly responsible for the publication. Whether he elects to sue all or only some or one of them, the judgment awarded is a single judgment against all those who are sued, and is enforceable, as to the whole amount, against all or any of them. Until the passing of the Law Reform (Married Women and Tortfeasors) Act, 1935, if the plaintiff elected to sue only one of those jointly responsible for publication, and recovered judgment against him, the judgment was a bar to any subsequent action against any of the others jointly responsible in respect of the same publication. Furthermore, subject to any special contractual arrangements between those jointly responsible for publication, if one of them were forced—as he might be—by the plaintiff to pay the full amount of the judgment, he would have no right to recover any part thereof from any of his co-defendants or from any other joint publisher who was not made a defendant to the action by the plaintiff.

118. By the Law Reform (Married Women and Tortfeasors) Act, 1935, which applies to defamation in exactly the same way as it applies to other torts, the old common law rule as to non-contribution between joint tortfeasors has been amended in two important respects—

(*a*) In the first place, while a plaintiff is still entitled to elect whether he will sue all or only some one or more of the persons jointly responsible for the publication complained of, and is awarded only a single sum of damages which he can recover in full against all or any of those whom he has elected to sue, the judgment in such action does not prevent him from later suing another joint tortfeasor whom he did not make a party to the first action. He cannot, however, actually recover in the aggregate from any of the joint tortfeasors a sum greater than the amount of the damages awarded in the first action; and he may be deprived of his costs in the second action, unless the Court is of opinion that there was reasonable ground for

bringing it. In practice, there is, of course, no reason for bringing a second action, except where the judgment debtor in the first action cannot pay the damages.

(*b*) In the second place, although a single sum is awarded as damages to the plaintiff and is recoverable by him in full against any or all of the joint defendants to the action, the persons—*whether actually sued or not*—jointly responsible for the publication sued upon are, as between themselves, entitled to have the total amount of damages apportioned between them in such manner as the Court may consider just and equitable, having regard to the respective responsibilities of the persons concerned in causing that damage. If, therefore, the sole defendant or one of two or more co-defendants pays, or is forced by the plaintiff to pay, the whole of the damages, he has a right to recover from any other person who is in law jointly responsible with him for the tort, *whether actually a co-defendant or not,* an appropriate proportion of the amount paid by him.

119. The Act does not affect the right of the plaintiff in actions for libel to bring separate actions in respect of each of the three separate publications referred to above; but, in practice, a plaintiff does not, as a rule, avail himself of such right, as he would be unlikely to recover more than contemptuous damages in the second or third actions.

(1) *Release of One Joint Tortfeasor*

120. So far as concerns the position of the plaintiff, there is a special difficulty which—although it may sometimes arise in actions for other torts—is of importance in actions for defamation. Although the common law rule that a judgment against one joint tortfeasor is an absolute bar to an action against another joint tortfeasor in respect of the same tort, has been abolished by Statute, the cognate rule that a release of one joint tortfeasor operates as a release of all still remains.

121. It often happens, in actions for defamation, that one of the defendants desires to pay a sum of money into Court which the plaintiff is willing to accept as releasing that defendant from further liability to him. Under the existing law, however, if the plaintiff takes out the money in Court, this operates as a release of the defendant who has paid the money in, and consequently, under the common law rule, as a release of his co-defendants. The plaintiff, therefore, unless he is prepared to abandon his claim against the remainder of the defendants, is compelled to refrain from taking the money out of Court and the action must proceed against all the defendants as parties, with a consequent increase in costs, which should be unnecessary. This technical difficulty could be avoided if the Act of 1935 were amended—at any rate, so far as actions for defamation are concerned—so as to provide that the acceptance of money paid into Court by one joint tortfeasor, while involving the discontinuance of the action against the defendant who has paid the money into Court, should not operate as a bar to the continuance of the action against the remainder. Any money so taken out of Court should be deducted from the damages finally awarded in the action, but the fact or the amount of any such payment should not be disclosed to the Court until after the conclusion of the trial.

122. We accordingly recommend that the existing law be amended so as to provide that, in actions for defamation against joint defendants, the plaintiff may take out money paid into Court by any one or more defendants in satisfaction of his claim against that defendant or defendants, and may

continue his action against any other defendants; but that any sums received by the plaintiff in consideration of such release shall be deducted from the amount of damages awarded against the defendant or defendants against whom the action is continued.

(2) *Apportionment of Damages*

123. Although the Law Reform (Married Women and Tortfeasors) Act, 1935, provides for contribution between joint tortfeasors, it does not alter the common law rule that the plaintiff is awarded a single sum of damages in respect of a joint tort and is entitled to recover the whole amount from any one of the joint defendants. In practice, he almost invariably recovers the whole of the damages from the defendant whose financial standing is highest, leaving it to that defendant to recover contribution from his co-defendants or other joint tortfeasors.

124. Where all the persons liable to contribute are solvent, no difficulty or injustice arises. The amounts of their respective contributions, if not settled by agreement, can be settled by the Court immediately after the hearing of the action itself. But in many cases one or more of the persons jointly liable is impecunious and in the result the solvent defendant, generally the publisher or the printer, finds himself saddled with the whole of the damages, although, as between himself and his co-defendants, his contribution thereto should be small.

125. It was represented to us on behalf of the Publishers Association and the British Federation of Master Printers that the law should be amended so as to provide that where an action is brought in respect of a joint publication of a libel, instead of a single sum being awarded to the plaintiff by way of damages, a separate amount of damages should be awarded against each defendant and only the sum so awarded should be recoverable by the plaintiff from him.

126. We are not satisfied that any sufficient case has been made out for so differentiating between the law relating to defamation and the law relating to other torts. Furthermore, where it comes to a question as to who is to bear any loss resulting from the impecuniosity of one of the parties to the publication of a libel, i.e. whether it should be the plaintiff, who *ex hypothesi* has suffered the full amount of the damages awarded, or the printer or publisher, who has made it possible for wide publicity to be given to the libellous statement, we think that the loss should fall upon the printer or publisher, who can refuse to print or publish, as the case may be, or can insure against what is one of the risks of his trade.

(3) *Joint Liability where the state of mind of the Defendant is Relevant*

127. In some cases of defamation, namely, where the defence of "fair comment" or "qualified privilege" is available and—if our earlier recommendations are accepted—in cases of "unintentional defamation," liability may depend upon the state of mind of the defendant, i.e. upon the presence or absence of malice, or, in the case of unintentional defamation, upon a knowledge of facts which would make the statement defamatory.

128. Under the existing law, where an action for defamation is brought in respect of a joint publication of a libel, malice on the part of any one of the persons jointly responsible for such publication is sufficient to defeat the plea of "fair comment" or "qualified privilege" so as to render all the defendants jointly liable to the plaintiff.

129. It is, however, only exceptionally in the English law of tort that "malice" or improper motive is a condition precedent to liability. Where defamatory matter is published, in circumstances which render the defence of "fair comment" or "qualified privilege" available, the publication *prima facie* is not tortious at all. It is only when malice on the part of one of the persons responsible for the publication has been established that a publication which would otherwise be lawful becomes an actionable wrong. But the actual damage to the plaintiff's reputation flows from the fact of publication. It is neither increased nor diminished by reason of the existence of malice upon the part of the defendants or one of them. Although, in the absence of malice under the present law, this damage is not recoverable, yet the presence of malice on the part of one defendant renders the whole of the damage recoverable from a co-defendant who may himself be wholly innocent of malice.

