

# THE AMERICAN LAW REGISTER

FOUNDED 1852

UNIVERSITY OF PENNSYLVANIA

DEPARTMENT OF LAW

---

---

VOL. 52 O. S.      JANUARY, 1904.      No. 1

---

---

## CONSTITUTIONAL PROVISIONS GUARANTEEING FREEDOM OF THE PRESS IN PENNSYLVANIA.

Freedom of speech and of the press has never been curtailed by the common law, but in England and in some of the American colonies, prior to the Revolution, the governing powers acted upon the assumption that such freedom is essentially dangerous to the state. The art of printing particularly was for a long time looked upon with much disfavor, and private persons could print only under the supervision of a censor. In England until 1641 the printing press was regulated by the Court of the Star Chamber, and after its destruction in the year mentioned the function of licensing printers and censoring publications was performed under the supervision of Parliament until 1694, although it never amounted to much after the Revolution of 1688.<sup>1</sup> There was not, however, any real freedom of the press until a much later period, as under the prevailing statutes the penalties for the publication

---

<sup>1</sup> See 4 Bl. Com. 152, note; Story on the Constitution, Vol. 2, § 1882; Cooley, Const. Lim., ch. 12.

of matter of a scandalous nature, particularly if it reflected on the government, was severely punished. The proceedings of Parliament were not allowed to be published at all until about the time of the American Revolution.<sup>2</sup>

There was little freedom of speech in America during the early colonial days. The idea that men should not be allowed free expression of their opinions about governmental matters especially could not be eradicated in a day. The feeling that the printing press was a dangerous weapon, likely to promote sedition and rebellion against proper authority, led to drastic measures against indiscreet publishers in many colonies. In Massachusetts "licensors" were appointed,<sup>3</sup> in Virginia printing was at one time forbidden altogether;<sup>4</sup> even in the Quaker Province of Pennsylvania a printer was compelled to flee for publishing a paper written by a Quaker, criticising his brethren who were in authority.<sup>5</sup> On a number of occasions measures were taken to suppress books already published, which were deemed to offend against public authority.<sup>6</sup>

As already suggested, these measures were not taken by virtue of the common law, but at the instance of arbitrary powers. Comparative freedom of speech and of the press would exist in the absence of anything done to limit it. This was recognized by the framers of the Constitutions of the United States and of the various states, so that the constitutional phrases are usually so framed as not to create freedom of the press, but to preserve it. Thus the first amendment to the Constitution of the United States provides that Congress shall make no law abridging freedom of speech or of the press. The states, then, are left free to deal with the subject as they please. All of them have adopted provisions similar in

<sup>2</sup> May's Const. Hist., ch. 7, 9, 10.

<sup>3</sup> 1 Hutch. Mass. 257 (2 ed.)

<sup>4</sup> 1 Hildreth Hist. U. S. 561.

<sup>5</sup> 2 Hildreth Hist. U. S. 171.

<sup>6</sup> Cooley, Const. Lim., ch. 12.

effect to those of Pennsylvania, as hereafter explained, which are intended to guarantee to the citizens that freedom of speech and of the press which was sanctioned by the common law.

The Pennsylvania Convention of 1776 adopted two provisions which were intended to have the effect heretofore suggested, ch. 1, § 12, "The people have a right to the freedom of speech and of writing and publishing their sentiments, therefore the freedom of the press ought not to be restrained," and ch. 2, § 35, "The printing presses shall be free to every person who undertakes to examine the proceedings of the legislature or any part of government." Both of these provisions, it will be observed, are intended not to extend but to preserve the freedom of the press. Particularly was the right to criticise those in authority insisted upon, it being then realized that the liberty of the people depends upon it.

The convention of 1790, in pursuance of their expressed determination to define more accurately the rights guaranteed by the constitution, made certain alterations in these provisions. The two clauses of the constitution of 1776 were consolidated into one and altered as follows: "The printing presses shall be free to every person who undertakes to examine the proceedings of the legislature or any branch of government; and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man; and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty. In prosecutions for the publication of papers, investigating the official conduct of officers, or men in a public capacity, or where the matter published is proper for public information, the truth thereof may be given in evidence; and, in all indictments for libels, the jury shall have a right to determine the law and the facts, under the direction of the court, as in other cases." Art. IX, § 7.

