OF

CHIEF JUSTICE AMES

AGAINST

THOMAS R. HAZARD.

HON. JOSEPH M. BLAKE'S ARGUMENT FOR DEFENDANT UPON PLAINTIFF'S DEMURRER.

PROVIDENCE:
A. CRAWFORD GREENE, STEAM BOOK & JOB PRINTER,
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TO THE PEOPLE OF RHODE ISLAND.

Many of you are aware that when Mr. Ames was appointed Chief Justice of the Supreme Court and Reporter of its decisions, he reported as an unprejudiced reporter the case of Robert H. Ives against Charles T. Hazard and others, in which he had been the leading counsel for Ives; and that his report was so satisfactory to Ives that he obtained a copy of it before it was officially published, and appended it to a letter published by him in his own vindication. I published a reply, and denounced the report as unfair and false, and as agent for the defendant, conducted his petition before the Gen. Assembly on the subject. Without being allowed an opportunity of defence, I was branded as a slanderer, and Mr. Ames sued me for a libel and attached and still holds a lien upon a large portion of my property, consisting of three valuable estates, one of which alone is taxed for nearly three times the sum named in the writ, to secure his claim of ten thousand dollars damages. I supposed that this suit, though it might be very costly to me, would afford me an opportunity of proving to the public whether I am a slanderer or not. Judges and Reporters hold their offices for the benefit of the public, and our Bill of Rights professes to secure the liberty of the press and the right of every man to defend himself upon the truth in libel cases, and it might seem a very simple thing for one to defend himself for a libel, if the facts he published were true. This would be a great mistake, and my principal object now is, to have you understand the power of our judges to smother and ignore the fundamental principles of our institutions. Before one can go to the jury upon the question whether his statements were true or not, he must, by a written plea, set forth the facts upon which his statements were based, and get the decision of the judges that the plea, if found true by the jury, is a sufficient answer.

I set forth in my Plea, that the facts stated by Ames in his report were not the real facts upon which the case was decided, that they were entirely foreign to the case, but so ingeniously stated as to deceive the public. Mr. Ames did not see fit to go to trial on this plea, but demurred—that is, he submitted to the court that it was not a sufficient answer, because I had called his conduct *flagitious*, whereas the plea did not allege it to be so. Whether it was flagitious or not, was matter of opinion and had nothing to

do with the *facts* I had stated. But the Court held the plea to be insufficient. In my new plea I alleged and held myself ready to prove that his conduct was flagitious, and that his report contained all the elements of a *gross forgery*. Was Mr. Ames willing to go to trial even upon this issue? No, he demurred again, and though it takes about a year to have a plea filed, answered, argued and decided, the Court, (of which he is chief justice) permitted him to demur a second time, and then held the new plea to be an insufficient answer, because it did not state that Ames made the flagitious report *through the influence of Ives*. I had never said or intimated that he was influenced by Ives, for I did not know. Facts I state I am responsible for, and I am willing to stand or fall upon their truth. To justify themselves for their decision, the judges rely not upon anything I had said or written, but upon this principle, namely, that in order to avail himself of the Bill of Rights and defend himself upon the truth, a defendant must admit that his meaning was just what the plaintiff says of it in his declaration. So that, (as my counsel said in his argument,) where one would recover damages of another for a libel while he fears to try the truth of the charges against him and would prevent the defendant from availing himself of the truth, he has only to say in his declaration, that the defendant meant something which he did not say or mean. It would seem self-evident that if this doctrine becomes established in Rhode Island, the liberty of the press must be utterly annihilated, as the plaintiff is practically made the arbiter of his own cause, there being no probability of a defendant avoiding conviction when he depends upon the truth of his words for justification.

So contrary to law and reason is the doctrine of the Court, that it was not contended for or alluded to by the plaintiff's own counsel, Mr. Paine and Judge Curtis of Boston. Hence a decision was made against me on the turning part of the case without a hearing, and my counsel asked to be heard before the decision should become final. This privilege was denied him, though the judges said he could submit anything he had to say in writing, which, under the circumstances, I thought it most prudent to submit to, although I suppose he could have done the same thing through the post office or otherwise, without their permission. But I mean to have my trial, so far as I can have any control over it, a public one, and I now submit to the public the argument of my counsel which he was not permitted to make in open court.

THOMAS R. HAZARD.

PROVIDENCE, SC.

SUPREME COURT.

MARCH TERM, A. D. 1861.

SAMUEL AMES,

vs.

THOMAS R. HAZARD.

DEFENDANT'S ARGUMENT UPON PLAINTIFF'S DEMURRER.

STATEMENT OF FACTS.

Robert H. Ives brought a suit in equity to this court, against Charles T. Hazard and others, to compel them to convey to him certain real estate in Newport, which he alleged the said Charles had promised to sell to him. The suit was sustained by the court, and the land conveyed to Ives. Mr. Ames was of counsel for Mr. Ives, and as such brought the suit and prosecuted it to final judgment. He was afterwards appointed Chief Justice of this court, and Reporter of its decisions, and as such reporter reported the case, and caused it to be published in the First Vol. of Ames' R. I. Reports, although it was not his duty to report any case tried before his appointment as reporter. The report consisted of the written opinion of the court, with a preliminary statement of facts made by Mr. Ames himself; but before it appeared in the Rhode Island Reports, Mr. Ives obtained a copy of it and published it, together with some remarks of his own, in pamphlet form, in vindication of his course. Then, in reply to this pamphlet of Mr. Ives, Thomas R. Hazard, the present defendant, published a letter addressed to Mr. Ives, in a pamphlet of about fifty closely written pages. From this publication Mr.

Ames selected a few detached clauses, and made them the basis of this action against Hazard for a libel. In his writ, dated January, 1859, he claims ten thousand dollars for his damages, to secure which he attached, and still holds sequestered, Hazard's Vancluse Estate in Portsmouth, and his homested and another estate in Newport.

PROCEEDINGS IN COURT.

On the eighth day of the term to which the action was brought, March, 1859, the defendant filed a plea of "Not Guilty," and as to a part of the alleged libel, a plea in justification, that the words complained of were true. Six weeks afterwards the plaintiff filed a demurrer to this plea in justification—a general demurrer, stating no causes, and leaving the defendant ignorant of the objections to his plea, until they were stated by the plaintiff's counsel when the parties were heard upon the demurrer at the September Term, 1859.

PLAINTIFF'S DECLARATION.

The passages of the alleged libel, justified by the defendant's plea, with the plaintiff's innuendos, or explanations which the plaintiff chooses to give of their meaning, are as follows:

"On perusing this report, I find it based on a statement of alleged facts, which whether true or false, are alike entirely foreign to any charges preferred in the complainants bill, or legal issues in any manner involved in the case reported upon. At the same time they are so ingeniously interwoven in the text and apparently sustained by the recognition of points submitted by the counsel of the complainant, that the most wary mind unacquainted with the real merits of the suit, can scarcely fail of being deceived by their perusal. Indeed so flagitious is the character of the text of this alleged Report of the Supreme Court of this State, that I could not fully persuade myself that it was a genuine document, and on that account delayed commenting on some passages in your communication, until I could obtain access to the 'forthcoming volume' of Rhode Island Reports, some of the contents of which you seem to have enjoyed the privilege of anticipating. My skepticism on this point was a good deal strengthened, upon being further assured by eminent counsel, thoroughly conversant with all the facts, that it was impossible that such a report could emanate from a judicial tribunal conversant with the case. I find, however, by reference to the 4th volume of Reports that has at

length made its appearance, that the document is genuine, and that the Supreme Court of Rhode Island has, by some means or from some cause, been induced to sanction and publish in the judicial report of its decisions, charges of the most infamous character against the defendant, of which he was not accused in the bill, and which are wholly unwarranted, and unsupported by any legal allegations or testimony whatever." (The innuendo to this passage not objected to.)

"How far the subsequent translation of your senior counsel, to the seat of the Chief Justice of the Court, and his appointment as reporter of its decisions, has influenced the language of the published report, remains to be shown. But I am bold to say that it affords about as pretty a specimen of unprincipled special pleading, as can be found on record." (Plaintiff's innuendo, meaning that the plaintiff, *influenced by his relation as counsel to the said Ives*, had availed himself of his offices of Chief Justice and Reporter, to cause to be made and published an unfair and unjust report of said suit in equity, and in making said report had resorted to unprincipled special pleading.)

"What kind of testimony the opinion of the Court as above expressed, is based upon, neither the defendant, C. T. Harzard, nor the public, would probably have ever known any more than the victims of the Holy inquisition in the dark ages knew of the testimony upon which that secret tribunal condemned them to the rack or the stake, were it not that your senior counsel and devoted friend, 'a citizen of the highest standing in our State,' and a man of singular piety and candor, had subsequently been elevated to the head of the Supreme bench, and constituted reporter of the courts opinions. For this and other kindred favors, allow me to tender him, *through you*, in behalf of myself and all truth-seeking citizens of the State, my unfeigned thanks." (Plaintiff's innuendo, meaning by said ironical language that the plaintiff, in his offices of Chief Justice and Reporter, *being influenced by his former relation as counsel for R. H. Ives, and by his devoted friendship for said Ives*, had caused to be published in said report a statement of facts, as a basis for the opinion of the court, which were not relevant to the case.)

