[769] CASES ARGUED AND DETERMINED IN THE QUEEN'S BENCH, IN EASTER TERM, XXVI. VICTORIA.

The Judges who usually sat in Banc in this Term were:—Cockburn C.J., Crompton J., Blackburn J., Mellor J.

CAMPBELL *against* SPOTTISWOODE. Saturday, April 18th, 1863.—Libel. Newspaper. Privilege. Bona fides.—1. When a writer in a newspaper or elsewhere, in commenting on public matters, makes imputations on the character of the individuals concerned in them, which are false and libellous, as being beyond the limits of fair comment, it is no defence that he bonâ fide believed in the truth of these imputations.—2. The plaintiff published in a newspaper, of which he was the editor and part proprietor, a proposal for inserting in it a series of letters on the duty of evangelizing the Chinese, and for promoting the circulation of the numbers of the paper in which those letters should appear in order to call attention to the importance of this work of evangelization. A series of letters accordingly appeared in the newspaper, and in the same numbers lists of subscribers for copies of the paper for distribution. In an action of libel against the defendant, the publisher of another newspaper, for an article commenting on the plaintiff's scheme, imputing that his real object was to promote the sale of his paper, and suggesting that the names of some of the subscribers in the lists were fictitious, the jury found for the plaintiff, with the addition that the writer of the article believed the imputations in it to be well founded: Held, that this belief of the defendant was no answer to the action.

[S. C. 3 F. & F. 421; 32 L. J. Q. B. 185; 8 L. T. 201; 9 Jur. N. S. 1069; 11 W. R. 569. Approved and followed, *Merivale* v. *Carson*, 1887, 20 Q. B. D. 283. Adopted, *South Hetton Coal Company* v. *North Eastern News Association*, [1894] 1 Q. B. 145. Followed, *Joynt* v. *Cycle Trade Publishing Company*, [1904] 2 K. B. 292. Applied, *Plymouth Mutual Co-operation and Industrial Society* v. *Traders' Publishing Association*, [1906] 1 K. B. 412. Discussed, *Thomas* v. *Bradbury*, [1906] 2 K. B. 627. Approved, *Hunt* v. *Star Newspaper Company*, [1908] 2 K. B. 320; *Walker* v. *Hodgson*, [1909] 1 K. B. 250.]

Libel. The declaration stated that the plaintiff was a Protestant dissenting minister, and minister of a [770] congregation of Protestant dissenters, and the editor of a newspaper called *The British Ensign*, and had published the names or descriptions of divers persons as subscribers for and persons purchasing and promising to purchase copies of that newspaper; and the defendant falsely and maliciously printed and published of the plaintiff, to wit, in a periodical publication called *The Saturday Review of Politics, Science, Literature and Art*, a false, scandalous, malicious and defamatory libel; and in one part of which libel was contained the false, scandalous, malicious, defamatory and libellous matter following of and concerning the plaintiff, that is to say:—"The doctor" (meaning the plaintiff) "refers frequently to Mr. Thompson as his authority—so frequently, that we must own to having had a transitory suspicion that Mr. T. was nothing more than another Mrs. Harris, and to believe, with Mrs. Gamp's acquaintance, that there 'never was no such person.' But as Mr. Thompson's name is down for 5000 copies of *The Ensign*, we must accept his identity as fully proved, and we hope the 'publisher of *The Ensign* is equally satisfied on the point." And in another part of which said libel was also contained the false &c. matter following of and concerning the plaintiff, that is to say:—"To spread the knowledge of the gospel in China would be a good and an excellent thing, and worthy of all praise and encouragement; but to make such a work a mere pretext for puffing an obscure newspaper into circulation is a most scandalous and flagitious act; and it is this act, we fear, we must charge against Dr. Campbell." And in another part of which said libel was also contained the false &c. matter following of and concerning the plaintiff, that is to say:—"There have been many dodges tried to make a losing paper 'go,' but it remained for a leader [771] in the Nonconformist body to represent the weekly subscription as an act of religious duty. Moreover, the well known device is resorted to of publishing lists of subscribers, the authenticity of which the public have, to say