The convention of 1873 made no change in the first two sentences, but the third was stricken out, and in its place was substituted the following: "No conviction shall be had in any prosecution for the publication of papers relating to the official conduct of officers or men in public capacity, or to any other matter proper for public investigation or information, where the fact that such publication was not maliciously or negligently made shall be established to the satisfaction of the jury; and in all indictments for libels the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases." Art. I, § 7.

The first two sentences in the sections relating to liberty of the press in the constitutions both of 1790 and 1873 consist of a declaration that private persons have an inalienable right to speak, write and print on any subject, and particularly when engaged in the investigation of the proceedings of the legislature or any branch of government.

No one will suppose that these provisions exempt any person from liability for slanderous or libelous words. This would be clear even in the absence of the qualifying clause, "being responsible for the abuse of that liberty." Their meaning is, that censorship of the press is forbidden, and that under no circumstances can the legislature suppress a publication because of the general tone of its criticism. The publisher may be held responsible if he abuses his privilege, but his right to publish is preserved inviolate. As early as 1788, Chief Justice McKean, in *Respublica v. Oswald*, 1 Dallas 319, said: "What, then, is the meaning of the Bill of Rights and the Constitution of Pennsylvania, when they declare 'That the freedom of the press shall not be restrained' and 'that the printing presses shall be free to every person who undertakes to examine the proceedings of the legislature or any part of the government?' However ingenuity may torture the expressions, there can be little doubt of the just sense of these

sections: they give to every citizen a right of investigating the conduct of those who are entrusted with the public business, and they effectually preclude any attempt to fetter the press by the institution of a licenser. The same principles were settled in England so far back as the reign of William the Third, and since that time, we all know, there has been the freest animadversion upon the conduct of the ministers of that nation. But is there anything in the language of the constitution (much less in its spirit and intention) which authorizes one man to impute crimes to another, for which the law has provided the mode of trial and the degree of punishment? Can it be presumed that the slanderous words, which, when spoken to a few individuals, would expose the speaker to punishment, become sacred, by the authority of the constitution, when delivered to the public through the more permanent and diffusive medium of the press? Or will it be said that the constitutional right to examine the proceedings of government extends to warrant an anticipation of the acts of the legislature or the judgments of the court? and not only to authorize a candid commentary upon what has been done, but to permit every endeavor to bias and intimidate with respect to matters still in suspense? The futility of any attempt to establish a construction of this sort must be obvious to every intelligent mind. The true liberty of the press is amply secured by permitting every man to publish his opinions; but it is due to the peace and dignity of society to inquire into the motives of such publications, and to distinguish between those which are meant for use and reformation, and with an eye solely to the public good, and those which are intended merely to delude and defame. To the latter description it is impossible that any good government should afford protection and immunity."<sup>1</sup>

---

<sup>1</sup> See also Addison's Report, Appendix, p. 274 *et seq.* (1803); *Res. pub. v. Dennie*, 1 Yeates 267 (1805). Immoral publications, however

All are agreed that clauses of this character forbid censorship,<sup>8</sup> and that this freedom from censorship does not excuse licentiousness, but that if the words, when published, are libelous, they properly subject the publisher to liability. There is, however, some difference of opinion as to how far liability for spoken or written words can be altered by the legislature. On the one hand, it may be said that freedom to publish being guaranteed, the constitution does not extend its protection further, and everyone runs the risk of being held responsible for his words, whether that responsibility is imposed by the common law or by legislative action; that the constitution does not concern itself with what happens after the matter has been given to the public. In other words, the publisher has full liberty to publish what he pleases, but let him see to it that he does not transgress the law, written or unwritten.

Another view of this matter is possible and has obtained some recognition, viz., that the constitution not only gives permission to publish, but guarantees immunity from liability for such words as at common law were non-libelous. It is said that "freedom of the press" would mean nothing if the legislature, while not able to restrain the printing, could pass laws which would inflict severe penalties for the publication of words which, judged by the standard of the common law, were innocent. The difference between the two views is that under the former the legislature can create new civil or criminal liability for spoken or written words, whereas, under the latter, its hands are tied; it cannot increase the common law responsibility. This conception of the meaning of the freedom of the press was advanced by Cooley, *Constitutional Limitations*, ch. 12. It has never been the basis

---

may be suppressed, *Com. v. Dowling*, 14 Pa. C. C. 607 (1894), and probably those tending to provoke a breach of the peace could be also.

