

New Jersey Court of Errors and Appeals,

IN THE LAST RESORT IN ALL CAUSES.

THE EVENING JOURNAL ASSOCIATION,
(Deft.) *Plff. in Error*,

vs.

ALLAN L. McDERMOTT,
(*Plff.*) *Deft. in Error*.

*In Error to
Supreme Court.*

BRIEF FOR PLAINTIFF IN ERROR.

I.

Was the publication sued on libellous?

So far as it relates to the plaintiff, it, in substance, states that he represented himself to be a constable. Does such an allegation "hold a person up to public hatred, ridicule or contempt?" If so, why? It nowhere appears in the article, nor in the proofs in the case, that the plaintiff was not a constable. If, however, we violently presume (as did the Court below) that the charge was of a false representation, is the disgrace in the charge of falsehood, or in the charge of assuming the particular rôle of constable? Perhaps the Court thought that, since Dogberry's day, it is injury enough to accuse a man of being willing to be thought to hold that ancient office.

Remembering that wrongly characterizing an act (as, for example, here as "stealing"), does not give it that

character when the true nature of the act is apparent; and remembering that the plaintiff is not accused of any of the active misconduct alleged in the article, the complaint seems to us puerile.

A constable could not lawfully have exercised any authority in such a situation as that portrayed in the article, therefore to personate one would be useless to effect the end of the "besiegers." This end was not, as Mr. Justice Reed erroneously says, "a search for stolen goods," but was the taking by one partner from another of property, a part of which at least admittedly belonged to the former.

Toward reaching this end, if resisted, it would have done no more good for plaintiff to say he was a constable and "pretend to read" a warrant, than to say that he was a member of the Legislature and "pretend to read" a statute giving him authority in the premises.

Neither the plaintiff in his declaration, nor the Court below in its opinion, regarded the article as making any other charge against the plaintiff than this of representing a constable.

Such a charge, under the circumstances, we submit, was not libellous.

The innuendoes, we think, do not enlarge the apparent meaning of the words published. If they do, we submit that while the statute authorizes this, yet where no proof to sustain the innuendoes is offered and the article itself does not warrant them, they can have no avail on a motion to nonsuit.

II.

Was not the publication sued on privileged?

The instruction of the trial Judge on the general subject of the privilege of a report of *ex-parte* proceedings before a magistrate was sufficiently favorable to the de-

defendant, but he deprived the defendant of all benefit therefrom by his limitation of what are properly to be considered as such proceedings. He excluded all preliminary statements to the magistrate, though publicly made, and confined the privilege to the technical complaint. No such narrow construction can be sustained. In the case of *Lewis vs. Levy*, E. B. & E., p. 537, which the Supreme Court cites and approves, the publication upheld was a reporter's account of what took place in the magistrate's office, with additions and explanations.

III.

Can a corporation be sued for libel?

In view of the tendency of the courts of this State, as well as those of other communities, to hold corporations amenable to the same rules with respect to torts which are applied to natural persons, we expect an affirmative answer to this question. Much may be said, and has been said on the other side, however, and we ask the Court's consideration of the cases cited in the opinion of the Court below.

But there is a broader question involved here, viz.:

IV.

Can actual malice be proved against a corporation?

Legal malice is implied in every libel, and may perhaps as well be implied of an artificial as of a natural person, being indeed a creature of the law, and really only a name for something which is not malice at all, to wit, *legal responsibility*. Actual malice is a different

thing, and to speak of it, as existing in a soulless being is absurd.

When it is remembered that the responsibility of corporations rests in an application of the principles of agency, the case becomes clear. To hold a principal responsible for the actual malice of his agent, is an alarming extension of the doctrine of *respondeat superior*. A railroad company would be responsible for even the willful tort of its servants if committed within the scope of his employment; but was it ever held that punitive damages could be given against a company in such a case?

With special reference to an action for libel, consider how the rules (if they be rules) with respect to the admissibility in evidence of other libels to show malice would be perverted, if actual malice can be supposed of a corporation. It is said that other libels, for an indefinite time before or after the libel sued on, are admissible to show malice. Grant this fiction of actual malice in corporations, and a burden is laid upon them which natural persons are never called to bear. A man buys a newspaper and edits it. The publications of that newspaper under its former ownership cannot affect him, but a corporation continuously owning a newspaper, though changed in management, and perhaps in the entire constitution of its stockholders, can never lose this imputation of actual malice if the erroneous principle contended for be logically carried out.

V.

Were the other publications admitted in evidence legally admissible?

They were offered in rebuttal expressly to show actual malice, the defendant having proved a retraction and disclaimer of the publication sued on, and an endeavor to make all possible amends.

The admissibility of other publications in an action for libel has been much discussed, and by many courts a distinction is drawn between publications that are actionable and those not so—the latter being held to be admissible, the former not; because to admit them for the very purpose of increasing the damages, while still leaving them the subject of another suit, would be to permit a double recovery.

