

NEW JERSEY

Court of Errors and Appeals

JOHN C. MARSH, PLAINTIFF, <i>Defendant in Error,</i>	} On Error.
<i>v.</i>	
WALTER E. EDGE, DEFENDANT, <i>Plaintiff in Error.</i>	

Brief of Defendant in Error.

This was an action against defendant as publisher and proprietor of "Atlantic City Daily Press," for an alleged libel on the plaintiff published in said newspaper.

The sixth and seventh assignment cannot be considered because they are too vague, indefinite and uncertain for defendant in error to meet.

The fifth assignment in error is to the Court's refusal to charge defendant's first request. That request is found on page 50 of the case and is in this language: "That from the fact of the publisher knowing nothing of the publication of the libelous article, the jury can only find actual damages;" this request assumes a fact, to wit, that the publisher knew nothing of the publication.

Whether he did or not know was a question for the jury, and to have charged the request would have been error against the plaintiff. The judge would have assumed a jury function. This assignment, we submit, is without legal merit.

The first, second, third and fourth assignment each go to the Court's refusal to nonsuit and direct a verdict for the defendant. It would have been clearly illegal for the judge to have nonsuited or to have directed a verdict for the defendant. That the article was printed and published in the newspaper of the defendant, and that he was the publisher and proprietor, and that the newspaper in which it was published was circulated in Atlantic county, and that the article was *per se* libelous, is clear under the evidence and the law. Therefore the trial judge would have been obliged to charge the jury that in any event the plaintiff was entitled to nominal damages. The real purpose which counsel for defendant and plaintiff in error had and has in view was and is to force a construction of an act to be found in the Pamphlet Laws of 1898, page 476, which is an act entitled "An act relating to libels." In view of what has been above said, he is in no position under the assignments to have a construction of that act, but assuming that he could have, we submit, first, that the plaintiff brought himself within the act.

See *Stuart v. News Publishing Company*, 51 *Atlantic Reporter*, 709.

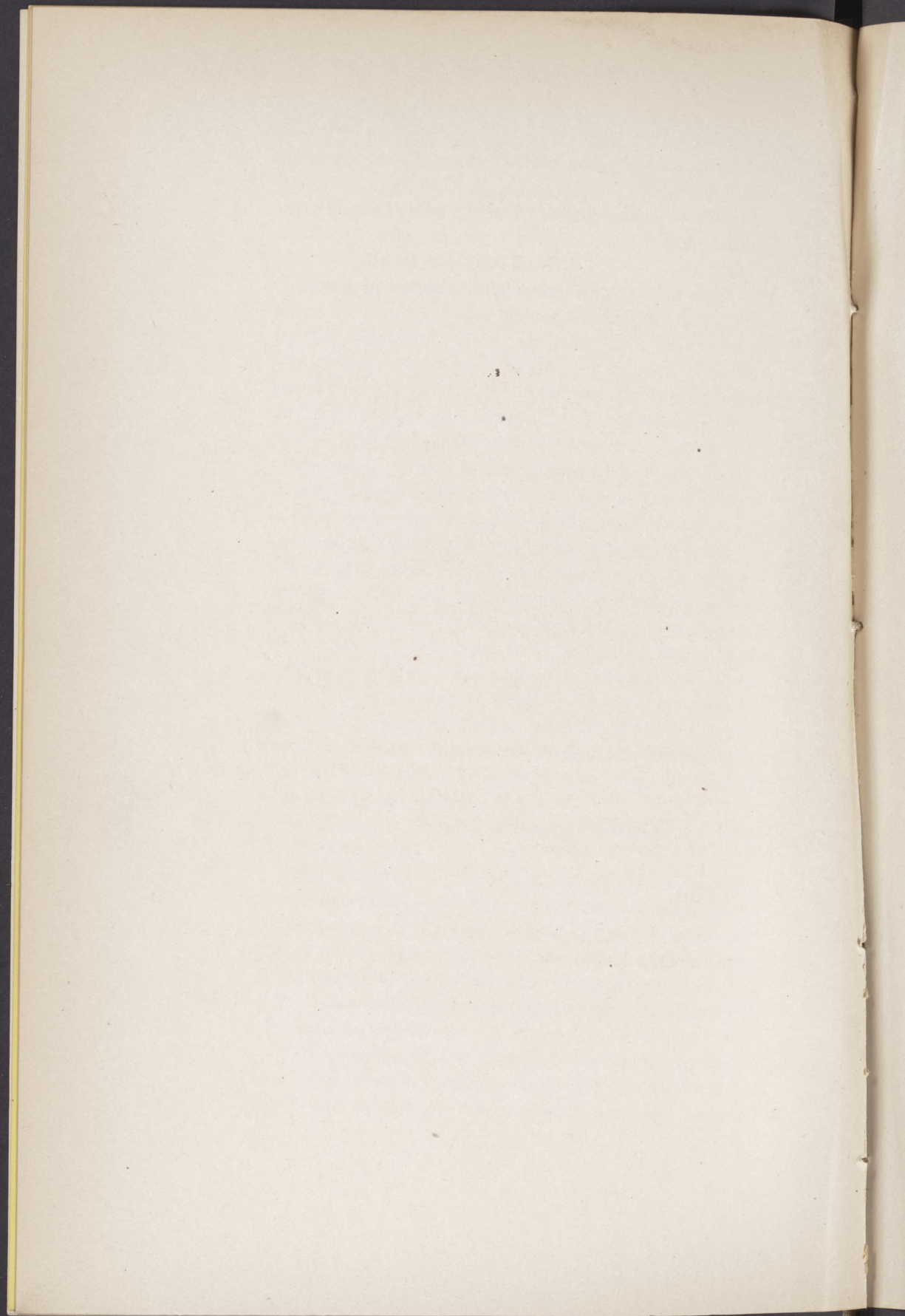
And secondly, that the act was clearly unconstitutional upon three grounds: first, because its object is not expressed in its title; it intermingles two subjects that have no fair relation to the other, and it undertakes to give to the publishers of newspapers a privilege that is not accorded other citizens, and is, therefore, clearly class legislation.

The question of the constitutionality of the act is mooted in *Stuart v. News Publishing Company* above cited, and an act of like character has been declared

unconstitutional by the highest Court in the State of Michigan.

See the case of *Park v. DFP Co.*
~~Allen v. Pioneer Press Company~~, 1st
L. R. A. 599.

THOMPSON & COLE,
Attorneys of Defendant in Error.



COURT OF ERRORS AND APPEALS.

John C. Marsh,	}	In Tort.
Plaintiff,		
Defendant in Error,		On Error.
vs.		
Walter E. Edge,	}	Brief of Plaintiff in Error
Defendant,		
Plaintiff in Error.		

Walter E. Edge, the defendant below, was the publisher of the Atlantic City Daily Press, in May, nineteen hundred and one. On the twenty-seventh day of that month there was an article published in his paper, as set forth on page 5 of Paper Book. 10

The publisher, from the evidence, was not in Atlantic City at the time the matter was inserted in the paper, and knew nothing about it, it having been brought to the office by one of the regular reporters, and having been obtained by him from the police headquarters, was published as a matter of news obtained from the Police Court. 30

The defendant's attention was called to the fact that a mistake had been made on the same day that the pub-

lication appeared, and immediately and voluntarily instructed his editor to insert a retraction, which was done on the twenty-eighth day of May, and which retraction appears on page 33.

John C. Marsh, the person who claims to have been injured by reason of the publication, brought suit in tort, alleging that by reason of said publication, the plaintiff had been forced and obliged to undergo, and hath undergone trouble in body and mind, loss of money,
10 good name and reputation, etc., as set forth in the Declaration, on page 7 of Paper Book.

The case was tried in the Atlantic County Circuit, and the jury gave the plaintiff a verdict of one hundred dollars.

The plaintiff offered no proof of any special damage, and in fact offered proof of no damage whatever, other than by offering the publication, relying upon it is sufficient for the jury to fine damages per se.

The defendant gave evidence showing the intention
20 of publishing the article: (Paper Book, pages 30, 33, 37, 39 and 40), showing that the article was published as general news, collected by the reporter from the Police Headquarters in the City of Atlantic City, and evidenced his intention by the wording and the publication of the retraction, showing that there was no animus, ill-will or malicious intent in the publication of the article against the plaintiff.

The defendant relied upon the statute of 1898, P. L. 1898, page 746, providing that the defendant may give
30 proof of intention, and unless the plaintiff shall prove either malice in fact, or that the defendant, after having

been requested by him in writing to retract the libelous charge in as public a manner as that in which it was made, he shall recover only his actual damages, proved and specially alleged in the declaration.

