THE LAW AND THE PRESS

THE REPORT OF A
JOINT WORKING PARTY
OF

JUSTICE

AND THE BRITISH COMMITTEE OF THE

INTERNATIONAL PRESS INSTITUTE

CHAIRMAN OF WORKING PARTY
THE RIGHT HON. LORD SHAWCROSS, Q.C.

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The Report of a Joint Working Party of representatives of JUSTICE and of the British Committee of the International Press Institute which in the view of the Council of JUSTICE clearly contains important recommendations and provides a basis for informed discussion

CHAIRMAN OF WORKING PARTY
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JUSTICE

British Section of the International Commission of Jurists

Joint Working Party with the British Committee of the

International Press Institute

on

THE LAW AND THE PRESS

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INTERNATIONAL PRESS INSTITUTE

The International Press Institute is a private association of newspaper editors which was founded in 1951 with headquarters at Zurich. Its aims are to safeguard the freedom of the Press, improve the practices of journalism and promote the exchange of news. It has members in 51 countries and National Committees in 24, where the Press is free.

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INTRODUCTION

Origins and purpose of the Working Party

1. This Working Party was set up in consequence of a Symposium on Legal Privilege organised by JUSTICE in the Spring of 1964. The main purpose of the Symposium was to explore the issues arising out of the imprisonment of two journalists for refusing to disclose to the Vassall Tribunal their sources of information, but the discussion covered other forms of privilege.

2. The contributors to the Symposium were Sir Edwin Herbert (now Lord Tangley), Mr. (now Sir) Dingle Foot, Q.C., M.P., and Mr. E. J. B. Rose, formerly Director of the International Press Institute.* A striking feature of the discussions was that, despite widely differing approaches to the problem, there was general agreement that no change in the legal position which had resulted in the imprisonment of the journalists was either desirable or possible. But it was clear that the Vassall affair had caused serious misgivings and some resentment against the law on the part of the Press. At the end of the discussion Mr. Rose suggested that JUSTICE could perform a useful service by setting up a joint Committee with representatives of the Press to consider means of allaying these misgivings.

3. Preliminary consultations showed that there was some strong similarities of approach between the lawyers and journalists who took part in them. The lawyers recognised the need for a free and responsible Press and the journalists accepted that the liberty of the subject and the security of the State had to be protected. It became clear, however, that the Press felt that there were some areas in which the Courts, in protecting the liberty of the subject and the security of the State, unduly restricted journalists from presenting facts of public interest and in commenting editorially on them. It appeared that to some extent these conflicts may arise from an insufficient understanding by journalists of the principles and practice of the law and inadequate appreciation by lawyers of the

* The addresses given by Sir Edwin Herbert and Mr. E. J. B. Rose at this Symposium were subsequently included in a special number of "Crucible" (the Journal of the Church Assembly Board for Social Responsibility), devoted to the subject of Privilege.

problems of journalists and the conditions under which they work. It was agreed that conflicts were most apt to arise in the areas of—

(a) Contempt of Court

(b) Official Secrets

(c) Libel.

4. It was therefore decided that a joint Working Party should be set up consisting of four representatives of JUSTICE and three representatives of the Press chosen by the British Committee of the International Press Institute, and that its terms of reference should be:

> "To enquire into the extent to which the Law and the practices of the Courts as at present existing in respect of Contempt of Court, Libel and Official Secrets, hamper the Press in publishing facts of public interest, and in editorially commenting thereon within the limits of what is necessary for the protection of the liberty of the subject and the security of the State."

5. It was further agreed that the setting-up of the enquiry should not be publicised and that its proceedings should be private, so that representatives of the Press who were invited to give their views and experiences could speak freely and give the Working Party details of concrete examples. It is for this reason that opinions and facts mentioned in this Report have in no case been individually ascribed.

6. We enjoyed the most helpful co-operation of all the various newspapers we approached. In fact we were not able to see all those who were ready to come and talk to us. We did, however, obtain the views of proprietors, editors, legal advisers and working journalists of many national newspapers and also of the editors of two provincial newspapers. Throughout the Report we have referred to them for convenience as witnesses but we should like to make it clear that we did not ask them to come in that capacity but rather as advisers and guides to us in our study of their problems and the search for a solution to them. We are greatly indebted to them for the help they gave us.

The Vassall case

7. Because this enquiry was prompted by the events which led to the imprisonment of the two journalists for contempt of court, we felt that we should consider that case and discuss it with our witnesses. But as the main issue involved in it was privilege rather

than contempt, and since the problems of privilege for the source of a journalist's information had recently been exhaustively discussed, we felt it unnecessary to go beyond the statement made at the JUSTICE Symposium by Sir Edwin Herbert, who on that occasion said:

8. "I hold firmly to the view that the present law is right and necessary and that the Court should not treat these communications as privileged. In their struggle for freedom and in particular their freedom from the bondage of Parliamentary privilege, the Press have had one friend and defender only, and that is the Courts; and the Courts could have done little for the freedom of the Press had they remained dependent on the executive branch of government. It was the revolutionary settlement of 1689 which did more than anything else to establish the Rule of Law which means that the citizen can appeal to the Courts and have his actions judged according to law, whatever either House of Parliament or the executive may say. If the supremacy and independence of the Courts had not been established, Courts could not have given the long series of decisions which cumulatively guarantee the freedom of expression upon which in its turn the freedom of the Press depends. The freedom of the Press depends upon the Rule of Law, which in the last resort depends upon the supremacy and independence of the Courts.

9. "There are numerous situations in life which impose a seal of confidence upon some person or another. One can think of the relationship between confessor and penitent, doctor and patient, and of course journalists and the source of information. Communications between these classes of persons are confidential and ought to be preserved. These loyalties should be respected. The Courts do, in fact, respect them; the judge will do everything humanly possible to avoid a conflict arising between these loyalties and the supreme loyalty to the Court. Lord Radcliffe's was a conspicuous example of this attitude on the Vassall Tribunal.

10. "But in the last resort these loyalties must give way to the supreme loyalty to the Court: and the reason is that the existence and safety of these loyalties depend in the last resort upon the supremacy and independence of the Court. . . . I would beg my journalist friends to ponder these things before pressing for any form of privilege which would be an inroad upon the supremacy and independence of the Courts."

11. While accepting this statement of principle, the representatives of the Press on our Working Party expressed support for a

suggestion made by Mr. E. J. B. Rose at the JUSTICE Symposium, when he said: "In my submission, a journalist cannot possibly know whether his information and its source are relevant to such an enquiry or not. I believe that there should be some intermediary between the tribunal and the journalist, a kind of Ombudsman, trusted by the law and by the profession of journalists, to whom the journalist could disclose his source. This intermediary could satisfy himself whether the tribunal needed the evidence and its source, and so advise the journalist, who would still have to decide finally whether to, as a matter of conscience, protect his source and take the consequences. This would be a more satisfactory arrangement than the present one; for journalists now feel that they are being compelled on insufficient grounds of relevance, and the public wonders whether the journalists have *bona fide* sources or have invented their stories." If an Ombudsman were appointed, this might well be one of the functions he could perform.

The Law and its Interpretation

12. In our view there are no final answers to the problem of balancing the need for the freedom of the Press to publish what it regards as being in the public interest against the occasionally higher interest in restricting publication. This is not a field of law in which it is easy to declare any absolute standards or rules. In the last resort it must rest with the Judges to hold the balance between conflicting interests, both public and private, and with the Press to act always with the highest sense of responsibility. In this Report we have therefore tried to examine any undesirable restraints which at present exist and to assess the extent to which they do or do not arise in the present law and the way it is administered, and to suggest practical safeguards and amendments to the law only where they appear to be needed.

CONTEMPT OF COURT

INTRODUCTORY

13. Contempt of court was the subject of the first Report issued by JUSTICE. This Report, which was published in 1959 and is now out of print, was not limited to the question of contempt of court by the Press but dealt with the whole field of civil and criminal contempt. Its recommendations led to the inclusion in the Administration of Justice Act, 1960, of clauses giving a right of appeal in cases of criminal contempt and providing a defence in cases of innocent publication and distribution of matter that would, but for such a defence, be in contempt.

14. *Contemptus curiae* has been a recognised phrase in English law from the twelfth century, but it can only be defined in the most general terms. We do not think that we can improve on the definition suggested in Oswald's *Contempt of Court:* "To speak generally, contempt of court may be said to be constituted by any conduct that tends to bring the authority and administration of the law into disrespect or disregard, or to interfere with or prejudice parties litigant or their witnesses during the litigation."

THE EVIDENCE OF WITNESSES

15. We invited our witnesses to consider the problem of contempt of court under three separate headings:

(a) References by the Press to proceedings known to be pending or imminent.

(b) Comment on trial proceedings and sentences pending a possible appeal.

(c) Criticisms of the conduct of judges.

General views

16. There was considerable divergence of opinion between witnesses as to the extent to which the law of contempt stifled legitimate comment or hampered the Press in its recognised duty to investigate and bring to light matters of public interest.

17. The Editor of one serious daily newspaper expressed the view that the law of contempt definitely weakened the Press in its efforts to give the public the knowledge to which it was entitled.

He felt in particular that considerable inhibitions existed in respect of publishing information about financial scandals in the City. He thought it was a newspaper's duty to warn investors of financial improprieties, but whenever there was a possibility of criminal proceedings, Editors' hands were tied. On the other hand, the Legal Adviser of a mass-circulation daily newspaper thought that the present law did substantial justice.

18. The divergence of view was especially reflected in relation to comment on the fairness of trial proceedings and on the conduct of judges presiding over them. A majority of witnesses expressed the view that the law of contempt considerably limited such criticism, whereas a minority thought there was ample scope for criticism provided that no partiality or other wrong motive was attributed to the judge.

19. Similarly in the case of comment on proceedings that were technically "pending", the same majority thought that it was dangerous to criticise the conduct or outcome of a criminal case before the appeal had been heard or while the time allowed for an appeal had not expired. The minority, however, were of the opinion that criticisms could legitimately be made and cited examples. We have referred to these differences of opinion in some detail under their appropriate headings and we mention them here in order to bring out at an early stage the sharp difference of view about the limitations under which the Press works.

20. There was, however, almost general agreement among witnesses that the restrictions imposed by the law of contempt were greater than they appeared because of uncertainty as to their precise extent, especially in view of the need to make quick decisions. An article could not normally be referred to counsel for consideration at leisure, but had to be rapidly evaluated. This tended to induce a cautious approach which usually militated against publication, particularly if legal advice was sought.