The learned editors of American Leading Cases (5th Ed., Vol. 1, p. 246, 197*) thus argue forcibly :

“Notwithstanding the great accumulation of authority
 “in favor of it, this whole practice of giving in evidence
 “words, or writings, published at other times, actionable
 “or not actionable, and before or after suit, is utterly in-
 “consistent with legal principle, and tends to gross in-
 “justice. If such evidence is admitted for the purpose
 “of affording ground to infer *legal malice* from the
 “matter charged in the declaration, then, if legal malice
 “was inferrible before, they are unnecessary, and if it
 “was not they give a cause of action where before there
 “was none, but if the object of such evidence is to intro-
 “duce *actual malice* into the case, it can have no other
 “operation than to increase the damages. If the jury
 “are not to give higher damages on account of it, it is
 “useless; and if they do, this result follows, that the
 “words, if not slanderous or libellous in themselves, are
 “yet so made use of as to bring damages, though not con-
 “nected with the principle words as part of the *res gestae*
 “and are made to sustain a verdict where they would not
 “sustain an action; and if they are slanderous or libel-
 “lous, they may become the ground of another suit and
 “a double compensation. The distinction apparently
 “taken in the English case of *Pearson v. Lemaitre*, the
 “Pennsylvania cases already cited, and *Brittain v. Allen*,
 “3 Devereux, 167, 171, that though damages are not to
 “be given for the injury done by the subsequent words,
 “yet these words may be used to inflame the damages
 “given for the words in the declaration, might be applic-
 “able in cases of special damage, but as applied to words
 “actionable in themselves it is futile and nugatory.

"Moreover, the fact that the defendant, months or years
 "before or after the occasion stated in the declaration,
 "uttered similar charges, with malice, does not reason-
 "ably prove that he was actuated by malice on the par-
 "ticular occasion sued upon ; and this is especially to be
 "considered in regard to words or publications after suit
 "brought. A man may have spoken or published some-
 "thing injurious to another, but without the least actual
 "malice ; he is sued for slander or libel, and then, in re-
 "sentment for such treatment he reiterates his charges
 "with real malignity. The reasons suggested in some of
 "the cases, that such evidence shows that the publication
 "or utterance was not by mistake or inadvertence, would
 "not justify the admission before the defendant has given
 "evidence that it is not intentional, for the law implies
 "intention. The suggestion in *Pearce v. Ornsby*, 1
 "Moody and Robinson, 455, and in *Symmons v. Blake*,
 "*id.*, 477, of admissibility to explain the meaning, seems
 "still more groundless, for it does not follow that the
 "person means the same thing in every writing or speech
 "on the same subject. The admission of such evidence
 "seems, in every view, irrational and dangerous, and it is
 "to be hoped that the Court will retrace their steps in re-
 "gard to it."

This Court may not be willing to adopt these views in
 their full extent, but every consideration of justice seems
 to demand that actionable articles, at least, should not be
 admitted in evidence. The Courts of New York so hold.

Howard *vs.* Sexton, 4 N. Y., p. 157, and cases
 cited in Am. Leadg. Cases, *supra*.

It is said that the publications in question were not ac-
 tionable. Perhaps not. We so contended at the trial,
 but they clearly went to the jury as such. The rulings of
 the Court to which exceptions were taken (Case, p. 27,
et seq.) can lead to no other conclusion.

Moreover, the effect of the ruling on page 27 is dis-
 tinctly to permit testimony that there had been other
 articles in the *Evening Journal*, previous to the one sued

Moreover, the fact that the defendant months or years on, published with reference to the plaintiff, which were adverse and defamatory. Whether the publications subsequently offered were those articles or not nowhere appears.

If, however, the articles were, as Mr. Justice Reed says, mere observations upon an appointment to a public office, and within the limit of legitimate criticism, they were privileged, and should have been excluded on that ground as irrelevant.

We made this point clearly at the trial.

The judgment should be reversed and a new trial awarded.

COLLINS & CORBIN,
Of Counsel with Plaintiff in Error.

THE ASSOCIATION OF THE PUBLISHERS OF THE PRESS OF GREAT BRITAIN

COURT OF ERRORS AND APPEALS

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WM. S. SHARP, Printer, 21 West State street, Trenton, N. J.

COURT OF ERRORS AND APPEALS.

THE EVENING JOURNAL
ASSOCIATION

vs.

ALLAN L. McDERMOTT.

In error to
Supreme Ct.

Points for Defendant in Error.

There is nothing to prevent a corporation being, in law, the publisher of a libel, and from being held liable as such publisher.

Townshend on Libel and Slander, (2d edition,) p. 460.

Aldrich *v.* Press Printing Co., 9 Minn. 133.

The Jeffersonville Railroad Co. *v.* Rogers, 28 Harrison (Ind.) 1.

The second assignment of error is upon the admission of previous publications. They were of the same nature as the article declared upon, in that they were published with the intent to injure the plaintiff in the practice of his profession.

- Stearns *v.* Cavoc, 17 Ohio 418.
 Van Derveer *v.* Sutphin, 5 Ohio (N. S.) 293.
 Elliott *v.* Bayles, 31 Penna. St. 65.
 Markham *v.* Russell, 12 Allen (Mass.) 573.
 State *v.* Jeandall, 5 Harr. (Del.) 475.
 Johnson *v.* Brown, 57 Barbour 118.