This act gives the defendant the right to show intention, or literally, the motive or reason by which the publication was uttered. It also imposes an obligation on the person who claims to be libeled, namely: that of notifying the editor of the publication, and thus affording such editor the opportunity of explaining, apologizing, denying, and of placing the person liable in a proper light before the public. If the editor refuses, after the demand is made, then the person injured has for his assistance in the prosecution of his case, the fact that a retraction was refused, and if the truth of the matters contained in the publication is not proven, then the presumption, and the strongest presumption is raised, that the article was inspired through sheer malice. 10

1. The defendant requested the Court to direct a verdict in favor of the defendant (pages 42 and 43 and 44) on the ground that there was no evidence of any malice in fact or any request to retract and refusal, or of actual damage proved as specially alleged; in other words—asked for a direction by reason of his right under the statute of 1898, as the plaintiff had shown no malice in fact, and no request for the retraction, and had proved no special damages as specially alleged in his declaration—the declaration having set up nothing but general damages; or if any special damage by implication was alleged in the declaration, there was no proof of any special damage. 20 30

By the terms of the statute, the defendant having shown intention, the plaintiff was compelled, in order to

recover anything, to prove malice in fact, not in law, but in fact, and to prove actual damages as specially alleged in his declaration, or to prove a demand for the retraction, which was not complied with. First, as to malice, malice in fact, or as I take it, express malice, is that evolution or condition of the mind that actuates one to utter or publish a matter, knowing and believing that it would have the effect of doing what it ought not to do, namely: Injury to a person's private rights, of which one is his
10 reputation or good name, not merely because he deserved to be injured or to be punished, as an act of justice or anything of that sort, but with the view of doing him an injury. It is distinguished from malice in law, in that the latter applies to an act done intentionally, without just cause or excuse. Malice in fact is actual malice which consists of a personal spite or ill-will.

The evidence in the case produced by the plaintiff, merely shows the publication of an article which was false, and no evidence of the injury caused by it, other
20 than that implied by law. The plaintiff proved nothing but implied malice, or malice in its technical, legal sense, and not having proved a demand for, and failure to secure a retraction under the statute, the court should have granted the motion for a direction.

As to the definition of malice in fact and malice in law, or implied malice—

See Newell on Libel and Slander, 2 Ed.,
pages 318, pp. 8 and 9.

The "malice" mentioned in the act imports that the

defendant was actuated by improper and unjustifiable motives in making the publication.

Moore vs. Stevenson, 27 Conn. 14.

The Trial Court on deciding the motion for a direction, refused to give the defendant the benefit of the statute, questioned its constitutionality, and disposed of it in this manner: (See Paper Book, page 43, beginning with line 9, and page 44 beginning with line 5), "I think, however, that of course if I should direct a verdict it would simply mean the taking up of the case on that particular point, and it would have to come back again to assess damages if the act is unconstitutional; and I think that I shall therefore refuse this motion to direct a verdict, and the counsel for the defendant of course will have the full benefit of any exception to the whole case, and the matter can be directly determined by the Supreme Court at Trenton or the Court of Errors and Appeals." 10

I charge that this is an error for that the Trial Court cannot determine the question as to the constitutionality of the statutes that may be pleaded before it. 20

The defendant was entitled to the benefit of the statute until it had been declared unconstitutional by a higher court.

The Court did not pass on the constitutionality of the act, it questioned it, said that the constitutionality of the act has been questioned. Now, I contend that if doubt exists as to the constitutionality of the statute, the benefit of the doubt is to be given to the law, and if the Trial Judge was merely doubtful as to whether or not the

Act of 1898 was constitutional, he should have considered it as a valid law in the trial of this case, and given the defendant the benefit of it.

Robinson, Treasurer, vs. Schenck, 102 Indiana, 307.

People vs. Draper, 15 N. Y., at 543.

Leonard vs. Wiseman, 31 Md. 201.

As a matter of fact the Trial Court did make use of the statute and applied it in disposing of a motion to nonsuit, thus considering it as a valid law. (Page 26.)

2. The act is constitutional. The provision that the defendant may prove intention is only an extension of the rule as to admissibility of evidence.

After showing intention, the plaintiff may produce rebutting proof, and if he does not, he cannot recover general damages, but is confined to the recovery of actual damages.

This is not in conflict with the provision of the State Constitution guaranteeing natural and inalienable rights of persons, among which that of pursuing and obtaining safety and happiness, or in conflict with the right to sue and recover for injuries to his reputation or good name. It is an extension, or abridgement of the quality of evidence necessary to be brought into the case.

The provision that the plaintiff shall prove malice in fact, was not intended to prescribe any new rule as to the kind and degree of malice to be proved, or as to the

evidence by which the existence in fact of improper motives was to be shown, but only to require that it should be shown, by other evidence than mere legal presumption from the fact of the publication, that the defendant's motives were not proper and justifiable.

The act cannot be construed as to abridging the rights of the plaintiff in such a suit. If intention is shown, the plaintiff must rebut by evidence, tending to show malice in fact, which the jury may find and give general damages in accordance therewith. It still leaves it for the jury to determine whether malice in fact existed, but the plaintiff must produce some evidence to show express malice, if the defendant has shown that the publication was published with no malicious intent. 10

Evidence of intention, that is, of the absence of malice in fact, was always admissible where the publication was privileged, in justification, and where it was not privileged, in mitigation of damages. A retraction of the libel was also always admissible in mitigation. In effect, this statute but extends this rule of evidence so as to permit evidence of intention—faith—coupled with a full retraction, not merely in mitigation of damages, but to prevent the recovery of general damages, as distinguished from special damages, for injury for a pecuniary nature. 20

Moore vs. Stevenson, 27 Conn. 14.
Hotchkiss vs. Porter, 30 Conn. 414.

The Act does not conflict with the constitution of the State of New Jersey wherein it provides that the Legis-

lature shall not pass private, local or special laws granting to any corporation, association or individuals any exclusive privilege, immunity or franchise whatever.

The Act does not give a newspaper special privilege of publishing libellous articles for which they cannot be made to pay damages, if such publications are false. It establishes a method of procedure. The newspaper is not released from answering for its wilfull and malicious acts, but it does provide a method for determining clearly
10 whether or not those acts were wilfull, malicious or done with intent to harm another. It does protect an honest and conscientious newspaper man from being forced to pay exemplary damages where there is no reason or justice that he should pay the same; but it does not protect a newspaper publisher who wilfully and intentionally does wrong to another.

In this state it has been held in some cases, such as that of slander of title, that malice is the gist of the action, and the real point on the question of malice, is whether
20 the defendant made the statement bona-fide and under an honest impression of its truth, or whether he made it maliciously for the purpose of slandering the plaintiff's title. If the occasion of the notice be such as to repel the presumption of malice, the burden is thrown upon the plaintiff of giving the evidence of actual malice.

Andrew vs. Deshler, 16 Vroom, page 167.
Pit vs. Donovan, 1 M and S., 639.

The statute in question was intended to direct a means by which actual malice could be ascertained with cer-

tainty. In that where the publisher proved that he published the article bona-fide believing it to be true, it was incumbent upon the plaintiff to rebut by proving actual malice.

As to the constitutionality of the act of 1898.

State constitutions are limitations and not grants, and the judiciary has no power to pronounce an act unconstitutional, because it is repugnant to fundamental principals, not necessarily declared, but necessarily implied in the State constitution.

10

People vs. Gallagher, 4 Michigan, 244, 252,
254.

An Act is not unconstitutional because conflicting with the fundamental principals.

Cooley, Const. Lim. 201, 206.

Nothing but a clear usurpation of power prohibited will justify the judiciary department in pronouncing an Act of the Legislature department unconstitutional.

Powell vs. Conn., 114 Pa. 265.

A statute is not unconstitutional unless in plain violation of some provision in the constitution, and its con-

20

stitutionality, will be supported by all possible presumptions not clearly inconsistent with the language and subject of the matter.

Atty. Gen. vs. Preston, 56 Mich. 177.

The act is not invalid as unequal or partial legislation because its provisions apply only to publishers of newspapers.

Laws public in their objects may be confined to a particular class of persons, if they be general in their applications equally to all of their classes, and the distinction made between them and others is founded on some reason of public policy and is not purely arbitrary.

The act is not invalid on the ground that it deprives a person of a certain remedy by law for injury or wrongs to his reputation—being a common law or constitutional right.

Allen vs. Pioneer Press Co., 3 Law. Rep.,
Annotated, page 532.

If then, this act has provided the person libelled with a remedy, and the measure of his damage is solely within the legislative discretion, no constitutional provision has been violated, although the law in certain cases limits his right to recovery to special damages of certain kinds, and the law must stand.

This is the stand taken by the Connecticut Courts.

Moore vs. Stevenson, 27 Conn. 14-25.

Hotchkiss vs. Porter, 30 Conn. 414-419.

At common law, the rule was that where the occasion is such as repels the presumption of malice and the plaintiff gives no evidence of malice, the Court must direct a verdict for the defendant.

Taylor vs. Hawkins, 16 Q. B., 308-321.

I respectfully submit that there being no malice in fact proved by the plaintiff in the case below, and there being no written demand for a retraction, that the Trial Court was bound to accept the statute as law, and direct a verdict for the defendant, he having proved that the publication was not the result of improper and unjustifiable motives, and that it was published with good intentions. 10

The statute means the absence of malice in fact.

There was no evidence before the jury upon which a verdict could be based as against the defendant, there being no evidence of malice in fact. The verdict of the jury was therefore contrary to the evidence and law.

This, the defendant proved, and the plaintiff not having proved actual damages as specially alleged in his declaration, the Court should have granted the motion for a direction in favor of the defendant, and that therefore, the judgment below should be reversed. 20

HARRY WOOTTON,
Atty. for Pltf. in Error.