Reports of imminent or pending proceedings

21. A large majority of witnesses expressed the view that, subject to specific criticisms set out in a later paragraph, the present position at law was substantially fair. The introduction in the Administration of Justice Act, 1960, of a right of appeal in cases of criminal contempt appeared to be an important factor in shaping this view. It was thought that detailed accounts of crimes and criminal investigations could be published provided that only known and indisputable facts were used to link the crime with the accused

person. It was stressed that greater difficulties arose over reports of investigations than reports of committal proceedings, where a ruling from the Court was at present the sole barrier to publication.

22. The legal adviser of a mass-circulation newspaper said that the police were usually helpful when a newspaper wanted to report the progress of criminal investigations and would indicate, for example, whether identity was in issue. It remained the responsibility of the newspaper, however, to make its own decision to publish in the light of the guidance given by the police. The great majority of witnesses recognised that this aspect of the law of contempt in general went no further than was necessary to safeguard the interests of persons suspected or accused of criminal offences, although it required the Press to exercise a high degree of care in handling reports of investigations and rumours.

23. A particular criticism of the law of contempt as it affects imminent or pending proceedings was referred to by a number of witnesses in our discussions on the law of libel. We were told that persons who were being adversely commented on in a newspaper quite often issued a writ for libel, so that the subject matter of the libel became *sub judice* and the law of contempt prevented any further comment. This not only silenced the newspaper concerned, but also inhibited other newspapers from commenting on the matter. A variation of this technique is for the person defamed or criticised to arrange for an associate to issue a writ relating to some aspect of the matter, so that he can obtain the umbrella of protection without having himself to take any action. This technique has frequently been used during elections.

24. Witnesses admitted however that the same effect was produced by writs issued honestly and with full justification, and no witness was able to suggest a remedy which would distinguish between proper and improper use of the power to issue a writ. It was considered unthinkable that the victim of a libel should be deprived of his right to seek the protection of the courts, and a lesser evil for such protection to be taken advantage of unfairly than for the safeguards of a fair trial to be removed. A suggestion that it should be made easier to secure the dismissal of an action for libel that is not being pursued has been dealt with in the section on libel.

25. The question was also raised as to whether it would necessarily be contempt of court for a second newspaper to make a similar allegation on a matter which had already been the subject of allegations in another newspaper. Some witnesses felt that they

should be free to do so provided the matter was one of public interest and the comment was not calculated to influence any proceedings, and we all accepted this view.

26. The majority of witnesses were critical of the fact that it was still possible for anyone to bring proceedings for contempt and felt that this had an important bearing on the problems just mentioned. They urged the adoption of the suggestion made by Lord Goddard, C.J., in 1953 in relation to the prosecution for contempt of the Editor of the magazine *Lilliput* that proceedings for criminal contempt not in face of the Court should be initiated only on instructions of the Attorney-General. This was recommended in the JUSTICE Report of 1959, and it appears right to us that the integrity of the courts should be the proper concern of the Attorney-General.

27. Some witnesses further suggested that, if such a procedure were adopted, news items and comments which it was desired to publish could be submitted to the office of the Attorney-General for advance clearance. An analogy was drawn with the procedure under the Official Secrets Act referred to in another part of this report. But others felt this to be impracticable, as all the facts and background of a case might not be known to the Attorney-General and could not be investigated by him quickly enough to allow the newspapers to make the comment at the relevant time. We agreed with this latter view and are in any event of the opinion that it is not the proper function of the Attorney-General to attempt to lay down the law in advance in this way.

Reports and Comments on Trial Proceedings and Sentences

28. The majority of witnesses were concerned about what they felt was the limitation on the right to comment on a trial before the hearing of an appeal, or before the expiry of the time allowed for appeal. In cases appealed up to the House of Lords a very long time could elapse before comment might be made on matters of considerable public importance. *R. v. Smith* (1)* (which went to the House of Lords) or *R. v. Connelly* (2) (where there were two trials, two appeals to the Court of Criminal Appeal, and an appeal to the House of Lords and a reserved judgment) were examples. It was emphasised by these witnesses that a newspaper, as opposed to a periodical, had to report facts and comment on them while

* Figures in brackets after the names of the cases referred to in the Report indicate the number of the case in the Notes on Cases in Appendix III.

they were still of immediate interest to its readers. Such interest existed primarily at the end of the trial. Only a limited number of persons normally sustained their interest in a case until the conclusion of the appeal.

29. A minority of witnesses, however, felt that no such limitation existed in practice, and cited examples where serious criticism had been made after the trial and before the appeal, for example, of the heavy sentences imposed in the Mail Train Robbery case. It was also pointed out that the decision in *R. v. Duffy* (3) ex parte—Nash (which held that contempt of court involves actions likely to prejudice a fair trial and not merely to cause embarrassment to the judges of the Court of Criminal Appeal) had widened the scope for comment after a criminal jury had given its verdict. It will be seen below that we share the view of the minority witnesses on this point. Although witnesses disagreed as to whether any real limitation on reasonable comment did exist, they were unanimous in taking the view that any such limitation was highly undesirable.

Appeals for witnesses

30. A matter which arose in discussion with the legal adviser of one newspaper was whether it was contempt of court to publish an appeal for new witnesses to come forward after the conclusion of a trial and before an appeal. A case was cited in which the wife of a man sentenced to 14 years' imprisonment for armed robbery had asked more than one newspaper to run a story asking two unidentified witnesses who could provide him with an alibi to come forward. They were unwilling to do so, because they feared that publication might be contempt of court. We were of the opinion that provided the appeal for witnesses was made in a responsible way, without pre-judging the outcome if the witnesses were to come forward and without criticism of the trial proceedings, such publication would be unobjectionable. But the view that it might constitute contempt, even if erroneous, was nevertheless genuinely held.

31. Witnesses shared our view that this was one of the ways in which the Press could and should assist in the administration of justice, especially if the proposed legislation to prevent publication of contemporaneous reports of committal proceedings is passed. We think that the Press should be free to help parties by calling for witnesses.

Lack of staff with legal experience

32. It was felt by all witnesses that some of the uncertainty as to the scope of the law of contempt, in this as in its other aspects, could be attributed to the fact that since the last war very few national newspapers have covered legal proceedings with their own staff. The majority rely on Agency reports. As a result few reporters were in touch with the atmosphere of the courts and the climate of judicial opinion, and equally very few members of editorial staffs had any real knowledge of legal matters or personal experience of the working of the courts.

33. A further result of this absence of specialised knowledge and experienced staff was that matters meriting critical comment often went unnoticed because their significance was not realised. It was generally agreed that these facts were true of all except two or three national newspapers, but it was pointed out that many provincial newspapers still sent their own reporters to cover proceedings at Assizes and Quarter Sessions and that local newspapers usually covered Magistrates' Courts in their areas.

34. We agree with this diagnosis and believe that the Press would do well to take proceedings in the courts more seriously, and to devote to them more of its resources than it does at present. It should resist the temptation to feel that it has done its duty by publishing the more sensational cases. The Press should take on far more than it has done in the past the role of the guardian of justice in the day-to-day proceedings of the courts. It is here that unnoticed abuses and miscarriages of justice are most likely to occur.

Criticism of the conduct of judges and judicial processes

35. Here also the views of witnesses were sharply divergent: a substantial minority of witnesses thought that the Press was extremely cautious in criticising the judiciary because of uncertainty as to what precisely constitutes contempt. Both the proprietor and the legal adviser of one of the larger newspaper publishers expressed the view that the Press was also chary of criticising the conduct of a judge for fear that an action in which the newspaper might subsequently be involved would be tried by the same judge, and that he would then be biased against it.

36. The majority, however, thought that there was ample freedom within the law for proper criticism of judges, and of their conduct of trials, although some considered that newspapers could

not impugn the integrity and impartiality of a particular judge. Some of this majority felt that the right of critical comment was not as freely exercised as it might be because lack of personal knowledge and experience on the part of reporters and editorial staff militated against criticism of conduct other than that appearing on the face of the record.

37. A number of witnesses felt strongly, and we agreed with them, that if judicial conduct appeared to deserve criticism newspapers should have the courage to make it. It was thought that occasions had arisen, and would continue to arise, when criticism could properly be made of a particular judge's handling of a civil or criminal case, or of a pattern of judicial behaviour. The responsible way to ventilate such criticism would be to send an experienced reporter to the court, and to publish a strictly factual account of the proceedings, for example of the number of interruptions made, and of the treatment of witnesses and counsel, and to add appropriate comments on such facts after the conclusion of the trial.

Conclusions and Recommendations

38. The foregoing summary and assessment of the views expressed to us indicate that we found a considerable divergence of opinion both as to the extent of comment on judicial proceedings that a newspaper can safely and properly make, and as to the deterrent effect of the law of contempt in practice. One witness pointed out to us that the deterrent power of the law of contempt was considerably greater than that of the law of libel because it could result in the Editor going to prison, and not simply in the payment of damages. We regard this as a very real factor to be taken into consideration. The main objection to the existing law of contempt is its uncertainty. To some extent this may be due to the fact that the law of contempt does not lend itself to precise definition. We sympathised greatly with the legal adviser of an important newspaper when he told us that contempt was far more difficult to explain to working journalists than libel, as the rules were so vague and there was not even an up to date text book on Contempt, We also have sympathy for the Editor who feels caught and somewhat helpless between the vagueness of the law and the harshness of the possible penalties. We are nevertheless of the opinion that the law of contempt is not nearly as threatening as some editors and journalists imagine it to be, and need not be as inhibiting.

Imminent Proceedings and Trial Proceedings

39. We have considered the various views and representations made to us relating to reports of criminal investigations and to comments on trials that are pending or in progress and have come to the conclusion that no change in the law is either practicable or desirable. We had brought to our notice the strictness and severity of the law in Scotland and, at the other extreme, the practice of what almost amounts to trial by newspaper in the United States. In respect of pending proceedings, we think that a fair and workable compromise has been reached in England by the provision in the Administration of Justice Act, 1960, that a person is not to be guilty of contempt if he can show that, having taken all reasonable care, he did not know and had no reason to suspect that proceedings were pending or imminent.

40. We gave special consideration to the problem of writs that are issued merely to stifle any further adverse comment. We agree that such abuse of the protection of the courts can act against the public interest, but we entirely support the view of all our witnesses that there is no remedy for this and that it would be unthinkable that the victim of a libel should be deprived of the power to issue a writ. We are further of the opinion that the risk of a prosecution for contempt in such circumstances is not in fact as great as it would appear to be. A newspaper which has libelled a person can always take the risk of repeating a libel if it is in a position to justify its truth and intends to do so. The victim's remedy, pending the hearing of the case, is to apply for an injunction and we are of the opinion that the courts would not encourage a prosecution for contempt instead, unless there were prima facie evidence of a deliberate attempt to influence trial proceedings.