130. The following three examples illustrate the effect of the rule that the malice of one defendant infects his co-defendants:—

(i) A literary journal publishes a contributed article containing a critical study of the works of a living writer. On the face of it, the article is perfectly fair criticism on a matter of public interest, but in fact the author of the article is actuated by feelings of enmity towards the writer so criticised. The editor and the proprietor of the journal, although ignorant of that enmity, are liable.

(ii) A newspaper publishes a letter to the editor containing what, on the face of it, is a perfectly legitimate comment upon the policy of a Member of Parliament. Unknown to the editor, the writer of the letter has quarrelled with the Member of Parliament and was actuated by spite in writing his letter. The editor and the newspaper are both liable.

(iii) A dissident shareholder desires to circulate a statement to his fellow shareholders critical of the conduct of the Board, and arranges for it to be printed by a printer. Although the occasion of the publication is *prima facie* privileged, the shareholder is in fact actuated by malice towards the chairman of the Board. The printer is liable.

131. Having regard to the fact that in all cases of this character the publication complained of is not *prima facie* a wrong at all, but only becomes so upon proof of malice, we think that the balance of advantage lies in the abolition of the existing rule that the malice of one defendant infects his co-defendants, except where his co-defendant knew, or ought to have known, of the existence of such malice. The defendant who is actually guilty of malice would remain liable, but his innocent co-defendants would be freed from liability.

132. We accordingly recommend that in actions for defamation where "fair comment" or "qualified privilege" is pleaded by any defendant, such plea shall not be defeated by reason of the malice of any person jointly responsible with him for the publication complained of, whether a co-defendant in the action or not, unless the defendant so pleading knew of the existence of malice on the part of such other person, or unless there was want of reasonable care on his part in failing to know.

(4) *Joint Liability in Cases of "Unintentional Defamation"*

133. We also consider that the special defence which we have recommended should be available in cases of "unintentional defamation" should be severally available to each defendant who has taken part in the joint pub-

lication of a libel. Thus, if an author under the guise of fiction writes matter defamatory of a real person, the publisher will, if our recommendation be accepted, be under no liability if the Court is satisfied that he personally had no knowledge of the existence of the plaintiff, that it was not through any want of reasonable care that he personally had no such knowledge, and that he has published or offered to publish a correction or apology as suggested in our recommendations. The author himself would, of course, remain liable. In the same way, the printer of a journal containing a statement about a real person which was not, on the face of it, defamatory, but which only became so by reason of facts known to persons reading the journal, would also escape liability if he could satisfy the conditions necessary to establish the defence of "unintentional defamation," even although the writer of the statement and the editor of the journal knew the facts in question and themselves intended the statement to be defamatory.

134. This relaxation of the normal rule of joint liability for a joint publication of a defamatory statement will only prejudice the plaintiff where the defendant who is both morally and legally guilty (i.e. the author in the former case, and the author and editor in the latter) is impecunious. In recommending this relaxation, we draw attention to the fact that the defence of "unintentional defamation" would only be available to a defendant who had published or offered to publish a correction or apology as recommended by us above; so that the actual damage to the plaintiff's reputation for which he would recover no pecuniary compensation because the co-defendant was impecunious should be small.

135. We accordingly recommend that the defence of "unintentional defamation" should be available to any defendant in an action for defamation, notwithstanding that the defamatory matter complained of was published jointly by such defendant and any other persons to whom such defence is not available.

(5) *Agreements for Indemnity in respect of libels*

136. We have given careful consideration to the question of agreements for indemnity entered into between authors and publishers or publishers and printers and insurers, whereby one party agrees to indemnify the other against any loss caused by the publication of a libel.

137. Although, in the course of our proceedings, evidence was given that some apprehension exists as to whether such indemnity agreements are legally enforceable, no case has been drawn to our attention in which liability under such an agreement has been repudiated upon the grounds that it is unlawful, except where the person indemnified was *knowingly* a party to the publication of a libel, i.e., himself knew that the work intended to be published was libellous. We do not think such agreements are illegal, but the doubt has been expressed and therefore, although we think it unfounded, we see no objection to the enactment of a provision making them legal save in cases where the statement published was intended to be defamatory.

IX. Limitation of Actions

138. The period of limitation in actions for libel has, since the first Limitation Act was passed in 1623, been the same as for the great majority of other torts, namely, 6 years. No alteration of this period was made in 1939 when the new Limitation Act, 1939, was passed. From 1623 until 1939, actions for slander actionable *per se* constituted an exception from the usual

6 year limitation period; and the period of limitation in such actions for slander was 2 years. This distinction was, however, abolished by the Limitation Act, 1939, and the normal period of 6 years was substituted.

139. It is true that in actions for defamation, any substantial delay in starting proceedings places an additional burden upon the defendant who wishes to plead and establish "justification." Evidence which would have been available at, or shortly after, the publication of the defamatory matter complained of may be lost or destroyed. Witnesses may die or disappear, but this disadvantage is not confined to actions of defamation.

140. In the great majority of cases, a plaintiff who is anxious to clear his reputation will, in the normal course, bring his action as quickly as possible. Moreover, an undue delay in bringing an action may well be regarded as evidence that the damage suffered is small and may be reflected in the sum awarded in the action by judge or jury, as the case may be, and this is borne out by the fact that, in practice, there are very few cases in which any substantial period elapses between the date of first publication of a libel and the commencement of proceedings.

141. In the case of slander actionable *per se,* the previously existing limitation period of two years was deliberately extended to six years as recently as 1939, but we understand that a Committee is now considering the general law of limitation of actions, and we are of opinion that the question of limitation in actions of defamation would best be dealt with by that body. We refrain, for these reasons, from making any proposal for the alteration of the existing period of limitation in the case of actions for defamation.

X. Mitigation of Damages

(1) *Evidence that plaintiff has recovered compensation for similar libels*

142. At common law, the defendant in an action for defamation has no right to give evidence in mitigation of damages that the plaintiff has already recovered damages in respect of other libels to the same purport or effect, or has received or agreed to receive compensation in respect thereof. Consequently, damages are assessed by the jury upon the basis that the libel sued upon was the only defamatory statement which had been made about the plaintiff, and that any damages which they were to award him would be the only recompense which he was receiving for the injury to his reputation.

143. An exception to this rule was made by the Law of Libel Amendment Act, 1888, in respect of libels contained in "newspapers" as defined in that Act; but the common law rule continues in force in respect of all other libels or slanders.

144. While libels contained in newspapers, no doubt, provide the commonest case of a number of different publications of the same libel, e.g. where the libel is contained in an agency report or syndicated feature, we see no logical reason for drawing a distinction between these and other cases. The rule is, in effect, only a rule of evidence. It is for the Judge or Jury, as the case may be, having taken into consideration the nature and scope of any previous publication of a similar libel in respect of which the plaintiff has already recovered or brought an action for damages, or received or agreed to receive compensation, to decide to what extent this should affect the amount of damages which they should award in respect of the publication sued upon.

145. We accordingly recommend that, in any action for defamation, whether or not the matter complained of is published in a newspaper, the defendant should be entitled to give evidence in mitigation of damages that the plaintiff has recovered, or brought other actions for, damages or has recovered or agreed to recover compensation, in respect of any defamatory statement to the same purport or effect as the defamatory statement for which such action has been brought.