THE HISTORY OF THE
CITY OF BOSTON
FROM 1630 TO 1880

BY
JOHN H. COOPER

VOLUME I
1630-1700

BOSTON
PUBLISHED BY
THE BOSTON PUBLIC LIBRARY

AT THE
CITY OF BOSTON

1880

PRINTED BY
J. B. LEECH

1880

1880

1880

1880

NEW JERSEY, ss:



The State of New Jersey to the Chief Justice and other Justices of our Supreme Court of Judicature,

GREETING:

For as much as in the record and proceedings, and also in the giving of judgment in a certain plaint, which was in our said Supreme Court of Judicature, before you between John C. Marsh, Plaintiff, and Walter E. Edge, Defendant, in an action in tort, manifest error hath intervened, to the great damage of the said defendant, as it is said; we being willing that the error, if any there be, should in due manner, be corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, that if judgment be thereupon given and affirmed, then you distinctly and openly send, under your seal, the record and proceedings aforesaid, with all things touching the same, to our Judges of our Court of Errors and Appeals in the last resort in all causes, at Trenton, on the twenty-third day of October, instant, together with this writ, that the record and proceedings aforesaid being inspected, we may cause to be further done thereupon, for correcting that error, what of right, and, according to the law and custom of the State of New Jersey, ought to be done.

Witness, our Chancellor and President Judge of our said Court of Errors and Appeals, at Trenton aforesaid, the sixth day of October, nineteen hundred and two.

S. D. DICKINSON,

HARRY WOOTTON,
Attorney.

Clerk. 30

NEW JERSEY COURT OF ERRORS AND APPEALS.

John C. Marsh,	}	
Plaintiff and Defendant		
in Error.		In tort.
vs.		On Error
Walter E. Edge.	}	to Supreme Court.
Defendant and Plaintiff		
in Error.		

WRIT OF ERROR &c.

10

HARRY WOOTTON,
Atty. of Deft. and
Pltf. in Error.

Returnable October 23, 1902.

The answer of the Justices of the Supreme Court of the State of New Jersey within named. The record and proceedings whereof mention is within made, with all things touching and concering the same, we do certify to the Court of Errors and Appeals of said State, in a certain schedule to this writ annexed, as within we are commanded.

20

WM. J. GUMMERE, (Seal)
C. J.

NEW JERSEY SUPREME COURT.

John C. Marsh,
vs.
Walter E. Edge.

In Tort. On Postea.
THOMPSON & COLE, Attys.

As yet of the twenty-second day of June, A. D., nineteen hundred and one.

Witness, DAVID A. DEPUE, Esquire,
Chief Justice.

WILLIAM RIKER, Jr., Clerk.

Atlantic County, ss:

10

Walter E. Edge, the defendant in this cause, was summoned to answer unto John C. Marsh, the plaintiff, in an action of tort, and now comes said plaintiff, by Thompson & Cole, his attorneys, and for cause of action avers that on the twenty-eighth day of May, in the year nineteen hundred and one, and always prior and subsequent to said date at Atlantic City, Atlantic County, New Jersey, he was a good, true, honest, just and faithful citizen of said city, county and state, and as such has always behaved and conducted himself and until the committing 20 of the grievances by the said defendant as hereinafter mentioned, was always reputed, estimated and accepted by and amongst all his neighbors and other good and worthy citizens of said city to whom he was in any wise known, to be a per-

son of god name, fame and credit, to wit, of Atlantic City, County and State aforesaid; and whereas he has not ever been guilty of nor until the time of the committing of the said several grievances by the said defendant, as hereinafter mentioned, been suspected of being guilty of keeping or maintaining a disorderly house or of selling liquor without a license or with harboring girls for immoral purposes at said Atlantic City or elsewhere, or to have been guilty of any other crime, by means of which

10 said premises the plaintiff, before the committing of the said several grievances by the defendant as hereinafter mentioned, had deservedly maintained a good opinion and credit of all his neighbors and other good and worthy citizens of said city to whom he was in any wise known, to with, of Atlantic City aforesaid;

Yet the said defendant well knowing the premises, but greatly envying the happy state and condition of the plaintiff and contriving and wickedly and miliciously intending to injure the plaintiff in his good name, fame and

20 credit, and to bring him into public scandal, infamy and disgrace within and amongst all his neighbors and other good and worthy citizens of said city, and to cause it to be suspected and believed by those neighbors and citizens that he, the said plaintiff, had been and was guilty of the crime of keeping a disorderly house and of selling liquor without a license, and of harboring girls for immoral purposes at Atlantic City aforesaid, and to subject him to the penalties by the law of the State made and provided against and inflicting upon persons guilty there-

30 of, and to vex, harass, oppress and wholly ruin the said plaintiff heretofore, to wit, on the twenty-eighth day of May, in the year nineteen hundred and one, at Atlantic City, Atlantic County, New Jersey, in a certain news-

paper called "The Atlantic City Daily Press" did falsely and maliciously compose, publish and procure to be published of and concerning the said plaintiff in said Atlantic City Daily Press, a newspaper printed, published and circulating in said City, County and State, a certain false, scandalous, malicious and defamatory libel of, concerning and against the said plaintiff, which said libel was in words following:—

"ILLINOIS AVE. HOUSE RAIDED.

John Marsh, the proprietor, and four others are in cells 10 at Headquarters.

Police determined to keep city clean.

Decent neighbors are not to be subjected to annoyances, if the authorities can prevent it—Two young girls in party.

Acting on complaint made to Chief of Police, Eldridge, Captain Maxwell and a squad of police raided the house, No 27 North Illinois Avenue, at 11 o'clock last night.

John Marsh, said to be proprietor of the place, a couple giving their names as Mr. and Mrs. George Parker, and 20 two girls, who said they were Mildred Davis and May Harris, were arrested. The last two prisoners gave 21 years as their ages, but in appearance they seemed more like children of 15 years.

Complaints against the house as disorderly were received by the Chief some time ago, but no action was taken until an investigation had been made. An officer was sent to the house in citizen's clothes and the complaints were found to have excellent foundation. The house was ascertained to be disorderly. Liquor was sold there 30 without a license and girls were harbored for immoral purposes.

GOOD EVIDENCE.

The police have in their possession small cards, bearing the names of the girls arrested and they all bear the number 27 North Illinois Avenue, and in the corner the words, "furnished rooms."

It is stated by the authorities that these girls have been conducting themselves immodestly on the streets and have caused their cards to be placed in many saloons.

Respectable persons, who are either owners or renters
10 of cottages in decent neighborhoods in the city, very naturally object to having disorderly establishments locate in their midst, and the police department is determined to break up such practices.

It was stated last night that bad characters, who had been run out of the tenderloin districts of New York, and Philadelphia, were endeavoring to secure cottages here, and would hire them wherever they could be had.

POLICE ARE ALERT.

A few examples made of them such as the raid of last
20 night the police believe will act as deterrent measures and tend to prevent decent sections from becoming contaminated.

There was much wailing last night when the party was brought up in the patrol wagon and landed in jail and a big crowd of men and boys followed them, even to the jail yard. The prisoners will probably have a hearing to-night."

Which said words and matter complained of, were used by said defendant, in a defamatory sense, in this, that
30 they defamed plaintiff, by charging him with being the proprietor of a disorderly house and a house where liquor

was sold without a license, and where girls were harbored for immoral purposes, and that the plaintiff had been apprehended for the commission of said criminal offenses, and had been carried through the streets of Atlantic City by the police of said City for the violation of said law, and had been confined in the city jail for such violation and detained over night for the same, whereas in fact the plaintiff was not the proprietor of said alleged disorderly house; he was not guilty of selling liquor without a license, and did not harbor girls for immoral purposes, 10 nor was he apprehended or detained as stated in said publication, all of which was well known to the defendant at and before and since the time of said publication, by means of which said premises the plaintiff hath been forced and obliged to undergo and hath undergone trouble in body and mind, and laid out and expended large sums of money, and has been greatly affected in his good name and reputation; prevented from transacting the necessary and lawful method of business, for a long space of time, by reason of said publication; his 20 family and children have been held up to shame, infamy and ridicule, and have also suffered in body and mind, by reason of such publication, and the plaintiff has otherwise been greatly injured and damaged to the amount of five thousand dollars; wherefore he brings his suit.

And the said defendant, Walter E. Edge, by his attorney, Harry Wootton, says he is not guilty of the said alleged grievances above laid to his charge, or of any or either of them, or any part thereof, in manner and form as the plaintiff hath above thereof complained against 30 him. And of this the defendant puts himself upon the country, &c.

And the plaintiff doth the like.

Therefore let a jury thereupon come before our Chief Justice or some other Justice of the Supreme Court of the State of New Jersey, at a Circuit Court to be holden at Mays Landing in and for the County of Atlantic, on the second Tuesday of April, in the year of our Lord. One thousand nine hundred and two, by whom, etc., and the same day is given to the parties aforesaid there, etc.

And now at this day, to wit, the third day of June, A. D. nineteen hundred and two, before our said Supreme
10 Court, at Trenton, comes the said plaintiff, by his attorney, aforesaid, and the Justice before whom, etc., having first sent hither his record had before him in these words, to wit:—

Afterwards, that is to say, on the eighth day of April, nineteen hundred and two, at a Circuit Court held at Mays Landing in and for the County of Atlantic, by his Honor Charles E. Hendrickson, one of the Justices of the Supreme Court of the State of New Jersey, according to
20 the form of the statute in such case made and provided, comes as well the within named plaintiff as the within named defendant, by their respective attorneys within named, and the jurors of the jury whereof mentioned is within made being summoned also come, who, to speak the truth of the matters within contained, being chosen, tried and sworn, upon their oaths, say that the defendant is guilty in manner and form as the plaintiff hath within complained against him, and they assess the damages of the said plaintiff on occasion thereof over and above his costs and charges by him about his suit in this behalf expended,
30 the sum of one hundred and twenty-five dollars..