"Beginning with your brother's irrelevant deposition, we find the burthen of both your opening and closing argument confined to this slanderous accusation, and now that the senior member of your counsel has been translated probably through you and your cliques contrivances to the Chief Justiceship of the Supreme Court, and Reporter of its decisions, we find this same atrocious

libel foisted into the text of the opinion of the court in almost the same words that were used by the Chief Justice when acting as your counsel."

(Plaintiff's inuendo. Meaning that the plaintiff *being influenced by his relation* of counsel of said Ives, had caused an atrocious libel and a slanderous accusation to be foisted into said report.)

"Thanks to the circumstances that have compelled you at so early a stage in the contest between might and right to hazard your cause on one and the last cast of the die; for as the great Napoleon never sent his *old guard* into the fight until every other expedient to turn the tide of battle had failed, so I am sure that Robert H. Ives, a greater *tacktitian* than he in the art of law if not in war, must have exhausted every other means of deception, before he ventured on the audacious expedient of exorcising from the Supreme Court, a documentary shield for his protection, partaking so far as truth and its judicial character are concerned, of all the elements of a gross forgery. I know that this is a grave charge to prefer against a body of men whose ermine should from the nature of their office, be pure and unsullied, even from suspicion of partisan bias, but still I will maintain the charge, and pledge myself to sustain it to the satisfaction of a majority of the Legislature of this State if necessary, in spite of all the dust that may be sought to be thrown in their eyes, by the swarm of debauched members of the bar that so generally infest its halls, and who as a body have of late proved themselves to be the abject slaves and lick-spittles of wealth and of a self-constituted tribunal, rather than the advocates and supporters of justice and the laws; but who, had they a tythe of the honorable sentiment and chivalrous impulses that once distinguished their profession, would rise to a man, and demand the instant and ignominious expulsion from the Supreme bench, of the man or men, who have so irreparably disgraced their position and the State, by causing to be inserted in the published judicial records, atrocious calumnies effecting to all time the reputation and standing of a plundered and grossly abused man, alike false in fact and unsupported by a tittle of evidence legally before the court, and which were they true, are wholly inapplicable to the case at issue. This was doubtlessly the document you relied upon to overawe the deliberations of the committee appointed by the house to report upon the merits of C. T. Hazard's memorial, and the Equity powers of the Supreme Court. We here behold the same old cry of "breach of trust" thundered into the ears of the committee, under sanction of the authority of a court who have not scrupled to incorporate in the report of

their opinion in the case of Ives vs. Hazard, whole sentences bearing unmistakable internal evidence of having been copied almost verbatim from the arguments of your counsel, or from your own statements, and which it requires nothing but a recurrence to original documents in possession of the Court to prove to be grossly *false.*"

(Plaintiff's inuendo. Meaning that the plaintiff in his said offices, *being influenced by said Ives*, had issued a report of said suit partaking of all the elements of a gross forgery, and had disgraced his position by inserting in said report atrocious calumnies, affecting to all time the reputation and standing of the said Charles T. Hazard, not supported by any evidence in the case, and not relevant to it, but which the plaintiff in violation of his duty as reporter, had availed himself of his said offices to insert into the report with intent to defame said Charles T. Hazard, and to convey to the public a favorable but untrue impression of the case of Ives.)

DEFENDANT'S PLEAS.

The defendant's plea in justification alleged that the plaintiff in his official character as reporter, in publishing the opinion delivered by the Court in the case of Ives against Charles T. Hazard and others, published also as a part of his report, a certain statement of facts upon which the opinion of the Court was based—recited the whole of that statement, and alleged that the facts contained in it were entirely foreign to any charges prefered by Ives in his suit against Charles T. Hazard, &c., and to all the issues in any manner involved in that suit, and that Mr. Ames as such reporter had so interwoven these into the text of his report that persons unacquainted with the real merits of the case would be likely to be deceived by the report. The plea then concludes as follows; "Wherefore the said defendant at Providence in said county at the time mentioned in the plaintiff's declaration, did compose and publish and caused and procured to be published the alleged libellous matter as he lawfully might do for the cause aforesaid, and this he is ready to verify."

Another plea in justification was filed which averred that *some* of the facts (instead of *the* facts,) contained in the reporter's statement, were entirely foreign to the issues involved, and calculated to deceive, &c.

ARGUMENT UPON THE FIRST PLEAS.

When the argument upon the demurrer was heard at the September Term, 1859, the latter plea was objected to, because its

averments applied to *some* of the facts only, and the Court sustained the objection. It would seem to be obvious that a statement of facts may be false and deceptive, although a portion of the facts contained in the statement be true; yet as this objection does not apply to the other plea, it is not necessary to dwell upon it.

To both the pleas it was objected that they did not profess to answer the whole declaration, and the counsel contended, although with but little apparent confidence, that the defendant could not justify by pleading the truth of some part of the supposed libel, and plead not guilty as to another part. In behalf of the defendant it was admitted that where a declaration refers to a single charge of a single thing, the plea must cover the whole of the charge. But, as it was urged, it is a well-known, clear principle of law, that where there are different charges, or a single charge of different things, the defendant may plead in justification to any part of the libel which is seperable from the rest, and at the same time plead not guilty as to the remainder, or the whole of the libel. If, for instance, in an action for defamation, for charging the plaintiff with lying and theft, the defendant cannot justify himself as to one of the charges, and plead not guilty as to the other—if he cannot be permitted to defend himself as to the charge of lying, without at the same time admitting that he did charge the plaintiff with theft, and avowing himself ready to prove his guilt, then the right to plead the truth in libel cases is not worth talking about. Upon this point the defendant cited, 1st, Starkie on Slander, 490; Cooke on Defamation, 119; McGregor vs. McGregor, 2; Dow, P. R. 775, and other authorities.

ARGUMENTS OF COUNSEL AND DECISION OF THE COURT UPON THE FIRST PLEAS.

The court referred to it as a *doubtful* point, but did not decide or express any decided opinion about it, because they were clearly with the plaintiff's counsel in their principle objection, or cause of demurrer, namely:—

That the pleas do not answer that part of the declaration which they profess to answer—that they attempt to *tone* down the libel, and do not aver that the report was flagitious, or that the proceedings of Mr. Ames in making it were morally wrong, whereas the libel declares that "so flagitious was the character of the text of the report," that the defendant could not fully persuade himself that it was a genuine document when first published by Mr. Ives. The counsel said that a justification must be as broad as the charge

is—must not go beyond it, nor fall short of it—that adjectives constitute the important part of a libel. For instance, in an action for charging the plaintiff with being the wilful cause of a man's death, the defendant could not justify himself by averring that the plaintiff did *cause* the death, because he may have caused it accidentally or in various ways without intentional wrong. All this I admitted as counsel for the defendant, but I reminded the court of these principles stated in the words of the authorities cited,—That "a plea of justification carries with it a fair comment upon the fact which it specifies."

Cooke on Defamation, 123.
Clarke vs. Taylor, 2, Bing., 654.
29 Eng. Com. Law Rep., 445.

And, "if the defendant justify specially, it will not be necessary for him in his plea to deny the inuendos and epithets contained in the declaration." (Starkie on Slander, 476; Cooke on Defamation, 114; Astley vs. Young; Burr, 807.) "It is sufficient if the plea answers the foundation and substance of all that part of the declaration which it professes to answer." (1 Chitty on Pleading, 455; Cooke on Defamation, 117; 1 Starkie on Slander, 483; Morrisson vs. Harmer; 3 Bing., N. C., 759; Edward vs. Bell; 1 Bing., 402.)

These principles were not questioned. On the contrary, the plaintiff's senior counsel, Judge Curtis, remarked that there appeared to be no difference between the counsel about the law, but only about its application to the case under consideration. It being then indisputably true, that it is enough if the plea justifies the foundation and substance of the charge, and that it need not justify the comments made upon it or epithets applied to it; what, may it please your honors, what, as I then asked, is the foundation and substance of the charge made by Mr. Hazard and which he has justified by his plea? It should be borne in mind, that the plaintiff states in his declaration, and that the defendant need not therefore state in his plea, that the plaintiff was the counsel for Mr. Ives, in the suit against C. T. Hazard and others—that after the trial and decision of that suit, he was appointed Chief Justice of this court and Reporter of its decisions; that as such reporter he did make and publish a report of that suit, and that the alleged libel relates to that report. The charge then, made by Mr. Hazard, amounts to this—that Mr. Ames, having been counsel for Mr. Ives in that suit, and obtained a decision in his favor, and having afterwards been appointed chief justice of this court and reporter of its decisions, and (although not required to report any suit tried

and decided before his appointment, and much less, any in which he had been counsel,) saw fit to make and publish, and did make and publish officially, a report of the suit with a preliminary statement of facts, which he represented as the facts upon which the decision was based, but which were really, entirely foreign to any charge made by Mr. Ives, in his bill against C. T. Hazard and others, and to any issues involved in the suit, while they were set forth in the report in such a manner as to deceive the reader. This is the charge, and the whole charge. The foundation and substance of it is, that as official reporter he volunteered to report a case in which he had been counsel, and made an unfair and deceptive report, to the prejudice of the opponent of his client.