The hypothesis of the plaintiff in an action for libel or slander, is that the libel was malicious; to prove malice it is relevant for the plaintiff to prove other causes of defamation by the defendant.

- Wharton on Evidence, § 32.
 Bassell *v.* Ellmore, 48 N. Y. 561.
 McBee *v.* Fulton, 17 Md. 403.
 Prime *v.* Eastwood, 45 Iowa 640.
 Barrett *v.* Long, 3 House of Lords 395.

In the case of Barrett *v.* Long, Mr. Baron Parke, speaking of the admission of articles published several years prior to the publication of the defamatory article sued upon, lays down the rule that they are admissible to show malice.

Publishing the contents of an *ex parte* affidavit, made to obtain the plaintiff's arrest, is not privileged as a report of judicial proceedings.

Cincinnati Gazette Co. *v.* Timberlake, 10 Ohio (N. S.) 548.

- Thomas *v.* Crowell, 7 Johnson 264.
 Haully *v.* Webb, 4 Sandf. 21.
 Huff *v.* Bennett, 4 Sandf. 127.
 Matthews *v.* Beach, 5 Sandf. 256.

ALLAN L. McDERMOTT,

Attorney pro se.

New Jersey Supreme Court.

THE EVENING JOURNAL ASSOCIATION,

Plff in Error,

vs.

ALLAN L. McDERMOTT,

Defd't in Error.

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*In Error to
Hudson Circuit.*

Writ of Error returnable February 15th, 1881.

COLLINS & CORBIN,

Att'ys. 20

Presented January 14, 1881.

M. M. K., *J.*

STATE OF NEW JERSEY, *ss*:—

The State of New Jersey to Manning M. Knapp,
Esquire, Judge of our Circuit Court of Jer-
sey City, in and for the County of Hudson,
[SEAL.] or such Justice of the Supreme Court of the
State of New Jersey as shall hold such Cir-
cuit Court, and to the said Circuit Court, greeting:
Because in the record and proceedings, and also in the
giving of judgment in a plaint which was in our Circuit
Court, holden in Jersey City, in and for the County of
Hudson, between Allan L. McDermott, plaintiff, and
The Evening Journal Association (a body corporate), de-
fendant, of a plea of trespass on the case, manifest error
hath intervened to the great damage of the said The
Evening Journal Association, as by its complaint, we are

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informed, we being willing that speedy justice should be done to the parties aforesaid in this behalf, do command you, distinctly and openly, to send under your seal the record and proceedings aforesaid, with all things touching and concerning the same, to our Justices of our Supreme Court of the State of New Jersey, on the fifteenth day of February next, together with this writ, that the record and proceedings aforesaid being inspected, we may further cause to be done thereupon what of
10 right and according to law ought to be done.

Witness Mercer Beasley, Esquire, our Chief Justice, at Trenton aforesaid, the thirteenth day of January, A. D. one thousand eight hundred and eighty-one.

BENJ. F. LEE,

Clerk.

COLLINS & CORBIN,

Att'ys.:

20 The answer of Manning M. Knapp, Esquire, Judge of the Circuit Court within named, the record and proceedings of the plaint whereof mention is within named, with all things touching the same, I certify to the Justices of our Supreme Court of the State of New Jersey, at Trenton, at the day and year within contained, in a certain schedule to this writ annexed, as I am commanded.

M. M. KNAPP, *J.* [L. s.]

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HUDSON CIRCUIT COURT.

ALLAN L. McDERMOTT

vs.

THE EVENING JOURNAL ASSOCIATION.

*In Case.**Judgment Entered**December 30, 1880**Damages... \$500.00**Costs..... 38.79*\$538.79

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ALLAN L. McDERMOTT,

*Att'y pro se.*STATE OF NEW JERSEY, } ss:
HUDSON COUNTY, }

Hudson Circuit Court of the second day of July, A. D. 1880, being of the April Term of said Court.

"The Evening Journal Association," a body corporate of this State, the defendant in this action, was summoned to answer unto Allan L. McDermott, the plaintiff therein, of a plea of trespass on the case; and thereupon the said 20 plaintiff, in his own proper person, complains of the said defendant for that whereas the said plaintiff for a long time before and at the time of the committing of the grievances of the said defendant hereinafter mentioned, had been, and was and still is, an attorney of the Supreme Court of the State of New Jersey, and also a solicitor of the Court of Chancery of said State, and had used, exercised and carried on the profession and business of an attorney and solicitor with great credit and reputation— to wit, at Jersey City, in the County and State afore- 30 said—and never was guilty of the offense or misconduct hereinafter stated to have been charged upon and imputed to him by the said defendant, nor until the time of the committing of the grievances by the said defendant as hereinafter mentioned, was ever suspected of any such offenses or misconduct, by reason whereof the said plaintiff had deservedly acquired the honor and esteem and good will of all his neighbors, and other good and worthy citizens of this State, to whom he was in anywise known, to wit, at Jersey City, in the county aforesaid. Yet the 40