41. It is also our view that it would not necessarily be contempt of court for a second newspaper to make a similar allegation to one already made in another newspaper, or to comment on it, unless it could be shown that such a publication was calculated to influence any proceedings. *We nevertheless think it desirable that the points in this and the preceding paragraph should be clarified in any future legislation.*

42. *We think it important, particularly in the light of the proposed prohibition of the publication of contemporaneous reports of committal proceedings, that the right of newspapers to publish responsible appeals for witnesses to come forward should be clearly established.*

43. *We also think, as did the* JUSTICE *Report of* 1959, *that it would be folly to label as contempt the publication of the name and photograph of a notorious and dangerous convict on the run, and the crimes he is suspected of having committed.*

Comment on sentences and convictions

44. We believe that it is open to a newspaper to comment on the sentences imposed on a convicted person prior to appeal provided that such a comment is temperate. A number of newspapers commented, both favourably and unfavourably, on the sentences passed on the Mail Train robbers. In that case the judge expounded the principles and reasons for the sentences. These were of social interest and importance, and in our view it was perfectly proper for newspapers to comment on them as well as on the length of the sentences. It has also been established that it is permissible to compare sentences passed for different kinds of offence, or for similar offences in different courts. To comment on a conviction, however, e.g. to say that the verdict was patently against the weight of the evidence may impugn the integrity of the court—both judge and jury. It would nonetheless, we feel, be wrong to state that comment upon a verdict necessarily constitutes contempt. Made in temperate terms upon careful and considered diagnosis it would seem that comment if fair and reasonable would not necessarily constitute a contempt even though made between trial and appeal.

45. We considered whether it was desirable to remove such uncertainties as exist in the minds of some editors and journalists by embodying the present accepted practice in a rule of law, but we found it difficult to frame a rule which would be generally applicable and yet precise. For example, comments upon cases are often based on inadequate reports which have not brought out the special features of the case or cases in question. Such comment or reports may occasion nothing more harmful than some slight embarrassment to the judges of the Court of Criminal Appeal, but we think it is desirable to preserve the residual jurisdiction of contempt to cover a situation where public opinion, which could in some circumstances influence an appellate judge, is being moulded by an uninformed report or intemperate comment which might create a greater difficulty for the appellate tribunal than mere embarrassment. We think it right that the Court of Criminal Appeal should be protected from the danger of being influenced by such objectionable matter.

46. For these reasons we can see no need for a change in the present law. Past cases show that responsible comment can be made without fear of contempt proceedings. *We therefore urge newspapers to regard themselves as free to comment responsibly on sentences between the trial and the hearing of the appeal and to do so in appropriate cases and not to rule out in proper cases temperate comment upon a verdict if based on careful analysis and reasoned conclusions which do not lose sight of respect for the court nor reflect upon its integrity.*

Criticism of the conduct of judges and trials

47. We believe that recent examples show that it is quite possible for newspapers to make criticisms of the conduct of judges and of trial proceedings, at least so long as the integrity of the judge is not called in question. We have in mind the trenchant criticism which appeared in a serious Sunday newspaper of the handling of common law cases by three High Court judges whose only experience, prior to their appointment, had been of commercial cases, and also a recital of the critical comments which had been made by the Court of Criminal Appeal on the behaviour and summings-up of a judge of Quarter Sessions. A book on the Stephen Ward case was highly critical of the judge's conduct of the trial.

48. The 1959 JUSTICE Report expressed a view that we were all able to support:

"In the case of criticism of a judge, the element of scandalising justice should, in our view, be weighed against the benefits of free discussion and comment . . . Having weighted in this way the interference with justice against other aspects of the public interest, if the scales come down in favour of the latter we do not consider that the act complained of should be regarded as contempt at all."

49. We again felt it undesirable and impracticable to attempt to frame any new rule. Each case should turn on its own particular facts and motives, and it is important that the protection of the image of justice against intemperate criticisms should ultimately rest with the courts themselves. The best guide for the Courts is to be found in Lord Atkin's judgment of the Privy Council in *Ambard v. Attorney-General for Trinidad and Tobago* (4) when he said:

"But whether the authority and position of an individual judge, or the due administration of justice is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticism, in good faith, in private or in public, the public act done in the seat of justice. The path of criticism is a public way; the wrong headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men."

50. Except from the kind of conduct which could provoke an Address by both Houses of Parliament there is no formal machinery for disciplining or removing judges in this country. There are the restraining and criticising powers of our Courts of Appeal, and no doubt complaints which reach the Lord Chancellor via the Bar Council or otherwise have some effect if they reach grave proportions. *But a large measure of responsibility rests upon the Press to keep a constant watch on the proceedings in the courts at all levels and to make such criticisms as appear necessary in the interests of justice. We therefore support the view of one Editor who said that if a criticism needed to be made, the Press should have the courage to make it and risk the consequences.*

51. The fact that the last two prosecutions for publishing criticisms of a judge took place in 1900 and 1928 suggests that the law is not as stern in this matter as it has been thought to be and that the Press may have been unduly cautious.

52. In 1900 a man named Wells was prosecuted before Darling J. for publishing an indecent book. The next day an editor named Gray published an article which on his own admission referred to Darling J. in terms which were "intemperate, improper, ungentlemanly and void of the respect due to his Lordship's person and office".

In his judgment Lord Russell of Killowen C.J. stated: "Any act done or writing published calculated to bring a Court or a Judge of the Court into contempt or to lower his authority, is a contempt of court . . . this belongs to the category which Lord Hardwicke L.C. characterised as 'scandalising a Court or a Judge' (in Re Read v. Huggonsen, 1742).

"That description of that class of contempt is to be taken subject to one and an important qualification. Judges and Courts are alike open to criticism, and if reasonable argument or expostula-

tion is offered against any judicial act as contrary to the Law or the Public Good, no court could or would treat that as contempt of court. The law ought not to be astute in such cases to criticise adversely what under such circumstances and with such an object is published; but it is to be remembered that in this matter the liberty of the Press is no greater and no less than the liberty of every subject of the Queen . . . In this case it is not criticism—I repeat that it is a personal scurrilous abuse of a judge as a judge."

Gray was fined £100 and £25 costs and detained in gaol until those sums were paid.

53. In 1928 Mr. Clifford Sharp, editor of the *New Statesman*, was called to show why he should not be attacked for contempt of court in respect of a paragraph published in the *New Statesman* on January 28, 1928, which it was alleged was calculated to lower the authority of Mr. Justice Avory and bring him into contempt.

The paragraph stated amongst other things: "We cannot help regarding the verdict given this week in a libel action brought by the Editor of the *Morning Post* against Dr. Marie Stopes as a substantial miscarriage of justice . . . prejudice against her aims ought not to be allowed to influence a court of justice in the manner in which they appeared to influence Mr. Justice Avory in his summing-up. . . The serious part of this case however is that an individual owning to such views as those of Dr. Stopes cannot apparently hope for a fair hearing in a court presided over by Mr. Justice Avory—and there are so many Avorys."

The court said it had no doubt that the article constituted a contempt in that it imputed unfairness and lack of impartiality to a judge in the discharge of his judicial duties. The court nevertheless accepted an apology and merely ordered costs against Sharp.

General Recommendations

54. Looking at the various categories of contempt as a whole we have considered two suggestions. The first is that proceedings for contempt of court in respect of publications in newspapers and journals should be instituted only upon the instructions or with the leave of the Attorney-General. The second, which is dependent on the first, is that a statement should be issued by the Lord Chancellor or the Attorney-General outlining the circumstances in which proceedings will be instituted. We have however rejected the second suggestion on the grounds that the whole remedy of contempt of court is designed not to protect the rights of the

citizen, but the judicial process and the independence of the courts. It seems to us desirable that the Attorney-General should be able to take an unfettered view of any particular case.

55. *We do however unanimously recommend that proceedings for contempt in relation to publications in newspapers and journals should be brought only on the instructions or with leave of the Attorney-General.*

56. *With regard to the Press itself we believe that it would be of great advantage to them, and to the public interest if newspapers could devote more continual and serious attention to matters concerning the administration of justice and employ more experienced reporters and editorial staff for this purpose.*

OFFICIAL SECRETS

57. We found in our discussions on Official Secrets that the representatives of the Press were, on the whole, reasonably satisfied about the position where national security is genuinely involved, but critical of the way the Official Secrets Act has been and can be used to stifle discussion on matters of general public concern, with no bearing on security at all.

Evidence of Witnesses

Security : Defence

58. All our witnesses testified to the general satisfactory position which exists in respect of genuine matters of national security, i.e. defence, provided the existing machinery is properly used. With certain types of news, " D " notices were issued which made the position of the Press quite clear. Where no " D " notices were issued, doubts could be quickly clarified by a reference to the Secretary of the Services Press and Broadcasting Committee of the Ministry of Defence. All witnesses paid tribute to the helpfulness and co-operation of the past and present Secretaries of this Committee.

59. It was recognised that much depended on the personal qualities of the Secretary. At present, news could be submitted to him for consideration at any hour of the day or night and the response was so quick that, even where consultation with departments was necessary, the item usually retained its news value. Further, an initial refusal to give clearance for publication would sometimes be reversed after discussion. It was the success of this system which prompted some representatives of the Press to think that it would be desirable if a similar system of reference to an authority could be available where an item might raise a question of contempt of court.

60. There was nevertheless some criticisms of the working of the " D " notice system. The Legal Adviser to one national daily newspaper thought that, in the case of the flight of an aeroplane over Aden, there had been an attempt to mislead the Press as to its route. This witness recognised that the misleading information may, however, have been given in the national interest. Some witnesses thought that an attempt had been made by a branch of

the security services to mislead the Press over some aspects of the Vassall case, although the actual object may have been to mislead another organisation rather than the Press. Some criticism was also made of the handling of the Blake case, and two witnesses thought that " D " notices were sometimes used to protect departments rather than security, for example by forbidding publication of information already published abroad.

Matters other than Security

61. In this field the majority of witnesses were far more critical of the use of the Official Secrets Act, saying that it was sometimes used to prevent publication of information which could not possibly affect security. The chairman of a group of newspapers expressed the view that it was sometimes used to protect the civil service. He said also that it was used in trivial cases to threaten, for example, a newspaper which had seen an official document about the holiday arrangements for the staff at Broadmoor. A provincial editor described it as " a handy blanket ".