the least, no means of checking. 'R. G.' takes 240 copies, 'A London Minister' 120, 'An Old Soldier' 100, and so on. Few readers, we imagine, will have any doubt in their minds as to who is the 'Old Soldier,'" meaning thereby that the plaintiff had falsely and deceitfully published, as the names or descriptions of subscribers for or purchasers of the said newspaper, divers fictitious names or descriptions which did not in fact represent any persons really being subscribers for or purchasers of the said newspaper. And in another part of which said libel is also contained the false &c. matter following of and concerning the plaintiff, that is to say:—"For, whatever may be the private views of the editor of *The Ensign*" (meaning the plaintiff), "there can be no question that his followers are sincere enough in the confidence they repose in his plan. It must be a very happy thing to be gifted with so large a stock of faith. It must take the sting out of many a sorrow, and smooth away many a trouble. The past cannot be very sad, nor the future very dreadful, to him who has the capacity for hoping all things and believing all things without hesitation. If this temper of mind should lay its possessor open occasionally to the beguilements of an impostor" (meaning the plaintiff) "more than an equivalent is provided in its freedom from doubts and suspicions, and the sense of security that it confers." And in another part of which libel was also contained the false &c. matter following of and concerning the plaintiff, that is to say:—"No doubt it is deplorable to find an **[772]** ignorant credulity manifested among a class of the community entitled on many grounds to respect; but now and then this very credulity may be turned to good account. Dr. Campbell" (meaning the plaintiff) "is just now making use of it for a very practical purpose, and to-morrow some other religious speculator will cry his wares in the name of Heaven, and the mob will hasten to deck him out in purple and fine linen. When Dr. Campbell" (meaning the plaintiff) "has finished his Chinese letters, he will be a greater simpleton than we take him for if he does not force off another 100,000 copies of his paper by launching a fresh series of thunderbolts against the powers of darkness. In the meanwhile, there can be no doubt that he is making a very good thing indeed of the spiritual wants of the Chinese." And the plaintiff, by reason of the premises, has been greatly injured, scandalized and aggrieved. And the plaintiff claims 1000*l*.

Plea. Not guilty.

On the trial, before Cockburn C.J., at the Sittings at Guildhall after Hilary Term, it appeared that the defendant was the printer of a weekly newspaper or periodical called *The Saturday Review of Politics, Literature, Science and Art*, and that the libels complained of were published in an article headed "The Heathens' Best Friend," contained in the number for June 14th, 1862.

The plaintiff was a minister of a dissenting congregation, and the editor and part proprietor of *The British Ensign* and *The British Standard*, which were dissenting newspapers or periodicals. Extracts from the former were put in evidence, containing a proposal to publish in it a series of letters to the Queen and persons of note on the subject and duty of evangelizing the Chinese, and to promote **[773]** as widely as possible the circulation of the numbers of the paper in which those letters should appear, in order to call the attention of missionaries and others to the importance of this work of evangelization. A series of letters accordingly appeared in *The British Ensign*, the three first of which, headed "Christian Missions," were addressed to the Queen, and the rest headed "China—Conversion of the Chinese," were addressed to the Archbishop of Canterbury, the Earl of Shaftesbury, Viscount Palmerston, Thomas Thompson, Esq., of Prior Park, Bath, and other persons; and from time to time in the same numbers with the letters were published lists of subscribers for copies of the paper for distribution. In one of these lists were the following, "The Hon. Mrs. Thompson, 5000 copies; An Old Soldier, 100; R. G., 240; M. S. D. 10; J. S. 240; A. J. 30."

The whole of the article in which the passages set forth in the declaration appeared was read to the jury.