said defendant, well knowing the premises, but contriving, and falsely, and fraudulently, and wickedly, and maliciously intending to injure the said plaintiff in his said credit and reputation, and also in his said profession and business, and to cause it to be suspected and believed that the said plaintiff had conducted himself dishonestly, injudiciously and improperly in the discharge of his duties as an attorney of the Supreme Court as aforesaid; and that the said plaintiff had been guilty of the misconduct
 10 hereinafter mentioned to have been charged and imputed to him by the said defendant, and to vex, harrass, oppress, impoverish and wholly ruin him, the said plaintiff, heretofore, to wit, on the eighteenth day of June, in the year of our Lord one thousand eight hundred and eighty, at Jersey City aforesaid, in the county aforesaid, in a certain newspaper called *The Evening Journal*, wrongfully, maliciously and injuriously composed and published, and caused to be composed and published, a certain false, scandalous and defamatory libel of and concerning the
 20 said plaintiff, and of and concerning him in his said profession and business as an attorney of the Supreme Court of Judicature of the State of New Jersey, containing among other things the false, scandalous, defamatory and libellous matter following of and concerning the said plaintiff, and of and concerning him in his said profession and business as an attorney of the Supreme Court of Judicature of the State of New Jersey, that is to say :

30 “ A MIXED UP CASE. STEALING GOODS FROM A SILK FACTORY. COUNSELLOR McDERMOTT REPRESENTS A
 “ CONSTABLE [meaning that the said plaintiff had unlawfully represented that he was a constable].

“ Louis Bowery, proprietor of a silk factory in Griffith street, Jersey City Heights, appeared before Justice Streng at Hoboken, and narrated a singular and interesting story. He represented that he was in partnership in the silk manufacturing business with a man named Kamp residing in New York. Owing to a misunderstanding, Bowery determined to sever all connections with his silent partner, so he authorized the latter
 40 “ to move the goods and materials belonging to him.

"Instead of complying with the request, Bowery alleges
 "that Kamp and four others, among them Allan McDer-
 "mott," [meaning the said plaintiff] "Corporation At-
 "torney for this city, and McDonald, a New Yorker,
 "besieged the place several days ago, and demanded an
 "unconditional surrender and a prompt delivery of the
 "goods and machinery in the establishment. Bowery
 "disputed the right of the men to molest him or make a
 "forcible entrance into the place, but he was rudely
 "thrust aside and cautioned to keep quiet. It is stated 10
 "that counsellor Allan McDermott represented himself
 "as a constable, and pretended to read a warrant
 "which authorized him to take the goods out of the
 "place" [meaning that the said plaintiff unlawfully
 represented himself as a constable for the purpose of un-
 lawfully obtaining certain goods]. "Bowery darted out
 "of the factory to summon the police, but he was con-
 "fronted at the gate by McDonald, who pointed a revol-
 "ver at him and forced him to retreat. Then, it is
 "alleged, that the marauders took a large quantity of 20
 "silk and some valuable machinery out of the place, and
 "made their escape. While the men were in the factory
 "they cut and ruined a large quantity of silk belonging
 "to a Mr. Kellener, who has already instituted a civil suit
 "for damages before Justice Streng. The Justice has
 "issued warrants for the arrest of all the parties con-
 "cerned, including the counsellor, both civilly and crimi-
 "nally" [meaning that a warrant had been issued for the
 arrest of the said plaintiff].

By means of which said premises, the said plaintiff 30
 hath been and is greatly prejudiced in his credit and repu-
 tation aforesaid, and brought into public scandal, infamy
 and disgrace, and is suspected to have been guilty of the
 misconduct so as aforesaid mentioned to have been
 charged upon and imputed to him, and to have acted dis-
 honestly and improperly and unlawfully in the way of
 his said business and profession, and has been greatly
 vexed, harrassed, oppressed and impoverished, and has
 also lost and is deprived of divers great gains and profits
 which would otherwise have arisen and accrued to him in 40

his said profession and business, and hath been and is otherwise much injured and damnified therein, to wit, at Jersey City, in the County and State aforesaid, to the damage of the said plaintiff, five thousand dollars, and therefore he brings this suit, &c.

And the said defendant, by Collins & Corbin, its attorneys, comes and defends the wrong and injury, when, &c., and says that it is not guilty of the said supposed grievances above laid to its charge, or any or either of them, 10 or any part thereof in manner and form as the said plaintiff has above thereof complained against. And of this the said defendant puts himself upon the country.

Therefore, to try the issues above joined, let a jury come before the said Circuit Court at Jersey City aforesaid, on the twenty-eighth day of December, in the year of our Lord eighteen hundred and eighty, who neither, &c., by whom, &c., to recognize, &c., because as well, &c., the same day be given to the parties aforesaid, at which day, before the said Circuit Court, comes the said 20 parties by their attorneys aforesaid. And the jurors of the jury above mentioned also come, who to speak the truth of the matter aforesaid, being chosen, tried and sworn, say upon their oath that the said defendants are guilty of the said grievances above laid to its charge; and they assess the damages of the plaintiff by reason of said grievances at five hundred dollars over and above his costs and charges by him about his suit in that behalf expended.