62. One witness pointed out that considerable difficulty was created by the fact that a newspaper dare not admit it had had access to an official confidential document, and thus was unable to justify criticisms of Government departments. The criticism may have been well founded, but without the supporting evidence it was liable to be dismissed as inaccurate and the reputation of the newspaper suffered accordingly. He thought that, in spite of the extensive public relations apparatus of Whitehall, there was a greater atmosphere of secrecy in this country than in France or the U.S.A. He also commented that the penalties for breaches of the Act were heavy and that the ever-present threat of prosecution had a powerful deterrent effect on disclosure of important cases of maladministration. This witness's views were strongly supported by the legal advisers of a serious daily newspaper.

63. One legal adviser thought that the mistakes of civil servants were sometimes covered up by the misuse of " D " notices and said that his newspaper would ignore any such warnings if it felt that the public interest demanded it. A majority of witnesses agreed that the danger of the abuse of " D " notices in this way did exist. Another legal adviser said that although his newspaper would not defy a " D " notice where national security was involved, it might well take the risk in the national interest when security was not involved.

64. A number of witnesses mentioned particular difficulties they had experienced, for example, in respect of criticism of prison conditions where information obtained from prison officers could not be quoted and articles written after accredited visits by responsible correspondents were strictly censored. Another example given was of criticisms of the working of the National Health Service. A majority of witnesses felt that it was an abuse of the Official Secrets Act to bring criminal proceedings against individual public servants who were guilty in minor matters of providing the Press with information in breach of their duty, when ample disciplinary powers existed for dealing with the offence.

Conclusions and Recommendations

Security: Defence

65. We were impressed by the virtual unanimity of the views expressed to us on matters affecting national defence and security and by the strong evidence of the good personal relationship and feeling of mutual confidence which exists between the Press and the Secretary of the Press and Broadcasting Committee of the Ministry of Defence. The possibility of any serious conflict between the law and the Press in matters vitally affecting national security and defence appears to be small. The advantage of the flexible relations that exist are such that we have no suggestions to make to improve the present situation.

66. We did however get the impression that "D" notices have occasionally been issued to prevent discussion or disclosure of matters which are not vital to national security or which have been already published in foreign newspapers, where the purpose was to protect a department rather than national security. We regard such a practice as undesirable and would not criticise any newspaper which published such material if it was certain that it could not harm the public interest

Matters other than security

67. It is in matters not affecting national security that the Official Secrets Act lends itself to abuse or suspicion of abuse. There appears to be a climate of secrecy surrounding the workings of Government departments and public authorities which is particularly marked in this country and in direct contrast to a country like Sweden, where any citizen can walk into a Government department and ask to inspect the files. This British tradition of

secrecy is of long standing but has increased during this century. It is not generally realised, for instance, that until the passing of the Official Secrets Act of 1911, spying in peace-time was not even a criminal offence, whereas now the disclosure or improper use of the most harmless document can lead to a prosecution. We feel that this does not make for good government since it can lead to protection of inefficiency and malpractice, stifle the needful exposure of public scandals, and prevent the remedying of individual injustices.

68. From the evidence we received it appeared that the prison service is one of a number of fields in which the Official Secrets Act is applied with unnecessary strictness. The representatives of JUSTICE on our Working Party were able to confirm this from their own experience, in that no member of the prison service, or welfare officers or prison visitors or chaplains, were allowed by the Home Office to give evidence to the JUSTICE Committee on Criminal Appeals on the difficulties experienced by prisoners in preparing their grounds of appeal. This was a study which would help prison staff as well as prisoners, and was of great importance to the proper administration of justice. Such prohibitions also appear to operate in other fields.

69. We cannot avoid coming to the conclusion that there are occasions when fear of proceedings under the Official Secrets Act does not serve the real public interest. It seems to us to be undesirable and anomalous to apply the provisions of the criminal law to disclosures in the Press of matters which are not really prejudicial to the security of the State. Such conduct is more appropriately dealt with as a breach of a contract of service. Disclosure of information relating to Government departments and the public service would still be deterred, even without the Official Secrets Act, by customary conditions of service and the threat of dismissal. In most cases, the authorities would be able to discover or guess its source. Private corporations are faced with a similar problem, and their employees exercise discretion without the sanction of an Official Secrets Act. It is therefore tempting to suggest that the Official Secrets Act should be invoked only in matters that are prejudicial to the security and vital interests of the State. This was the main purpose of the Act of 1911. The problem, however, is not capable of this simple solution.

70. In the first place it is an offence under the Act not only to give but also to receive information (though oddly enough publication itself is not an offence). The sanction of dismissal or of other

penalties under a contract of service might well deter the giver of information but it could obviously have no effect on the receiver or subsequent publisher, who would be immune from any kind of deterrent or penalty.

Other kinds of information

71. Moreover, the Official Secrets Act does not stand in isolation. There are other fields of government activity in which the free disclosure of information obtained by public servants is undesirable. Similar provisions included in other Acts are designed to prevent the disclosure of information contrary to the national interest, e.g., the Atomic Energy Act, 1946, and the Essential Commodities Reserve Act, 1938. The Bank of England Act, 1946, forbids the disclosure of any advance warning of instructions to be issued to banks by the Treasury, and invokes the provisions of the Official Secrets Act. There is also a whole series of Acts which in the main forbid the disclosure of information collected by or submitted to Government departments in confidence. Among these are the Census Act, 1920, Agricultural Marketing Act, 1931, Import Duties Act, 1932, Coal Act, 1938, War Damage Act, 1943, Statistics of Trade Act, 1949, and the Sea Fish Industry Act, 1951.

72. It appears that there are five main types of information that we have to consider:

(1) Information prejudicial to the security of the State, e.g., defence and police.

(2) Information prejudicial to the national interest, e.g., foreign relations, banking and currency, commodity reserves.

(3) Information which through premature disclosure can provide opportunities for unfair financial gain by private interests.

(4) Information which is confided to Government departments on promise of non-disclosure.

(5) Information which is not prejudicial to the national interest or to legitimate private interests, and relates solely to the efficiency or integrity of a Government department or public authority.

73. In respect of categories (3) and (4), we think it reasonable that the provisions of the Official Secrets Act should continue to apply, in the same way as it must apply to categories (1) and (2). But we do not regard it as in the interests of good government

that the disclosure of information in category (5) should be treated as a criminal offence. If a civil servant knows, for example, that there has been corruption in his department, and victimisation of someone who has tried to bring it to the notice of his superiors, then it is in the national interest that as a last resort he should disclose the facts and that a newspaper should publish them.

Recommendation

74. It might, however, be difficult to devise an amendment to the Act to bring such matters entirely outside its provisions and to overcome the unfair situation described in para. 70 above. *We therefore recommend that it should be a valid defence in any prosecution under the Official Secrets Act to show that the national interest or legitimate private interests confided to the State were not likely to be harmed and that the information was passed and received in good faith and in the public interest.*

LIBEL

Introduction

75. The Defamation Act, 1952, which came into force on November 30 of that year represented a considerable improvement in the law of defamation. Even so, a number of decisions during the past five years, in particular *Speidel v. Plato Films Limited and Others* (5), *Webb v. Times Publishing Company Limited* (6), *Lewis v. Daily Telegraph Limited* (7), *Broadway Approvals Limited v. Odhams Press Limited* (8) and *Egger v. Chelmsford and Others* (9) have revealed the possibility in certain circumstances of publishers, and in particular newspapers, being unfairly vulnerable both in the field of substantive law and in relation to the amount of damages awarded in libel actions. It is significant that two of the recommendations of Lord Porter's Committee on the Law of Defamation, which were not incorporated in the Defamation Act, 1952 (relating to evidence of bad character and the issue of malice) might if enacted have provided effective defences for the publishers in two of the cases mentioned above.

76. The pattern of libel legislation over the last two centuries reveals no more than one statutory change or series of changes in the law in every half century beginning with Fox's Libel Act, 1792. This Act was followed by three Acts between 1840 and 1845, then the Law of Libel Amendment Act, 1888, and finally the Defamation Act, 1952, showing an interval of over 60 years between the last two measures. There appeared to our Working Party to be no justification for such infrequent consideration of this branch of the law in the more rapidly changing conditions of today nor for failure to reconsider some of the recommendations made by the Porter Committee which were not enacted in 1952 but which may be more pressing today.

77. There is also considerable evidence that awards of damages in libel actions in recent years have been wholly disproportionate to what might be considered proper compensation for the aggrieved parties and in the view of the Working Party there is little doubt that damages have spiralled to the detriment of the balance which should properly be preserved between the right of the Press to investigate and comment freely upon matters of public interest and the right of the individual to a remedy where his reputation is unjustly attacked.

78. The high water mark of what may be described as excessive awards were the cases of *Lewis v. The Daily Telegraph Limited* and *Lewis v. Associated Newspapers Limited*, when awards were made of over £100,000 in each case to the same Plaintiffs. The imbalance to which these decisions led clearly calls for urgent examination, though the order for a new trial of these two actions by the House of Lords and the later decisions of *Rookes v. Barnard* (10) and *McCarey v. Associated Newspapers Limited* (11) (which established that save in exceptional circumstances damages should only be compensatory and not punitive or exemplary) may do much to restore the balance.

79. Although the deliberations of this Committee had almost been concluded when the Court of Appeal delivered their judgment in *McCarey v. Associated Newspapers Limited*, the recommendations which follow have taken into account these latest judgments of the Court of Appeal upon *quantum* and nature of damages.

80. Throughout this Report, in our references to defamatory statements and defamatory matter, we have used the word defamatory in its legal connotation. Thus "defamatory statements" refer to any statements which fall within the generally accepted legal definitions, namely:

> "statements concerning any person which expose him to hatred, ridicule or contempt or which cause him to be shunned or which have a tendency to injure him in his office, profession or trade" (*Fraser on Libel and Slander, 7th edn.*);
>
> "a false statement about a man to his discredit" (*Scott v. Samson* (12));
>
> "words which tend to lower the plaintiff in the estimation of right thinking members of society generally" (*Sim v. Stretch* (13)).

All references to defamatory statements therefore mean statements which are calculated to reflect upon the person to whom they refer, but to which there may or may not be one or more tenable defences such as justification, fair comment or privilege.

A brief note on the cases referred to in this section of our Report will be found in Appendix III.

The Evidence of Witnesses

81. We have heard and considered evidence in relation to two aspects of the law of defamation:

(1) Practice and Procedure.

(2) Substantive Law.

Practice and Procedure

Risks of publication

82. Most of the evidence we received related to aspects of the system of trial by jury. All the witnesses considered that there was considerable danger of injustice to the Press in actions for defamation and that this danger stemmed principally from the system of trial by jury. The risk of such injustice, particularly in respect of awards of damages, inhibited the Press from publishing matters which were of legitimate public interest and importance, but the truth of which they might not be able to prove.