(2) *Evidence of the Plaintiff's Bad Character*

146. Up to the year 1882 when the case of *Scott* v. *Sampson* (8 Q.B.D. 491) was decided, there were conflicting decisions as to the extent to which a defendant in an action for defamation could, in mitigation of damages, call evidence to show that the plaintiff had in fact a bad reputation at the time at which the libel was published, or that he had been guilty of conduct—other than that charged in the libel—which, if known, would adversely affect his reputation.

147. In *Scott* v. *Sampson,* where the earlier cases were elaborately reviewed by Cave J., it was held, on the one hand, that the defendant may mitigate damages by giving evidence to prove that the plaintiff is a man of bad general reputation, and that, therefore, the damage to his reputation caused by the libel complained of cannot be so great as it would be in the case of a man of good reputation; but that, on the other hand, the defendant cannot give evidence of specific facts and circumstances to show the disposition of the plaintiff as distinct from general evidence that he has a bad reputation. The grounds given by Cave J. for excluding the last-mentioned type of evidence, i.e. evidence of specific acts of misconduct by the plaintiff not charged in the libel itself, were principally that, in practice, such evidence would impose upon the plaintiff the burden of showing a uniform propriety of conduct during his whole life, and would give rise to interminable issues which would have but a very remote bearing on the question which is in dispute, viz.—to what extent the reputation which the plaintiff actually possesses has been damaged by the defamatory matter complained of. In *Hobbs* v. *Tinling* (1929 2 K.B. 1) where the rule in *Scott* v. *Sampson* was applied to questions asked in cross-examination of the plaintiff, Scrutton L.J. laid stress upon the logical ground for exclusion of such evidence, namely that the foundation of the cause of action for defamation being injury to the reputation which a man possesses in the eyes of his fellows, evidence of specific acts of misconduct not charged in the libel does not prove what his actual reputation was, but proves only that he ought not to have such a reputation.

148. As a pure matter of theory, the doctrine propounded in *Scott* v. *Sampson* may be supported, but, in practice, it leads to curious and, we think, inequitable results.

149. In the first place, it is, in practice, almost impossible to find witnesses prepared to go into the witness box to give evidence that the plaintiff is of general bad reputation. The task of such a witness, who will be subjected to cross-examination by the plaintiff, is so invidious that, however bad the general reputation of the plaintiff may in fact be, it is seldom, if ever, that this kind of evidence can be called. Subject to what is said below as to cross-examination to credit, the rule in *Scott* v. *Sampson* may operate in practice so as to enable a notorious rogue to recover damages for defamation upon the basis that he is a man of unblemished reputation.

150. In the second place, the rule in *Scott* v. *Sampson* does not affect the ordinary rule that any witness may be cross-examined as to " credit "—or, more accurately " credibility "—with a view to showing that he is not to be believed upon his oath. If the plaintiff gives evidence in an action for defamation he—like any other witness—can be cross-examined as to " credibility " and may be asked questions as to any particular acts of misconduct in his past life, with the ostensible object, not of mitigating damages, but of showing that he is not to be believed on his oath. If he denies any matter put to him in cross-examination as to credibility, evidence-in-chief to contradict his denial cannot be called by the defendant. In practice, therefore, if the plaintiff elects to give evidence-in-chief, he can be asked questions as to particular incidents in his past life not charged in the libel, and, although the jury should be directed by the Judge that any admission by the plaintiff ought not to be taken into consideration in mitigation of damages, it is inevitable that, if the jury believes the plaintiff to have been guilty of acts of misconduct which have been disclosed as a result of cross-examination as to credibility, such belief will be reflected in the amount of damages which they award.

151. On the other hand, since these questions are only admissible as to credibility, they cannot be put if the plaintiff elects not to go into the box; or if he goes into the box but gives no evidence-in-chief, and merely submits himself for cross-examination. In the latter case, since he has given no evidence-in-chief to be impeached, cross-examination as to credibility is inadmissible. In the result, a libel action may resolve itself into a tactical battle in which the defendant adopts such manoeuvres as are likely to force the plaintiff into a position where he is compelled to go into the box and give some evidence —however little—in chief, so that there may be put to him in cross-examination as to credibility the very questions which are inadmissible in cross-examination in mitigation of damages under the rule in *Scott* v. *Sampson.*

152. It is, we think, plainly undesirable that matters which are of great importance to both parties in an action for defamation should depend, not upon any question of merits, but upon mere tactical manoeuvres in the course of the proceedings; and we consider that the present rule as to evidence in mitigation of damages, when taken in conjunction with the rule as to cross-examination to credibility, does, in some cases, cause serious injustice to one party or the other.

153. In our view, the rule in *Scott* v. *Sampson,* in so far as it excludes the giving of evidence of specific instances of misconduct on the part of the plaintiff in mitigation of damages, ought to be abolished. A defendant, provided that he gives due notice to the plaintiff, should be allowed to rely in mitigation of damages upon specific instances of misconduct on the part of the plaintiff, and should be entitled to call evidence-in-chief and to cross-examine the plaintiff (if he goes into the box) in support of those allegations. The plaintiff, in turn, should naturally be entitled to call evidence-in-chief to contradict any such allegation by the defendant. Notice in sufficient detail of the facts relied upon by the defendant in mitigation of damages should be given to the plaintiff not later than the date at which the action is set down for trial so as to obviate any danger of surprise.

154. The only limitation upon the facts upon which the defendant should be entitled to rely in mitigation of damages should be that he should not be entitled, in the absence of a plea of justification, to rely upon the facts alleged in the publication complained of i.e. he should not be permitted to justify the libel complained of under the colour of giving evidence in

mitigation of damages; nor should he be entitled to discovery of documents in support of any allegations of fact contained in his notice in mitigation of damages.

155. Such an amendment to the existing law may, in some cases, increase the length of the trial, but we think that, in practice, the right to give evidence of specific instances of the plaintiff's misconduct in mitigation of damages will be sparingly used. In assessing the damages, the tribunal is entitled to take into consideration the way in which the defendant has conducted his defence, and an abuse of the right to give evidence in mitigation of damages would have the result of inflating the damages awarded. Furthermore, while we do not recommend that any specific alteration should be made in the existing rule as to cross-examination to credibility, we consider that our proposals will have the practical result of curtailing this type of cross-examination of plaintiffs in actions for defamation and of reducing the abuses to which it is now subject. If a defendant, in the guise of cross-examination as to credibility, seeks to impugn the plaintiff's character by instances of alleged misconduct in respect of which he has given no notice in mitigation of damages, the Court will be entitled to draw the inference that the defendant is unable to prove the allegations which he has suggested in cross-examination, and it can express its view of such conduct in the damages which it awards to the plaintiff.

156. We accordingly recommend that, in actions for defamation, a defendant, upon giving due notice to the plaintiff, should be entitled to rely in mitigation of damages upon specific instances of misconduct on the part of the plaintiff, other than those charged in the publication complained of, and should be entitled to call evidence-in-chief and to cross-examine the plaintiff in support of such allegations, provided he gives particulars of the incidents upon which he proposes to rely. The plaintiff, in turn, should be entitled to call evidence to contradict any such allegations.

D. PRACTICE AND PROCEDURE IN ACTIONS FOR DEFAMATION

I. Mode of Trial

157. The evidence tendered to us in 1939 by representatives of those professions and trades in which the risk of being sued for libel is most serious, was unanimously to the effect that the damages awarded by juries were out of all proportion to the real injury caused to the reputation of the plaintiff. After the outbreak of war in 1939, under Emergency Rules of Court, the jury was practically abolished in actions for defamation as in all other civil actions, and, until a few months ago, except in one or two instances, all actions for defamation during the previous seven and a half years had been tried by a Judge alone. The evidence tendered to us since we resumed our sittings in 1945 is that, taking the matter generally, although there has been considerable variation in the amount of damages awarded, the damages awarded by a Judge are substantially less than those which would be awarded by a jury in respect of the same libel.