Whether such a report, made under such circumstances is *flagitious* or not, is a matter of comment and opinion, although it is difficult to understand how there can be two opinions about it. In the case put to illustrate the necessity of a defendant's justifying his adjectives, where the words were "the wilful cause of the man's death," the word *wilful* forms a part of the charge and of the substance of it—the words used mean murder.

But suppose the alleged libeller, after charging the plaintiff with being the wilful cause of the death, had characterized the act committed as flagitious. Besides setting forth the facts constituting murder, would he have been required also to aver that it was a flagitious murder? Certainly not. He might have exhausted his vocabulary of denunciation, without danger of enabling the plaintiff to divert the jury from the real issue in the cause.

I also insisted that if it were necessary to justify as to the word, it had been done by the plea, specifying as it does, proceedings of the plaintiff in his official capacity, clearly and grossly wrong. The court cannot doubt that if he did just what he is charged with doing in the plea, he was highly culpable. Is'nt there then a good justification? If it were necessary for the defendant to use the particular word in his plea, it would be necessary for him to prove it, and a verdict might be rendered, or a disagreement obtained upon the precise meaning the jury might be induced to attach to the word, or upon the propriety of its application, when as to the charge made by Mr. Hazard, as to the real issue between the parties, as to the *thing* itself, the jurors might be all agreed, and have no doubt at all. The principles laid down in the cases cited for defendant, were admitted to be correct by the plaintiff's counsel. I thought them conclusive. I will here remind the court of them, as I shall have to refer to them when I come to

the new plea. In Morrison, &c., vs. Hamer, &c., (3 Bing., 759,) the defendants published concerning the plaintiffs an alleged libel, part of which was in these words: "We may safely claim the merit of having crushed the self-styled hygeist system of *wholesale poisoning* since we exposed the *homicide tricks* of these *impudent and ignorant scamps*, who had the audacity to pretend to cure all diseases with one kind of pills, composed of nothing more nor less than gamboge and aloes. Several of the *rot-gut rascals* have been convicted of manslaughter for killing people with enormous doses of their universal boluses." As to that part of the libel the defendants pleaded that the plaintiffs, although unskilled and unfit to compound medicines, did manufacture and sell large quantities of pills of gamboge and aloes, which were dangerous substances when unskillfully compounded, and to deceive the public called themselves hygeists, and falsely pretended that their pills cured all diseases. The plea also set forth that two professed hygeists (but not the plaintiffs) had been convicted of manslaughter for selling and prescribing the pills to two men, who were killed by their use; but the plea did not answer, or attempt to answer, any of the approbious terms—not one of them—nor did it allege that the plaintiffs had anything to do with or knowledge of either of the manslaughter cases. Yet the plea was sustained because the court said, "The terms made use of, however offensive, did not contain any ground of charge substantially different and distinct from that which forms the main charge; and we are not aware of any authority that the justification of the truth of the substantial imputation contained a libel, is not sufficient, unless it extends also to every epithet or term of general abuse in the description or statement of the imputation."

Edwards vs. Bell, 1 Bing., 402.

This action was brought by a minister against the proprietors of the *Times* newspaper, for the following publication: "A serious misunderstanding has recently taken place amongst the independent dissenters of Marlow and their pastor, in consequence of some personal invectives publicly thrown from the pulpit by the latter, against a young lady of distinguished merit and spotless reputation. We understand, however, that the matter is to be taken up seriously." The justification alleged with the proper specifications, that the minister did in his chapel, from a station therein assigned to him for the delivery of a sermon, (not from the pulpit,) censure a young lady, one of the Sunday School teachers, and thereby occasioned a misunderstanding among six

of the congregation. But it did not allege that the censure was pronounced from the pulpit, that it had caused any misunderstanding between the congregation, or any of them, and their pastor, nor that the matter was to be taken up seriously, or that any body had thought of taking it up at all. The plea was held good. The court said it is sufficient if the substance or sting of the libel be justified. The substance of this libel is the charging the plaintiff with delivering invectives from the pulpit. The plea answers that substantially, and that is enough.

After holding the case sometime for advisement, your honors decided that the sting or substance of the libel in the cause before you, was in ascribing to the report a flagitious character—that that part of it was not answered, and that the pleas therefore were bad.

NEW OR AMENDED PLEA.

On the 7th of April, (March Term)1860, a new plea was filed for Mr. Hazard, averring the report to be of a flagitious character, so as to meet the objection made by the Court to the first pleas. The plaintiff again demurred, without assigning any causes of demurrer and leaving the defendant and his counsel to guess what they were, if they could, until the case was argued to the Court at the September Term 1860. In the written brief produced by the plaintiff's counsel at that time, their objections to the new plea are these.

That the sting of the libel is that Mr. Ames having been counsel for Mr. Ives was by Mr. Ives, made Judge and reporter, and *as* reporter acted for Ives, and to gratify *him*, and accomplish his purposes, misrepresented the facts and slandered Charles T. Hazard—and also that the libel is one, and that the whole of it must be justified if any part—that Mr. Hazard, the defendant, had in Court and out of it, asserted the literal truth of the libel and it is time for him to plead to that effect. At the close of the term your Honors delivered a written opinion sustaining the demurrer upon grounds, some of which were not taken by plaintiff's counsel, and basing your opinion upon authorities none of which were produced, cited or alluded to by them. At the March Term 1861, I therefore moved to be heard again before your decision should become final. Although unwilling to hear me orally, your Honors gave me permission to submit my views in writing, which I am now endeavoring to do. I recite the whole of that opinion except a few words in conclusion not contained in the copy with which I was furnished.

OPINION DELIVERED BY THE COURT UPON THE NEW PLEA.

"The defendant heretofore pleaded a justification of certain parts of the libelous matter charged by averring its truth. Those pleas have been over-ruled because they do not answer that portion of the declaration which they profess to answer; they did not answer the sting of the charges made the substance of (part) the libelous matter. It is not necessary to repeat the rules laid down and of the judgement, delivered upon the demurrer to those pleas.

When defendant undertakes to justify by pleading the truth o the libelous matter he is understood to admit the matter, to be libel ous as charged. If he denies it to be libellous he has no occasion to justify. He may in such case plead the general issue and if the matter be not libellous a verdict of not guilty, which the jury wil give, will sufficiently protect him. It is only necessary to plead the truth of matters which is in part libelous, against which he can no otherwise defend himself but by proving it to be true— In such case what he is to justify is not the literal truth of the mere words in some sense of them but the libel,—the language in the sense in which it was used—the implication upon the charac• ter of the plaintiff contained in it as used.—

In the case of Mountney vs. Watton, 2 B. & A. 673.

"The libel charged was a publication headed 'horse stealer, and giving an account of the arrest of plaintiff on suspicion of hav- ing stolen a horse. The plea as to all the alleged matter except the words "horse stealing" justify it. On demurrer one cause as signed was that the plea does not allege any fact which justified the libel as explained by the innuendo, Ld. Tenterden said the dec laration charge, that the libel was published that it might be believ ed, that the plaintiff was guilty of horse stealing. If the word al- leged did not amount to a charge of felony, defendant would have had a verdict of not guilty without a justification. If they do. then a justification alleging only suspicion is insufficient, Littledale in the same case says the declaration avers in the beginning and conclu- sion by way of innuendo, that the intention was to impute felony, and it was held that an imputation of felony must be justificd by averring that the plaintiff was guilty of stealing.

In Easel vs. Russell, 4 Man. and Granger 1090.

"The words charged as being slanderous were "He killed my child, it was the saline injection that did it," meaning that the plaintiff was guilty of feloniously killing the child, and had by gross ignorance and gross want of caution, administered the injection.

The plea alleged that plaintiff did administer the saline injection, injudiciously, indiscreetly, improperly and contrary to his duty, and the child thereupon and directly went into convulsions &c., and shortly died, and the death was caused or greatly accelerated by the medicine. But upon demurrer the plea was, insufficient in the language of Tisdale, "in confessing the use of the words in the sense imputed by the plaintiff and not avoiding or justifying them in the same sense by showing the truth of the charge;" and says the words as explained by the innuendo amounted to a charge that the plaintiff had been guilty of man-slaughter, the defendant must be taken to have admitted that he used the words in the sense imputed, that is a conveying a charge" of man-slaughter, and the Judge concurred that the defendant must be taken to admit the use of the words in the sense suggested by the innuendo, the sense in which the plaintiff alleged they were used and must be justified in that sense if justified at all.

In O'Brian vs. Bryant, 16 ; Mees & Welb, 168, and others.