<sup>8</sup> 2 Story on the Constitution, § 1884, § 1885; Hallam, *Const. Hist. of Eng.*, ch. 15; De Lohne, *Const. of Eng.* 254; 4 Bl. Com. 151.

of a judicial decision, as no law raising the point has had its validity questioned on that ground.\* This view, as applied to the clause in the constitution of Pennsylvania which provides that "the printing press shall be *free*" and "*no law* shall ever be made to restrain the right" to investigate the proceedings of any branch of government, seems logical and sound. If the legislature could at will punish the publication of the result of such investigation (either criminally or by establishing civil liability), then, surely, the printing press would not be free. It follows, that, a law establishing new liability in any such case (*i. e.*, where there has been a published investigation of any branch of government), however slight the change might be (*e. g.*, a provision that negligence only and not malice need be shown where the occasion is privileged) would be contrary to the constitution, and hence of no effect.

As applied to the second sentence, guaranteeing freedom to any person to speak, write and print on any subject, being responsible for the "abuse" of that liberty, there is more doubt. The solution of the question would turn upon the construction of the word "abuse." It may with reason be contended that this clause is less broad in its provisions than the preceding, and that the

---

\* The Pennsylvania libel act of May 12, 1903, P. L. 349, may be attacked upon this ground, and if so there may be a judicial determination of this important question. By the terms of that act civil liability is created in a class of cases in which at common law there was no liability. It is provided that the publishers of newspapers shall be civilly responsible in damages for all publications made without a careful investigation into the facts. In other words, the test of liability in all cases is negligence. This means that where the words have been spoken upon a privileged occasion, the plaintiff to succeed need not (as he must at common law) prove actual malice on the part of the defendant, but that it is sufficient if he prove negligence only. It is true that recklessness in publishing may be evidence of malice, but it is not malice (in *Briggs v. Garrett*, 111 Pa. 404, mere failure to investigate was held no evidence of malice); hence the new act creates liability in a class of cases in which at common law there was no liability. If Cooley's view should be adopted, the act may be declared void as being contrary to the constitutional provisions under discussion.

legislature may create new liability for words spoken under any circumstances which may reasonably be construed as an "abuse" of the privilege of free speech. Hence a provision, such as the one mentioned, making one liable for words negligently published, even though the occasion be privileged (not being an investigation of any branch of government) and no malice be shown, might be upheld—the lack of due care being construed as an "abuse." But even under the latter clause the legislature could not wantonly punish innocent words.

We now come to the consideration of the next sentence in Section 7, viz.: "No conviction shall be had in any prosecution for the publication of papers relating to the official conduct of officers or men in public capacity, or to any other matter proper for public investigation or information, where the fact that such publication was not maliciously or negligently made shall be established to the satisfaction of the jury."

The first observation to be made concerning these words is that they refer to criminal cases only. This is clearly evident from the text and has been judicially determined.<sup>10</sup> Unlike its predecessor, this clause does not purport merely to guarantee an existing right, but, on the contrary, to create a new one. Its language would seem to imply that, in the absence of such a provision, convictions could be had in such cases where the libel was not malicious and not negligent.

In order to determine whether this be true, it is necessary to inquire as to the scope of the expression, "papers relating to the official conduct of officers or men in public capacity, or to any other matter proper for public investigation or information." At common law, libels published upon certain occasions are "privileged." The public welfare sometimes requires a disclosure of facts the publication of which would otherwise subject the pub-

---

<sup>10</sup> *Barr v. Moore*, 87 Pa. 385 (1878):



lisher to criminal liability. The private injury is considered to be of less importance than the public good resulting from the disclosure. Upon such occasions, even though the publisher may have been entirely mistaken in his facts, and the statement made be grossly false, yet he is exonerated both civilly and criminally unless the injured party can prove express malice. The publisher, therefore, at common law, in giving out statements that are privileged because of their character, warrants only that he is acting from good motives and not on account of personal spite. He does not warrant that the words are true.<sup>11</sup>

If the cases mentioned in the constitution are, at common law, privileged, then the clause does not in fact change the law, but is only declaratory of it, for even at common law, upon a privileged occasion, there could be no conviction unless the publication were maliciously made.