83. Some witnesses felt the inhibitions to be severely restricting. Witnesses particularly referred to the fact that matters of general public interest (including criticism of people and institutions) were often not published for fear of the consequences since there were no defences of qualified privilege specifically to cover publication of material within these categories. Most witnesses, however, said that they were prepared to risk publication of defamatory matter of public importance provided they were likely to be able to substantiate their allegations.

Reasons for apprehension by the Press

84. A number of reasons were suggested to explain why the Press had reason to be nervous of the outcome of a libel action. It was suggested that:

(i) juries might be prejudiced against the Press because it had offended public taste by giving unnecessary and unjustified publicity to people's private lives;
(ii) a jury was not competent to cope with the technicalities of a libel action;
(iii) the man in the street had lost sight of the true value of money and considered newspapers could well afford to pay huge damages;
(iv) it was found in practice very difficult to advise upon the amount which juries might award.

Some witnesses considered that judges were not immune from the first of these influences.

Excessive damages

85. There was unanimous criticism and concern over the very high damages which juries often tended to award in actions against newspapers. The awards in *Lewis v. Associated Newspapers* and *Lewis v. The Daily Telegraph* (7) were particularly criticised. The inhibiting effect of those awards on publication had been extreme. Legal advisers of newspapers who gave evidence said that after those cases newspapers had been anxious to settle libel actions whatever the cost and sometimes with little regard for advice that negotiations might effect a more economical settlement; they further stated that a result of such awards had been to revive dormant actions. For a time after the Lewis cases it appeared that each newspaper was most reluctant to be the next to take a case to trial irrespective of its merits for fear it might be the victim of another astronomical award.

86. The Lewis cases were extreme examples of the general tendency of juries to award excessive damages against the Press. The risk of such damages frequently prevented newspapers from publishing defamatory matter unless they had the means to justify such allegations in court. Witnesses agreed that newspapers should be deterred from publishing defamatory matters of doubtful truth. On occasions, however, newspapers had good reason to be certain of the truth of allegations without being able to prove them in court. It was often against the public interest that they should be inhibited from publishing in such cases. The present scale of damages did so inhibit them.

87. Most witnesses considered that it would be preferable for the judge rather than the jury to assess the award of damages. This, it was thought, would result in more moderate awards, although those witnesses who considered that some judges also were hostile to the Press thought that for judges to award damages instead of juries would be only the lesser of two evils.

88. These witnesses thought, however, that if the issue of damages was to continue to be left to the jury, the Court of Appeal should have the power to vary awards. In *McCarey v. Associated Newspapers Ltd. and Others* (11) the Court of Appeal had shown that it was not reluctant to interfere when the award of a jury was absurd. At present in defamation cases, if the Court of Appeal wished to interfere with an award, it was restricted to ordering a new trial.* This was cumbersome and expensive.

Malice

89. The question of damages was the principal, but not the only, criticism of juries. One newspaper chairman considered that

* Order 58 r. 10 R.S.C.

a plea of justification by a newspaper was bound to be rejected by a jury, regardless of its merits. A more general criticism was that juries were prone to find "malice" to rebut a newspaper's defence of qualified privilege, whether there was evidence to justify such a finding or not. It was suggested that it should be the judge's duty to determine the facts alleged to constitute malice and to decide whether in fact malice was proved. Alternatively, it should be for the jury to decide the facts, but for the judge to decide whether malice should be inferred from those facts.

Trial by Judge alone

90. A small majority of the witnesses thought that, ideally, the entire defamation action should be tried by the judge alone because in their view a jury was not a competent tribunal to try an action for defamation which was frequently very technical. On the other hand the minority of witnesses thought that, apart from awards of damages, juries reached satisfactory results and should retain their functions save in respect of damages.

Words capable of having defamatory meaning

91. Concern was expressed by some witnesses about the trial procedure adopted to decide if publications were defamatory. At present it is for the judge to decide if words are capable of bearing a defamatory meaning, and for the jury to determine whether they do in fact bear such a meaning. This practice has been universally in use in civil cases since at least the early 18th century, and in criminal cases since Fox's Libel Act, 1792, so divided the functions in cases of criminal libel with the object of giving greater powers to the jury. Witnesses felt that such rulings must inevitably influence juries to decide that the words were defamatory. Some witnesses thought that, because of the historical background, and a number of decisions, this division of functions had become undesirably artificial and was unnecessary. It was suggested that in all cases (except where it was submitted to the judge that the words were not in law capable of a defamatory meaning) the issue should be left solely to the jury.

Dismissal of actions

92. All witnesses who commented upon attempts to dismiss a dormant action for want of prosecution considered that the interests of the plaintiff were excessively protected. The Master was rarely prepared to dismiss an action, and, when he did, the plaintiff usually

succeeded on appeal to the judge against dismissal. The pre-trial history of *Ross v. Hopkinson* (14) illustrated the difficulties a defendant had in getting a defamation action dismissed for want of prosecution. In applying to dismiss an action (for want of prosecution) a newspaper always ran the risk of stirring up a dormant action. This risk was not worthwhile when the chances of getting the action dismissed were so slight. Where proceedings were not pursued by the plaintiff it was desirable that newspapers should be able to get them dismissed, and it was felt that masters and judges should exercise their powers to dismiss more robustly.

93. Some witnesses felt that such an attitude towards dismissal was particularly desirable because of their complaint that, once a writ had been issued against a newspaper in respect of a statement, other newspapers could not publish comments about the statement complained of for fear of being held in contempt of court. This fear sprang to a large extent from uncertainty about the operation of the law of contempt. The position seemed especially unsatisfactory when other newspapers might be in possession of independent evidence which supported the truth of the statement complained of. There was a reason for facilitating the dismissal of a defamation action for want of prosecution which was peculiar to defamation cases.

Substantive Law

94. A number of improvements to the law were suggested, mainly by legal advisers who were unhappy about the effect of certain recent judicial decisions.

Justification

95. Some witnesses were concerned about the effect of section 5 of the Defamation Act, 1952, which provides as follows: "In an action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every allegation of fact is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges." Witnesses considered that this section was clearly intended to protect a defendant who had published a number of defamatory matters about the plaintiff, most of which were true, in circumstances where the untrue matters did not materially injure the plaintiff's reputation having regard to the truth of the remaining matters.

96. It was at present open to the plaintiff to pick out the untrue allegations and bring an action in respect of those alone. In such circumstances it was not open to the defendant to point to the true allegations and claim a defence under section 5 on the ground that the plaintiff's reputation was not materially injured by the untrue allegations: *Plato Films Ltd.* v. *Speidel* (5). Section 5 should be amended to give effect to the intention behind it of allowing reference to the entire publication, not merely that part pleaded as defamatory.

Qualified privilege

97. It was suggested by certain witnesses that it would be desirable if a qualified privilege could attach by way of defence to publications upon matters of public interest. It was thought by the witnesses that this would assist the editor in fulfilment of his duty to publish, for at present there were undoubtedly circumstances, as the witnesses indicated by examples, when legitimate matters of public interest were not published because of fear of a libel action. The witnesses thought that it was right that there should be such publication provided that a reasonable statement from the person defamed in explanation or contradiction was published on request. In this context it was further felt that difficulties sometimes arose in respect of the repetition of critical statements made by persons about other persons or individuals. It was thought desirable that it should be open to a newspaper to repeat the statement provided it had offered the other person or the institution a right of reply.

Offer of amends

98. Several witnesses commented upon the present effect of section 4 of the Defamation Act, 1952. The section provides that when a person has published words unintentionally defamatory of another he may make an offer of amends. If subsequently sued he will have a good defence if he can show (i) that the publication was innocent, as defined in the section, and (ii) that he made a proper offer of amends in accordance with the section. A proper offer of amends includes an offer to publish a suitable apology.

99. In *Ross v. Hopkinson* (14), the defendants had made an offer of amends. Despite this, they were criticised by the judge for not having published an apology in any event as soon as the defamatory matter was drawn to their attention. It was thought that if the defendants are expected to publish an apology in any event as soon as they become aware of the defamatory matter, there seems little point in requiring them to publish a second apology when the offer of amends is accepted. The witnesses suggested that when an offer of amends is made, the court should have power to rule that an apology published before the offer constituted satisfaction of the requirement to offer to publish an apology made by section 4.

Admissibility of evidence of previous bad character

100. A further criticism of the existing law was made by a majority of witnesses in respect of the inadmissibility of evidence of previous bad character. Evidence of general bad reputation of a plaintiff is admissible to show that the plaintiff's character was not one deserving protection. The Porter Committee had recommended that evidence of the previous instances of bad character of a plaintiff should equally be admissible. Witnesses were of the opinion that effect should be given to this recommendation.

Reduction of limitation period

101. It was suggested to us that the limitation period for commencing libel actions should be reduced from six years to six months. Some witnesses contended that the lapse of years before an action was commenced often made it difficult if not impossible to trace evidence which might have been available if the proceedings had been instituted promptly. On the other hand it was argued that those who had been libelled often do not hear of the libel upon them until some time after publication.

Foreign judicial proceedings

102. Witnesses spoke of the difficulty in deciding whether to publish reports of foreign judicial proceedings. At present, qualified privilege attached to these in some circumstances but not in others: *Webb* v. *The Times Publishing Co. Ltd.* (6). It was suggested that all reports of foreign judicial proceedings should be privileged, and some witnesses thought that this privilege should also attach to reports of foreign Parliamentary proceedings.

Actions by foreign plaintiffs

103. Several witnesses expressed discontent with the fact that foreign plaintiffs could sue in this country in respect of matters published here although an action in respect of the original

publication in their own country could not have been profitably pursued.

Precautions taken

104. Representatives of both national and provincial newspapers gave us information about the steps taken in their offices to avoid the publication of defamatory material. While the majority of newspapers employed or retained lawyers to read any copy that was likely to offend, there appeared to be a considerable variation in the extent of the precautions taken. In one or two cases we were told that the whole paper was read; on the other hand one editor told us that it was his newspaper's deliberate policy to put the responsibility on the editorial staff and to consult its legal adviser only when it was desired to publish material which might be regarded as defamatory. This same paper also made a practice of leaving its editorial staff to deal with letters of complaint until such time as it appeared that legal action might be taken against it. All witnesses stressed that the precautions taken were designed not only to protect their newspapers against possible actions for defamation but also to avoid unwarranted attacks on any individual's reputation.