Therefore it is considered that the said plaintiff do recover against the said defendant his said damages by the

jury in form aforesaid found to ONE HUNDRED AND TWENTY-FIVE DOLLARS.

Judgment signed the third day of June, A. D., nineteen hundred and two.

WM. S. GUMMERE,
C. J.

I, William Riker, Jr., Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the judgment entered in the above stated cause as the same remains of record in my office.



In testimony whereof I have set my hand and the seal of said Court at Trenton, this fourth day of August, A. D., nineteen hundred and two.

WILLIAM RIKER, Jr.,
Clerk.

10

NEW JERSEY SUPREME COURT.
ATLANTIC COUNTY CIRCUIT.

John C. Marsh,	)	In tort.
Plaintiff,		
vs.	)	
Walter E. Edge,		
Defendant.		

Mays Landing, N. J., April 8, 1902.

TESTIMONY

10 Before Hon. Charles E. Hendrickson, Judge, and a jury.

APPEARANCES

For Plaintiff, Messrs. Thompson & Cole.

For Defendant, H. Wootton and A. B. Endicott, Esqs.

BE IT REMEMBERED, That on this eighth day of April, A. D., nineteen hundred and two, the issue joined in this cause between the parties, came on to be tried in the New Jersey Supreme Court, at Mays Landing, in the County of Atlantic, before a jury for that purpose duly impaneled and sworn; thereupon the following witnesses were sworn, and testified on the part of the plaintiff and of the defendant respectively, as hereinafter set forth, to wit:

20

JOHN C. MARSH, SWORN.

DIRECT EXAMINATION.

BY MR. COLE:

Q. Mr. Marsh, where do you live?

A. I live at 27 North Illinois Avenue.

Q. How long have you lived in Atlantic City?

A. Twenty-four years last March.

Q. Are you married or single?

A. Married.

Q. How long have you been married?

10

A. Eighteen years.

Q. Have you any children?

A. Two.

Q. Where were you living on the 27th and 28th of May, 1901?

A. I was living in a little cottage in the rear of 27 North Illinois, I judge fifty feet from the front cottage.

Q. How long had you lived there prior to the 28th of May?

A. Why, this tenant that rented the cottage had rented it on Saturday and on the following Monday, I believe, the 28th or 27th, the house was raided, the following Monday.

Q. Then you went from the front house to the rear?

A. Yes, sir.

Q. Immediately after renting to the parties in the front house?

A. Yes, sir.

Q. Do you know Walter E. Edge?

A. Yes, sir.

Q. Do you know where Mr. Edge lives?

30

A. I did know several weeks that he lived in the Press Building.

Q. Atlantic City?

A. Atlantic City, yes sir.

Q. And has lived there how long? I mean in Atlantic City?

A. Oh, in Atlantic City I have known Mr. Edge I judge about eight years.

Q. That is his home, isn't it?

10 A. That is his home, yes, sir.

Q. And has been for the past eight years?

A. Yes, sir.

Q. Now do you know a paper there known as the Atlantic City Daily Press?

A. Yes, sir.

Q. Do you know where that paper is printed?

A. Yes, sir.

Q. Where?

A. Printed at the present time at the corner of Pennsylvania and Atlantic Avenues.

20 Q. Atlantic City?

A. Yes, sir.

Q. Where was it printed on the 28th of May, 1901?

A. On Atlantic Avenue below South Carolina.

Q. Atlantic City?

A. Yes, sir.

Q. Do you know whether the Atlantic City Daily Press circulates in Atlantic City?

30 A. Yes, sir, I have bought a paper from several different dealers and from boys on the street.

Q. Do you know if it circulated in Atlantic City on the 28th of May, 1901?

A. Yes, sir.

Q. Do you know who the editor and publisher of the Atlantic City Daily Press or was on the 28th of May, 1901?

A. Walter E. Edge.

Q. The defendant here?

A. Yes, sir.

Q. Do you know of any other John Marsh living in Atlantic City now or who did live there on the 27th or 28th of May, 1901?

A. No, sir.

Q. You never heard of any other John Marsh?

A. No, sir.

Q. Did you see the issue of the Atlantic City Daily Press of the 28th of May, 1901?

A. I did, yes, sir.

Q. How did you see the issue?

A. Well, the first paper was handed to me by a man by the name of Rosenberg, who keeps a cigar store, I believe, at 1520 or 1522 Atlantic Avenue. I just went around and bought a paper from him.

Q. How did you come to buy the paper?

A. Well, he made the remark he was glad to see me out so soon.

Q. And after he said that did you purchase a paper?

A. Yes, after that.

Q. When was that?

A. On the morning of the 28th.

Q. I show you a paper and ask you if that is the paper you bought?

A. No, sir; this is from Mr. Schafer, another newsdealer on Atlantic Avenue.

Q. He is another newsdealer?

A. Yes, sir.

Q. When did you buy that?

A. In five minutes after I bought the other one from Rosenberg.

Q. Do you know Schafer?

A. Yes, sir.

Q. Where is he?

A. He is a newsdealer and stationer on Atlantic Avenue.

Q. Atlantic City?

10 A. Yes, sir.

Q. When you bought this did you see any more on Mr. Schafer's stand?

A. Yes, sir; I judge there were twenty or twenty-five papers there.

Q. For sale?

A. Yes, sir.

Q. And you bought this?

A. I bought this, yes, sir.

(Paper offered in evidence and marked Exhibit P 1.)

20 Q. Where did you say you bought another of the same issue?

A. Off of Rosenberg.

MR. WOOTTON:—We admit the circulation.

Q. Who is he?

A. A cigar dealer and newsdealer.

Q. Where?

A. 1520 and 22 Atlantic Avenue.

Q. Is this the paper you bought of Rosenberg?

(Paper shown witness.)

A. Yes, sir.

(Paper offered in evidence and marked Exhibit P 2.)

Q. Did you get an issue of that paper from any other source?

A. Yes, sir.

Q. Where?

A. My wife got one from Mays Landing, from James Baker, got that on Decoration Day.

Q. You read this article?

A. Yes, sir.

Q. "Illinois Avenue House Raided?"

A. Yes, sir.

Q. Were you arrested on that night?

A. No, sir; I was in bed asleep.

Q. Were you ever arrested for keeping a disorderly house?

A. No, sir.

Q. Were you ever locked up in the jail at Atlantic City?

A. No, sir.

Q. Were you on the 27th or 28th or any time before or after carried there in the patrol?

A. No, sir.

Q. Were you the proprietor of the house 27 North Illinois Avenue?

A. No, sir.

Q. Where were you at eleven o'clock, or between nine o'clock at night and six o'clock the next morning, on the night of the 27th of May and the morning of the 28th?

A. I generally go to bed in the summertime from

half past seven to eight o'clock and get up at half past one.

Q. Did you do that on this night in question, May 27th?

A. Yes, sir.

Q. When did you first hear of this alleged raid?

A. About, I should judge, six o'clock in the morning.

Q. From whom did you hear it?

(Answer ordered stricken out.)

10 Q. You read this article?

A. Yes, sir.

Q. Is there any of it, so far as it relates to you, true?

A. No, sir.

Q. How old are your children?

A. One boy is ten years old and the other is seventeen.

Q. Were they attending school at this time?

A. Yes, sir.

Q. Did they say anything to you about this article?

20 (Objected to as irrelevant and hearsay.)

THE COURT:—I don't think that is relevant, what the boys may have said. Of course it can be proved that they saw the article in the paper. That is all legitimate.

NO CROSS EXAMINATION.

JAMES BAKER SWORN.

DIRECT EXAMINATION.

BY MR. COLE:

Q. Where do you live, Mr. Baker?

A. Mays Landing.

Q. Did you live there on the 28th of May, 1901?

A. Yes, sir.

Q. Do you remember the issue of the Atlantic City Press of that date?

A. No, sir; I don't I remember taking the paper very 10
well.

MR. WOOTTON:—If the Court please, the defendant has admitted the circulation of this newspaper. I think this evidence leading up to that point, as far as it may, is irrelevant and immaterial.

MR. COLE:—I have no objection to the defendant admitting the circulation, but I don't want him to limit my showing the extent of it, whether this paper got into the hands of different people.

THE COURT:—Yes; at present I don't think I would 20
be justified in restraining the plaintiff from showing the actual persons or people who received the paper or saw the article. It might become after a while cumulative, but I allow this question.

Q. Do you remember the issue of the paper that published an article respecting the raiding of an Illinois Avenue house?

- A. I remember reading it at the time.
Q. What did you do with the paper after you read it?
A. I gave it to Aaron Schenck.
Q.. Do you know what he did with it?
A. I think he gave it to his sister.
Q. Who is his sister?

MR. WOOTTON:—I object to what he thinks.

- A. I suppose that is Mr. Marsh's wife.
Q. Where did you get the paper?
10 A. I get that paper every week, subscribe for it.
Q. Through the mail?
A. Yes, sir.
Q. This issue came to you through the mail, did it?
A. Yes, sir.
Q. From the Press office?
A. Well, I couldn't say about that. I get it from the
mail.
Q. You pay annually for the paper and get it through
the mail?
20 A. I have a mail carrier that carries my mail right to
the hotel.