It was contended, on the part of the plaintiff, that the passages set forth in the declaration imputed to him the charge of fabricating fictitious subscription lists, and of trying to procure subscriptions professedly for the conversion of the heathen, but in reality for the purpose of putting money into his own pocket. The plaintiff himself and some of the subscribers, among whom was Mr. Thompson, were called as witnesses, to shew that such charges were without foundation, and to prove the reality of the subscriptions.

For the defendant it was contended that the article was such a comment as a public writer was entitled to make upon the scheme publicly put forward by the plaintiff; and that scheme was such that the writer of the article was privileged in imputing improper **[774]** motives to the plaintiff, provided he fairly and honestly believed such imputations to be well founded.

The Lord Chief Justice directed the jury that if they thought the effect of the article complained of was fairly to criticise and comment upon, though in a hostile spirit, the scheme publicly put forward by the plaintiff, they should find for the defendant. But if they thought that the article went beyond that, and imputed to the plaintiff base and sordid motives which the evidence had shewn to be without foundation, and that he asked for public subscriptions, not for the purpose of promoting the progress of Christianity in China, but for the purpose of private pecuniary gain, they should find a verdict for the plaintiff. Further that, in his opinion, it was no defence that the writer honestly believed the imputations made to be well founded. At the some time he asked them, at the suggestion of the defendant's counsel, if they returned a verdict for the plaintiff, and were of opinion that the writer of the article made the imputations under a genuine and honest belief that they were well founded, or the plaintiff was fairly open to them, they should find the fact specially.

The jury found a verdict for the plaintiff, damages 50l., and also found that the writer of the article in *The Saturday Review* believed the imputations in it to be well founded.

The Lord Chief Justice thereupon directed the verdict to be entered for the plaintiff, and reserved leave to move to enter the verdict for the defendant.

Bovill moved accordingly, or for a new trial on the ground of misdirection.—He argued that a matter not only of public but universal interest, which was the subject of fair comment and criticism, was brought before **[775]** the public by the plaintiff in his newspaper; that the editor or publisher of a newspaper or other periodical was privileged in making such comment or criticism and therefore the ordinary presumption of malice was rebutted; and that, in commenting upon public matters and the conduct of public men, there was permitted for the interests of society an unlimited right of discussion as to motives, if there were no attack on private character, provided the person making such comments honestly and bonâ fide believed them to be well founded. He cited *Paris* v. *Levy* (2 F. & F. 71, 75, 76), per Erle C.J.; S. C., in banc, per Byles J. (9 C. B. N. S. 342, 363); Stark. on Slander and Libel, 2d ed., Prely. Disc., p. cxxx., vol. 1, p. 304-305; *Eastwood* v. *Holmes* (1 F. & F. 347, 350), per Willes J.; *Turnbull* v. *Bird* (2 F. & F. 508, 523, 526), per Erle C.J.; *Beatson* v. *Skene* (5 H. & N. 838); *Maitland* v. *Bramwell* (2 F. & F. 623); *Carr* v. *Hood*, note to *Tabart* v. *Tipper* (1 Camp. 354, 357), per Lord Ellenborough; and *Padmore* v. *Lawrence* (11 A. & E. 380). He also contended that the Lord Chief Justice ought to have left to the jury the question whether the imputations contained in the libel were in excess of fair comment or not.

Cockburn C.J. I am of opinion that there ought to be no rule. The article on which this action is brought is undoubtedly libellous. It imputes to the plaintiff that, in putting forth to the public the sacred cause of the dissemination of religious truth among the heathen, he was acting as an impostor, and that his purpose was to put money into his own pocket by obtaining contributions to his newspaper. The article also charges that, **[776]** in furtherance of that base and sordid purpose, he published in his newspaper the name of a fictitious person as the authority for his statements, and still further that, with a view to induce persons to contribute towards his professed cause, he published a fictitious subscription list. These are serious imputations upon the plaintiff's moral as well as public character.