105. Witnesses undoubtedly recognised that there had been some cases of reprehensible conduct on the part of some sections of the Press, and that this had contributed to the likelihood of high awards of damages referred to below. They made it clear to us that the Press had become more conscious of the need to avoid injury to its own image by unwarranted attacks on individuals and groups, or by injurious gossip about matters which could not conceivably be regarded as affecting the public interest, or by intrusions on privacy. They also thought that the Press Council was beginning to exert a far more powerful restraining and remedial influence since it had been strengthened by the appointment of a lay Chairman and lay members.

Conclusions and Recommendations

Obligations of the Press

106. It is generally recognised that the power of the Press to investigate and comment freely upon matters of public interest must be balanced by the right of the individual to a remedy where his reputation in unjustly besmirched. Until recently the law has provided a fair balance between freedom of speech and the protection of the individual. It is indeed the function of the law of defamation to preserve this balance. In recent years, however, the scales appear to have been tilted somewhat against the Press by the decisions in a small number of cases by juries which do not seem always to have adopted an objective attitude to the cases they were trying. The climate of opinion at present appears to be hostile to the Press. Whilst we recognise that the actions of certain sections of the Press may have brought the Press on the whole into discredit, we believe that the desirable balance described above should be maintained.

107. We were favourably impressed by the care generally taken by newspapers to prevent the publication of anything untrue. We were also satisfied that the Press is now generally aware that its present unfavourable image has arisen in some measure from its own lapses, in particular those involving intrusions on privacy. In our view this awareness and the growing influence of the strengthened Press Council together constitute the best safeguards against those abuses of the power of the Press for which a legal remedy may be unavailable or inappropriate. We gave some consideration to the advisability of establishing an individual's right to privacy by legislation such as that advocated by Lord Mancroft which would give the aggrieved party a right of action. We felt, however, that legislation of this kind would impose an undue restriction on the proper activities of the Press. Moreover, the borderline between that which the public has a legitimate right to know, and that which constitutes an unnecessary intrusion on privacy, is in practice hard to define.

108. We also considered the advisability of creating a legal obligation on the part of newspapers to print in an equally prominent position a correction of any untrue statement about an individual, or association of individuals, in those situations where such an obligation does not already exist as, for instance, where a statement is untrue but not defamatory. There are, however, technical difficulties in establishing a statutory obligation in this respect. False statements, if calculated to cause injury, are already actionable under existing law. We therefore think it sensible to wait to see the extent to which the Press Council is able to induce newspapers to regard the making of appropriate corrections as a professional duty. In this connection we welcome the practice recently adopted by *The Times* of printing corrections on its main newspage.

Practice and Procedure

Risk of high damages

109. We appreciate the desire of the Press to publish news items of public interest and to be free to comment upon them without excessive risk. We consider that the Press labours under real difficulty in that damages awarded in some recent cases have been so high as virtually to deter any publication which, in the event of any inadequacy of evidence or of some incidental inaccuracy or mistake, might give rise to a successful action. While the decisions in *Rookes v. Barnard* (10) and *McCarey v. Associated Newspapers Ltd.* (11) have increased the restraint that can be placed on juries in the framework of the present law, we consider that the risk of excessive damages has by no means been eliminated. The pendulum may be swinging back in favour of the Press, but juries are probably still likely, on occasions, to award damages quite incommensurate with the damage done.

Judge or jury

110. Whilst trial by jury has been eliminated in respect of many classes of litigation, it remains a recognised principle of English law that an individual is entitled to trial by jury where his life, liberty or reputation is in jeopardy. We think that this principle should be preserved and accordingly reject the suggestion that actions for defamation should be tried by a judge alone. We recognise that the case for removing the question of damages from the jury is a strong one. This would, however, involve an erosion of the existing right of persons whose reputations have been attacked (to use an ancient phrase), " to put themselves upon the country ". For this reason we do not feel justified in recommending that the assessment of damages should be removed from the jury to the judge. *We do, however, recommend that the Court of Appeal should be given the power to vary damages awarded by a jury in the same way as it is entitled to vary an award of damages made by a judge.*

Words capable of having a defamatory meaning

111. We agree with the criticism that witnesses have made respecting the dangers inherent in the judge's ruling in the presence of the jury that words are capable of a defamatory meaning. *Accordingly we recommend that the issue whether the words are or are not capable of having a defamatory meaning should not be decided by the judge in the presence of the jury. The judge should only sum up to the jury the evidence upon which they were to decide whether the words were defamatory and the jury should then decide the issue without being given any ruling that the words were capable of a defamatory meaning. It should still, however, be open to defence counsel to submit in the absence of the jury that the words were not capable of bearing a defamatory meaning. If such a submission were rejected the case should continue before the jury without their being informed of the judge's ruling upon the submission and the judge should sum up in the same way as in cases where no submission was made.*

112. One member of our Working Party holds strongly to the view that the important function of a jury is to decide whether the words complained of are or are not defamatory and that a jury is not now a suitable body for deciding damages in circumstances which may be extremely complicated and often demand knowledge of professional, academic, literary or technical status and procedures which jury members in general may not have. The right of plaintiffs to " put themselves upon the country " would be fully met by a jury charged with deciding whether a person had been wronged or not. The extent of the wrong and the damage suffered would be best measured by a judge accustomed to weighing the merits of the arguments and likely to have a wide knowledge of affairs and of awards in comparable cases. It would simplify the law, simplify court procedure, simplify the duties of jurors and probably lead to a fairer assessment of damages if the decision on defamation were left solely to the jury (without direction from the judge as to whether the meaning was capable of being defamatory) and decisions on malice, if alleged, and on damages were left entirely to the judge.

113. Another member suggested to us that the judge should direct the jury to award damages within the minimum and maximum limits that the judge deemed to be appropriate to the circumstances of the case. We consider that this does not differ in principle from removing the entire issue of damages to the judge and for the reason already mentioned we do not approve this suggestion. We feel, however, that juries often require clearer directions than they normally receive, and specific directions that damages, unless there are exceptional circumstances, must only be compensatory.

Grounds for mitigation

114. It has recently been stated that juries are not permitted to know what enquiries a reporter makes before he writes an article the subject of complaint and that he cannot describe the process by which he came to commit an error. Whilst it is true that none of this is relevant to the issue of truth or falsehood, it is in fact relevant upon the issue of damages and newspapers are and have for many years been entitled to give evidence in mitigation and to serve a notice in mitigation of damages.* Whilst it is also true that juries are entitled to take into account various matters in aggravation of damages it would seem clear now having regard to the decisions in *Rookes v. Barnard* (10) and *McCarey v. Associated Newspapers Limited* (11) that there are only two categories of circumstances where juries are properly entitled to award aggravated, exemplary or punitive damages, namely,

(i) where the motives and conduct of the defendant have aggravated the injury done to the plaintiff; and

(ii) where the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff.

It is really only in the second of these cases that the damages can rightly be described as punitive and not purely compensatory since motive and conduct are calculated to cause more damage and thus increase the amount of compensation to which the plaintiff is properly entitled. Nonetheless it is felt that without clear direction from the judge there remains a danger that juries will continue to award damages which are not wholly compensatory though the circumstances only justify purely compensatory damages.

Malice

115. We agree with witnesses that in a number of recent cases the juries have found that defamatory matters were published with malice, although the evidence on which such a finding could be based was tenuous. We considered leaving the jury to decide on the truth of facts alleged to be evidence of malice while reserving to the judge the task of deciding whether on the facts found by the jury malice was proved. However we did not find it possible in practice to separate the question of malice nicely into law and fact. Whether a publication was malicious is a technical question,

* Order 82, rule 7, of the Rules of the Supreme Court.

a matter of judgment rather than proof. *We recommend that, whenever the defence of fair comment or qualified privilege is met with an allegation of malice, it should be the function of the judge to decide whether or not the publication was malicious.*

Dismissal of actions

116. We feel that witnesses were justified in their complaints that it is too difficult to get an action dismissed for want of prosecution. We can understand the reluctance of a master or judge to dismiss an action on this ground, but we think it undesirable that the dilatory plaintiff should be able to prolong an action without good cause particularly as the existence of a dormant action can stifle legitimate publication. *We recommend that the Rules of the Supreme Court be amended so that if a defendant can show that a plaintiff has taken no steps to prosecute an action for at least six months he shall be entitled to have the action dismissed unless the plaintiff can show good cause for his delay.*

Substantive Law

117. We think there is considerable scope for improvement of the substantive law. All the recommendations that we make are designed to preserve the balance between freedom of the Press and the right of the individual to protect his reputation.

Justification

118. We agree with the criticism that witnesses have made of the operation of section 5 of the Defamation Act, 1952. At present a plaintiff can bring an action in respect of one untrue defamatory statement which he has selected from a number of others which were true. In these circumstances section 5 does not entitle the defendants to plead as a defence that the plaintiff's reputation was not materially injured having regard to the truth of the other defamatory statements. If, however, the plaintiff had chosen to complain of all the defamatory statements, the defendants could rely on the truth of the majority of them to provide a good defence under section 5. We can see no merit in this anomaly. *Accordingly we recommend that section 5 be amended to provide that where an action is brought in respect of a defamatory publication, the defendant shall be entitled to rely on the defence of justification in respect of the whole publication so that if the truth of every allegation of fact is not proved the defence shall not fail if the*

words not proved to be true do not materially affect the plaintiff's reputation taking the publication as a whole.