158. Damages for defamation are, in the nature of things, peculiarly difficult to assess. There is no hard and fast method of determining the appropriate pecuniary recompense where a man's reputation has been injured; but the amount of damages awarded in some of the cases which have been drawn to our attention appear, on any basis of assessment, to be excessive.

159. While juries as the tribunal for deciding issues of liability have not wholly escaped criticism, particularly upon the question whether the words complained of in fact bear a defamatory meaning or would be reasonably

understood to refer to the plaintiff, the substantial criticism has been directed to the damages awarded by them. We are satisfied that, so long as the jury system remains part of the English law of procedure, actions for defamation should be tried, if either party so desires, before a jury. We consider, however, that the Court of Appeal should exercise wider powers in relation to the amount of damages awarded by juries in actions for defamation, and should be empowered, if it thinks fit, itself to reassess the damages on appeal instead of necessarily ordering a new trial.

160. We accordingly recommend that, in appeals in actions for defamation, the Court of Appeal shall have power to review the amount of damages awarded, whether by Judge or jury, and if they consider such amount either inadequate or excessive, shall be entitled to substitute such sum as, in their view, should, in all the circumstances of the case, have been given, even although the damages awarded by the jury are not so excessive or so small as would, under the present practice, be held to justify an interference with them.

II. Pleadings and Particulars

161. In certain respects, the present technical rules of pleading in actions for defamation appear to us to be capable of improvement, so as to define with greater precision the issues in the proceedings and to prevent either party from being taken by surprise at the trial.

(1) *Innuendoes*

162. Where the words complained of are not *ex facie* defamatory of the plaintiff, it is necessary, under the existing practice, for the plaintiff to aver in his statement of claim by means of an innuendo the defamatory meaning which he alleges is to be attached to the words complained of. Such innuendo may be necessary either for the purpose of showing that words which do not on the face of them refer to the plaintiff would, in view of the surrounding circumstances, be understood to refer to him, or because words not *ex facie* defamatory would be understood in a defamatory sense owing to the existence of extraneous facts known to the persons to whom such words were published.

163. Thus, to say falsely that a woman was married on 1st January, 1946, is not *ex facie* defamatory; but would be defamatory if the facts, known to the person to whom the words were published, were that she had given birth to a child on 1st March, 1946, and before marriage had been a spinster.

164. Where the words do not, on the face of them, refer to the plaintiff, the plaintiff, under the existing rules, is bound to give particulars of the facts relied upon as identifying him as the person defamed in the libel. Where, however, the words themselves refer to the plaintiff, but are not *ex facie* defamatory of him, the plaintiff need give no particulars of the special facts relied upon to show that the statement would be reasonably understood in a defamatory sense.

165. Under the old practice, such facts would have had to be pleaded, but the necessity for pleading them was abolished by Section 61 of the Common Law Procedure Act, 1852* although, in practice, it is still usual—although not obligatory—to plead any special facts relied upon. We see no reason either in logic or convenience why a plaintiff who relies upon special facts as giving a defamatory meaning to the statement complained of should

* This Section has since been repealed but the change in practice which it introduced still remains.

not be obliged to plead such facts in the Statement of Claim so that the defendant may know the case which he has to meet. If such facts are pleaded, the defendant may desire to deny them and to call evidence at the trial to prove that they are incorrect. Furthermore, it is only if such facts are pleaded that the defendant is in a position to decide whether to admit the defamatory meaning placed upon the words by the innuendo and to pay money into Court in respect of the libel, or to deny the defamatory meaning alleged as not being a reasonable interpretation of the words complained of in the light of the facts so pleaded.

166. We accordingly recommend that the existing practice be amended so as to provide that, in all cases where the plaintiff alleges by an innuendo that the words or matter complained of were used in a defamatory sense, he should be obliged to give particulars of any facts, other than the actual words or matter complained of, upon which he relies in support of such innuendo.

(2) *Particulars of Malice*

167. Under the existing law where "fair comment" or "qualified privilege" is pleaded by a defendant, such defence is liable to be defeated by proof that the defendant in publishing the defamatory matter complained of was actuated by express malice. Once a *prima facie* case has been made out by the defendant that the matter complained of was comment upon a matter of public interest, or was published upon a privileged occasion, as the case may be, the onus of proving that the defendant was actuated by express malice lies upon the plaintiff. Nevertheless, by an anomalous historical survival, the plaintiff under the existing rules of pleading is under no duty to give particulars of the facts relied upon by him from which he alleged that express malice is to be inferred. The result is that when the action comes on for trial, the defendant is liable to be confronted with evidence, of which he has received no notice in advance, of some previous statement which he is alleged to have made, or some previous quarrel that he is alleged to have had with the plaintiff, or some other alleged circumstances from which it is suggested that malice should be inferred, and which he has no opportunity of calling evidence to disprove unless the trial is to be adjourned.

168. In our view, there is no justification for the continuance of this practice. In justice to both parties, the plaintiff should be compelled to give particulars of any facts upon which he relies as giving rise to the inference of express malice, so that the defendant is not taken by surprise at the trial.

169. We accordingly recommend that the existing practice should be changed so as to provide that, whenever in an action for defamation the defendant in his defence pleads that any of the words or matters complained of are "fair comment on a matter of public interest" or were published upon a privileged occasion, the plaintiff, if he desires to allege that the defendant in publishing the said words or matter was actuated by express malice, shall deliver a Reply alleging express malice and specifying the facts, other than the terms of the alleged defamatory words or matter themselves or the mode of conduct of the trial itself, upon which he relies as giving rise to the inference that the defendant was actuated by express malice.

Mode of Conduct of Trial as evidence of malice

170. It will be noted that we do not recommend any express alteration of the existing rule that the Court may take into consideration the defendant's mode of conduct of the trial itself in order to draw therefrom the inference that he was actuated by malice upon the occasion of the publication of the defamatory statement.

171. It has been urged upon us—and we think with some justice—that in the past juries have been too willing to draw an inference of malice from the defendant's mode of conduct of the trial, although, in fact, the responsibility for the manner in which the trial is conducted is normally not that of the defendant, but of his counsel. This tendency to draw too readily inferences of malice often proves an embarrassment to the proper trial of an action, as, for example, where there are possible alternative defences of justification and fair comment available. If the defendant pleads, as he is entitled to do, these two defences in the alternative, and fails to prove justification, he may find that his unsuccessful attempt to prove justification is treated as evidence of malice and thus defeats his alternative defence of fair comment also.

172. But although the rule has, from time to time, been unduly stretched in favour of the plaintiff, we think that the balance of advantage lies in its retention, more particularly in view of our recommendation that the defendant should be allowed to call evidence of specific instances of misconduct on the part of the plaintiff in mitigation of damages. Some sanction should be retained against the making of baseless allegations at the trial, either in mitigation of damages or in cross-examination as to credibility; and if such allegations are made, we think that it is both logical and proper that the Court should be entitled, if it thinks fit, to draw an inference of malice therefrom.