30 Therefore, it is considered that the said plaintiff do recover against the said defendant his damages aforesaid, in form aforesaid found, and also thirty-eight dollars and seventy-nine cents for his costs and charges by the said Court now here adjudged to the plaintiff and with their assent, which said damages, costs and charges in the whole amount to five hundred and thirty-eight dollars and seventy-nine cents.

And the defendants in mercy, &c.

40 Judgment signed December 30th, A. D. 1880.

M. M. KNAPP, *Judge.*

HUDSON CIRCUIT COURT.

SEPTEMBER TERM, 1880.

 THE EVENING JOURNAL ASSOCIATION

agst.

ALLAN L. McDERMOTT.

 10
 } *In Case.*
 } *Bill of Exceptions.*

Be it remembered, that at a Circuit Court held at Jersey City, in and for the County of Hudson, before the Honorable Manning M. Knapp, Judge of the said Court, according to the form of the statute in such case made and provided, on the twenty-eighth day of December, A. D. eighteen hundred and eighty, came on to be tried the issue in the above-stated case, joined between the said Allan L. McDermott and The Evening Journal Association (*pro ut* the same), at which day, before the said Judge, came as well the said Allan L. McDermott as the said The Evening Journal Association, by their respective attorneys aforesaid, and the jurors of the jury aforesaid, whereof mention is within made, being called, likewise came, and were sworn to try the said issue in manner aforesaid respectively joined.

For plaintiff—Mr. William T. Hoffman and Mr. Allan L. McDermott *pro se*; for defendant—Mr. Gilbert Collins.

And thereupon, to maintain the said issue on his part, the plaintiff proceeded as follows:—

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JOSEPH A. DEAR, a witness produced on the part of the plaintiff, being sworn, testified as follows:—

Direct examination by Mr. McDermott:—

I am the Treasurer of the defendant; *The Evening Journal* is published at 37 Montgomery street, Jersey City; this paper shown me of June eighteenth, eighteen hundred and eighty, is a copy of *The Evening Journal*;
10 it is one of *The Evening Journals* issued upon that day.

Plaintiff offers the newspaper in evidence.

The circulation of *The Evening Journal* on that day was about 6,500; *The Evening Journal* is published by The Evening Journal Association, an incorporation of this State.

20 It is admitted by the defendant that The Evening Journal Association is an incorporation of this State and issues *The Evening Journal* newspaper.

Plaintiff rests.

Mr. Collins, on behalf of the defendant, moves to nonsuit the plaintiff on the grounds—*first*, that an action for libel will not lie against a corporation; that a corporation cannot be guilty of a tort of this kind, which is peculiarly personal;

30 And also upon the further ground that the article itself is not libelous;

And also upon the further ground that proceedings before a committing magistrate may be published as a matter of news, and whether true or false makes no difference; that the publication of such proceedings is a privilege which extends to this article; it professes to be of a privileged character, and the burden is on the plaintiff to
40 show that this privilege is not well founded; that it is not

true that there was no such proceeding before the magistrate. The point I make is that where, on its face, the article published purports to be a report of such proceedings, the burden is on the plaintiff to show that it is not true.

The Court denies the motion to non-suit, and allows the defendant an exception.

Whereupon the defendant prays that this, his bill of 10 exceptions, may be sealed, and it is sealed accordingly.

M. M. KNAPP, J. [SEAL.]

Mr. Collins opens the case for the defense, and offers in evidence an article in a copy of *The Evening Journal* of June 22d, 1880.

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Plaintiff objects to the reading of any article published subsequent to the commencement of this suit.

[Mr. Collins.]—It appears by the return of the summons that it was served on June 22d, the same day that this alleged retraction is published.

The Court admits the article referred to in the 30 paper of the 22d, and Mr. Collins reads it in evidence.

ALEXANDER B. VANDERVOORT, a witness produced on behalf of the defendant, being sworn, testifies as follows :—

Q. You are in the office of the Prosecutor of the Pleas of this county ?

A. I am.

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Q. [Showing witness legal papers.]—Are those criminal complaints that were sent to the Prosecutor in the ordinary course of business?

A. Yes, sir; they were sent up by Justice Streng.

The defendant offers the papers in evidence. Plaintiff objects to their admission. The Court admits the papers.

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GUSTAV STRENG, a witness produced on behalf of the defendant, being sworn, testifies as follows:—

I am a Justice of the Peace; have been so for seven years; I live in Hoboken; my office is in Hoboken.

Q. I call your attention to a matter before you as a Justice in June last; you have been in Court this morning during this trial?

A. Yes, sir.

20 Q. Did you hear counsel read to the jury a publication in *The Evening Journal* of June 18th, 1880?

A. I did.

Q. In which your name appeared?

A. Yes, sir.

Q. Prior to that publication, did a man named Louis Bowery make complaint before you as Justice of the Peace?

A. Yes, sir.

30 Q. State the substance of the oral complaint he made to you when he first came?

The question is objected to on the ground that the complaint is a matter of record—it is in writing, and is the best evidence.