There is no question that publications relating to the official conduct of public men were at common law privileged. Hence, in these cases, the constitution affords no additional protection.<sup>12</sup> The latter part of the clause is much broader and includes all prosecutions for papers relating to "any matter proper for public investigation

---

<sup>11</sup> Odgers, Libel and Slander, p. 197 *et seq.*, p. 436; Wharton, Crim. Law, § 1629 *et seq.*, *Gray v. Penland*, 2 S. & R. 23 (1815); s. c., 4 S. & R. 420 (1819); *Chapman v. Calder*, 14 Pa. 365 (1850); *Pittock v. O'Neil*, 63 Pa. 253 (1869); *Neeb v. Hope*, 111 Pa. 145 (1885); *Briggs v. Garrett*, *Ibid.* 404 (1886); *Press Co. v. Stewart*, 119 Pa. 584 (1888); *Conroy v. Pittsburg Times*, 139 Pa. 334 (1890); *Com. v. Featherston*, 9 Phila. 594 (1874); *Com. v. Smelhurst*, 16 Phila. 475 (1883).

<sup>12</sup> Odgers, Libel and Slander, p. 225, 226. The only doubt (if there is any) that could be raised to this statement would be on account of the expression "relating" to official conduct, etc. The constitution of 1776, as we have seen, in providing that the truth might be given in evidence, confined it to cases where there were prosecutions for papers "investigating" official conduct. These are privileged without doubt. It is not thought, however, that there is any essential difference in the two expressions.

or information." There are no Supreme Court decisions as to the scope of these words, and the common pleas cases are not entirely in accord. The question first came up before Judge Thayer in Philadelphia County. He stated that the constitution had introduced "an entirely new principle" into the law of libel, and from some passages of his remarks it might be inferred that he did not then have in his mind the principle of criminal immunity in cases of privilege at common law (where no malice was shown), but it is probable that he did, and merely meant to say that in that class of cases not privileged by the common law and covered by the constitutional provision, a new principle had been introduced.<sup>13</sup> Judge Woodward was of opinion that the constitution increases the cases of privilege,<sup>14</sup> and this also seems to be the view of Judges McPherson<sup>15</sup> and Parsons.<sup>16</sup>

There is some expression of opinion in the Superior Court, but as the question has never been the basis of a decision, there is not entire unanimity. In *Shelly v. Dampman*, 1 Superior 115 (1896), Wickman, J., at page 123, intimated that "privilege" at common law and under the constitution is not the same. On the contrary, Rice, P. J., in *Oles v. Pittsburg Times*, 2 Superior 130 (1896), at page 144, used language showing that he deemed the very words of the constitution "proper for public investigation and information," as the test of privilege at common law.

If, in fact, all matter "proper for public investiga-

<sup>13</sup> *Com. v. McClure*, 3 W. N. C. 58 (1876). In *Com. v. Singerly*, 15 Phila. 368 (1881), Judge Briggs evidently misinterpreted the law on this point. He says that the new constitution made an innovation in requiring proof of malice for the conviction of a defendant in any case. This is clearly wrong.

<sup>14</sup> *Com. v. McClure*, 1 Pa. C. C. 207 (1885); *Com. v. Coon*, 4 Pa. C. C. 422 (1886).

<sup>15</sup> *Com. v. Rudy*, 5 D. R. 270 (1896).

<sup>16</sup> *Com. v. Sanderson*, 2 Clark 269 (1844), referring to the same words in the constitution of 1790. See also the cases of *Com. v. Costello*, 1 D. R. 745 (1892), and *Com. v. Place*, 153 Pa. 315 (1893).

tion or information" is at common law privileged, then, notwithstanding the *dicta* mentioned, no change is in fact made by the new constitution. There are many occasions which are privileged at common law, so that no recovery or conviction can be had unless the plaintiff or the commonwealth proves express malice. The class most nearly approximating to the one defined by the constitution is that comprising cases in which the public has an interest in the disclosure. It is well settled that if one person in good faith and with a proper motive makes even a false statement to another about a matter which affects the interest of both, he is protected. If the subject-matter of the communication be one which concerns the welfare of the public at large, it is one in which the public has an interest, and on the same principle any member of the public making the statement in good faith is protected. This includes any statement made in the progress of a *bona fide* investigation of the character or fitness of a candidate for public office, or relating to the official conduct of any public man. "Every communication is privileged which is made *bona fide* . . . . to prevent or punish some public abuse."<sup>17</sup> This is perhaps the extent of such common law privilege. Whether the cases contemplated by the Pennsylvania constitution go beyond it, depends upon the construction which shall ultimately be placed upon the word "proper." If it shall be construed to mean that cases "proper" for public information are those only in which the public has an interest, then the constitution is only declaratory of existing law in this respect. If, on the other hand, it shall be determined that there are cases where matter is proper for public information, but which does not intimately concern or affect the public welfare, then a new class of cases where there may be criminal immunity has been created. There are no cases in the books (after thirty