(3) *The "Rolled-up Plea"*

173. Within the last thirty years, it has become a common practice, where the defamatory statement complained of consists partly of allegations of fact and partly of expressions of opinion, to plead the defence of "fair comment" in the form popularly referred to as "the rolled-up plea." This pleading is in the following terms:—

> "In so far as the words complained of consist of statements of fact, they are true in substance and in fact; in so far as they consist of expressions of opinion, they are fair comment made in good faith and without malice upon the said facts, which are a matter of public interest."

174. It has been held that, where such a plea is raised, it is for the jury or, if the case is tried by a Judge alone, for the Judge, to determine at the trial which of the words complained of are statements of fact and which are expressions of opinion, and that, consequently, the defendant cannot be compelled to specify in his pleading, or in further and better particulars thereof, which statements he alleges to be facts and which he alleges to be expressions of opinion. As a logical extension of this doctrine, it has been further held by the Court of Appeal that the defendant cannot be indirectly required to specify which statements he alleges are statements of fact by being required to deliver particulars of the facts relied upon in support of his plea. Thus, if, for example, the statement complained of was "A. has been guilty of dishonesty and is not fit to be a member of any respectable club" and the defendant pleads the "rolled-up plea", the defendant cannot be compelled to give any particulars of the dishonesty of which the plaintiff is alleged to have been guilty.

175. While we appreciate the logical basis of this rule, it appears to us in practice to work a manifest injustice to the plaintiff who may be forced to come to the trial without knowing what are the specific allegations of fact which will be made against him. He may thus be unprepared with

evidence which would otherwise have been available to contradict the defendant's allegations; and his only remedy is to ask for an adjournment, with the consequent increase of cost and inconvenience.

176. A defendant who pleads the "rolled-up plea" must know what facts he proposes to prove at the trial in support of his plea, and there is no practical difficulty in his giving to the plaintiff adequate particulars of them.

177. In practice, the "rolled-up plea" is often used instead of an ordinary plea of fair comment, or even justification, simply in order to avoid giving such particulars, e.g., in cases where a defendant hopes that some material may come to hand before the trial, which will enable him to succeed upon his plea. We accordingly recommend that where a defendant pleads the "rolled-up plea" or any other plea to the like effect, the plaintiff should be entitled to particulars of the facts relied upon by the defendant in support of such plea.

III. Discovery in Actions for Defamation

(1) *Discovery of Documents*

178. In all civil actions, except actions for defamation, each party is entitled to have disclosed and produced to him all documents within the possession or control of the other party which touch or concern the matters in issue in the action, except documents which fall within the well-defined and limited categories of documents which are privileged from inspection. This rule of practice in all other actions does not give an *absolute* right to discovery and inspection. It is subject to the discretion of the Court, which may refuse an order for discovery or may limit it to certain classes of documents, if satisfied that discovery or full discovery, as the case may be, is not necessary either for disposing fairly of the cause or matter, or for saving costs. In cases of fraud, discovery is normally limited to the particulars of fraud given in the pleadings, but this is not an inflexible rule and there is power in the Court in a proper case to give a wider discovery.

179. In actions for defamation, however, under the existing practice, a rigid exception to the general rule as to discovery is made. Where justification is pleaded, the defendant is not entitled to general discovery of the plaintiff's documents which are relevant to the subject matter of the libel. He is only entitled to such documents as relate to the particular facts which are alleged in his particulars of justification. The basis of this rule of practice is that a person who makes defamatory statements should be sure of his facts before he publishes the statement and should not be entitled to a roving discovery of the plaintiff's documents in order to discover whether or not he is in a position to justify what he has said.

180. While it is possible that where there has been a vague general defamatory allegation, wide discovery of the plaintiff's documents might be unreasonable and oppressive to the plaintiff, the discretion which is retained by the Court, in cases where fraud is alleged, to refuse or limit discovery where it is not necessary either for disposing fairly of the cause or matter or for saving costs, appears to us to offer a sufficient safeguard against the right to discovery being abused in actions for defamation. The present rigid rule, on the other hand, may prevent a defendant from obtaining in a legally admissible form evidence of facts which are really not open to doubt, and which, if proved, establish the truth of the libel. It thus may assist a rogue to recover damages on the footing that a true statement is false.

181. We are satisfied that the general discretion vested in the Court as to applications for discovery in civil actions is sufficient to prevent the power to grant discovery being used oppressively in actions for defamation as well as in other actions.

We accordingly recommend that discovery of documents in actions for defamation should be granted in accordance with the same rules of practice as apply to discovery in actions of fraud.

(2) *Interrogatories*

182. The criticism of the existing practice of allowing interrogatories in actions for defamation has been directed to the class of interrogatories commonly known as "*Elliott & Garrett* Interrogatories," administered in cases where privilege is pleaded, and the analogous interrogatories often called the "*Plymouth Mutual* Interrogatories," used where fair comment is pleaded.

183. The form of these Interrogatories at present in general use is as follows—although, as regards some of the specific questions, it may not be entirely justifiable:—

Elliott & Garrett Interrogatories

(1) Before publishing the words complained of, did you take any and what steps, and make any and what inquiries with a view to ascertaining whether they were true or not? When, and of whom, did you make such inquiries? Were such inquiries verbal or in writing? If verbal, state the substance of the same, and if in writing, identify the documents.

(2) Did you receive any and what answer or answers, and from whom, to any and which of the inquiries referred to in the last preceding interrogatory? State the date or respective dates on which you received such answer or answers. If any such answer or answers were verbal, state the substance of the same, and if in writing, identify the document or documents. Did you publish the said words as the result of the inquiries referred to? Did you in fact believe that the said words were true?

(3) What information, if any, had you when you wrote and published the said words which induced you to believe that the said words or some and which of them were true? When, and from whom, did you obtain such information? Was such information verbal or in writing? If in writing, identify the document or documents. Did you in fact believe that the said words were true?

Interrogatories where Fair Comment is pleaded

(1) What information had you when you wrote and/or printed and/or published, or caused to be written and/or printed and/or published the words set out in paragraph 3 of the Statement of Claim, which induced you to believe that the expressions of opinion, or any and which of them, in the said words contained, and which you allege in paragraph 5 of the Defence herein are fair comment made in good faith and without malice, were true? Did you then in fact believe that the said opinions were true?

(2) State what steps you took before writing and/or printing and/or publishing, or causing to be written and/or printed and/or published, the said opinions to test the said information and to ascertain whether the said opinions, or any and which of them, were founded on fact.

(3) From whom did you obtain the information on which you relied in writing and/or printing and/or publishing, the said expressions of opinion, or any and which of them?

184. The grounds upon which the *Elliott & Garrett* Interrogatories are permitted are that where a defamatory statement is published on a privileged occasion, the defence of "qualified privilege" is liable to be defeated by malice on the part of the defendant. The absence on the part of the defendant of a *bona fide* belief in the truth of the statements which he made constitutes malice; and a relevant method of testing his *bona fides* is to ascertain whether he made, in advance, proper inquiries to verify the truth of his statements. He may have done so; but he may, on the other hand, have contented himself by repeating irresponsible gossip without caring whether it were true or false.

185. The questions put in the *Elliott & Garrett* Interrogatories are thus relevant to the issue of malice where privilege is pleaded and could properly be put to the defendant in cross-examination if the action reached the stage at which the defendant was compelled to go into the witness box. But the onus of proof of malice lies upon the plaintiff. Consequently, unless some evidence of malice has been given before the close of the plaintiff's case, the defendant is entitled to judgment and no occasion arises for him to go into the witness box at all.