[Mr. Collins.]—We are not proving the technical complaint, but the oral complaint to the committing magistrate.

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The Court admits the testimony, to which ruling the plaintiff prays an exception.

A. On Saturday, two days previous to making the complaint before me, Mr. Bowery called at my office late in the afternoon and desired to make the following complaint, viz. : That certain persons, one named Heller, one named Camp, and one named McDonald, with some others whose names he did not know, had unlawfully and wilfully stolen some of his property at Griffith street, Jersey City; he said that Camp and McDonald were non-residents, that they lived in New York City, and that Mr. Heller resided in Palisade avenue, and as to the 10 other persons, he did not know their residence or names, but he understood that one who represented himself to be a constable, was a lawyer in Jersey City, who had been retained by Camp; I inquired where the non-residents were then; he said they had left across the river, and would be back on Monday; I concluded to persuade him to wait for his complaint until the Monday following, as Mr. Heller would not run away in the meantime, and the other defendants were not to be found that day; that was Saturday afternoon; Monday he came to me and re- 20 peated the complaint; I took it, and it is here now; I forget the wording of it.

Complaint handed to witness.

[Witness continuing:]—I forgot that he mentioned the name of Butterfield the Saturday before, and he then stated that the party representing himself to be a constable, and who demanded that the house be opened and he admitted, was Mr. McDermott, of Jersey City; he may have said 30 lawyer McDermott; I couldn't say positively now; I inquired further what part McDermott had taken in this action, and he stated that he was the commander-in-chief; that he hadn't touched anything himself; he hadn't assisted in moving any article, but that the force was under his command.

Q. Did he refer to any warrant, which this person claiming to be constable had?

A. He stated that the party who was mentioned to be McDermott had a paper—produced a paper—in the shape 40

of a warrant, and commenced to read it to him, and he—
not being able to understand English perfectly—under-
stood it to be a writ issued out of a Court commanding
him to open the door and let these parties in.

Q. On the first day that he came he said a lawyer
from Jersey City.

A. A lawyer from Jersey City; and on the second
time he came he said he had learned that the man's name
was Mr. McDermott, from Jersey City.

10 Q. Did he say what these people who had come to the
place demanded?

A. They demanded to remove the silk belonging to
Mr. Camp, to which he did not object; in fact, he would
like to have it removed, only they took some property be-
longing to him individually.

Q. Where was the place that he said they came to?

A. 118 and 120 Griffith street, Jersey City—used as a
silk factory.

Q. On that statement that he made to you, what ad-
20 vice did you give him as to McDermott?

A. I did not give any advice as to McDermott; I did
not want to enter his name in the complaint, thinking
that the examination which would be held in the matter
would show what part he had taken in it.

Plaintiff's counsel objects to what the witness
thought.

30 [The Court.]—What took place openly in a
Court is the subject matter of privileged commu-
nication.

[Plaintiff's counsel.]—Mr. Streng is testifying
to what he thought.

Q. I ask what advice you gave as a magistrate to this
man about McDermott's name?

A. I told him McDermott was not liable to any pen-
alty; he did not enter the building; he did not lay
40 hands on anything—simply personating a constable—and

I did not know that that was criminal, and I so informed Mr. Bowery, and I left out the name of Mr. McDermott for these reasons, and I so informed Mr. Bowery.

Q. Are those the two complaints made before you on that day?

A. Yes, sir.

Q. They both refer to this silk factory transaction?

A. Yes, sir.

Defendant offers in evidence the two complaints, 10
and the plaintiff objects to them as irrelevant.

Q. Was this entire conversation on Monday in your office?

A. Yes, sir.

Q. And on Saturday?

A. Also.

Q. Before you as a magistrate—as a Justice of the Peace?

A. Certainly.

20

Q. Were the proceedings open and public to anybody who saw fit to come in?

A. Certainly; there were other parties there.

Q. Did you send these documents to the Public Prosecutor?

A. I did.

Q. To be proceeded on according to law?

A. Although the charge had been dismissed before me on examination, still I sent the papers up to the Prosecutor as required by law.

30

Cross-examined by Mr. McDermott:—

Q. Upon the complaints that have been offered in evidence and the warrants issued upon those complaints, what was done?

A. The warrants were served.

Q. Were the parties named in the complaint arrested?

A. Some of them; Heller and Camp were arrested and they were bailed for examination.

40

Q. Was there ever an examination under those complaints?

A. Yes, sir.

Q. Have you the record of it?

A. All the record of this case must be in the office of the Prosecutor.

Q. You say there was an examination under these complaints?

A. Certainly.

10 Q. As a matter of fact, did you not dismiss the defendants without any examination under those complaints?

A. No, sir.

Q. Was not all the examination taken, with reference to this transaction, taken in a case of trespass brought against Mr. Heller?