---

<sup>17</sup> Odgers, Libel and Slander, p. 225; Pollock on Torts (Webb's Edition), p. 335.

years of experience under this constitution) where matter which would not have been privileged at common law has been determined to be within the scope of this clause. On the other hand, there are numerous cases where the contention has been made that it was proper for public information, but where the contention has failed because the matter did not in fact concern the public welfare. Thus, in *Com. v. Murphy*, 8 Pa. C. C. 399 (1890), Judge Endlich, in rejecting the argument of counsel that the facts concerning a man's treatment of his step-daughter were proper for public information within the meaning of the constitution, said: "There are certain occasions pointed out by the constitution where any private citizen or newspaper may publish the truth, or what is honestly believed to be the truth, without being liable to the individual for the injury done him, or to the commonwealth for any provocation for a breach of the peace. There are occasions where the interest of the public to know the truth is of more consequence (than) the possibility of its peace being disturbed by the publication of that truth, and in those cases where the truth is disclosed in a plain, unvarnished tale, without wrongful motive, simply for the information either of private persons or officials, who have a right to know it, or of the public that has a right to know it, the fact that it is true or that it is made upon reasonable ground of belief is a complete justification for its disclosure. Such publications are termed privileged. . . . The subject-matter of this libel is not one proper for public information and discussion. Subjects that are proper for public information and discussion are only those in which the public has an interest. The fact that a large number of people may have a private interest in the matter will not make it a matter proper for public investigation. . . . Nothing that happens in the privacy of a man's family, short of a crime that calls for public interference, can justify the publicity of

accusations or comment in the columns of a newspaper."<sup>18</sup>

This reasoning and these sentiments seem sound, both logically and morally. All statements made upon occasions contemplated by the constitutional provision are substantially privileged, even if at common law they were not. To include in that class, as proper for public exploitation, statements about matters which only excite the curiosity of the public, but in the truth of which it has no interest, would be wholly inconsistent with a sane view of the constitutional guarantee. True liberty of the press does not mean a license to circulate with impunity libelous statements about private individuals. It means that the press or any individual may freely discuss matters which vitally affect the public welfare, and may disseminate information which the public has a right to know, even though it be untrue, warranting only their good faith in so doing. Nothing can be "proper for public investigation or information" unless it be of this character. The clause under discussion, therefore, merely preserves the common law and forbids any future alteration by the legislature. It does not include any cases not privileged at common law.<sup>19</sup>

We will now consider more particularly the latter part of this clause, "Where the fact that such publication was not maliciously or negligently made shall be established

---

<sup>18</sup> See also the opinion of Henderson, P. J., in *Com. v. Brown*, 1 D. R. 565 (1892).

<sup>19</sup> Hon. George M. Dallas, who fathered this constitutional provision in the Convention of 1873, expressed his opinion that it made no change in the law, as he understood it to be. He favored the provision to prevent future action by the legislature prejudicial to the freedom of the press, and also because a recent decision in a quarter sessions court had apparently disregarded the fixed principles of the common law, as heretofore explained. He therefore felt it to be of the highest importance that the matter should be settled. The decision he referred to has never been recognized as authority, so that the common law of Pennsylvania is as he then thought it was and should be. 4 *Debates* 688 *et seq.*

to the satisfaction of the jury.' Assuming that the cases to which this language is applied are at common law privileged, of course express malice must be proved in order to convict, irrespective of the constitution. But what is the meaning of the phrase, "or negligently"? These words were inserted by amendment against the protest of the promoters of the clause, after a long, tiresome debate, in which the true aspect of the law had been almost lost sight of. Mr. Dallas, who had been the chief sponsor for the clause all through the debate, expressed his opinion that they mean nothing. Negligence may be evidence of malice, but since the malice must be shown, at all events the expression, "or negligently," is mere surplusage.<sup>20</sup>

It has been intimated in some common pleas decisions that in the cases covered by the constitution, the defendant may be convicted if it be shown that he is negligent, although there be no malice.<sup>21</sup> This is not accurate. If there be no proof of malice at common law, there can be no conviction, if the occasion be privileged. Then, most certainly, there cannot be if there be proof of negligence only, unless that negligence in fact amounts to malice, in which case the former supposition is incorrect. It may

---

<sup>20</sup> Mr. Dallas, 5 Debates 589, says: "Before the vote is taken, I wish to say that I have no objection to the amendment, except that it adds two additional words, and unnecessary words, to the proposition. What my friend from Carbon stated is precisely true, that if a man negligently fires a pistol or throws a stone he is held liable, because the law reasonably infers, from that negligence, malice. That is the only reason. Negligence such as the amendment of the gentleman from Allegheny comprehends would be in result malicious, and therefore I think it unnecessary."