186. If the *Elliott & Garrett* Interrogatories were disallowed, there might occasionally be cases where a plaintiff would fail, although if the facts as to the inquiries made by the defendant had been elicited in advance by interrogatories and put in evidence before the jury as part of the plaintiff's case, the jury would have found that the defendant was actuated by malice and thus not entitled to succeed upon his defence of privilege. But although such cases might exist, we are satisfied that they would be very rare. In practice, although the *Elliott & Garrett* Interrogatories are administered almost as a matter of course in most libel actions where privilege is pleaded, it is very seldom indeed that the answers are put in evidence. If the defendant was in fact actuated by malice, there is almost invariably sufficient evidence of this to enable the plaintiff to establish a *prima facie* case of malice without the assistance of the interrogatories; and the only use, if any, which is made of the answers to the *Elliott & Garrett* Interrogatories is to assist in the cross-examination of the defendant—which is not a legitimate purpose for which interrogatories should be administered.

187. The administration of these interrogatories, and, more particularly, the preparation of the answers, adds considerably to the costs of actions for defamation, and so imposes considerable hardship upon a large number of defendants. Having regard to the very small number of cases in which any appreciable harm would be done to a plaintiff by his inability to administer such interrogatories, we feel justified in recommending that the *Elliott & Garrett* Interrogatories should be abolished.

188. The corresponding interrogatories in cases where fair comment is pleaded appear to us to have even less justification. Comment to be fair must be made upon facts. If the facts upon which the comment is based are stated in the words complained of and the defendant pleads the rolled-up plea, he is limited at the trial to proving the truth of the facts so stated. If his comment is based upon additional facts not stated in the words complained of, he must give particulars of the facts upon which his comment is based. If he fails to prove the facts upon which his comment is based, he fails in

his defence of "fair comment." The only circumstances in which the information which he had at the time at which he published the words complained of might assist the plaintiff's case would be if the defendant did not know the facts at the time he made the comment, or if the information in his possession at the date of the comment, although in fact true, was obtained from so tainted a source that the jury could draw the inference that the defendant himself did not honestly hold the opinions he had expressed on those facts. These possibilities seem so remote that we feel that there can be no justification for continuing to subject defendants in general to the costs of administering interrogatories of this kind where the defence is that of "fair comment."

IV. Consolidation of Actions

189. Special statutory provisions facilitating the consolidation of separate actions brought by a plaintiff against two or more defendants in respect of the same or substantially the same libel are contained in the Law of Libel Amendment Act, 1888. The whole amount of the damages in respect of all the libels forming the subject of the consolidated action are assessed in one sum, but are apportioned between the various defendants and recoverable from them severally and not jointly by the plaintiff, in the same way as if they had been awarded in separate actions.

190. The existing statutory power of consolidation applies only to actions for libel. We recommend that it should be extended to all actions for defamation, whether for libel or for slander, and to actions on the case in the nature of actions for defamation.

V. Payment into Court

191. As already stated, we recommend that, if the plaintiff takes out of Court money paid into Court by a joint defendant in satisfaction of his claim against the defendant paying the same, the action against the remaining defendants should not abate, but the sum paid into Court should be set off against any damages ultimately awarded to the plaintiff in the action.

VI. Interlocutory Proceedings to determine whether words bear a defamatory meaning

192. In a large proportion of actions for defamation, the only issue between the parties upon the question of liability is whether the matter complained of bears a defamatory meaning. This really involves two separate issues; the first an issue of law to be decided under existing practice by the Judge—whether the matter complained of is capable of bearing a defamatory meaning; the second, which only arises if the first is decided in the affirmative—whether the matter complained of in fact bears such meaning. The latter is an issue for the jury.

193. It has been suggested to us by a number of witnesses that special provision should be made whereby the issue whether the matter complained of is capable of bearing a defamatory meaning should be determined upon an interlocutory application, so as to avoid the costs of a trial if the question should be answered in the negative.

194. We do not think the creation of a special procedure applicable to actions for defamation would effect any useful purpose. Under the existing Rules of Court, it is possible to apply to strike out the Statement of Claim on the ground that it discloses no cause of action, or to apply for any issue of law to be decided separately from, and in advance of, any issue of fact.

As mentioned above, the question whether words are capable of bearing a defamatory meaning is an issue of law and could be decided in advance under the existing Rules. Such application is seldom made under the present practice, but the procedure which we have recommended, namely, that particulars should be given of the facts and circumstances from which an innuendo other than the meaning which the words naturally bear can be inferred, should go some way towards enabling the Court to decide expeditiously whether the words are or are not reasonably capable of a defamatory meaning.

195. We do not, therefore, recommend any alteration in the existing practice in this respect.

VII. Costs in Actions for Defamation

196. One of the most widespread complaints against the existing law and practice in actions for defamation is based upon what are alleged to be the excessive legal costs involved. Several witnesses ascribed the allegedly high costs to the number and expense of interlocutory proceedings.

197. We have considered this criticism with great care and have examined in considerable detail the facts and figures produced to us.

198. So far as interlocutory proceedings are concerned, we are satisfied on the evidence of the officers of the Law Courts that the number of interlocutory proceedings in actions for defamation does not, as a general rule, exceed the number of interlocutory proceedings in other types of action for tort or breach of contract of comparable importance and complexity. Naturally, in the commonest type of civil action, viz. the "running down case," interlocutory proceedings are reduced to a minimum, but, with this exception, there is no evidence that interlocutory proceedings are more numerous in actions for defamation than in other civil actions.

199. The figures which have been made available to us for the taxed costs in actions for defamation, i.e. the costs which are recoverable by the successful from the unsuccessful party, also indicate no noticeable difference between the costs of actions for defamation and other actions of comparable importance.

200. The impression which is undoubtedly current, that actions for defamation are exceptionally costly, is due to a number of factors.

201. In the first place, the general cost of litigation in the High Court in England is high and has increased considerably during the past fifty years. The witnesses who complained most strongly about the cost of libel actions were generally familiar only with this type of action, and thus did not realise that they might have found their complaint equally applicable to other types of litigation if they had been familiar with them.

202. In the second place—and this relates particularly to complaints about the costs of interlocutory proceedings—many actions for libel to which there is no defence never get beyond the stage of interlocutory proceedings followed by an agreed statement in Court. In these actions, it is within the knowledge of both parties from the outset that the action will almost certainly be settled upon terms which will include the payment by the defendant of the whole of the plaintiff's costs. In such circumstances, it is not unnatural that the plaintiff should be less economical than he might otherwise be in the costs which he incurs in interlocutory proceedings. We can see no possible legislative remedy for this. It is for defendants, in agreeing terms of settlement, to discourage the practice of incurring excessive costs.

203. In the third place, actions for defamation require considerable special skill on the part of both solicitors and junior counsel in the interlocutory stages, and offer considerable scope for effective advocacy at the trial. Plaintiffs attach great importance to their good name. Just as in the case of a major operation patients are apt to go to the best or most fashionable surgeon, persons who are defamed tend to insist upon briefing the best-known leaders to represent them. Defendants, particularly where they are newspaper proprietors, also tend to instruct fashionable counsel in matters in which success or failure is regarded as important, whether in the case itself or in its bearing on other cases, or as a matter of prestige. On the whole, the fees actually paid by the parties to counsel—although not necessarily those allowed on taxation—may be somewhat higher in actions for defamation than in some other types of actions, but this, to a lesser extent, is true of any actions of a specialised character in which counsel are apt to be chosen from those who are known as experts in that field, and can demand proportionately higher fees.