CROSS EXAMINATION.

BY MR. WOOTTON:

- Q. You say you received a paper on the 28th. Did
you receive a paper also on the 29th?
A. I couldn't say about that.
Q. Couldn't say about that?
A. No, sir.

Q. Did you see an explanation in any paper in reference to this matter of arrest?

(Objected to as calling for a conclusion.)

Q. Or the same paper.

(Objected to.)

MR. WOOTTON:—He stated he received this through the mail every day.

THE COURT:—Just now you are asking him about what he saw in the paper the succeeding day. Counsel objects to the form of the question, I think.

10

MR. WOOTTON:—My purpose is to bring out the fact that this paper has not a circulation in his district that he said it has, because he doesn't remember anything about the other day.

THE COURT:—You might ask him, Mr. Wootton, whether he received a copy of the Press the next day, and then you can show by the contents whether his attention was called to any particular item.

Q. Did you receive a copy of the Daily Press on the 29th?

20

A. I don't remember. Oftentimes the paper comes in and I hardly look at it, only when I have time, then I sit down and look over it. Mr. Rogers and I sat there that morning and I happened to spy it and showed it to Mr. Rogers.

THE COURT:—You are going beyond what you were asked, I think, Mr. Baker. Just wait for the question.

MR. COLE:—I have no objection to that.

Q. Did you read the article in the Atlantic City Press entitled "Mr. Marsh Not Arrested?"

(Objected to.)

MR. COLE:—I want the paper that he speaks of.

THE COURT:—Yes, you had better have the paper,
10 I think.

(Mr. Wootton produces paper.)

MR. COLE:—Before that is shown I would like to see it. (Examines paper.) I object to the question, first, because it is not cross-examination of this witness; secondly, that if there is such an article it can only be introduced, if at all, by way of defence; and next, that it cannot be introduced at all, because the pleadings there can be no defence except a denial of the publication of the article. The plea is a general issue.

20 THE COURT:—I think at this time I sustain the objection made at this time as not being cross examination.

SAUMEL F. DOUGHTY SWORN.

DIRECT EXAMINATION.

BY MR. COLE:

Q. Where do you live?

A. I live at 1714 Arctic Avenue, Atlantic City, New Jersey.

Q. Where did you live on the 28th of May, 1901?

A. 1714 Arctic Avenue.

Q. Do you know John C. Marsh?

A. I do.

Q. Did you see an issue of the Atlantic City Daiy Press, of the 28th of May, 1901?

A. I suppose I did, yes, sir.

Q. Where did you get it?

A. Schafer, the news agent serves me with the paper every morning and has, I guess, ever since—well, not ever since that paper was issued; there was another party served it to me first and then I discharged that fellow and then Schafer served it to me ever since.

Q. I show you Exhibit P 2, which is the issue of the Atlantic City Daily Press of March 28th, 1901, and ask you if that is the copy of the paper that you saw?

A. Well, I couldn't tell you. I suppose it is. They are all just alike. I had one of those papers issued on that day that was served on me by Schafer.

Q. You remember if you saw this article respecting the Illinois Avenue raid?

A. I did.

Q. Did you read it?

A. I did.

Q. Do you remember what you did with the paper?

A. I sent the paper out to my daughter out in Wheeling, West Virginia.

Q. Were you in the habit of sending a paper out to her?

(Objected to.)

Q. You did send it to her?

A. I did send it out to her.

NO CROSS EXAMINATION.

MRS. JOHN C. MARSH SWORN.

10

DIRECT EXAMINATION.

BY MR. COLE:

Q. You are the wife of the plaintiff, John C. Marsh?

A. Yes, sir.

Q. Where were you living on the 28th or 27th of May, 1901?

A. In the rear of 27 North Illinois Avenue.

Q. Did you see the issue of the Atlantic City Daily Press of May 28th, 1901?

A. I certainly did.

20 Q. Where did you get it?

A. My husband brought it home in the morning and a friend of mine brought one also in the afternoon.

Q. Who was it brought you one?

A. Mr. Dougherty's son, Gid Dougherty, of Atlantic City. He came over to know if there was anything he could do to get my husband out.

Q. Do you know where your husband was on the night of the 27th and the morning of the 28th of May?

A. Yes, sir; he was asleep in bed, and I prayed that night that he would sleep when I heard the raid.

Q. Was he arrested that night?

A. No, sir; he was asleep.

Q. Was he taken to the City Hall in the patrol? 10

A. No, sir; he got up at his usual hour and went to work.

Q. Was he living that night at 27 North Illinois Avenue, in that house?

A. He was living in the rear with me.

Q. I mean the front house; was he living there?

A. No, sir.

Q. You and your children and he were living in the rear house, were you?

A. In the rear house, yes, sir. 20

CROSS EXAMINATION.

BY MR. WOOTTON:

Q. Mrs. Marsh, were you well acquainted with the tenants of the house 27 North Illinois Avenue?

MR. COLE:—I object. That is not in issue here. It is not cross examination.

THE COURT:—I don't see how it is cross examination, Mr. Wootton, I will hear you on it.

MR. WOOTTON:—I will put the question another way and withdraw it.

Q. Did you know the inmates?

A. I never met them till that morning they came to rent the cottage.

MR. COLE:—I object. That is not cross examination, but she has answered it now.

THE COURT:—I think there is nothing material in that answer.

PLAINTIFF RESTS.

10

MR. WOOTTON:—If the Court please, I think beyond a doubt we are entitled to a non-suit. Under the act of 1898, the Legislature laid down a method of procedure to be taken by parties who are injured by mistake or otherwise in false publications or incorrect publications in newspapers, and enacted an act known as Chapter 204 in the Pamphlet Laws of 1898, entitled "An act relating to libel." I will read the whole act. (Reads.)

Now I hold, your Honor, that there were two things necessary for this plaintiff to do: First, prove malice in
20 fact, not in law, which attaches to all false publications wherever the words are false per se; but malice in fact, with the condition of the mind of the defendant and his acts apparently tending to wilfully injure and wrong another. In order to give the plaintiff or the person wronged an opportunity to satisfy himself as to whether or not he had been intentionally wronged, the law provides that he must in writing demand a retraction. If

that was not complied with in as public a manner as that in which it was made, it would be, I think, for the Court or any jury, conclusive evidence that the editor wilfully and with malice in fact published such an article.

Now this plaintiff has done neither of those two things; and according to the act, taking it in its most literal and clear construction, I think there is no question but that we should be entitled to a non-suit. The succeeding or closing clause of that act clearly states that unless those two things are done he shall recover his actual damage 10 proved and specially alleged in his declaration. Now, if the Court please, the declaration alleges no special damage. The clause in which the damage is set up is contained within the following lines: "By means of which premises the plaintiff hath been forced and obliged to undergo and hath undergone trouble in mind and body and laid out and expended large sums of money and hath been greatly affected in his good name and reputation and prevented from transacting the necessary and lawful method of business for a long space of time by reason 20 of said publication." That is the allegation of damage.

I contend, your Honor, that there is not a special allegation sufficient upon which to prove actual damages, and that he has not proved according to the allegations of his declaration. That there being no evidence before the Court, because this act, in stating that malice in fact must be proved, destroys that presumption of law that damages have accrued, when we construe these cases under the old idea of malice in law, and I think the last few lines, prohibiting his recovery for anything more than 30 the actual damage proved and specially alleged in the declaration, are sufficient beyond doubt to entitle us to a non-suit.

(Mr. Cole replies.)

THE COURT:—It seems to me from reading this second section that this motion may be premature. This says that, "In every such action the defendant may give proof of intention," and then goes on to say unless the plaintiff shall prove either malice in fact or that the defendant after request by him in writing to retract, which he fails to do, and so on, he shall recover only his actual damage proved and specially alleged. I don't know, but it
10 seems to me that under that section the plaintiff's case would stand until there is proof of intention called for in the section of the statute.

MR. COLE:—And that it must be a question for the jury.

THE COURT:—Well, I have not decided that. I am deciding one question at a time. It seems to me that the defendant, necessarily, under that act, must take up his defence. How far they will offer evidence in defence, that is for the defendant to determine. It would
20 seem to me that the defence should offer their evidence and then see whether the plaintiff offers any additional evidence, and then the whole case is before the Court for determination. So that I refuse to non-suit in this case at the present stage.

(Whereupon the defendant, by his counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

CHARLES E. HENDRICKSON, (seal)
J. S. C.

DEFENDANT'S TESTIMONY.

WALTER E. EDGE, Sworn.

DIRECT EXAMINATION.

BY MR. WOOTTON:

Q. Mr. Edge, you are the proprietor and publisher of the Atlantic City Daily Press?

A. I am.

Q. Who constituted the staff of the Atlantic City Daily Press, May 27th, 1901?

(Objected to as immaterial.)

10

MR. WOOTTON:—It is alleged here by their own witness that Mr. Edge was the editor of the paper. I have asked him the question if he was the publisher of the paper and I am about to prove by him who was the editor.