<sup>21</sup> *Com. v. Slingerly*, 15 Phila. 368 (1881); *Com. v. McClure*, 3 W. N. C. 58 (1876); see also *Com. v. Chambers*, 15 Phila. 415 (1882); *Com. v. McClure*, 1 Pa. C. C. 207 (1885); *Com. v. Costello*, 1 D. R. 745 (1891); *Com. v. Rudy*, 5 D. R. 270 (1895). See, however, the opinion of Judge Woodward in *Com. v. Coon*, 4 Pa. C. C. 422 (1886), and that of Judge Allison in *Com. v. Smethurst*, 16 Phila. 475 (1883), apparently expressing the opposite view, viz., that malice must be shown.

be said that the constitution, by declaring there shall be no conviction unless the publication be negligently made, must be construed to create liability where such negligence is shown. This is not tenable, however. There is no dispute that the entire purpose of this clause was to diminish and not to increase liability for libelous publications. To turn a shield into a hostile sword would be a violent and impossible construction of the provision.

Finally, how may this malice be shown? Upon whom is the burden of proof? If the publication relates to matter proper for public information, must the commonwealth affirmatively prove malice to convict, or is the burden on the defendant to clear himself by showing no malice—*i. e.*, by proving his good faith and his reasonable grounds for believing in the truth of the matter published?

At common law the burden was on the commonwealth. The defendant, by showing that the publication was made upon a privileged occasion, rebutted the presumption of malice created by the publication itself, and threw upon the prosecutor the duty of showing evil motive,<sup>22</sup> and unless some evidence more than the mere fact of publication was produced, the verdict necessarily had to be for the defendant.<sup>23</sup>

As we have seen, the constitutional provision operates only upon cases privileged at common law. The language of the clause "where the fact that such publication was not maliciously or negligently made shall be established to the satisfaction of the jury," seems at first thought to place upon the defendant the duty of proving a negative. But this cannot be the true construction, for we must remember that the clause was intended and by its terms clearly shows that its sole purpose was to guarantee immunity (if not to increase it) from criminal convictions for libel in certain cases. But if we construe

---

<sup>22</sup> Odgers, Libel and Slander, 270-271, 330.

<sup>23</sup> Ibid., 273.

it to lay upon the defendant the burden of proving his own innocence, his good faith, lack of malice, etc., then his criminal responsibility is increased and not diminished. This cannot, therefore, be the meaning of the clause. The words do not require such an interpretation. They merely show that the question of malice is to be left to the jury to be found as a fact, and the burden is left where it properly belongs, on the commonwealth. This is the only logical conclusion possible. The constitution preserves privilege in certain cases. The occasion being shown to be a privileged one, the presumption of malice is rebutted, and the burden of proving it naturally falls upon the prosecutor. Malice is an essential element of the crime of libel. In the absence of privilege, it is presumed as a legal conclusion. If the occasion be privileged, there is no such presumption. Then, as in all other cases, the *animus*, the essential element of the crime, must be proven by the commonwealth. It would be a monstrous doctrine to require the defendant to prove himself not guilty, when there is no presumption of his guilt from facts already shown.<sup>24</sup>

It is hard to understand how any court could take the opposite view of this question, so vitally concerning the right of trial by jury, but there are a few common pleas decisions and one in the Superior Court which seem to hold that the defendant must, to make out his privilege, as they say, affirmatively prove himself to have been innocent of wrongful motive.<sup>25</sup>

---

<sup>24</sup> In the case of *Com. v. Sanderson*, 2 Clark 269 (1844), Judge Parsons intimated that actual malice must be proven by the commonwealth in all cases of criminal prosecutions for libel, whether the occasion be privileged or unprivileged. This is not the law. The mere fact of publication where no excuse is offered implies malice, and it need not be proven as a fact. *Com. v. Murphy*, 8 Pa. C. C. 399 (1890).

<sup>25</sup> *Com. v. Singerly*, 15 Phila. 368 (1881); *Com. v. McClure*, 3 W. N. C. 58 (1876), and perhaps *Com. v. Chambers*, 15 Phila. 415 (1882); *Com. v. Swallow*, 8 Super. 539 (1898).