"Says the libel, as stated in the declaration, imputes to the plaintiff a fraudulent evasion of his creditors by being unable to pay them—the plaintiff might be unable to pay, as quitting indicates, without being guilty of house *bolting* implies, and the plea was by leave amended, by averring that he left with intent to defraud.

"Another imputation, charged in the declaration to have been made upon the plaintiff by the language of the libel, is that he being influenced by his relation as counsel to R. H. Ives, had availed himself of his office of Reporter and Chief Justice, to cause to be made or published an unfair and unjust report of said suit in equity, and in making said report had resorted to unprincipled special pleading.

"No part of the imputation is justified by the plea. It neither alleges as that the plaintiff was influenced in making the report, by his relation of counsel of Ives, or that he took advantage of his office of reporter to make an unjust and unfair report, with or without such influence. It is not averred in the plea that the plaintiff resorted to special pleading, still less to that which was unprincipled ; and though it is alleged that the statement in the report was made by the plaintiff, the plea does not assert that it is a specimen of unprincipled pleading. The sting of the charge here is, that it was done for want of principle, corruptly, designedly, and it is in no way answered.

"Another imputation, charged to be conveyed by the libel, is stated by the plaintiff, that, meaning by said (ironical) language that the plaintiff in his office of Chief Justice, and being influenc-

ed by his former relation of counsel for Ives, had caused to be published in his report of said suit in equity, a statement of facts, as a basis for the opinion of the court, which was irrelevant to the case. It is no where averred in the plea that any such relation influenced the statement of facts, or that the plaintiff was induced by any such improper motive to state facts which were irrelevant to the case.

"Again the plaintiff alleges that the libel intended to impute to him that in his said offices, being influenced by his said relation of counsel, had caused an atrocious libel and scandalous accusation to be foisted into the report of the decision of the Supreme Court in said suit.

"The sting of this charge is not that the statemement made is in the same words used by counsel at some other time, but that it was put into the report wrongfully and without warrant, falsely and untruly, and was influenced to it by said relation of counsel. The plea held only that a charge was contained in the report against the defendant in the suit in equity, of an infamous, libelous or caluminous character, which was false, viz.: that C. T. Hazard purchased a farm, as agent of Ives, took a deed to himself, and was guilty of fraud and breach of trust.

"Another imputation upon the plaintiff contained in the libel, as charged by him in the declaration, that the plaintiff, influenced by the said Ives, had issued a report of said suit, partaking of all the elements of a gross forgery, and that the plaintiff in his said offices had disgraced his position by inserting in said report atrocious calumnies affecting to all time the reputation and standing of Charles T. Hazard, and to convey to the public a favorable but untrue impression of the case of said Ives.

"The new plea justified a few sentences of the alleged libel not cornered by the first pleas, and two of the objections made by the court relate to those sentences, but the grounds of objection are the same as to every part, namely, that the defendant does not aver that Mr. Ames was influenced by Mr. Ives, or by his relations to Mr. Ives, to commit the acts complained of, whereas the libel charges that he was so influenced according to the meaning the plaintiff ascribes to it by his innuendo; and that by the rules of law, if a defendant would defend himself by pleading the truth of an alleged libel, he must admit what the plaintiff says it means, and justify and hold himself ready to prove it, as charged in the declaration."

The additional sentences included in the new plea, with the plaintiff's interpretation of them, are as follows:

"Beginning with your (meaning Mr. Ives') brother's irrelevant deposition, we find the burden of both your opening and closing argument confined to this slanderous accusation, and now that your senior counsel, (meaning the plaintiff) has been translated probably through your, and your clique's contrivances to the chief justiceship of the Supreme Court and reporter of its decisions; we find this same atrocious libel foisted into the text of the opinion of the court, in almost the same words as were used by the chief justice when acting as your counsel." (Plaintiff's inuendo) "meaning and intending thereby that *the plaintiff* in his offices aforesaid *being influenced by his relation of counsel to said Ives*, had caused an atrocious libel and a slanderous accusation to be foisted into the report of the decision of the Supreme Court in said suit in Equity.")

"Thanks to the circumstances that have compelled you at so early a stage of the controversy between might and right to hazard your (meaning said Ives) cause on one and the last cast of the die; for as the great Napoleon never sent his old guard into the fight until every other expedient to turn the tide of battle had failed, so I am sure that Robert H. Ives, a greater tactician than he in the art of law if not in war, must have exhausted every other means of deception before he ventured on the audacious expedient of exorcising from the Supreme Court a documentary shield, partaking, so far as truth and its judicial character are concerned, of all the elements of a gross forgery. I know that this is a grave charge to bring against a body of men whose ermine should, from the nature of their office, be pure and unsullied, even from the suspicion of partisan bias; but still I will maintain the charge, and pledge myself to sustain it to the satisfaction of a majority of the Legislature of this State, if necessary in spite of all the dust which may be thrown into their eyes by the crowd of debauched memders of the bar that so generally infest its halls, and who, as a body, have of late proved themselves to be the abject slaves and lick-spittles of wealth, and a self-constituted tribunal rather than the advocates and supporters of justice and the laws, but who, had they a tithe of the honorable sentiment and chivalrous impulses that once distinguished their profession, would rise to a man and demand the instant expulsion from the Supreme Bench the man (meaning the plaintiff) or the men who have so irreparably disgraced their position and the State, by causing to be inserted in the published judicial records, atrocious calumnies affecting to all time the reputution and standing of a plundered and grossly abused man, alike false in fact, and unsupported by a title

of evidence legally before the court, and which even were they true, are wholly inapplicable to the case at issue.

"This report was doubtless the "document you relied upon to overawe the deliberations of the committee appointed by the House to report upon the merits of C. T. Hazard's memorial, and the equity process of the Supreme Court. We here behold the same old cry of 'breach of trust,' thundered into the ears of the committee, under sanction of the authority of a court who have not scrupled to incorporate in their report of their opinion of Ives vs. Hazard, whole sentences bearing unmistakable evidence of having been copied almost verbatim from the arguments of your counsel, or from your own statements, and which it requires nothing but a recurrence to original documents, in possession of the court, to prove to be grossly false."

(Plaintiff's innuendo, "meaning and intending thereby, that *the plaintiff*, in his office aforesaid, *being influenced by the said Ives*, had issued a report of said suit in equity, partaking of all the elements of a gross forgery, &c.")

And that part of the plea which specially refers to and answers the above quoted part of the declaration, is as follows:

"Which said report, contained in nearly the same words that were used by the plaintiff ("Mr. Ames") when acting as counsel as aforesaid, charges against Charles T. Hazard, one of the respondents in said equity suit, of an infamous, libellous, and calumnious character, false in fact, unsupported by any legal allegations or evidence legally before the court in said suit, and wholly inapplicable to the issue therein, to wit.—that the said Charles T. Hazard bought a certain farm, *as the agent of said Ives*, and then took a deed thereof to himself, and that he was guilty of fraud and a breach of trust—whereby said report partook, so far as truth and its judicial character were concerned, of all the elements of a gross forgery."

If your honors objected only to that part of the plea which refers to the additional sentences, you would not be required to overrule the whole plea. When a declaration containing some good and some bad counts is demurred to, generally or specially, the plaintiff is entitled to judgment on those parts which are good, and so when there is a demurrer to a plea, bad in some distinct parts and good in others, the demurrer can be sustained only as to the bad. But, as has been already mentioned, your honors do not apply to the additional sentences any different principles from those applied to other parts of the alleged libel, in regard to all which, the new plea is a transcript of the first, excepting only that the present plea justifies the use of the word flagitious.

All the exceptions now taken by court and counsel, were open to both on the first argument, when the one contended, and the other decided, that the plea was bad because it contained no sufficient justification of the use of that word, which, the court said, constituted the very sting of the libel. But now, when the defendant has pleaded in conformity with the decision, the counsel say in their written brief, and orally argue, and the court decide, that the sting of the libel consists in charging the plaintiff with *having been influenced by Ives.*

PLAINTIFF CANNOT DEMUR TO AN AMENDED PLEA, FOR CAUSES HE DID NOT ASSIGN AT FIRST.

The plea conforming as it does to the decision, *I deny that they have any right to demur for any cause which they did assign, or might have assigned in the first instance.* I wish the more, to make my views understood on this point, because I was not permitted to do so upon the argument, for when I began to state the proceedings had upon the first demurrer, the court required me to confine myself *to the case then before the court.* I have now shown what those proceedings were, and it is for the court to determine whether they have anything to do with the subject under consideration, or not. A demurrer is not designed for the evasion of the real issues of a cause, nor for delay, nor any vexatious purpose, but the object of it is, as we read in the books, to give a party a good writ or plea for a bad one. If the plaintiff has the right which he has sought to avail himself of, he can wield it with great effect in baffling attempts to defend upon the truth, by pointing out some omission in each new plea, till he finds the defendant still persists in justifying, and then insist upon the importance of some statement which he knows is not susceptible of proof. He could require the defendant to prove that the report was so bad as to render him unable to persuade himself, and that he in fact was unable to persuade himself that it was a genuine document, and did in fact delay commenting upon it on that account. A defendant puts in a plea to a declaration. The plaintiff demurs, that is, he says the plea is an insufficient answer, because it does not allege a certain fact. The point is argued and time is taken for consideration, and then, the demurrer having been sustained by the court, the defendant files a new or amended plea conforming to the decision. Has the plaintiff a right to demur again on the ground that there is still another fact which ought to have been, but was not averred in the first or in the amended plea?