A. There was an examination under these warrants.

Q. Was that examination sent to the office of the District Attorney?

20 A. I think it was.

Q. What was done with the defendants after that examination?

A. They were discharged.

Q. Were any of them present during the examination?

A. I should say they were.

Q. Was I present?

A. I forget.

Q. Do you remember whether they had counsel during that examination?

30 A. I think your clerk acted as counsel.

Q. You are positive there was an examination under the criminal charge?

A. I am positive.

Re-direct examination :—

Q. The clerk to which you have reference is Mr. McLean?

A. Yes, sir.

40 Q. He was present as counsel for some of these parties?

A. Yes, sir.

Re-cross examination :—

Q. Do you know he was my clerk?

A. I have found him in your office acting in your place when you were not there, two or three months ago.

Q. Did you find him there before these complaints were made?

A. No, sir.

Q. Have you your docket here?

A. No, sir; I don't keep any docket in any criminal case. 10

Q. To whom did you give the testimony taken?

A. I sent it along with other papers and other matters to the office of the Prosecutor.

GUSTAVUS A. SEIDE, a witness produced on behalf of the defendant, being sworn, testified as follows:—

Examined by Mr. Collins :—

20

Q. Are you a reporter of *The Evening Journal*?

A. Yes, sir.

Q. [Handing witness copy of *The Evening Journal*—
I show you an article under date of June 18th, 1880, in
The Evening Journal; did you furnish the report as
there published to *The Evening Journal*?

A. I did.

Q. From whom did you receive it?

A. I received my information from Justice Streng, 30
the last witness.

Q. What did Mr. Streng tell you?

Question objected to as hearsay.

[Mr. Collins]—It is admissible in mitigation of damages bearing upon the question of malice to show the manner in which the defendant came to publish it; we propose to show how this reporter got this information.

40

The Court admits the question.

A. I went into Justice Streng's office in the regular way as I have always done ; I asked him if he had any news ; he showed me that warrant ; I looked at it and read it and asked him for an explanation, and he gave me an explanation ; I asked him who the four men were, and he told me one was represented to be Allan McDermott ; I asked him if he knew Mr. McDermott ; he said, " Yes," that he was corporation attorney of Jersey City ; I asked him whether he was positive of McDermott, and he said he
 10 was, and he gave me also the facts appearing in this article here.

Q. You said he showed you the warrant ?

A. He classified it as a warrant of arrest.

Q. What was the document you saw ?

A. It was the affidavit I saw, with Mr. Heller's signature attached ; he said the affidavit was sufficient to serve as a warrant of arrest.

Q. How did you come to go to Justice Streng's office at all ?

20 A. I considered it a legitimate news headquarters, and I was in the habit of going there every day and furnishing the paper the information I gathered there.

Q. Was there any one with you ?

A. I was accompanied by Mr. McCormick of *The Argus* ; we both received the information at the same time.

Q. Did you go there of your own motion ?

A. Yes, sir.

Q. You wrote the article ?

30 A. I did.

Q. Was it written entirely of your own motion ?

A. Yes, sir.

Q. Do you have any instructions given you by anyone connected with the paper to write it ?

A. No, sir.

Q. Did you send it in its present shape yourself to the paper ?

A. Yes, sir.

Cross-examined by Mr. McDermott :—

Q. As to your personal responsibility, are you a freeholder?

Question objected to as irrelevant

Q. You say you had not received any orders from the Evening Journal Association; do I understand by that that you write what you please and they insert it in the paper?

A. We all have our legitimate districts and we are supposed to get all the information and news we can, and submit it to the office, and it is all supervised by the editor-in-chief and city editor.

Q. Then what you write passes under the supervision of another and higher agent in the office who adopts or rejects the article?

A. Yes, sir. 20

Q. Did Justice Streng tell you it was a mixed-up case?

A. I don't know as he used those words.

Q. Did he tell you that I had represented a constable?

A. He did.

Q. Why didn't you testify to that on your direct examination?

A. I substantiated the facts contained in the article; I said I received that information as it is in that article from Justice Streng. 30

Q. Did he use the words "Stealing goods from a silk factory?"

A. He used every word contained in that whole article.

Q. And the caption?

A. I don't know; he told me in substance everything contained in that article; I got the article up myself.

Q. Did he tell you that Louis Bowery, proprietor of the silk factory, appeared before him at Hoboken and narrated to him a singular and interesting story? 40

A. I don't know that he used the word, "singular" or "interesting;" he said he had a very good case for me.

Q. Did he say that the man in New York was a silent partner?

A. He gave me all the facts contained in there; he must have made that remark if I wrote it.

Q. Did he say that the parties besieged the place several days ago?

10 A. I don't know as he used the word "besieged" exactly, but he implied that meaning.

Q. Was not that created by the reportorial imagination of the scene around the factory?

A. I don't know that it was.

Q. Did he say that Bowery had disputed the right of the men to molest him, or to make forcible entry?

A. He did.

Q. Did he say that he had been rudely thrust aside?

A. He told me that in substance; he told me he was
20 pushed aside, and they forced their way in and past him.

Q. Did he say that I pretended to read a warrant?

A. Yes; he said that you had what purported to be a warrant?

Q. Did he say that I pretended to read a warrant?

A. That is my best recollection—that you pretended to read what purported to be a warrant.

Q. How is your memory as to that?

A. My memory is distinct so far as the reading of the warrant is concerned.

30 Q. Did he say that Bowery darted out of the factory?

A. I don't know as he said "darted," but he said running out of the factory.

Q. What reason did he say there was for Bowery's darting or running out of the factory?

A. I suppose he meant to infer that he ran for assistance, that he was going to call the police, that he ran out for assistance.