THE COURT:—Yes; that is proven. Now the question is with reference to the staff. Of course anything that is material may be proven, and anything as to how the material got there, might be admissible in the way of circumstances of the case. If they are offered for that purpose, of mitigation of damages. As to who the staff were I don't think is material just now. Any person that was personally engaged in this particular report might be called or proven. I think you may call upon any one that knows personally as having procured information upon which the article was based. 20

Q. You said that you were the publisher of the paper. Were you the editor at that time?

A. I was not and never have been.

Q. Who was the editor?

A. Mr. James Kearney, of Trenton.

Q. Where were you May 27th, 1901?

MR. COLE:—I would like to ask the purpose of this question.

MR. WOOTTON:—The declaration, your Honor,
10 charges Mr. Edge with publishing and causing to be published this article. We are entitled, I think, to prove where he was, if not in Atlantic City. If not about the building, if not at his place, he cannot be charged with the publication of it.

THE COURT:—You don't offer it to disprove the publication?

MR. WOOTTON:—No, sir.

THE COURT:—It is only on the question, I suppose, of malice, actual malice?

20 MR. COLE:—I would like counsel to declare the purpose of his offer, that I may get the benefit of an exception.

MR. WOOTTON:—For the purpose of showing all matters that may be shown—

MR. COLE:—I ask counsel now whether the purpose of this offer is simply to be used in mitigation of damages.

MR. WOOTTON:—Mitigation of damages.

MR. COLE:—Well, if it is limited to that I have no objection.

MR. WOOTTON:—And that we had no knowledge of the publication.

MR. COLE:—I don't think that makes any difference in law. The plea here is denial and under it I insist it is no evidence— 10

THE COURT:—It would not be any justification, but I suppose if he didn't know anything of it it might be evidence on the question of malice or ill will. Of course it is not legal justification, but I think that as part of the circumstances it might have something to do on the question that you see is yet to be determined, whether there was malice in fact.

MR. COLE:—The proposition is that under this plea, no matter what the statute may say, under this plea the only evidence that can be introduced is evidence which denies either that he is the publisher or that this article was published. That is all that can go in. And that testimony, under this plea, must be limited thoroughly to the question of mitigation of damages. In other words, he does not get the benefit of the statute, because of his failure to plead. 20

THE COURT:—Of course it cannot prove any justification, because he has not pleaded on the question; but he may state the circumstances in mitigation of damages. That is the only purpose that it is attempted for.

MR. WOOTTON:—We offer it for the further purpose of taking advantage of that act which says we can show intention.

THE COURT:—Well, it is the same thing, you know. You can do that. That is the question of intention. Under the statute the intention can be proved. Of course that is practically the same thing as malice in fact. If he didn't intend anything that can be shown—if there was no intent, I mean.

(Question repeated.)

A. I don't recall positively just that date. I was out of Atlantic City; I think I was in New York at the time. I had gone to Philadelphia and New York, but just positively the city I don't remember on that date.

Q. Did you know anything about the publication of
20 this article?

A. Nothing at all.

Q. When was it first called to your attention?

A. It was first called to my attention on the day of the 28th. I dropped in Atlantic City some time during the afternoon of that day.

Q. Did you cause to be published any retraction or explanation of the articles?

A. Just as soon as I learned that there had been a mistake—

MR. COLE:—I object. I don't see how that is relevant.

THE COURT:—I think that is admissable on the question of his intention and whether there was any malice in fact, as a mitigating circumstance. Of course if he acted immediately to undo any damage that had been done, or tried to do it, it would be evidence in mitigation. I think, of the damages, not of justification.

(Exception noted for plaintiff.)

(Question repeated.)

10

A. Immediately on learning of the error that had happened in the publication of the article I asked the editor to make a retraction, in consideration of what Mr. Marsh had explained. I believe he called at the office. It was made that same night and published the next day.

BY THE COURT:—

Q. You were speaking of Mr. Marsh. Did you see him?

A. I din't see him personally, no.

Q. You can't tell what somebody else told you. That 20 had better be stricken out. You can state upon information received what you did.

A. I will change that. Upon information received, the answer as I gave it.

BY MR. WOTTON:—

Q. Whom did you notify?

A. The editor of the paper, Mr. Kearney.

Q. Was this explanation or retraction published?

A. It was published the following morning.

Q. What date?

A. May 29th.

Q. Is that a copy of the paper issued by the Atlantic City Daily Press, your publishing company, on May 29th?

(Paper shown witness.)

A. It is, yes.

Q. Will you turn to that paper and show the article
10 that you refer to as having directed your editor to have inserted?

A. That is the articles referred to . (Indicating.)

Q. Is that the article?

A. That is the article.

MR. WOOTTON:—I will read it to the jury.

MR. COLE:—Subject to our objection.

MR WOOTTON:—I offer it in evidence as being identified by the publisher of the paper as being the issue of the Atlantic City Daily Press of May 29th.

20 MR. COLE:—I object to it as irrelevant under the pleadings.

THE COURT:—I admit the paper in evidence on the point and ground as mitigating damages, not as justification.

(Exception noted for plaintiff.)

(Paper marked Exhibit D 1.)

(Mr. Wootton reads articles as follows:

“MR. MARSH NOT ARRESTED.

Police Misunderstood a Question, Resulting in Blunder.

Because the police authorities misunderstood a question put by a Press man on Monday night, John Marsh, a well known resident of this city, was printed as having been arrested in connection with the police raid of the house, No. 27 North Illinois avenue.

Mr. Marsh was not arrested, nor in any way connected with the action of the police department. Immediately after the raid the Press was informed that the proprietor and three women had been locked up. An inquiry as to who the proprietor was, was mistaken for a request for information as to who owned the property. The answer was “John Marsh,” it being believed that Mr. Marsh owned the property, if he does not now. The Press regrets that the misunderstanding of a question should have resulted in connecting Mr. Marsh’s name with such an affair.”

20

Q. Mr. Edge, did you ever receive from Mr. Marsh a written request for the retraction of that article?

MR. COLE:—I object. It is wholly unnecessary if they retract it and it would not be relevant anyhow under this pleading.

MR. WOOTTON:—We want to show that our action was voluntary, that there was no legal obligation on us.

THE COURT:—The statute has no application. If they did in advance what we asked them to do I don't know why we are called upon to do what they have done.

MR. WOOTTON:—We look upon that as a power under the statute.

THE COURT:—I think on the same line you can show that the plaintiff in this case visited the office or said or did anything about this matter; I think you may prove it. But if Mr. Edge doesn't know anything about it—I
10 asked him the question whether or not the plaintiff had been to the office.

MR. WOOTTON:—He said he had been.

THE COURT:—How does he know? He was not there. He came back. Now if he had any interview with the plaintiff, Mr. Marsh, he can tell, of course; but how is he to say, unless he was present and received the message or communication, how could he say whether there was or was not a request made to retract it? He can say whether he received any request.

20 MR. WOOTTON:—That is all the question implies, whether he received any written request.

THE COURT:—Whether he received any, I suppose that will do, from the plaintiff in the case.

MR. COLE:—We object, on the ground that it is not relevant and cannot be admitted under the pleadings.

THE COURT:—It is admitted as circumstances of what the parties did in relation to the controversy. It is admissible on the question of mitigated damages.

(Exception noted for plaintiff.)

(Question repeated.)

A. I did not.

Q. Did any one else connected with that paper, so far as you know?

(Objected to.)

THE COURT:—Well, if he knows. He has told that he never received any.

Q. Do you know of any written request?

A. I do not.

THE COURT:—He doesn't know of any such message; that is all he can say.

(No cross examination.)

JAMES KEARNEY, Sworn.

DIRECT EXAMINATION.

BY MR. WOOTTON:—

Q. Mr. Kearney, what is your profession?

A. I am a newspaper man, I suppose, commonly called.

20

Q. What is your present position?

A. I am connected with the Trenton Evening Times, political reporter.

Q. Were you connected with the Atlantic City Daily Press in May, 1901?

A. I was.

Q. What was your position there?

A. Editor.

Q. Were you on duty as editor on May 29, 1901?

10 A. I was.

(Witness being shown a copy of the Atlantic City Press containing an article headed "Illinois Avenue House Raided,") he is asked:

Q. Do you remember that article?

A. Yes, sir; very well.

Q. From whom did you receive it or how came it in the paper?

A. It was brought to the office by Edward M. Benton, who was at that time covering police courts for the paper.

20 Q. Explain how it came to you and what was done with it. How much of it came to you?

THE COURT:—What Mr. Benton said, you know, wouldn't be evidence.

BY MR. COLE:—

Q. I understand you wrote the articles; is that right?

A. Me?

Q. Yes.

A. No.

BY MR. WOOTTON:—

Q. Explain what you did with the article.

(Objected to.)

Q. One moment. Was all of that article as it appears in that paper brought to you?

A. With the exception of the head lines.

Q. Now if you will just go on and explain the course of publishing the paper and how that article came in the paper—

MR. COLE:—I object. I don't understand. It seems to me that is rather a comprehensive question.

THE COURT:—Yes; it is perhaps too broad a question, Mr. Wootton, for the reason that the witness' knowledge is limited, of course, and you must ask questions to draw out his actual knowledge.

MR. WOOTTON:—I thought it would save time.

THE COURT:—Yes; I know, but you had better limit it to questions to bring out what he knows personally.

Q. What part of that article was delivered to you by Mr. Benton?

20

A. The entire article, with the exception of the head

Q. The head?

A. The headlines, as we call it.

Q. Did you prepare the headlines?

A. I did, yes, sir.

Q. Do you know or have any other knowledge of the case other than as contained in the article brought to you by Mr. Benton?