Plaintiff's counsel refer to no authority and mention no reasons for such a course, nor do the court refer to any, for there are none. If he can demur twice for the same causes, he can twenty times. Had he set forth particular causes by special demurrer, it will scarcely be contended that after argument and judgment he could assign new causes. Still less can he do so after a general demurrer, for that embraces not merely a part, but all the defects of the plea.

For this cause, therefore, I ask your honors to reconsider your opinion.

ARGUMENT UPON THE OPINION OF THE COURT,

That the Plea must admit the sense of the Libel to be just what the Plaintiff chooses to impute to it.

I come now to the written opinion already set forth.

I understand by it, in the first place, that you propose to decide, that if the defendant would rely upon the truth, he must confess that his meaning was, not what the language clearly indicates or expresses, and not what the jury or even the court may say he meant, but just what the plaintiff by his inuendos declares it to have been. You say,—"When a defendant undertakes to justify by pleading the truth of the libellous matter, he is understood to admit the matter libellous, *as charged.*" And you then refer to several English cases, where the defendants were required to justify in the sense in which their language is explained by the inuendos. But I do not understand that such a principle as your honors would adopt in this case, has ever been adopted or laid down by any court in England or America, nor that it was contended for by the plaintiff's counsel. It was not mentiond in their Brief, as it should have been if they meant to rely upon it; nor did they introduce authorities to establish it; nor do I recollect to have heard or read an enunciation of any such principle of law, during the whole progress of the cause, until I read it in the written opinion of the court. To constitute *authority*, a decision must be based to some extent at least, on common sense; yet if such is the law, the right it professes to give to plead and go to the jury upon the truth, is a mockery and a cheat. In the suit for publishing of the plaintiff, among other things the words, "I wonder how he came by his gold watch which belonged to A., now in his grave." If the declaration had explained the meaning to be that the watch was obtained by robberry and murder, though the defendant had never dreamed of

making any such imputation, he could not have pleaded the truth of the publication without confessing that it charged the plaintiff to be a robber and a murderer. And in any case, all that the plaintiff would have to do to prevent the truth being proved or pleaded, would be to aver in his declaration that the meaning was to make a charge which he knew the defendant could not prove and had never made or thought of making. Indeed I am confident your Honors must see upon re-perusal that no such doctrine is laid down, applied or approved in any one of the cases cited in your opinion. The most they amount to is, that the words must be justified as charged, when they are correctly charged. Examine the first case cited—that of *Mountney vs. Walton*, 2, *B. & A.* 673. The action was for publishing of the plaintiff that he was a horse stealer. The libel was headed "Horse Stealer," and set out the circumstances. Defendant justified as to all, except the word "horse stealer." The court said they did not mean to deny that where a libel is divisible, one part may be justified separately from the rest; but in the case before them, the gist of the whole matter was in the word *horse stealer*, while the justification stated only suspicious circumstances. They said, "in such a case a defendant cannot excuse parts of a libel, as grounded on matter of suspicion, unless he can justify that which is the result of the whole." That is all. The opinion was given not upon the intention imputed by the plaintiff, but upon the court's own interpretation of the obvious sense of the libel.

The next case is that of *Easel vs. Russell* 4, Mann. & Granger, 1090, and I submit that instead of sustaining the doctrine, it is an authority directly against it. 'Twas for slander in saying of an apothecary, "he killed my child; it was the saline purgative that did it." The inuendo explained the charge to mean a felonious killing, or manslaughter. If the child's death was caused by the gross ignorance or neglect of the plaintiff, he was guilty of manslaughter. But the defendant justified by alleging that the plaintiff administered the medicine *injudiciously and indiscreetly*, and that the child's death was *caused or accelerated* thereby. Tindal, chief justice, did say, to be sure, "I think the defendant must be taken to admit that he used the words in the sense imputed by the plaintiff, that is, as conveying the charge of manslaugter, and to justify such a charge there must be gross negligence, and all the plea charges is want of judgement.

The judge does not say that the defendant must be taken to admit that he used the words in the sense imputed to them by the plaintiff, *because* the plaintiff imputed to them that sense. Un-

doubtedly the words do naturally impute more than a want of judgment. If one should say to us of another "he killed my child," we should, under any ordinary circumstances, understand that the death was caused by something more than want of judgment—that it was caused by gross ignorance or neglect at least—and that would be manslaughter. But the meaning of the court is rendered clear by other judges. Cottman J. agreed with the Chief Justice. He says—"Cromwell's case, upon which it is sought to support the plea, is very different from the present. In that case *the court could see the words were not used in the sense charged.*"

And Erskine J. said—"The *words* impute felony, but the plea shows nothing to justify such a charge." In Cromwell's case it was shown that the words were not spoken in the sense imputed to them by the declaration. The court therefore did not decide that words must be justified according to the plaintiff's explanation of them, but on the contrary, they admitted that he need not do so unless the court see that the explanation is correct and proper. Neither does the doctrine derive the least support from the third and last case relied upon. (O'Brien vs. Bryant, 16 M. & W.) The libel stated that the plaintiff, in expectation of being elected member of a club, gave an entertainment, and the next morning *bolted*, and some of the tradesmen had to regret the fashionable character of the entertainment. The justification, after stating that the plaintiff gave the entertaiment and was not elected, went on to state that the next morning "he quitted the town, leaving a number of tradesmen, to whom he owed money, unpaid." The court did not say one word about justifying in the sense charged by the innuendo, but they decided upon their own judgment of the natural meaning of the words, which, including the word *bolting*, they thought imputed fraud, as they evidently did. Their opinion is all expressed in a single sentence. That in its connection they say, "charged the plaintiff with going away suddenly, leaving debts unpaid, and under such circumstances that the creditors could not find him, and therefore means more than *quitting*, as stated in the plea. What would be an innocent departure, consistent with proof that the plaintiff went out of town for a day, and then returned and paid the debts." No one of the judges state in any one of the cases, as a general proposition, or as a principle of law, that the plea must justify words in the sense imputed to them by the plaintiff, and none of them allude to any thing of the kind, but on the other hand, the cases show, so far as they refer to the subject at all, that the court must decide as

to the sufficiency of a plea, by their own judgment of the meaning of the libel.

Now please observe the authorities contradicting the doctrine of your written opinion. Chitty says—1 *Chitty on Pleading*, 344—"An innuendo is only explanatory of some matter already expressed, and serves to apply the slander to the precedent matter, as he, (meaning the plaintiff,) but cannot *add* to, *enlarge*, *extend* or *change* the sense of the previous words."

In Rex vs. Hoone, *Cowper* 684, De Grey, Chief Justice, in delivering the opinion of the Judges in the House of Lords, he says—"An innuendo means nothing more than '*that is*,' or '*seilicet*,' as explanatory of a matter sufficiently expressed before; as *such a one*, *meaning the defendant*, but it cannot extend the sense of the expressions beyond their own meaning, unless something is put upon record for it to explain. As in an action for saying *he burnt my barn*, the plaintiff cannot by way of innuendo say, meaning his barn full of corn, because that is not an explanation of what was said before, but an addition to it. But if it had been averred that the defendant had a barn full of corn, and that in a discourse about *that* barn, the defendant had spoken the words, an innuendo of its being *the* barn that was full of corn, would have been good."

Cooke says (*Cooke on Defa.* 93)—"An innuendo cannot extend the sense of the words; it can only connect them with some matter already on the record. It is only a link to attach together facts already known to the court." And on page 114, "the plea of justification need not deny the innuendos nor the malice, for if the *facts* be true, the plaintiff's right to damages is gone."

Starkie an Slander, *vol.* 1, *page* 419, describes an innuendo in the same manner, and illustrates its proper use by a case where the plaintiff, after charging that the libel was published concerning him, explains by innuendo that the initials by which he is referred to, means *the same plaintiff*. And the same author says (*page* 475), "the plea of justification must in general confess the publication as charged in the declaration," but it will not be necessary for the defendant "in his plea to deny the innuendos or the epithets."

The case of Glosteir vs. Foss, in the Exchequer Chamber, (2 Young & Jer., 146,) was for reporting that plaintiff was an unfit and improper person for being proposed and voted for as a member of a certain society, for the detection of sharpers and swind lers—meaning, as the innuendo stated it, *that he was a sharper and a swindler*. There was no averment that by the usage and practice of the society, or any by law; it was understood that when it was reported that a person was unfit to be proposed and voted

for as a member, he was intended to be branded as a sharper and a swindler, but there was this innuendo, "meaning that the plaintiff was a swindler and a sharper." The court held that the innuendo was inadmissable upon the general rule, because it alleged a meaning beyond the natural import of the language, when there was no averment to show that by the usages or by the laws of the society a person so reported was understood to be so branded. Ch. J. Best said the reason of the rule was, that the court must *see upon the record* that the libel did charge the plaintiff as a sharper and a swindler."