On the other hand, there is a larger number of decisions which support the true rule as given above.<sup>26</sup>

If evidence of malice be introduced, the defendant in rebuttal may show that he made the publication in good faith, honestly believing it to be true or that in fact it was true. It must not be forgotten that in criminal prosecutions for libel, the occasion being privileged, the issue is malice or not malice. It has been sometimes assumed, erroneously, that if the defendant proves his words to be true, he is exonerated. This is a mistake. According to the common law as interpreted in England, the truth could not be shown in any case; it was said to be no justification. Defamatory words, if true, were thought to be more likely to lead to a breach of the peace than if untrue. "The greater the truth, the greater the libel."<sup>27</sup> This was changed in England by Lord Campbell's Act, 6 and 7 Victoria, ch. 96, making the truth always admissible in mitigation of punishment, and making it a justification if the public welfare required its disclosure. In America the English view of the common law on this point was not accepted in all cases. It was ruled in most states, and among them in Pennsylvania, that while the truth could never be a justification for a libel, yet it was always proper to be given in evidence after conviction in mitigation of punishment, and in cases of privilege, upon the trial, to show lack of malice. Perhaps the earliest case on record where the truth was held admissible in a criminal prosecution for libel at common law was that of *The Proprietor v. George Keith et al.*, Pennypacker's Colonial Cases, p. 117 (1692).<sup>28</sup>

<sup>26</sup> *Respub. v. Dennie*, 4 Yeates 267 (1805); *Com. v. Godshalk*, 13 Phila. 575 (1877); *Com. v. Smethurst*, 16 Phila. 475 (1883); *Com. v. McClure*, 1 Pa. C. C. 207 (1885); *Com. v. Mellon & Porter*, 29 W. N. C. 433 (1892); *Com. v. Costello*, 1 D. R. 745 (1892); *Com. v. Rudy*, 5 D. R. 270 (1896); *Com. v. Meeser*, 1 Brewst. 493 (1867).

<sup>27</sup> Odgers, 437, Wharton Crim. Law, § 1643, and cases there cited.

<sup>28</sup> See *People v. Crosswell*, 3 Johns. Cas. 337 (1804), usually accredited with being the first case in which the truth was admitted.

Most of the states have specific provisions, either statutory or constitutional, concerning the admission of evidence to prove the truth.<sup>29</sup> In Pennsylvania, by Article IX, Section 7, of the Constitution of 1790, it was provided, that "in prosecutions for the publication of papers investigating the official conduct of officers or men in public capacity, or where the matter published is proper for public information, the truth thereof may be given in evidence." This did not mean that the truth was a justification for the libel, but merely that it might be given in evidence in certain cases of privilege for the purpose of rebutting evidence of malice, etc. This clause probably did not change, but was only declaratory of, the existing common law.<sup>30</sup> In the convention of 1873 it was not thought necessary to reincorporate this sentence in the constitution, and it was accordingly omitted. The rule is, therefore, as at common law.

As already indicated, the truth may not be given in evidence unless the occasion be privileged.<sup>31</sup> Upon other occasions no public or private good can be accomplished by circulating defamatory stories. In such cases the old maxim, "The greater the truth, the greater the libel," is and should be enforced. To revive old scandals long since dead and circulate them about persons who may have outlived early faults and be leading exemplary lives, is certainly no less a crime than to tell that which is untrue. But when the occasion is privileged and the commonwealth has introduced evidence to prove express malice on the part of the defendant, it is eminently proper that the defendant should be allowed to show not only that his words were proper for public information, but that they were true, in order to rebut the evidence of

<sup>29</sup> See Whart. Crim. Law, § 1643, and notes.

<sup>30</sup> See Whart. Crim. Law, § 1643. A *dictum* in *Com. v. Sanderson*, 2 Clark 54 (1844), seems to indicate that truth under the constitution of 1790 may be a justification. This is a mistake.

<sup>31</sup> *Runkle v. Meyer*, 3 Yeates 518 (1803); *Respub. v. Dennie*, 4 Yeates 267 (1805); *Com. v. Brown*, 1 D. R. 565 (1892).

malice, and this in Pennsylvania is the common law.<sup>33</sup> Nevertheless, even in such cases, the truth is not an absolute defense, for although the words be true and privileged, if they be spoken maliciously the defendant may be convicted.<sup>33</sup>

The last sentence in the section under discussion is, "And in all indictments for libels the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases." The purpose and meaning of this provision become evident by a glance at the evil in the common law procedure which it was designed to correct. At common law, upon prosecutions for libel, some cases held that the court must decide whether the words were libelous as a matter of law, and all that the jury could determine was whether the defendant published in the manner and form charged, and the truth of the *innuendo*.<sup>34</sup> In other words, the jury was

<sup>33</sup> *Proprietor v. Keith et al.*, Penny. Col. Cas. 117 (1692); *Runkle v. Meyer*, 3 Yeates 518 (1803); *Respub. v. Dennie*, 4 Yeates 267 (1805). See cases cited *supra*, in which the defendant (since the new constitution omitting the provision about proving the truth) was allowed to show the truth in order to rebut the evidence of malice.