A. None whatever.

Q. Were the headlines prepared as based on the matter brought by Mr. Benton?

A. Based on the article, yes, sir.

Q. Now Mr. Kearney, what was the intention in publishing that article?

10 MR. COLE:—I object. That is a question of fact for the jury.

THE COURT:—Well, I think the witness' evidence is such that it is apparent that it was no intention on his part, and he could not testify to other people's intentions. He says he didn't know anything but the fact that it was brought by Benton, a reporter, and he placed it in the paper and put the headlines over it. He says he didn't know anything of the facts. Now that is as far, I think, as you can go. Any facts, as a matter of fact, as regards
20 the intention, I don't think it is material. It is shown from this evidence that there was present in his mind no intention but to put what was brought to him on the paper as facts brought to him. Now your question is as to his intent. Is that the idea?

MR. WOOTTON:—His intention in publishing that article. He is the editor. The article was given to him by a reporter and he prepared the headlines. Now, your Honor, under the act of 1898 it says we can show intention.

THE COURT:—Whose intention is that supposed to be, the intention of the owner of the paper, or Benton, the reporter, or the editor?

MR. WOOTTON:—The intention of the editor, the employe of the publisher.

THE COURT:—We can't take in all these intentions. I think you asked the publisher, Mr. Edge, about his intention, didn't you, that he had no intention?

MR. WOOTTON:—He expressed no intention. I didn't ask him that question. He didn't know about it. 10

MR. COLE:—My proposition is that the question of intent is a mental operation and can only be determined from facts. The witnesses testified to facts and the jury say whether those facts amount to intent to do one thing or the other.

MR. WOOTTON:—I will withdraw the question.

THE COURT:—You can ask him if he put it in the paper as an ordinary matter of news, without knowing anything about it. That you have practically done.

MR. WOOTTON:—I will ask the witness why he 20 published that article.

THE COURT:—Well, that why is a very peculiar question. I think you may ask him if he published it is an ordinary matter of news coming to the office through the reporter.

MR. WOOTTON:—That was the purpose of this line of questions, but I wanted to avoid any leading questions
Q. Answer the question.

THE COURT:—You ask the question yourself. I only made that as a suggestion of what would seem to me to be proper.

(Question repeated.)

A. The article was published as a matter of public news and as a duty that the paper—

10 THE COURT:—Oh, no; that won't do.

MR. COLE:—We don't want your conception of the duty of a newspaper.

THE COURT:—That won't do. We only wanted your reason for it. The question of duty is for counsel to speak of, probably, in connection with the question.

Q. Did this information come to your office of your department in the regular way?

A. Yes, sir.

Q. What was that regular way?

20 A. The regular way was for the reporters regularly employed on the paper to bring in matters of news and prepare them for publication; they were then handed to me and I went over them and prepared the headlines and did what editing was necessary.

Q. Mr. Kearney, were you ever called upon or was ever demand made upon you in writing to make a retraction of that article?

(Objected to as irrelevant.)

THE COURT:—You can ask what he knows personally, whether this plaintiff made any demand on him to retract the article.

Q. Did the plaintiff, John C. Marsh, ever make a written demand on you for the retraction of this article?

(Objected to for the reason before stated.)

(Objection overruled. Exception noted for plaintiff.)

A. He never made any written demand on me or any to demand whatever.

CROSS EXAMINATION.

BY MR. COLE:—

Q. Have you the issue of May 28th before you?

A. Yes, sir.

Q. Would you mind reading how much of that you wrote?

A. "Illinois avenue house raided. John Marsh, the proprietor, and four others are in cells at headquarters. Police determined to keep city clean. Decent neighborhoods are not to be subjected to annoyances, if the authorities can prevent it. Two young girls in party." 20

Q. You wrote all that?

A. Yes, sir.

Q. How long had you been a newspaper man when you wrote that?

A. Some seven years, I think.

Q. And you stated as a fact that John Marsh, the proprietor, and four others, were in cells at headquarters upon the writing that came to you from a reporter that was below the headlines, did you?

A. Yes, sir.

(Both sides rest.)

MR. WOOTTON:—Now, if the Court please, we renew our motion in the form of a motion for a direction
10 believing we have shown beyond a doubt that there was no intention and that therefore the plaintiff having made no demand in writing and that special damages must be proved and specially alleged in the declaration.

MR. COLE.—I have nothing to say in reply. My view of the case has been covered by my reply to the former motion.

(Mr. Wootton cites authorities.)

THE COURT:—Well, this point in reference to the statute is not involved in it, is it, Mr. Wootton? That
20 was back of the time in 1898 when this was passed. There is no case, is there, bearing upon the effect of that statute.

MR. WOOTTON:—Since the passage of that act, no, sir. I have made diligent search and can find no case. I will refer to a case prior to that, if your Honor

wishes, as to the right of the plaintiff to recover from a defendant who has no knowledge of the publication.

THE COURT:—The motion is to direct a verdict for want of evidence, as I understand it, of any malice in fact or any request to retract and refusal, spoken of in section 2 of this act.

MR. ENDICOTT:—Or of actual damage proved and specially alleged. That goes with it.

THE COURT:—Yes; the claim is that there was no what we call actual damage proved. I think counsel has admitted that practically. That is, the damage is that which arises per se from a libel, I think, per se. And I may say that in reference to this motion to direct a verdict, I think it proper enough to say that the constitutionality of this act has been seriously questioned in the state by the judiciary, although it has not directly been determined.

MR. ENDICOTT:—I see the same act in Connecticut has been sustained by its highest Court.

THE COURT:—Yes; and the same in Minnesota or Michigan—one or two other states—has been declared unconstitutional. So that it is a vexed question with the courts; that is, the point as to its constitutionality arises, whether or not a citizen can by a legislative act be deprived of a remedy for what would be considered an attack on his reputation, being one of his absolute rights, and whether that can be taken away. That is a serious question which has been under consideration in

this state, and in a case rather recently tried the statute was practically ignored by the charge to the jury, and allowing the matter of damages to go to the jury; and it came up, but the result was determined upon another question and this was not directly determined. I think however, that of course if I should direct a verdict it would simply mean the taking up of the case on that particular point, and it would have to come back again to assess damages if the act is unconstitutional; and I think
10 that I shall, therefore, refuse this motion to direct a verdict, and then counsel for the defendant, of course, will have the full benefit of any exception to the whole case and the matter can be directly determined by the Supreme Court at Trenton or the Court of Errors and Appeals. So that I think I will leave the case in that way to go to the jury after argument and upon such instructions as the Court ought to give to a jury on the question of damages, and let the jury, as usual, assess whatever they deem, after hearing the charge of the Court, proper dam-
20 ages. I think that would be my better way, from my knowledge of the present aspect of this question in the state, the better way to rule in this matter, not to direct a verdict against the plaintiff, but to allow the case to go to the jury. Therefore, counsel may take an exception to that ruling and the case may be argued. I would be glad to hear counsel fully on this matter on both sides, on what the damages should be, if anything, or what they find from the evidence the facts are.

MR. WOOTTON:—The defendant excepts to the
30 Court's refusal to direct, and prays an exception.

THE COURT:—That is allowed.

(Whereupon the defendant, by his counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

CHARLES E. HENDRICKSON, (seal)
J. S. C.

CHARGE OF THE COURT.

Gentlemen of the Jury:

This is an action brought by the plaintiff in this case seeking to recover damages of the defendant for what is deemed to have been a libelous publication, calculated to affect the defendant, to disgrace him and hold him up to public ridicule and contempt. A libel, properly speaking, signifies the publication of slanderous words in writing or printing, or in some way like that, maliciously, with intent to thus injure a person, hold him up to disgrace, ridicule and contempt. A libel may be actionable per se, so that no actual damages need be proved to justify recovery, or the libel may not charge any criminal offence or anything disgraceful, but it might injure a person; that is, might in some way injure him in his business, and yet not be what is called actionable per se; and when that is the case, special damages must be proven in order to justify a recovery. I need not detain you on that question, because it is admitted, practically, I think, in this case, that the article in question is of the nature of a libel that is actionable per se, of itself; that it does present the defendant in such a way before the community as practically to charge him with being implicated in keeping a disorderly house and being arrested; and, in

other words, to hold him up to disgrace. So that the article itself (I think it is not disputed) is such an article as I have described, that is, actionable per se; that is, of itself, without proving special damages, which is sometimes very difficult. A man may be injured by a libelous publication, and yet it be difficult to prove where he has actually lost anything by it. So that in actions for libel which are actionable per se, the plaintiff, if the proofs are sufficient, as to the publication, the wrongful publication, may recover what the law describes as general damages; that is, without proof of any special loss; he recovers general damages.