It is said, on behalf of the defendant that, as the plaintiff addressed himself to the public in a matter, not only of public, but of universal interest, his conduct in that matter was open to public criticism, and I entirely concur in that proposition. If the proposed scheme were defective, or utterly disproportionate to the result aimed at, it might be assailed with hostile criticism. But then a line must be drawn between criticism upon public conduct and the imputation of motives by which that conduct may be supposed to be actuated; one man has no right to impute to another, whose conduct may be fairly open to ridicule or disapprobation, base, sordid, and wicked motives, unless there is so much ground for the imputation that a jury shall find, not only that he had an honest belief in the truth of his statements, but that his belief was not without foundation,

In the present case, the charges made against the plaintiff were unquestionably without foundation. It may be that, in addition to the motive of religious zeal, the plaintiff was not wholly insensible to the collateral object of promoting the circulation of his newspaper, but there was no evidence that he had resorted to false devices to induce persons to contribute to his scheme. That being so, Mr. Bovill is obliged to say that, because the writer of this article had a bonâ fide belief that the statements he made were true, he was privileged. I cannot assent to that doctrine. It was competent to the writer to [777] have attacked the plaintiff's scheme; and perhaps he might have suggested, that the effect of the subscriptions which the plaintiff was asking the public to contribute would be only to put money into his pocket. But to say that he was actuated only by the desire of putting money into his pocket, and that he resorted to fraudulent expedients for that purpose, is charging him with dishonesty: and that is going farther than the law allows.

It is said that it is for the interests of society that the public conduct of men should be criticised without any other limit than that the writer should have an honest belief that what he writes is true. But it seems to me that the public have an equal interest in the maintenance of the public character of public men; and public affairs could not be conducted by men of honour with a view to the welfare of the country, if we were to sanction attacks upon them, destructive of their honour and character, and made without any foundation. I think the fair position in which the law may be settled is this: that where the public conduct of a public man is open to animadversion, and the writer who is commenting upon it makes imputations on his motives which arise fairly and legitimately out of his conduct so that a jury shall say that the criticism was not only honest, but also well founded, an action is not maintainable. But it is not because a public writer fancies that the conduct of a public man is open to the suspicion of dishonesty, he is therefore justified in assailing his character as dishonest.

The cases cited do not warrant us in going that length. In *Paris* v. *Levy* (2 F. & F. 71) there may have been an honest and well founded belief that the man who published the handbill which was commented upon could only have had a bad motive in publishing it, and if the jury were [778] of that opinion, the writer who attacked him in the public press would be protected. We cannot go farther than that.

Crompton J. I am of the same opinion: for the reasons given by the Lord Chief Justice. It must be taken that the jury have found that the imputations made were not within the range of fair argument or criticism on the plaintiff's publication of his scheme. Nothing is more important than that fair and full latitude of discussion should be allowed to writers upon any public matter, whether it be the conduct of public men, or the proceedings in Courts of justice or in Parliament, or the publication of a scheme or of a literary work. But it is always to be left to a jury to say whether the publication has gone beyond the limits of a fair comment on the subject-matter discussed. A writer is not entitled to overstep those limits and impute base and sordid motives which are not warranted by the facts, and I cannot for a moment think that, because he has a bonâ fide belief that he is publishing what is true, that is any answer to an action for libel. With respect to the publication of the plaintiff's scheme, the defendant might ridicule it and point out the improbability of its success; but that was all he had a right to do.

The first question is, whether the article on which this action is brought is a libel or no libel,—not whether it is privileged or not. It is no libel, if it is within the range of fair comment, that is, if a person might fairly and bonâ fide write the article; otherwise it is. It is said that there is a privilege, not to writers in newspapers only, but to the public in general, to comment on the public acts of public men, provided the writer believes that what he writes is true; in other words, that this belongs to the class of privileged [779] communications, in which the malice of the writer becomes a question for the jury; that is, where, from the particular circumstances or position in which a person is placed, there is a legal or social duty in the nature of a private or peculiar right, as opposed to the rights possessed by the community at large, to assert what he believes. In these cases of privilege there is an exemption from legal liability in the absence of malice; and it is necessary to prove actual malice. But there is no such privilege here. It is the right of all the Queen's subjects to discuss public matters; but no person can have a right on that ground to publish what is defamatory merely because he believes it to be