<sup>34</sup> Wharton Crim. Laws, §1645. In New York and in various other states there are provisions, either statutory or constitutional, to the effect that the truth shall be a complete justification if the matter is proper for public information. See Whart. Crim. Law, § 1643 (notes). But such is not the law in Pennsylvania, where the truth may be given in evidence, but is not a justification. There was a short period during which in Pennsylvania the truth in certain cases was, by statute, a complete justification, but the act was allowed to expire by its own limitation and has never been revived. Act of March 16, 1809. See *Com. v. Duane*, 1 Binn. 601 (1809). At the present time the act of July 1, 1897, P. L. 204, is declaratory of the common law (as interpreted in Pennsylvania) in providing that the truth may be given in evidence if the matter charged as libelous be proper for public information. Of course, if the matter be true and proper for public information, it is nearly impossible to prove actual malice; but if in any case it should be done, a conviction must follow. Sometimes the manner in which the publication is made, its headlines, etc., if in a newspaper, are evidence from which malice may be inferred. *Com. v. Scouton*, 20 Super. 503 (1902); *Com. v. Little*, 12 Super. 636 (1900).

<sup>35</sup> Odgers, Slander and Libel, p. 94.

deprived of the right, usual in criminal cases, of bringing in a general verdict of guilty or not guilty. Judge Sharswood doubted whether this ever really was settled law, and gave expression to these doubts in *Kane v. Com.*, 89 Pa. 522 (1879), but whether ever settled law or not, it was deemed necessary in England to pass an act guaranteeing to the jury this right, which was done in 1792 by the Act of 32 Geo. III, c. 60, usually known as "Mr. Fox's Act," because he was instrumental in passing it. The early Pennsylvania courts seem to have been favorable to allowing this right without a statute. In the colonial case heretofore mentioned the jury was allowed to determine whether the words published were seditious or not.<sup>35</sup> In order, however, that all doubts might be set at rest, the provision quoted above was inserted in the constitution of 1790 and retained in that of 1873.

Its meaning is merely that the jury under judicial instruction may find the defendant guilty or not guilty. It does not, however, give the jury any higher right than in other cases. It has been suggested that the constitution gives the jury the right not only to pass upon the question of guilt or innocence as determined by the elements present in the publication, but that it also gives them the right to determine whether the occasion be privileged; for example, that the jury and not the judge is to decide whether the matter is proper for public information.<sup>36</sup>

This view is erroneous. The evil which the law was intended to correct was only as to the right to decide whether the words are libelous. It is so recognized in all the cases. The decision as to whether or not an occasion be privileged has always belonged exclusively to the court. This is so in civil as well as in criminal cases.

<sup>35</sup> *Proprietor v. Keith et al.*, Penny. Col. Cas. 117 (1692).

<sup>36</sup> *Com. v. Paschall*, 8 Lanc. L. Rev. 37; *Com. v. Moore*, 2 Chest. Co. Rep. 358; *Com. v. McClure*, 3 W. N. C. 58 (1876); *Com. v. Godshalk*, 13 Phila. 575 (1877).

The distinction between civil suits and criminal prosecutions in the function of the jury was sought to be corrected by Mr. Fox's act and by the constitution of 1792. That this only was intended is clear from the expression, "as in other cases." Judge Endlich, in a very able opinion in *Com. v. Costello*, 1 D. R. 745 (1892), very effectually shows the fallacy of the views held by the courts in the cases mentioned above. He points out among other things that if the determination of what occasions are privileged should be left to the jury, the "knowne certaintie" of the law would be lost. It is proper that the defendant's motives and purposes and the essential effect of the alleged libel should in each case be decided by the jury, but the court only is competent to say whether the occasion is such as to justify the publication and to rebut the presumption of malice.<sup>37</sup>

*Thomas Raeburn White.*

---

<sup>37</sup> See also *Respub. v. Dennie*, 4 Yeates 267 (1805).