Chief Justice Spencer, in delivering the opinion in *Thomas vs. Croswell*, 7 *John, R.* 264, said—"An innuendo, as has often been decided, cannot enlarge, extend, or change the sense."

The U. S. Circuit Court said, "it cannot extend the sense of the words beyond their usual and natural import." *Beardsley vs. Tappan Blatch, Cir. Ct. R.*, 588.

There are numerous decisions in the Mass. Reports, to the same effect, but a reference to two of them will be sufficient. *Bloss vs. Toby*, 2 *Pick.* 320. Here the words were "he burnt it himself." The declaration averred that in a certain conversation of and concerning the plaintiff, and of and concerning a certain store of the plaintiffs, in the town of Alvord, which has been consumed by fire; the defendant uttered these words of and concerning the plaintiff and said store, viz.—"he (meaning the plaintiff) burnt it (meaning said store) *himself*, (meaning the plaintiff,) and further meaning that the plaintiff wilfully and maliciously burnt said store."

Here is a plain illustration of the whole matter. As the declaration alleged that the words were uttered in a conversation about the plaintiff and his store, so much of the innuendo is good as explains *he* to mean the plaintiff, and *it* to mean the store, because it does not enlarge the natural signification of the words, but merely connects them with what has gone before, and as C J. Best said, the court could *see upon the record*, that the charge was what the plaintiff represented it to be—that *he* did mean the plaintiff, and *it* the store, while that part of it which explains the words to mean a *wilful* burning, is bad, because it attempts to extend the meaning. I quote from the opinion delivered by Ch. J. Parker: "Although it is alleged by the innuendo that the defendant meant and intended to charge the plaintiff with having done the act wilfully and maliciously, yet the words do not thereby acquire any force or meaning which they had not in themselves, the office of an innuendo being only to make more plain

what is contained in the words themselves as spoken, not to enlarge or extend their meaning, or give them a sense which they do not bear when taken by themselves without the aid of an innuendo." In *Carter vs. Andrews*, 16, *Pic.* 1, the words (which were spoken by an auctioneer) were—" we offer these books under a disadvantage, as the library has been plundered by Deacon Carter," and the innuendo was this, "meaning *robbed.*" Held insufficient because the word plundered, did not import the charge of *robbing*, and the innuendo could not extend the sense. Ch. J. Shaw said the true principle, and the ground upon which it rests were so fully stated in the above named case of Bloss vs. Tobey, 2d Pick., that it would not be necessary for him to repeat it, and he approved of what Ch. J. Best said, that the court must *see upon the record* that the meaning of the words was what had been affixed to them in the declaration. And heard in his recent work on Libel and Slander, (sec. 220,) declares that " it is now well settled law, applicable to indictments as well as to actions for libel or slander, that it is not the office or province of an innuendo, to enlarge or point the effect of the language of the defendant;" and in support of the proposition, he cites forty adjudged cases from the English and American Reports, without alluding to the existence of any authority to the contrary.

But before leaving the adjudged cases, let me refer to some one of them for illustration—say that of *Snow vs. Witcher* (9 *Iredell*, 346),

The decision of your honors implies, that in order to defend upon the truth, a defendant must aver and prove the literal truth not only of the substance of the charges, but of each remark in its broadest and most offensive sense, and even of every word used to express the writer's opinion of the charges, and in short, that he must aver and prove such things as will justify the charges in the sense in which the plaintiff may choose to impute to them. Now compare your view of the law with that of the court in Snow vs. Witcher. There the slanderous words were—that the plaintiff, (an unmarried woman) " had lost her little one." The plea was, that she had been guilty of fornication. The plaintiff might well urge, as she did, that the charge of fornication was in words different from, and might in fact be much more injurious to her than the charge of fornication. Yet upon the principle, that it is only the substance of the charge which need be justified, the court held the plea to be good and sufficient, because, they said, there was no harm in conception and delivery *per se.*, and that the whole *gist* or substance of the charge consisted in the unlawful intercourse.

Can any two decisions upon the same subject, be more unlike in principle than this decision, and that of your honors?

Then, if anything can be proved from the books, it is proved that plaintiff cannot by his declaration extend the meaning of the words and compel defendant in pleading the truth, to admit and justify them in the sense charged.

WHETHER, IF THE DECLARATION STATES THE MEANING OF THE LIBEL INCORRECTLY, DEFENDANT WOULD FOR THAT RFASON BE ENTITLED TO A VERDICT ON HIS PLEA OF "NOT GUILTY."

There is another matter relative to this part of the cause requiring some attention. You assign as a reason for your decision, a supposed rule of law to the effect, that when the declaration sets forth the meaning erroneously, defendant has no occasion to plead the truth, because the plea of "not guilty" will be his sufficient protection. You state it in this manner:—"When a defendant undertakes to justify by pleading the truth of the libelous matter, he is understood to admit the matter to be libelous as charged.

"If he denies it to be libelous, he has no occasion to justify. He may in such cases plead the general issue, and if the matter be not li belous, a verdict of not guilty, which the jury will give, will sufficiently protect him." And a remark of Lord Tenterden in *Mount ney versus Walton* is referred to as recognizing the rule. Now if it please your honors, I have been unable to find any recognition or intimation of such a rule in that case, or any where else outside of your written opinion, while the remark of his Lordship is wholly inapplicable to the case at bar, and when applied to it, utterly fallacious.

Although I have already spoken of the case, to prevent the possibility of a misunderstanding, I will set forth Lord Tenterden's very words and all that he uttered. "I am of opinion that this plea is not sufficient. The declaration states that the defendent published a libel with intent to cause it to be believed that the plaintiff had been guilty of stealing a horse. If the words of the alleged libel did not amount to the charge of felony, the defendant on a trial, would have succeeded upon the general issue, and without a justification. But if the words declared upon do impute an actual felony, as the declaration charges, then a justification merely setting out that the plaintiff was on certain grounds, suspected of stealing, cannot be an answer. I do not however, mean to lay it down, that where an alleged libel is divis-

ible, one part may not be justified separately from the rest if a proper justification can be made out."

You see, he laid down no rule, and said nothing about there being any. By the way, as to the other point, please observe, that he formed his opinion from the defendant's words themselves, and not from the construction put upon them in the declaration. " If the words of the alleged libel," &c., and " if the words do impute an actual felony, as the declaration charges," &c. And instead of saying that the defendant would be safe on the general issue if his words were misconstrued by the declaration, by virtue of any rule or principle of law, he spoke only of the consequence of a false statement of his meaning, in that particular case, under its own peculiar circumstances. *There*, he said, the defendant need not rely upon a justification, and he and Justice Littledale more especially, tell the reasons. The defendant was sued for charging the plaintiff as a horse stealer. The article was headed with that word, as has been already mentioned. The innuendo imputed the intention to make such a charge, the court thought the language clearly expressed it, and the declaration alleged no cause of action for anything else, while the plea stated certain circumstances, inducing suspicion only without attempting to justify that word, or any words imputing felony. Both the Judges said the charge made by the defendant was one and indivisible; and Littledale said, " the gist of the whole matter is contained in the word, " *horse-stealer*." It was therefore, manifestly true, as the court decided, that if the defendant was not guilty of making the charge, he would be entitled to a verdict under the plea, of not guilty. How unlike that case is the case at bar! Where is the analogy between them? Is there here but one thing contained in the alleged libel, or one thing only in the declaration? Is there but one innuendo here, and is it obvious that it truly sets forth the meaning of the publication? Does the actionable nature of the whole of that publication, or all of it declared upon, depend upon the correctness of the innuendos; and if they are incorrect, can the court see and know that the defendant would be entitled to a clean verdict upon the general issue? A man may say many things orally with impunity, which he would be liable for publishing, and he may be liable for publishing concerning another in an official position, what would not be actionable if applied to him in his private capacity. The plaintiff is referred to, and his conduct commented upon, as a judge and a reporter, and anything published concerning him in either of those offices, calculated to injure him therein to excite hatred or contempt towards him, or to lower him in public estimation, is libellous if false. The only way in which a defendant can avail himself of the truth of his

charges, is by a special plea of justification. He cannot give it in evi ' dence, nor can the jury inquire into it under the general issue, and if this action can be sustained, there is enough in that part of the publication declared upon, to sustain half a dozen actions. Why, your Honors have extracted from it, and set forth in your opinion, five or six distinct substantive charges, which you pronounce libelous, and have found and exhibited the sting of each. And, irrespective of the innuendos, strike them from the declaration, and take the meaning of the publication to be just what it imports to be by the natural force, and usual understanding of the language, and then it is unquestionably true, that if the defendant should yield his special plea, he would be convicted under the general issue, for aught the court can now know to the contrary; whereas in *Mountney versus Walton*, the court could see and know from the record that the defendant would be entitled to an acquital. I repeat that there is no such rule, and if there were, it could have no application in the present instance, for a rule ceases with the reason of it.