204. Satisfied as we are that, except in the above respects, as to which legislation provides no solution, the cost of proceedings for defamation does not differ from that incurred in other kinds of civil proceedings of comparable complexity, we do not feel that it lies within our province to make recommendations affecting the general question of costs in proceedings in the High Court.

205. The whole question of the cost of litigation is under consideration by another Committee charged *inter alia* with the specific task of investigating this matter, and any recommendations which they may make and any changes which may result will, no doubt, apply to actions for defamation in common with other civil actions.

206. There is, however, one special problem, as distinct from the general expenses of litigation, which has been frequently drawn to our attention by witnesses in the course of our proceedings. It is alleged that actions for defamation are frequently brought or threatened by impecunious plaintiffs who are not in a position to meet any judgment for costs awarded against them in the event of their action failing. It is this risk—so newspapers and publishers in particular assert—which causes them, as a matter of business, to settle actions to which there is a good defence, but capable only of being established at considerable expense.

207. That there are, from time to time, plaintiffs who welcome an opportunity of being libelled as providing a source of profit we do not doubt, but we think that it is easy to exaggerate their prevalence. What may seem a very trivial slur to the defamer is often regarded as a serious imputation by the victim. It is seldom possible to say with certainty that a defence is bound to succeed. The action or threatened action which the defendant stigmatises as " gold-digging " may be founded upon a genuine sense of grievance, and the acceptance of a small sum and an apology in settlement may be a reluctant acquiescence with the view of the plaintiff's professional advisers that the damages recovered if the action were fought would be too small to cover the difference between the party-and-party costs which would be awarded and the actual liability of the plaintiff to him for legal expenses.

208. We do not suggest that " gold-digging " actions are unknown or even extremely rare; but so long as the Courts are freely open to those who allege that they have suffered a legal injury, the problem of the " gold-digging " plaintiff must remain. It is by no means restricted to actions for defamation. It arises in many types of action. But the general law and practice must be

based upon the assumption that litigants are honest and reputable—as the great majority are—and the rights of the majority should not be curtailed because they may be misused by a limited number of persons.

209. We consider that the principle that the Courts should be open to all who allege that they have suffered an injury for which the law provides a remedy is of such vital importance that we cannot recommend any alteration in the existing law or practice which would either bar a plaintiff from his legal remedy, or force him to have recourse to a different tribunal, merely because he is poor. In this matter, we are, in our view, in agreement with the recommendations of the Rushcliffe Committee.

210. The County Court has at present no original jurisdiction in libel or slander, but on an application by the defendant in an action for defamation, the High Court, if satisfied that the plaintiff has no visible means of paying the defendant's costs should a verdict not be found for the plaintiff at the trial, has a discretion either to order security for costs, or to transfer the action to the County Court. The discretion is to be exercised having regard to all the circumstances of the case; and, in practice, although actions for slander are not infrequently so remitted, it is not usual for an action for libel to be transferred to a County Court under this rule. Actions for libel and slander very often involve difficult and technical issues, and we do not think that a case has been made out for conferring original jurisdiction in actions for defamation on the County Court. This being so, we think that the existing rule as to remission to the County Court of actions for defamation started in the High Court is adequate for its purpose.

211. It has been proposed by more than one witness that, in all actions for defamation, there should be a rule preventing the plaintiff from recovering more costs than damages, unless the Court, in the exercise of its discretion and having regard to all the circumstances of the case, otherwise directs. A precedent for this is contained in the Slander of Women Act, 1891. In our view, however, this is a precedent which should not be extended.

212. There are many cases in which plaintiffs do not press for heavy damages. There are others, particularly where justification is unsuccessfully pleaded, where, although the injury suffered may not be very great, the costs which the plaintiff has been forced to incur by reason of the defence put forward, are very large.

213. Much of the complaint against the existing law and practice is, as already stated, that the damages awarded are too large. We can think of no rule more likely to increase the general level of damages than one which limits the plaintiff's recovery of costs to the amount of damages awarded.

214. In our view, there are no grounds for drawing a distinction between actions for defamation and other types of action, so far as concerns the recovery of costs by a successful plaintiff to whom small, but not derisory damages are awarded.

CONCLUSION

215. We are conscious that we have been involved in a task of some magnitude and that it is not easy to overcome the difficulties inherent in it. Apart from the many facets presented by the varying facts which give rise to a claim for damages for defamation, we have had to deal with a prolific growth of convention, both in the law itself and in the procedure evolved in order to deal with the problems with which it is concerned.

216. Much of this is inevitable, but there has been a good deal of haphazard development, more particularly in the practice which has gradually grown up in the administration of the substantive law, which makes for unnecessary complication.

217. Moreover, we have felt it essential that the interests of plaintiff and defendant alike should be kept in mind, and this has necessitated a long and careful consideration and weighing of the evidence adduced before us, and of the advantages and disadvantages of the many solutions suggested.

218. One of the most drastic alterations in the substantive law which we have suggested is that dealing with what we have called "unintentional defamation". In this, the changes suggested aim at providing relief to those who are only inadvertent wrongdoers, whilst giving adequate protection to the character of those whose reputation has been attacked.

219. An easier, but, we think, less fair, method of proceeding would have been to do rough justice by abolishing any right of action in such a case and by recommending that unintentional defamation unaccompanied, or even if accompanied, by negligence, should no longer be a tortious act. But such a course would in some cases leave a plaintiff without any method of re-establishing a character wrongly besmirched.

220. Apart from this and a number of lesser changes in the substantive law, we have suggested a large number of alterations which we regard as important in simplifying and improving the necessary procedure, and, in particular, in the case of those preliminary steps which have led to unnecessary expense and to a too meticulous enquiry as to the defendant's state of mind.

221. We have already stated why we do not regard the codification of this branch of the law as a practical step at this stage of its development, and that, in our view, such changes as the abolition of trial by jury or the enactment of a right of action in the case of defamation of the dead are undesirable.

222. The fact is that, though the law as to defamation requires some modification, the basic principles upon which it is founded are not amiss. It is the rigidity and technicality of the procedure which has gradually come to be adopted in working out the preliminary steps and guiding the conduct of the case which, in our opinion, give ground for complaint. Such faults do not call for large or drastic changes in the substantive law, but are best met by pruning away the objectionable features and by modifying and simplifying the procedure.

223. It is true that room is still left for a considerable divergence of view as to what constitutes a defamatory imputation, as to what is an occasion conditionally privileged, and what is evidence of express malice. Moreover, the damages, even if, as we suggest, controlled by the Court of Appeal, are still very much at large. But all these matters are, in our view, inherent in the nature of the subject matter itself. It is not the fault of the law that discreditable imputations are so varied, circumstances so diverse, and the problems so numerous.

224. English law has, as a whole, recognised the wide range of questions to be solved and treated them not as a part of a rigid system, but as governed by general principles in compliance with which the bounds of the law can be expanded or contracted to meet the varying needs of the particular case. This outlook we think the right one in the case of a subject whose limits are, and must be, so widely drawn as is the case in libel and slander.

Such a subject must be amongst the latest to be codified and is best dealt with at the moment by careful modification, rather than by drastic change.

225. For this very reason, we have felt it necessary to scrutinise each branch of the substantive law with care and to view with a critical eye the practice which has grown up around it. The work has been long and exacting, and, if not spectacular, at least contains an attempt to simplify and improve the methods under which redress is to be obtained, and the grounds upon which it is to be granted.