true. If this were so, a public man might have base motives imputed to him without having an opportunity of righting himself. Therefore it is necessary to confine privilege, as the law has always confined it, to cases of real necessity or duty, as that of a master giving a servant a character, or of a person who has been robbed charging another with robbing him. Though the word "privilege" is used loosely in some of the cases as applied to the right which every person has to comment on public matters, I think that in all the cases cited the real question was whether the alleged libel was a fair comment such as every person might make upon a public matter, and if not there was no privilege.

In the present case it is clear, as found by the jury, that the article is beyond the range of fair comment, and, this not being a case within the rule as to privilege, the only other available mode of defence was by proving the truth of the article.

The verdict was therefore right; and the finding of the jury, that the writer of the article believed what he wrote to be true, affords no answer to the action; and I **[780]** think the case is so clear that we ought not to throw any doubt upon the subject by granting a rule.

Blackburn J. I also think that the law governing this case is so clearly settled that we ought not to grant a rule. It is important to bear in mind that the question is, not whether the publication is privileged, but whether it is a libel. The word "privilege" is often used loosely, and in a popular sense, when applied to matters which are not, properly speaking, privileged. But, for the present purpose, the meaning of the word is that a person stands in such a relation to the facts of the case that he is justified in saying or writing what would be slanderous or libellous in any one else. For instance, a master giving a character of a servant stands in a privileged relation: and the cases of a memorial to the Lord Chancellor or the Home Secretary on the conduct of a justice of the peace, *Harrison* v. *Bush* (5 E. & B. 344), and of a statement to a public functionary, reflecting upon some public officer, *Beatson* v. *Skene* (5 H. & N. 838), rank themselves under that class. In *Maitland* v. *Bramwell* (2 F. & F. 623) the bona fides of the defendant was left to the jury, because she was privileged by her position to say what she believed to be true; so in *Eastwood* v. *Holmes* (2 F. & F. 347), when properly understood, Willes J. must have considered that there was a privilege of this kind when he nonsuited the plaintiff in an action against the publisher of a report of the proceedings of The British Archæological Association, in which it was stated that some supposed antiquities offered for sale by the plaintiff were of recent fabrication. In these cases no action lies unless there is proof of express malice. If it could be shewn that the editor or pub-**[781]**-lisher of a newspaper stands in a privileged position, it would be necessary to prove actual malice. But no authority has been cited for that proposition; and I take it to be certain that he has only the general right which belongs to the public to comment upon public matters, for example, the acts of a minister of state; or, according to modern authorities somewhat extending the doctrine, where a person has done or published anything which may fairly be said to invite comment, as in the case of a handbill or advertisement; *Paris* v. *Levy* (2 F. & F. 71). In such cases every one has a right to make fair and proper comment; and, so long as it is within that limit, it is no libel.

The question of libel or no libel, at least since Fox's Act (32 G. 3, c. 60), is for the jury; and in the present case, as the article published by the defendant obviously imputed base and sordid motives to the plaintiff, that question depended upon another,—whether the article exceeded the limits of a fair and proper comment on the plaintiff's prospectus; and this last question was therefore rightly left to the jury. Then Mr. Bovill asked that a further question should be left to them, viz. whether the writer of the article honestly believed that it was true; and the jury have found that he did. We have to say whether that prevents an action being maintained. I think not. Bonâ fide belief in the truth of what is written is no defence to an action; it may mitigate the amount, but it cannot disentitle the plaintiff to damages. Moreover that honest belief may be an ingredient to be taken into consideration by the jury in determining whether the publication is a libel, that is, whether it exceeds the limits of a fair and proper comment; but it cannot in itself prevent the matter being libellous. **[782]** In *Turnbull* v. *Bird* (2 F. & F. 508) it was assumed that a person who entertained the belief that a Roman Catholic would falsify a document for the good of his church, might bring forward that belief in commenting upon the question whether a Roman Catholic should hold a particular office; and in