The right to defend upon the truth is as important to Mr. Hazard as the cause itself, and he will not be driven from his plea as long as he has the power to cling to it. The proposition that if a defendant would protect himself by proving the truth of an alleged libel, he must confess and justify it in the sense imputed to it by the plaintiff's innuendos, is so repugnant to reason and to the uniform series of English decisions, from Coke's time to the present day, and of the courts in this country, and to the law as laid down by all the text books, I trust I may safely assume that your honors will not continue to adhere to it—that you will not finally decide that the plea is insufficient, merely because it does not admit what his adversary says about the meaning, nor unless, in the language of Ch. Justice Best, "*the court can see upon the record* that the plea falls short of the *usual and natural signification of the words.*"

THE PLEA JUSTIFIES THE CHARGES REALLY MADE.

The only remaining question is, does the plea substantially justify the charges, construing them reasonably, according to the usual and natural signification of the words employed, unaided and uninfluenced by the plaintiff's innuendos?

I might perhaps take for granted that you would decide this question affirmatively, inasmuch as you declare that the defendant must admit the matter to be libelous as charged, and speak of his doing that in the same way as some of the authorities speak of his admitting

the *publication* ; and because you do not assign as a reason for holding the plea to be bad, the actual meaning, nor your own understanding of it, but base your decision entirely upon the meaning stated in the declaration. But the subject is important to the defendant, and from abundant caution I think it my duty to remark upon it. As all public offices are held in this country for the benefit of the people, as our bill of rights secures the liberty of the press, gives every man the right to publish his sentiments, and in all actions for libel to prove the truth when not published from malicious motives, as a perfect defense ; as the jury are the judges of the facts, and it being laid down as a familiar principle in all the books, that the jury are to judge whether a publication is a libel or not, and to determine the meaning of the words, persons unacquainted with technical rules would naturally suppose that it would be for the jury to determine the question of meaning in this instance, and would be surprised to learn that they can have nothing to do with it, and that the defendant cannot avail himself of the right of defending upon the truth, until the court has decided the question, and decided it in his favor. When the English courts persisted in arrogating to themselves and withholding from the jury in libel cases all questions except as to the fact of publishing, and the truth of such allegations, for instance, as that *the King meant the King of England*,—every thing indeed which was in controversy, all England was alarmed for the rights of juries, and the sounds of the alarm did not cease until those rights were secured by the interposition of parliament when both lords and commons by an unanimous vote, I believe, refusing to *alter* the law and thus indicate that the courts had been right, attained the object by a declaratory act.

There would seem to be no difficulty in submitting the plea to the jury for them to sustain or not as they might find that it did or did not justify the charges in their true meaning, though I do not deny that by the existing rules of pleading the plaintiff has the right to take the question to the judges by demurrer and require their decision upon it, but I submit that such a course is not to be favored, that the language ought not to be streched, and that the judges should take care not to give it a broader signification than a jury would be likely to give it.

And I must refer to another matter in this connection, because I think it proper to do so in the discharge of my duty as counsel, although with entire respect to your Honors, being fully aware that you cannot select the causes to come before you, nor the questions to be raised in them. The defendant is in the disadvantageous position of defending a case brought by the plaintiff before his own associates in

the court of which he is Chief Justice. Nor is this all. Mr. Hazard was surprised by the decision of the Equity cause, and thought it worthy of public interest and public animadversion, and he was still more surprised when he read the official report of that cause which he deemed quite as censurable, and which Mr. Ives obtained in advance of its official publication and appended to his letter issued in pamphlet form in his own vindication; and in writing a reply to Mr. Ives, he seems to have taken but little if any pains to soften his language, or check the impetuous flow of his indignation. He says and it is evident from the writing itself, that he had the impression which many have, that the reports of cases proceed from the court, and hence much of his censure is hurled at the judges collectively. Hence he is being tried, and the right to submit to a jury with his plea the truth of the charges he had made, is to be determined by the very judges he is supposed to have libelled. It is certainly proper that this fact should be alluded to and considered, seeing that no man is possessed of pure intellect without sensibilities and with a judgment working like a machine not susceptible to the influence of feeling.

In your written opinion you have set forth four principal substantive libels or charges which are libellous, and not justified by the pleas.

1. *That being influenced by his relation as counsel to Ives*, the plaintiff had availed himself of his offices of Ch. Justice and Reporter to publish an unfair report of the Equity Cause.

2. *That being influenced by his relation as counsel to Ives*, the plaintiff had published in his said report a statement of facts as a basis of the opinion of the court, which was irrelevant to the case.

3. *That being influenced by hia relation as counsel to Ives*, the plaintiff had caused an atrocious libel and scandalous accusation to be foisted into said report.

4. *That being influenced by suid Ives*, the plaintiff had issued a report of said Equity Cause partaking of all the elements of a gross forgery.

You consider that the sting or substance of each of these principal charges consists in the influence, and that the plea is bad because it does not admit that the plaintiff was charged with having acted under that influence, and justify the charge. Your opinion being based on the assumption that the plea must admit the charges to have been just what the plaintiff's declaration says of them, you appeal for the nature of the charges to the innuendos alone, without referring to any of the words to show that the plaintiff's condnct was in fact attributed to such influence. And you would examine in vain the libel, and the whole pamphlet from which it is taken, for any language expressing such a

charge, or any intention of making it directly or indirectly, while you would find abundant proof that the writer had no thought of publishing statement of facts, and hi ssentiments concerning them so as toavoid responsibility, and that he would not wish or be willing to insinuate anything against friend or foe, which he would hesitate to roundly assert.

It will be perceived from that part of the declaration which I have already quoted, that in regard to the first of the four charges, the only langnage alleged to impute the influence, is contained in this clause. "How far the subsequent translation of your senior counsel to the seat of the Chief Justice of the court, and his appointment of reporter of decisions has infleenced the language of the published report, remains to be shown, but I am bold to say, that it affords about as pretty a specimen of unprincipled special pleading as can be found upon record." By this clause, *meaning*, the innuendos says that the plaintiff, influenced by his relation as counsel to said Ives, had availed himself of said offices to make and publish an unfair and unjust repert, in making which he resorted to unprincipled special pleading. But is any sush thing expressed or intimated by the language itself? Mr. Hazard was under the impression that the language of reported cases was that of the court and not of the reporter, and that accounts for his saying it remained to be shown how far it was influenced by the plaintiff's translation to the bench. It was influenced by the plaintiff's translation, for he made the report himself, which fact is averred in the plea. Buf the objection is only to the *influence*, and nothing is said about his being influenced to make the report by his relation as counsel. It is not even said that the *translation* influenced the language of the report, and although that comes nearer in *sound* to the imputation than anything else does, it is a very different thing. A man having been appointed to the bench when the other jndges were about to report a case in which he had been of counsel, might innocently, and with propriety, be referred to by them about some points or facts, and thus influenced the language of their report, and a statement of the circumstance would convey quite a different impression from that conveyed by the assertion that " he was influenced by his relation as counsel, to make an unfair report." Instead of charging that his relation as counsel induced him to make the report, the influence is spoken of as consequent npon the change of position, and although it did have an effect, because the plainaiff made the report himself as the new reporter, yet as the defendant did not then know that the whole of it was his work, he is careful to say, that how far the snbsequent translation influenced the language, *remained to be shown* But sup-

pose the statement had been in terms, that it remained to be shown how far the plaintiff had been influenced by his relation as counsel, in making the unjust report,—could it be maintained that the plea was bad because it did not justify the statement? Certainly it could not be, because nothing but the gist need be jnstified, and the plea does aver and the whole gist is contained in the averments, that he was the leading counsel for Ives in the cause, that he was afterwards appointed Judge and Reporter, and as such made a false report containing facts not in the case prejudicial to his client's opponent, and the court officially know, and therefore it need not be averred, that he was not required by his official duty to report the case at all.

The second charge states that what kind of testimony the opinion of the court was based upon, neither C. T. Hazard or the pnblic would probably have ever known, &c., had not the counsel and friend of Ives been appointed Judge and Reporter. And the declaration has it, that the meaning of this ironical language is, that the plaintiff was influenced by his relation as counsel to publish in his report a statement of facts, not relevant to the case. And yet the clause contains not a word or an allusion about his being influenced by his relation as counsel.—A person cannot avoid responsibility by expressing slander in an adroit and covert manner, but if language evidently used as the defendant's is to express the writers sentiments in a plain, direct and fearless manner, can be so wrested from its natnral and usual signification, it will be deubtless easy to convict him; and had he declared in express terms that he did not mean to say that the plaintiff was influenced by such relation, the innuendo might have been," " meaning by said ironical langnage, that the plaintiff *was* so influenced."