- 10 Now in this case that part of the evidence you have heard. The defendant is the publisher of the newspaper in question. It has been testified as to its circulation among the people; witnesses have been produced that read the article, and the evidence seems to be undisputed on the point of publication, and if you believe the evidence, the case has been made out against the defendant, so far as the publication of the libelous article is concerned. Therefore, the plaintiff, as a matter of law, would be entitled to recover damages, even though there is no proof of any special loss or damage. And if you reach that point, that the defendant made this publication of these libelous words, then it would be your duty under the
- 20 law to give to the plaintiff damages, what we call general damages. And in assessing those damages you have the right to give to the plaintiff in this case whatever would compensate him for the loss or injury which he has sustained by this publication; that is, to make him whole; and there is no special rule for that assessment or fixing those damages. That is left to the jury in their reasonable judgment, to give to him who has been injured

in this way what they think under all the circumstances of the case would be a fair, just and reasonable compensation to him, to make him whole from the injury he has suffered. And in assessing those damages you have a right to consider the injury that would follow from such an attack upon plaintiff's character and reputation, published in the newspaper. You may consider the injury to his feelings, his mental suffering or anguish, if you think he would be likely to suffer such results from such a publication attacking his character and reputation. 10 You may consider those grounds in estimating what the plaintiff should recover of the defendant, as compensatory damages. You could not go beyond that, gentlemen. That is admitted in this case. You cannot give what is called punitive damages, vindictive damages; that is, damages to punish the publisher of the newspaper. You cannot give that. The amount that you could assess would be to compensate; that is the language, to compensate the plaintiff for the injury that you think has been done him by this publication.

Now, of course, in considering the question of damages, 20 you have a right, and ought to look at the circumstances surrounding the case and see whether there are any circumstances proven which mitigate the damages; that is, diminish or soften the blow, the injury to the plaintiff's feelings and the mental suffering which he may have had. Now the circumstances of the case are such as show that the defendant himself knew nothing about this publication. He is the one that is sued. He was away from home. It went into his daily paper in the usual, 30 ordinary channel, through the reporter, as a matter of public news. That does not relieve the defendant from his liability. It does not justify the article at all. The

publisher of such a newspaper is responsible for the legal effect of any publication that goes in the paper under circumstances like these, where he knew nothing about it. The editor, according to his testimony, received the item from a reporter as a matter of news, and he placed the headlines upon it and it went into the newspaper in that way. And the law is that where the publisher of a newspaper commits an injury like this in such a way, through mistake made by his reporters, he cannot be
20 held, as I stated before, for punitive damages, but still he may be held for compensatory damages. But you will look at such a condition. I may say right here that as regards malice, the publication of a libelous article such as this implies malice; that is, sufficient malice in the law to sustain a recovery for general damages. But that malice in law is not necessarily malice in fact.

Now you may look at the circumstances of this case, the way it was published, to see whether Mr. Edge, the defendant, had any malice at all against the plaintiff or
O I whether he had any intent to injure him. I do not think you will have trouble in determining the actual fact that there was no actual malice on his part. This is a question, of course, which is like all others, for you to consider.

Now if there was no malice, you may look at the situation, look at all the circumstances surrounding the publication, and see whether there is any ground for mitigation of the damages from what they otherwise would be. Naturally the jury would think it proper, perhaps,
30 to give larger damages against a newspaper that not only published the libelous words, but said nothing about it afterwards, though it learned the true facts, kept still and let that libel go out to do its work, to injure a man's

reputation. That is what I mean by circumstances bearing upon this question of the mitigation of damages.

Now it is testified here in behalf of the defendant that he came home the day the paper was issued containing the libelous article, and the next day, you see, the paper had in it what is called a retraction. And it will be for you, to look at that and read it over carefully from beginning to end and see the nature and character of that retraction. If it was a full, clear, explicit retraction such as any reasonable person could understand, of all its 10 defamation of the plaintiff, you may consider that in mitigation of damages, not to justify the libel at all, but simply upon the question of the mitigation of damages. As I observed, if the editor immediately publishes a retraction, it does not rectify the wrong; it does not entirely do away with the damage that the article caused, perhaps, yet you would naturally consider the case a little differently from that where a publisher refused or failed in some way to make any retraction. Now that is what I mean by this observation in regard to mitigation 20 of damages. If the defendant in this case published this retraction it is for you to consider the character of that retraction, whether it was full, clear and explicit; and if it was full, clear and explicit, you have a right to consider it on the question of damages, and say what mitigation it should be upon the damages that you would otherwise put upon the defendant in favor of the plaintiff for the injury he has suffered.

Of course you may look at other facts. You will look at the fact that it has been shown by witnesses that this 30 same paper had a circulation, and it is admitted it had a general circulation; and of course whether it reached the eyes of the plaintiff himself when it was issued, there is

no proof upon that point, I believe. The plaintiff has not made any statement about that. But of course that is a question for your good judgment under all the circumstances of the case. There is some evidence here that seems to tend to show that the plaintiff in this case did not go to the office of the Press and make any request. He was not bound to do it at all. I only refer to it, though, as a circumstance, as to whether he had or had not seen this article, the retraction. If there had not been
10 a retraction the question would be whether or not the plaintiff might not have gone there to the office. He might or he might not. He was not bound to. You can look at this circumstance in connection with the general question as to the amount of damages that the plaintiff should recover. You may look at these circumstances of mitigation, not to justify, not to refuse to compensate the plaintiff for the injury which he has sustained through the publication of that one issue of the 28th. And of course the issue of the 29th may not have
20 reached all the parties who saw the other article. You will look at all these circumstances, and the jury should try to do what is right and just between both the parties and to exercise a fair and reasonable judgment that would give to the plaintiff what seems to be his due upon the principles stated and that would take no more from the defendant that would be fair and just under the circumstances and under the instructions that I give to you.

The defendant requests the Court to charge:

1. That from the fact of the publisher knowing nothing of the publication of the libelous article, the jury
30 can only find actual damage.

That I decline to charge. I have fully explained that matter to you, that whether he knew it or not, if he pub-

lished a libelous article, one that is actionable, such as this one, the jury can find general damages, compensatory damages, such as I have explained to you. The defendant in making this request says "actual damage." I assume that he means by that special damages such as have to be proven. If he does I decline to charge that. But if it is actual damages in the sense of compensatory damages for injury and suffering to a person's feelings, of course then I charge it. I think we understand that.

10

2. That the publication of a retraction or apology for the defamatory words must be considered in mitigation of damages.

I charge that, as I have charged before, that you may take that under consideration on the question of the mitigation of damages.

DEFENDANT'S EXCEPTIONS.

1. The defendant excepts to that part of the charge directing that the jury can give general damages without any proof of special damage.

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(Which exception is hereby allowed and sealed accordingly.)

CHARLES E. HENDRICKSON, (seal)
J. S. C.

2. The defendant also excepts to that part of the charge informing the jury that they may consider the injury to name and personal feelings.

(Which exception is hereby allowed and sealed accordingly.)

CHARLES E. HENDRICKSON, (seal)
J. S. C.

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3. The defendant also excepts to that part of the charge stating that a retraction does not take away the right of the plaintiff to recover damages, as the same is a matter for the consideration of the jury.

(Which exception is hereby allowed and sealed accordingly.)

CHARLES E. HENDRICKSON, (seal)
J. S. C.

10 4. The defendant also excepts to the refusal of the Court to charge as requested in the first request.

(Which exception is hereby allowed and sealed accordingly.)

CHARLES E. HENDRICKSON, (seal)
J. S. C.

THE NEW JERSEY COURT OF ERRORS AND
APPEALS.

John C. Marsh,	} Plaintiff	} On Error.	
vs			} Defendant's Assignments
Walter E. Edge,			
Defendant.			

The said Walter E. Edge, the defendant below, and plaintiff in error in this cause, by Harry Wootton, Esquire, his attorney, complains and says, that the said judgment against the said Walter E. Edge is erroneous and ought to be set aside for the following reasons:

1. Because the trial court, on the motion of the defendant, refused to non-suit the plaintiff, because the plaintiff had not proved malice in fact, and had not demanded in writing, a retraction from the defendant, Walter E. Edge, of the matters alleged to be libelous as required under an act entitled, "An Act relating to libel," approved June 13th, 1898, P. L. N. J., 1898, Chapter 204, Section 2, at page 476.

20

2. Because the trial court, on motion of the defendant, refused to non-suit the plaintiff, and held that the defendant must offer his evidence before the statute above referred to could receive the consideration of the trial court.

3. Because the trial court on motion of the defendant, refused to direct a verdict for the defendant, and held that

the case should go to the jury for it to assess damages, and refused to allow the defendant the benefit of the statute above referred to.

4. Because the trial court, on the motion of the defendant, refused to non-suit the plaintiff, and held that there was sufficient proof to entitle the jury to find for the plaintiff.

5. Because the trial court refused to charge the defendant's first request.

IO 6. Because the trial court improperly charged and instructed the jury.

7. Because the said judgment against the defendant is erroneous and contrary to law, and divers other particulars apparent upon the face of the record.

Dated October 23, 1902.

HARRY WOOTTON,
Atty. for Plaintiff in Error.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

John C. Marsh,	}	
Plaintiff,		
Defendant in Error,		Joinder in Error.
vs		In Error.
Walter E. Edge,	}	
Defendant,		
Plaintiff in Error.		

And, hereupon, afterwards, to wit, on the twenty-third 10
day of October, A. D., 1902, the said John C. Marsh, by
Thompson and Cole, his attorneys, comes into Court and
says that there is no error either in the record and pro-
ceeding aforesaid, or in giving judgment aforesaid, and
he prays here that the Court here may proceed to exam-
ine as well the record and proceedings aforesaid, as the
matters aforesaid assigned for error, and that the judg-
ment aforesaid, in manner aforesaid given, may in all
things be affirmed, etc.

THOMPSON & COLE, 20
Attorneys for and of Counsel with Defendant.