Special defence of qualified privilege

119. We are concerned with the number of occasions on which newspapers have refrained from publishing matters of public interest and importance because of the fear that they might not be able to prove in a court of law what they believed to be the truth. At common law where one person, who has a recognised duty to do so, publishes a defamatory matter to a recipient, who has a recognised interest in hearing it, qualified privilege attaches to the publication. The law does not, however, recognise that newspapers have a duty to publish matters which are of public interest and importance. Nor does the law recognise that the public has a legitimate interest in learning of such matters. We consider that the law should recognise such a duty and such an interest. *Accordingly we recommend that there should be a statutory defence of qualified privilege for newspapers in respect of the publication of matters of public interest where the publication is made in good faith without malice and is based upon evidence which might reasonably be believed to be true, provided that the defendant has published upon request a reasonable letter or statement by way of explanation or contradiction and withdrawn any inaccurate statements with an apology if appropriate to the circumstances.*

120. A somewhat different difficulty arises where, criticism not involving allegations of fact having been made of a person or institution, a newspaper feels inhibited from publishing such matter for fear of becoming liable for the repetition of a libel. The fact that such criticism has been made, irrespective of the merits of the criticism, is often a matter of public interest. Yet the plea of fair comment is not always available to a newspaper in such circumstances, for if the initial critic was actuated by malice a newspaper repeating the criticism will be liable in defamation, even though acting with the utmost responsibility and good faith in repeating the criticism. We consider that it is sometimes desirable that publicity should be given to such criticism. Where the public interest justifies publication, newspapers should be free to publish, but the person or institution criticised must be given the opportunity to reply to the criticism, and any such reply must also be published. *Accordingly we recommend that there should be a statutory defence of qualified privilege for newspapers in respect of publication of criticism made of a person or institution if the subject matter of the criticism was one of public interest, and the newspaper made the publication in good faith, provided that the newspaper if requested to do so by the person or institutions criticised has published a reasonable letter or statement by way of explanation or contradiction.*

Offer of amends

121. We agree with the criticism that witnesses have made of the operation of section 4 of the Defamation Act, 1952. *Accordingly we recommend that this section be amended to provide that where a defendant relies on the defence that an offer of amends was made in accordance with section 4 of the Defamation Act, 1952, the Court should have power to rule that an apology made before the rejection of the offer of amends constituted satisfaction of that part of the offer which requires publication of an apology.*

Admissibility of evidence of previous bad character

122. We have considered the suggestion made by certain witnesses, and also by the Porter Committee, that evidence of previous bad character should be admissible in an action for defamation. We feel that it is unjust that the defendant is never entitled to adduce evidence of the plaintiff's previous bad character in mitigation of damages. The Porter Committee recommendation that 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 was not enacted in the Defamation Act, 1952. There is certainly an argument against permitting evidence of past instances of misconduct where such evidence has no relation in time or substance to the subject matter of the libel. For example, it should not be permissible having made an allegation of rape in 1965 to tender evidence in mitigation a conviction for burglary in 1947. Nonetheless we take the view that some provision should be made for such evidence to be tendered where there is a contiguity in time or substance. *Accordingly we recommend that evidence of specific known past conduct of the plaintiff, which is connected in time or substance to the statements of which the plaintiff complains, should be admissible in evidence in mitigation of damages.*

Reduction of period of limitation

123. We considered the suggestion that the limitation period for commencing libel actions should be reduced to six months. We feel that the present period of six years is too long but cannot accept the view that the period should be as short as six months. We further take the view that the limitation period within which actions for tort can be commenced should properly be considered in relation to all such actions and should not be dealt with piecemeal for each particular category of tort.

Foreign judicial proceedings

124. In this country absolute privilege attaches to fair and accurate reports of judicial and parliamentary proceedings. This privilege is an integral part of the manner in which government and justice is administered. The privilege is designed to strengthen Parliament and the Courts rather than the Press. It is calculated to ensure that in Parliament or the Courts no man is inhibited by fear of the consequences from speaking with complete freedom. In contrast, reports of foreign judicial and parliamentary proceedings attract privilege only in those restricted circumstances where they are protected by the common law as in the case of *Webb v. The Times Publishing Co. Ltd.* (6). We agree with witnesses that this privilege should be extended, but there is no basis for according foreign proceedings the absolute privilege that attaches to proceedings in this country. *We therefore recommend that fair and accurate contemporaneous reports of foreign judicial and parliamentary proceedings published in a newspaper should be the subject of qualified privilege.*

Actions by foreign plaintiffs

125. A number of witnesses complained that newspapers were especially vulnerable to actions for defamation brought by foreign plaintiffs. We consider this complaint ill-founded. If a foreign national sues an English newspaper in his own country, the newspaper need not submit to the jurisdiction, unless it carries on business in that country and has voluntarily appeared or submitted to its jurisdiction. Unless these circumstances apply the foreign plaintiff will be unable to enforce the foreign judgment in England. It is true that sometimes a foreign plaintiff can bring an action in England in circumstances where he cannot do so by the law of his own country, but this may be the case in respect of torts other

than libel when committed against a foreign plaintiff in England. We see no reason why the English courts should deny to foreigners remedies which are available to citizens of this country. The reputation of a foreigner who is little known in England will not suffer greatly from a libel published in England and read by English readers. Where damage to reputation is slight, the damages recovered should be commensurately modest. The Court of Appeal, if given the additional power we recommend, would be able to alter damages awarded to foreign plaintiffs which were out of proportion to the damage inflicted on their reputations.

Acknowledgements

126. We would like to express our warm thanks to Robert Alexander and Nicholas Phillips for their helpful services as Secretaries of our Working Party, and to Tom Sargant, the Secretary of JUSTICE, who took part in all our discussions.

SUMMARY OF RECOMMENDATIONS

Contempt of Court

(1) Proceedings in relation to publications in newspapers and journals should be brought only on the instructions or with leave of the Attorney-General (para. 55).

(2) The question of whether it is contempt for a newspaper to publish a further libel after a writ has been issued or to comment on a libellous publication in another newspaper should be clarified in any future legislation (para. 41).

(3) In the light of the proposed prohibition of the publication of contemporaneous reports of committal proceedings, the rights of newspapers to publish responsible appeals for witnesses to come forward should be clearly established (para. 42).

(4) It should not be regarded as contempt to publish the name and photograph of a notorious and dangerous convict on the run, and the crimes he is suspected of having committed (para. 43).

(5) Newspapers should regard themselves as free to comment responsibly on sentences between a trial and the hearing of an appeal and should do so in appropriate cases (para. 46).

(6) Newspapers should accept their responsibility as guardians of the proceedings in the courts and if criticism of judges needs to be made they should be prepared to risk the consequences of making it (para. 50).

(7) In the public interest newspapers should devote more continual and serious attention to matters concerning the administration of justice and should employ more experienced reporters and editorial staff for this purpose (para. 56).

Official Secrets

It should be a valid defence in any prosecution under the Official Secrets Act to show that the national interest or legitimate private interests confided to the State were not likely to be harmed and that the information was passed and received in good faith and in the public interest (para. 74).

Libel

Practice and Procedure

(1) The Court of Appeal should be given the power to vary damages awarded by a jury in the same way as it is entitled to vary an award of damages made by a judge (para. 110).

(2) The issue whether the words are or are not capable of having a defamatory meaning should not be decided by the judge in the presence of the jury. The judge should only sum up to the jury the evidence upon which they were to decide whether the words were defamatory and the jury should then decide the issue without being given any ruling that the words were capable of a defamatory meaning. It should still, however, be open to defence counsel to submit in the absence of the jury that the words were not capable of having a defamatory meaning. If such a submission were rejected the case should continue before the jury without their being informed of the judge's ruling upon the submission and the judge should sum up in the same way as in cases where no submission was made (para. 111).

(3) Whenever the defence of fair comment or qualified privilege is met with an allegation of malice, it should be the function of the judge to decide whether or not the publication was malicious (para. 115).

(4) The Rules of the Supreme Court be amended so that if a defendant can show that a plaintiff has taken no steps to prosecute an action for at least six months he shall be entitled to have the action dismissed unless the plaintiff can show good cause for his delay (para. 116).

Substantive Law

(5) Section 5 should be amended to provide that where an action is brought in respect of a defamatory publication, the defendant shall be entitled to rely on the defence of justification in respect of the whole publication so that if the truth of every allegation of fact is not proved the defence shall not fail if the words not proved to be true do not materially affect the plaintiff's reputation taking the publication as a whole (para. 118).

(6) There should be a statutory defence of qualified privilege for newspapers in respect of the publication of matters of public interest where the publication is made in good faith without malice and is based upon evidence which might reasonably be believed to be

true, provided that the defendant has published upon request a reasonable letter or statement by way of explanation or contradiction and withdrawn any inaccurate statements with an apology if appropriate to the circumstances (para. 119).

(7) There should be a statutory defence of qualified privilege for newspapers in respect of re-publication of criticism made of a person or institution if the subject matter of the criticism was one of public interest, and the newspaper made the publication in good faith, provided that the newspaper if requested to do so by the person or institution criticised has published a reasonable letter or statement by way of explanation or contradiction (para. 120).

(8) Where a defendant relies on the defence that an offer of amends was made in accordance with section 4 of the Defamation Act, 1952, the Court should have power to rule that an apology made before the rejection of the offer of amends constituted satisfaction of that part of the offer which requires publication of an apology (para. 121).

(9) Evidence of specific known past conduct of the plaintiff, which is connected in time or substance to the statements of which the plaintiff complains, should be admissible in evidence in mitigation of damages (para. 122).

(10) Fair and accurate contemporaneous reports of foreign judicial and parliamentary proceedings published in a newspaper should be the subject of qualified privilege (para. 124).

Appendix I

LIBEL STATISTICS

A number of newspapers went to a great deal of trouble to provide us with statistics showing the number of occasions on which complaints had been received and libel proceedings threatened against them in the past three years, and the way in which these threats had been finally disposed of. The figures we received were most helpful to us in that they gave us considerable insight into the difficulties which newspapers had to face and into the motives of those who made complaints.

They showed, however, such wide variations that it was impossible to draw any firm conclusions from them, mainly because of the different characters and policies of the newspapers concerned and the degree of their readiness to acknowledge claims and settle them at an early stage.

For example, one popular newspaper received nearly 200 letters of complaint of which 41 were followed up by writs. But payment was eventually made only in eight cases and only three were fought out in court. Another popular newspaper received 56 solicitors' letters of which only six resulted in writs and only one case was fought out in court. On the other hand, one more serious newspaper received 45 solicitors' letters of which six resulted in writs, but some kind of settlement was made in 32 cases. Two were settled by a statement in court accompanied by a payment, and only one was fought.

In our consideration of these statistics and our discussion about them with our witnesses, we gained a strong impression that the main purpose of many of the complainants was to obtain some kind of financial payment rather than to have their reputations publicly cleared. It appeared to be quite a common thing for a complainant, when offered the alternative of a payment accompanied by a statement in court and a somewhat higher payment without a statement, to choose the latter.

Appendix II

LIBEL OR NO LIBEL
PROVINCE OF JUDGE AND JURY

In the course of the deliberations of the Working Party, it was decided to investigate the origins of the practice that the judge rules whether words are capable of a defamatory meaning and that the jury decides whether in the particular circumstances the words are defamatory.

Research covered a number of text books starting with Cooke on *Defamation* 1844 and Flood on *Libel and Slander* 1880 and including among others Stephens *History of Criminal Law* 1883, Bower's *Code of the Law of Actionable Defamation* 1908 and Holdsworth's *History of English Law* 1925.

Flood states at page 379 *et seq:*

"In *Parmiter v. Coupland*, 6 *M. and W.* 105 9 *L.J.* (*ex*) 202 Parke B declares that the proper course for a Judge to adopt in civil cases whether of a civil or criminal character is to give the jury a legal definition of a libel and leave it to them to say whether in the case before them the facts necessary to constitute a libel are proved to their satisfaction."