The third charge alleges that " now your senior counsel has been translated probably through you and your clique's contrivances. to the Chief Justiceship of the Supreme Court and Reporter, we find the same atrocions libel foisted into the text of the opinion of the conrt in almost the same words that were used by the Chief Justice when acting as yonr counsel." And what has all this to do with the sense imputed to it?" It may express a qualified imputation upon the conduct of Mr. Ives, but it does not intimate that the plaintiff was aware of that conduct, and mnch less that he was inflneneed by his connection with him.

By the fourth and last of the charges, the defendant tells Mr. Ives that he must have exhausted all other means of deception before attempting to exorcise from the court a report partaking of the character of a forgery—that the members of the bar, if like their predecessors, would demand the expulsion from the bench of the man or men who

had inserted upon the records of the court, gross calumnies, and whole sentences copied almost verbatim from the statements of Mr. Ives. or his counsel. But in the whole clause there is not a word about the plaintiff being influenced by his relation as counsel.

The influence cannot be legitimately inferred from those charges, nor from any part of the writing declared upon, except the parts duly averred in the plea. Strike from the writing the facts set forth in the plea, that the plaintiff was counsel, and afterwards was made judge and reporter, and reported the cause, &c., and the most careful reader would not understand that anything was said about the plaintiff, having been so influenced. The idea that he was, is suggested by the facts themselves, and the defendant is not responsible for that. In a libel case for publishing of a judge "that after the trial of a cause, he was closeted with one of the parties, talking with him about the case, and the next morning decided it in his favor," would it not be sufficient for the defendant to allege in his plea the truth of those facts? It might be urged that the imputation was conveyed that the judge was *influenced* by the interview to make the decision, and people generally would draw that influence, for it is naturally suggested by the facts themselves; but as it was not stated by the writer, if such a plea would not be good, then he could not defend himself upon the truth, the Bill of Rights notwithstanding. The case put is exactly like the present. The influeuce by which the plaintiff was actuated, is a matter not susceptible of proof, not involved in, and which would serve only to divert a jury from the real issues, and while the defendant shrinks from no just responsibility for anything he did publish, he did not know, and did not therefore declare or intimate what were the operations of the plaintiff's mind, or by what motives, or by what or whose influence he was induced to act.

Besides the neglect to charge the influence, the written opinion points out one or two other fatal objections. It is said that the plea don't allege that "the plaintiff took advantage of his office of reporter to make an unjust and unfair report." But it is only the substance which need be averred, and the plea does aver that the report was unjust and unfair, and that he made it as official reporter; and it is not easy to understand how he could have made it officially without taking advantage of his office to make it.

Another of these objections is, that it is not averred that the statements in the report exhibits "a specimen of special pleading," and much less, "a specimen of unprincipled special pleading." And why should there be any such averments? If all the comments and epithets contained in a pamphlet of fifty pages were to be justified with the

requisite formalities, the pleading would be interminable, and the jury be required to decide the most trivial issues. The publication makes a charge of improper conduct, basing the charge on certain facts, and then expresses the writer's opinion of that conduct. The plea justifies the charge, and avers the facts, and it says nothing because neither court nor jury have anything to do with the correctness or incorrectness of the writer's opinions about, or the epithets he applied to those facts, or that conduct. But the plea does aver that the statements were unprincipled, for surely no one possessd of a moral sense could doubt their being so if the allegations in the plea are true. But the defendant don't aver and profess to be ready to prove that the report affords a specimen of special pleading. Special pleading! Why, that is a matter of law, and one of the subtleist parts of the law ;—so subtle, so technical, hard and dry, and requiring so much attention that most of us of the bar at the present day pay scarcely any attention to it at all. Yet the court think that in this instance that matter should be submitted to the consideration and decision of a jury.

May it please your honors, whether the defendant has been right or wrong, there is no reason why his defence should receive an unfair or an unfriendly consideration. He did not engage in the controversy from malicious or selfish motives.

In their brief the plaintiff's counsel have referred to oral statements said to have been made by the defendant out of court, and which you know nothing about, and I may therefore perhaps be permitted to mention a few things which you do know something about.

The defendant learned that Mr. Ives had psosecuted a suit against Charles T. Hazard and another person, to whom Hazard had conveyed part of the land in question, upon an alleged contract, for a sale by Hazard of a farm to Ives, consisting of a memorandum of three or four lines in pencil mark, written by Ives on a leaf in his own pocket book, and signed by Hazard in haste at the boat when it was about to leave the wharf, and after he had repeatedly told Ives he did not then wish to contract to sell, and when, he declares upon oath, he thought the memorandum only a conditional promise to sell. It was not signed by Ives, nor did Hazard have any copy of it, or have any means of compelling Ives to buy the farm. The one party was illiterate, not suspecting, but looking up as to a powerful patron to the other party who possessed great wealth and influence, was educated, shewd and familiar with bnsiness negotiations and written contracts.

Afterwards Hazard sold some portions of the land, and the purchasers took possession and made improvements under the eye, but without objection or remark from Ives ; but the land rose immediately

in value, and instead of submitting the case to a jury for damages, Ives brought his suit in Equity, and Hazard was compelled through the unlimited power of that court to fine and imprison, to execute an instrument conveying the farm to Ives, and to acknowledge it as his *voluntary* act and deed, and was thereby ruined, and left to depend upon his labor for the fnture support of himself and an unfortunate family.

The defendant was not related to him, and had no personal interest in the matter, but he thought the conduct of Ives had been unjust, hard, and overreaching, and that the decision was an improper one. He was himself surprised, and thought the people of the State generally would be surprised to learn, and that it would be for their interest to know the nature of the Equity powers exercised by the Court, and therefore published remarks concerning the whole matter, and applied to the General Assembly for a new trial of the cause. Then the plaintiff, having been ap pointed Judge and Reporter, made the report, which was unquestionably calculated to injure the reputation of C. T. Hazard, and to prevent legislative interposition in his behalf; and when Mr. Ives, [published it as an appendix to his letter, the defendant published in reply, the pamphlet forming the subject of this action.

A committee of the General Assembly took the matter of the report into consideration, and it was stated in the public press, altho' untruly stated, that the committee entirely exonerated the plaintiff from blame. The same newspapers would admit no reply from Mr. Hazard, the general Assembly refused to hear him, the documents upon the subject had become so voluminous that but few would read enough of them to learn the truth, and so instead of being commended as a generous and fearless advocate of right against might, he is branded and by many believed to be a malicious libeler.

When the present action was commenced against him, altho' it claimed a large amount of damages, which his property was attached to secure, he rejoiced to believe that it would at least afford him an opportunity of proving to the peoplc of the State whether he was a libeller or not; and the only instruction he gave his counsel was, *plead the truth.*

A plea was filed, averring as it was thought every material fact constituting the charges against the plaintiff. But he demurred to the plea. Now pray mark and bear in mind the fact, that a demurrer admits the truth of all the facts which are duly set forth in the plea. But his counsel contended, and the court decided that the substance of the charge did not consist in the *facts* stated

about the report, but in the epithet *flagitious* which the defendent had applied to it—that, the court said, was the substance or sting of the charge.

The defendant did not shrink from justifying as the court by their decision required him to do, and his new plea besides all that was included in the first contains the further averrments—that the report was of a *flagitious* character, that it contained in nearly the *same words* used by the plaintiff when *acting as counsel libelous and infamous* charges against Charles T. Hazard, which were not in the case, and which were *false* in fact, and that the report partook of all the elements of a *gross forgery*. The plaintiff's counsel contend that this is not enough, and say in effect, "You aver that the report made by the plaintiff officially, is a flagitious one, that it is false, that it contains statements which are infamous libels, and that it is really a gross forgery. But that is not what we sued you for,—we don't care about all that. We admit all these facts—but you said the statements were special pleading—We want to go to the jury upon that—prove that; that is the sting of your charge." And they ask the court to respond, "yes, that is the sting." May it please your Honors, can the rejecting of the plea on such grounds be treating the defence fairly? Can it be reasonable, can it be just, or consistent with legal principles? With no private interest to subserve, and no ill will to gratify, in maintaining as he believes the cause of right against wrong, of the weak against the powerful, and of the lowly against men in high places, Mr. Hazard has labored long, spent much time and money, and been subjected to much missapprehənsion, obloquy and abuse.

There have been and are those who have devoted their time, talents and property to the relief of oppressed humanity with no other hopes of reward on earth than an approving conscience and the approbation of their fellow men. But the instances are rare indeed of those who with zealous philanthropy have united the sterner qualities which enable and impel them to contend for the good of others at the sacrifice of private freindship, of social advantages and public favor. And though the Supreme Court may sometime have a higher duty to discharge than merely to announce—"thus the law is written"—perhaps in foreign states and in other days, and may be requirəd to modify the law in applying it to the existing condition of society, so as to check evil tendencies and foster the good, it is submitted that there is nothing in the signs of the times, or spirit of the age indicating so much danger of the defendants example being followed to so mischievous an extent, as to render it the

duty of your Honors in his case to disregard or intringe upon established principle, from controlling considerations of public policy.

JOS. M. BLAKE.

SEPTEMBER, 1861.