226. Some anomalies must, we fear, in the nature of things, remain, but so far as possible we have endeavoured to avoid them, and, we hope, have provided an adequate remedy for the defamed, whilst not neglecting the giving of sufficient protection to the alleged defamer.

SUMMARY OF RECOMMENDATIONS

(A) Substantive Law

(1) *Group Defamation, Defamation of the Dead, Invasion of Privacy*

We find ourselves unable to accept proposals which have been made to us that the law of defamation should be extended to embrace false statements vilifying groups or classes of persons distinguishable by race, colour, creed or vocation, or defamation of the dead, or invasions of privacy by the press. In so far as abuses of these kinds call for remedy, we do not consider that any appropriate remedy falls within the general scope of the law of defamation. (*Paragraphs* 24-32.)

(2) *Slander actionable per se*

(a) *Broadcasting of Defamatory Statements*

While we do not recommend the general assimilation of the law of libel and slander so as to make all slanders actionable without proof of special damage, we consider that all oral statements broadcast over the radio should be actionable without proof of special damage. (*Paragraphs* 33-43.)

(b) *Slander of a person in the way of his office, profession or trade*

We also recommend a minor modification in the definition of oral statements spoken of a person in the way of his office, profession or trade which, under the existing law, are actionable without proof of special damage. (*Paragraphs* 44-49.)

(3) *Actions on the Case*

We recommend that the existing law with respect to written or oral falsehoods which are made maliciously and calculated in the ordinary course of things to produce actual damage should be amended so as to make them actionable without proof of special damage. (*Paragraphs* 50-54.)

(4) *Unintentional Defamation*

We recommend that, where a statement which is in fact defamatory of the plaintiff is made by a defendant who was not aware that it would be understood to refer to the plaintiff, or was aware of facts which would make the statement defamatory of him, the plantiff's remedy should be restricted to requiring the defendant to publish an explanation and apology, and that if such explanation and apology is published, no damages should be recoverable. We also propose a procedure whereby, in the case of dispute, the form and manner of publication of the apology can be settled by the

Court. The defendant should not be entitled to be relieved of his liability for damages unless he took reasonable precautions before publication of the statement to ascertain whether or not it was defamatory. (*Paragraphs* 55-73.)

(5) *Justification*

We think that, in practice, the scope of the defence of justification has become too narrow, and that it should be placed upon a broader basis. We accordingly recommend that a defendant should be entitled to succeed in a defence of justification if he proves that so substantial a portion of the defamatory allegations are true that any remaining allegations which have not been proved to be true do not add materially to the injury to the plaintiff's reputation. (*Paragraphs* 74-82.)

(6) *Fair Comment*

We recommend that the basis of the defence of fair comment should be broadened in a similar manner to that of justification. (*Paragraphs* 83-91.)

(7) *Qualified Privilege*

We are satisfied that the time is ripe for an extension of the statutory defence of qualified privilege created by the Law of Libel Amendment Act, 1888, both by widening the definition of " newspaper " so as to include monthly journals as well as those published at shorter intervals, and by extending the categories of reports entitled to such privilege, so as to give effect to the changes in social, economic and political conditions which have occurred during the last sixty years. The safeguard whereby a person defamed in a privileged report is entitled to require the newspaper to publish a statement by way of contradiction or explanation should apply to the majority of the new categories of reports. (*Paragraphs* 95-111.)

(8) *Joint Tortfeasors*

(a) *Malice of one of several joint publishers*

We recommend that, where there is joint publication of a defamatory statement, the defence of privilege or of fair comment by any of the publishers who was not himself guilty of malice should not be defeated by the malice (if not known to him) of any other person jointly responsible for the publication of the statement. (*Paragraphs* 127-135.)

(b) *Payment into Court*

Where money is paid into Court on behalf of one of the joint publishers, we consider that the fact that the plaintiff takes such money out of Court in satisfaction of his claim against that publisher should not operate as a release of his claim against the other joint publishers. (*Paragraphs* 120-122.)

(c) *Agreements for Indemnity*

In view of the fact that doubts have been expressed as to the validity of agreements to indemnify publishers against libels which may exist without their knowledge, we see no objection to express statutory provision that such indemnities are legal. (*Paragraphs* 136-137.)

(9) *Mitigation of Damages*

(a) *Recovery of Damages in other actions*

We recommend that the right to rely in mitigation of damages upon the fact that the plaintiff has brought actions or recovered damages against other persons for the same, or substantially the same, libel, should be extended to all defendants and not limited, as at present, to newspapers. (*Paragraphs* 142-145.)

(b) *Acts of Misconduct by the Plaintiff*

We recommend that a defendant should be entitled to rely in mitigation of damages on specific acts of misconduct by the plaintiff other than those charged in the publication complained of, provided that due notice has been given to the plaintiff of the instances upon which the defendant intends to rely. (*Paragraphs* 146-156.)

(B) PRACTICE AND PROCEDURE

(1) *Particulars of Innuendoes*

We recommend that a plaintiff should be required to give particulars of any facts, other than the actual words or matter complained of, upon which he relies in support of any defamatory innuendo which he pleads. (*Paragraphs* 162-166.)

(2) *Particulars of Malice*

In cases where privilege or fair comment is pleaded, we recommend that the plaintiff, if he wishes to rely upon actual malice on the part of the defendant, should give particulars of the facts, other than the terms of the alleged defamatory words or matter themselves, upon which he will rely as giving rise to the inference that the defendant was actuated by express malice. (*Paragraphs* 167-169.)

(3) *Particulars under the "Rolled up Plea"*

Where a defendant pleads the rolled up plea, the plaintiff should be entitled to particulars of the facts relied upon in support of such plea. (*Paragraphs* 173-177.)

(4) *Discovery of Documents*

We recommend that discovery of documents in actions for defamation should be granted in accordance with the same rules of practice as apply to discovery in actions for fraud. (*Paragraphs* 178-181.)

(5) *Interrogatories where Privilege or Fair Comment is Pleaded*

We recommend that the interrogatories as to sources of information and belief in cases where privilege or fair comment is pleaded, should be abolished. (*Paragraphs* 182-188.)

(6) *Powers of Court of Appeal*

We recommend that the Court of Appeal should be given a wider discretion to vary the amount of damages awarded by a jury in an action for defamation. (*Paragraphs* 157-160.)

PORTER (*Chairman*).
NORMAN BIRKETT.
J. W. BOWEN.
R. F. BURNAND.
WILLIAM CHARLES CROCKER.
E. M. FORSTER.
VALENTINE HOLMES.
RICHARD O'SULLIVAN.
G. O. SLADE.
H. A. TAYLOR.
E. C. S. WADE.

KENNETH DIPLOCK,
Secretary.
September, 1948.

RESERVATION BY MR. BERTRAM CHRISTIAN

While in general sympathy with the positive recommendations of the Report, I feel that these go less far than they might in remedying defects in the existing law, especially in regard to practice and procedure.

Claims in respect of libel are more lightly launched, more difficult to defend and more burdensome in their effects than is the case in other similar actions. I am not satisfied that we have done everything possible to render them less tempting to initiate and costly to resist.

In particular, the section of the Report relating to costs is not one to which I could subscribe without reservation. Its argument and the analogies on which it is so largely based are, in my judgment, inadequate to sustain its conclusions.

BERTRAM CHRISTIAN.

September, 1948.

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