"The Judge may if he pleases give his opinion as to the nature of the publication but he is not bound to do so as a matter of law. Mr. Fox's Libel Act (32 George III c. 60) is a declaratory statute and did not in my opinion introduce any new principle. The rule was the same in civil as in criminal cases." (per Parke B).

"Alderson B also expresses the same view 'If the Judge were to take upon himself to determine the question of libel or no libel he would be wrong'."

Stephen at *Vol.* 2, after reciting the history of events leading up to the passing of Fox's Libel Act, 1792, states in relation to the law immediately preceding the Act:

"Perhaps however the most remarkable and instructive analogy is to be found in the law as to civil actions for defamation. In actions for defamatory words it is undoubtedly a question of law whether given words are or are not actionable."

The most helpful passage appears in Spencer Bower's *A Code of the Law of Actionable Defamation*, 1908, at page 49, Footnote x:

"The rule that it is for the Judge to determine whether the matter published is capable of a defamatory primary meaning is laid down and acted upon in the following cases (in all of which the Plaintiff failed and the matter was either not allowed to go to the Jury at the trial, the Plaintiff being non suited thereat or his declarations being successfully demurred to or if it was so allowed, the Court set aside the verdict and entered Judgment for the Defendant)."

He then cites six cases:

Purdy v. Stacey (1771) 5 *Burr*, 2698
Kelly v. Partington No. 2 (1833) 5 *B. and Ad.* 645
Clay v. Roberts (1862) 8 *L.T.* 397
Hunt v. Goodlake (1873) 43 *L.J.* (*C.P.*) 54
Green v. Reid (1905) 7 *F.* 891 and
Beswick v. Smith (1908) 24 *Times L.R.* 169

and concludes that the Libel Act, 1792, was "merely declaratory of the common law". *Capital and Counties Bank v. Henty* 1882 7 *App. Cas* 741 is also cited and Lord Blackburn's judgment (at page 775):

"The case of *R. v. Shipley* was a criminal proceeding at the instance of the Crown and 32 *Geo.* 3 *c.* 60 is in terms confined to such proceedings. But though no doubt the Court has more power to set aside verdicts in civil cases there is no reason why the functions of the Court and Jury should be different in civil proceedings for a libel and in criminal proceedings for a libel."

Holdsworth's *History of English Law, Vol.* 8, does not give much assistance on these points but cites *Rex v. Franklin* (1731) 7 *S.T.* at pages 671-672 in setting out the functions of Judge and Jury before *Fox's Libel Act*, 1792, as follows:

"In this information for libel there are three things to be considered whereof two by you the Jury and one by the Court. The first thing under your consideration is whether the Defendant Mr. Franklin is guilty of the publication of this craftsman or not. The second is whether the expressions in that letter refer to his present Majesty and his principal officers and Ministers of State and are applicable to them or not . . .

but then there is a further thing to wit whether these defamatory expressions amount to a libel or not. This does not belong to the office of the Jury but to the office of the Court because it is a matter of law and not of fact."

Fraser, *Sixth Edition*, at page 355 states:

"Prior to this provision (Fox's Libel Act) becoming law it had come to be the practice for the Judge and not the Jury to decide whether the words complained of were or were not a libel . . . the Judge is, of course, still at liberty to explain to the Jury any point of law and if he thinks it proper to do so he may state his own opinion but the jury 'are the sole judges of the guilt or innocence of the Defendant. They are the judges of law and fact and on them rest the whole responsibility. In this sense the Jury are the true guardians of the liberty of the Press'" per FitzGerald J. in *R. v. Sullivan* 1868 11 *Cox cc.* 52.

and Gatley, *Third Edition*, at page 133:

"Whether the words complained of are defamatory or not is a question of fact for the Jury to decide but there is always the prior question are the words capable of a defamatory meaning and this is a question for the Judge to determine" *Capital and Counties Bank v. Henty* 1882 7 *App. Cas.* 741.

Two cases further confirm this to be the law:

"The question of whether there is or is not a libellous publication is in the first instance for the Judge. Though Fox's Act of course only applied to criminal cases undoubtedly it has been since the passing of that Act assumed that the question of libel or no libel is for the Jury and not for the Judge but subject always to this: that the matter is charged as libellous shall be capable of being and apparently is libellous" per Lord Halsbury L.C. in *Nevill v. Fine Art Company* 1897 *A.C. p.* 72.

"If there is a controversy as to whether the words used are defamatory or not it is for the Judge to determine whether they are capable of a defamatory meaning and that being resolved in the affirmative it is for the Jury to find whether they are defamatory or not" per Lord Dunedin in *Adam v. Ward* 1917 *A.C.* 329.

Odgers on *Libel and Slander, Sixth Edition*, further supports the view that the practice has always been the same in civil libel actions. After reciting at page 94 the provision in Fox's Libel Act that in all criminal proceedings for libel the Jury are to decide the question of libel or no libel subject to the direction of the Judge he goes on to state:

"In civil proceedings for libel the practice is and always was the same" (citing *Baylis v. Lawrence* 11 *A and E* 920).

Having regard to the authorities cited above it appears therefore:

(a) that Fox's Libel Act, 1792, although in terms confined to criminal proceedings, is in fact declaratory of the common law respecting functions of the Judge and the Jury in civil actions;

(b) that the rule that it is for the Judge to determine whether the matter published is capable of a defamatory primary meaning and for the Jury to determine whether the words are defamatory has been in force, accepted and acted upon since towards the end of the Eighteenth Century.

Appendix III

NOTES ON CASES

(1) *D.P.P. v. Smith* [1961] A.C. 290.

(2) *Connelly v. D.P.P.* [1964] 2 W.L.R. 1145.

(3) *R. v. Duffy, Ex parte Nash* [1960] 2 Q.B. 188.

(4) *Ambard v. Attorney-General for Trinidad and Tobago* [1936] A.C. 322.

(5) *Plato Films Limited v. Speidel* [1961] A.C. 1090.

Speidel brought an action in respect of certain portions of a war film which he claimed were defamatory. The House of Lords held: (i) That the Defendants could not adduce evidence to show that other portions of the film about which no complaint had been made were also defamatory of the Plaintiff. They had sought to include such evidence as showing the "circumstances under which the alleged libel was published" for purposes of mitigation; (ii) That the Defendants could not adduce evidence of particular acts of misconduct on the part of the Plaintiff in mitigation of damages. They could only adduce evidence of "reputation".

(6) *Webb v. Times Publishing Co. Limited* [1960] 2 Q.B. 535.

An English newspaper published a report of a trial in a Swiss court of a British subject. The report included a statement made by the accused in the Swiss court which was defamatory of the Plaintiff. Pearson J. held: (1) That there was no qualified privilege of a general or "blanket" character attaching to fair and accurate reports of judicial proceedings in foreign courts, since the reason for the existence of such privilege attaching to reports of English judicial proceedings, based on the close concern of the whole British public in the administration of the law under which they live, were not really applicable nor transferable to reports of foreign judicial proceedings. But (2) that qualified privilege attached to this particular report, for its subject-matter was closely connected with the administration of justice in England and was, therefore,

of legitimate and proper interest to the English newspaper-reading public. The foundation of all privilege was the public interest, in the sense of a legitimate and proper interest as opposed to an interest due to idle curiosity or a desire for gossip. Where such an interest could be shown, there was such privilege for a newspaper report of foreign judicial proceedings.

(7) *Lewis v. Associated Newspapers Limited*
Lewis v. Daily Telegraph Limited } [1964] A.C. 234.

On the same day, two national newspapers published in their front pages that the police were investigating the affairs of a limited company. The company and its chairman claimed that these stories carried the implication that they were suspected of fraud. In the first action the chairman was awarded £25,000 damages and the company £75,000. In the second action the chairman was awarded £17,000 and the company £100,000. The House of Lords held, *inter alia*, that the damages awarded were excessive and ordered new trials.

(8) *Broadway Approvals Limited and Another v. Odhams Press Limited and Another. The Times*, March 27, 1965.

The Defendants accused the Plaintiffs, a stamp company and its managing director, of sharp practice. The company was awarded £5,000 damages and the managing director £10,000. The Court of Appeal, ordering a retrial, held that these damages were extravagantly out of all proportion to the injury suffered. The judge had left it open to the jury to award punitive damages, which was a misdirection in view of the principles set out in *Rookes v. Barnard*.

(9) *Egger v. Viscount Chelmsford* [1964] 3 W.L.R. 714.

The Plaintiff sued the assistant secretary and ten sub-committee members of an unincorporated club for libel in a letter published on an occasion of qualified privilege. The Court of Appeal, reversing the Judge of first instance, held that the malice of some of the defendants did not prevent those innocent of malice from setting up the defence of qualified privilege.

(10) *Rookes v. Barnard and Others* [1964] A.C. 1129.

This case concerned intimidation by members of a trade union who threatened to strike unless a fellow worker was removed from his employment. At first instance the Plaintiff was awarded £7,500

as exemplary damages. The House of Lords ordered a new trial on the question of damages. Lord Devlin in his judgment at pp. 1226, 1227 held that exemplary damages could only be awarded: (i) in cases of oppressive, arbitrary or unconstitutional acts by government servants; (ii) where the Defendant's conduct had been calculated by him to make a profit for himself which might well exceed the compensation payable to the Plaintiff; (iii) where expressly authorised by statute.

(11) *McCarey v. Associated Newspapers Limited* (*No.* 2) [1965] 2 W.L.R. 45.

The Plaintiff was awarded £9,000 for a defamatory statement which constituted a slur on his honour, but was not shown to have caused him any pecuniary or social loss. The Court of Appeal ordered a new trial on the issue of damages. The Court held that an award of this size clearly included either an element of bounty for the Plaintiff or punishment for the Defendants. Applying *Rookes v. Barnard* the Court held that the jury were not entitled to make such an award. There was a clear distinction between compensatory and punitive damages, and the true measure of damages for libel was compensatory. While compensatory damages might take into account not only any actual and anticipated pecuniary loss and the social disadvantage resulting or likely to result from the wrong done, but also the grief and distress caused to the Plaintiff, and any high-handed, oppressive, insulting or contumacious behaviour by a Defendant which increased his mental pain and suffering and might constitute injury to his pride, punitive or exemplary damages should only be awarded in the case of a defendant who has profited from his own wrong.

(12) *Scott v. Samson* [1882] 8 Q.B.D. 491.

(13) *Sim v. Stretch* [1936] 52 T.L.R. 669.

(14) *Ross v. Hopkinson*. *The Times*, October 17, 1956.

In this case the Defendant relied on an offer of amends. It was held that this did not provide a good Defence as it had been made too late. The offer was made some six weeks after the Plaintiff had complained of the defamatory statement to the Defendant, and this was not " as soon as practicable ".