that case the question of the bonâ fide belief of the defendant might be a proper ingredient to be considered in determining whether the alleged libel was in excess of fair and proper comment or not. But Chief Justice Erle does not say that the alleged libel was a privileged communication in the strict sense of the word, requiring proof of actual malice: neither does he say that honest belief, taken by itself, would have the effect of making it not an unfair comment or not a libel. In *Paris* v. *Levy* (2 F. & F. 71) if the jury thought that the handbill commented offered an inducement to servants to commit petty thefts, as was alleged in the article complained of, that also might be an ingredient in considering whether the article was a fair comment.

Mellor J. I am of the same opinion. I should be unwilling to limit the right of a writer in a newspaper, or any other individual, to canvass any scheme, even though it be a scheme of public benevolence. But giving full latitude to fair comment, so soon as a writer imputes that the person proposing the scheme is doing it from a base and sordid motive, and is putting forth a list of fictitious subscribers, in order to delude others to subscribe, it cannot be said to be within the limits of fair criticism.

If comment is beyond the limits of fair criticism it becomes a libel. And I agree that the question in this [783] case is, libel or no libel. If the words were used upon a justifiable occasion, no action could be maintained; for the interest and exigencies of society require that there should be free communication between parties who have a duty, either moral or legal, to discharge towards each other, as in the common case of a master giving the character of a servant, in which defamatory words are privileged unless proved to be false and malicious. But in the present case there was no legal or moral duty on the writer to make these imputations upon the plaintiff. The jury found that the comments were beyond the limits of fair criticism; I think they were; and it would be very hard if an action could not be maintained. Suppose an action brought against a person for a libel, containing a serious imputation on the plaintiff's character; and the jury think that the party making it honestly believed it to be true. If the doctrine contended for by Mr. Bovill prevailed, what would be the effect upon the character of the plaintiff? He could not clear himself; and it would be said that, although the jury had not found that the imputation was true, they found that the person who made it fairly and honestly believed it to be well founded. That would be a serious hardship on the person libelled. And, as far as I am aware, this is the first time it has been contended that a libel which imputes the obtaining of money under false pretences, and is not excused by being true, nor made on an occasion in which the exigencies of society required it, is excused by the fact that the person making it believed it to be true.

I therefore concur in thinking that no doubt should be left on the point by granting a rule.

Rule refused.

[784] SHERBORN THE YOUNGER, *Appellant*, WELLS, *Respondent*. Wednesday, April 29th, 1863.—Metropolitan Police Act, 2 & 3 Vict. c. 47, s. 54. Cattle "loose" in a thoroughfare.—The owner of land on both sides of a highway, who claimed the grass and herbage growing on such parts of it as were not gravelled, put his cattle under the care of a servant, but who had no hold of them, to graze upon it: Held, that they were not turned loose within the meaning of The Metropolitan Police Act, 2 & 3 Vict. c. 47, s. 54, clause 2.

[S. C. 32 L. J. M. C. 179; 8 L. T. 274; 9 Jur. N. S. 1104; 11 W. R. 594.]

Case stated by justices under the 20 & 21 Vict. c. 43.

The appellant was convicted, under The Metropolitan Police Act, 2 & 3 Vict. c. 47, s. 2, on the information of police serjeant Wells, at the Petty Sessions Police Court at Sunbury, in the county of Middlesex, in the penalty of ten shillings and costs, for having, on the 23d June, 1862, turned loose a quantity of cattle, to wit, &c., in a public thoroughfare in the parish of Bedfont, in the said county, being within the Metropolitan Police District.

The police serjeant gave evidence that, on the 23d June, 1862, his attention was called by Mr. Robert Taylor, of Bedfont, to a number of cattle that were loose in the Stanwell Road, in that parish: that he went there and saw eleven head of cow cattle