40 Q. What was the next incident that occurred at the factory, according to your recollection of Justice Streng's narrative, after he darted out of the factory for the police?

A. He explained to me that there was somebody stationed at the door, or on the street, that had a revolver and threatened him.

Q. Did he say that these men were marauders?

A. He did not use that word exactly; he said they forced their way in there and forcibly took the goods.

Q. Then you drew upon your imagination for a title to give them?

A. I did not draw on my imagination for the facts, but I wrote it as I thought suitable to read. 10

Q. Did he say that valuable machinery had been taken out of the place?

A. Yes, sir.

Q. Did the Justice tell you that warrants had been issued for the parties concerned, including the counsellor, both civilly and criminally?

A. He did.

Q. He testifies that he did not issue warrants.

A. He told me in the presence of another gentleman.

Q. Then he told you an untruth, if he told you so, 20 didn't he, and if his testimony is correct?

A. The way I understand it—certain affidavits in cases of that nature generally serve as warrants.

Q. Then your idea was, that on this complaint which describes some parties and other parties unknown, I might have been arrested; is that it?

A. That is the way I looked at it; he told me you was one of the parties implicated.

Q. Did he tell you that he had issued a warrant for my arrest? 30

A. He told me a warrant had been issued for the arrest of all the parties concerned.

Q. Did he tell you that warrants had been issued for all parties, including the counsellor?

A. Yes, sir.

Q. Did he use the word "warrants?"

A. "Warrants."

Q. Plural or singular?

A. Just as I stated.

Q. Did he say that civil warrants had been issued? 40

A. Both civil and criminal.

Q. How long did you stay in Justice Streng's office?

A. All of fifteen or twenty minutes.

Q. Did you derive all of your information from him, or from somebody else in the office?

A. I derived it all from him.

Q. Was there anybody else there when you were there?

A. Mr. McCormick; I believe he and I went in together, but I am not positive about that.

Q. When did you next attend Justice Streng's and hear of this case?

A. I think the following day I was taken sick and I went away to the country; I made arrangements for a week's vacation, and I went away the following day, or the same afternoon before the paper was issued.

Q. Do you remember when the civil warrants were returned?

A. I do not; I remained away eight or nine days.

20 Q. Didn't you report the trial upon the civil case brought by Mr. Bowery?

A. No, sir.

Q. Were you not in Court at the trial of it?

A. No, sir.

Q. Were you not in Court after the trial; didn't you go in there and get the facts and report the case?

A. No, sir; I had a substitute while I was away; I reported the warrants issued in this case.

Q. Is that the last you ever wrote about the case?

30 A. That is the last.

Q. Did you ever write a retraction?

A. No, sir; I did not.

Q. Do you know where my office is?

A. No, sir.

Q. Did you inquire where my office was?

A. No.

Q. Have you ever been in my office?

A. No.

40 Q. Have you ever been in the building where my office is?

A. I don't know the building where your office is.

Q. Did you go to the City Hall in Jersey City and inquire whether I was there?

A. That day?

Q. Yes; or any day concerning this article.

A. No, sir.

Q. Did you make any inquiry as to where my office was?

A. No.

Q. Did you make any inquiry to ascertain the truth or falsity of the statements which you say you received from Justice Streng?

A. Nothing further than the information I received from him; I asked him three or four times; I asked him to describe you, and he described you to me, and the description he gave corresponded with what I presumed to be a description of you; I was dubious about believing the story, and I expressed my doubts about your being connected with such a transaction; I says, "I know him;" says I, "describe him;" he described you to me; he stated again that he was positive of it; he also told me the position you occupied in Jersey City.

Q. What was your mind as to your doubts?

A. I doubted very much that a lawyer of your standing would have anything to do with a case like that.

Q. Why didn't you inquire about whether it was true or not?

A. I didn't know where you was.

Q. Why didn't you inquire where my office was?

A. It was late in the afternoon, and I had just time to go to the office and get away.

Q. This article appears in the first edition?

A. Yes, sir.

Q. What time does this paper go to press?

A. I don't remember.

Q. When did you write that article?

A. I think about twelve o'clock; and I took it over to the office myself that day.

Q. What was your reason for not inquiring where my office was, and ascertaining the truth or falsity of this statement?

A. Because I didn't think it necessary ; I always found Justice Streng to be reliable.

Q. You say you had your doubts?

A. I had my doubts about your being mixed up in the case ; I told him I doubted very much whether you was mixed up in it ; he told me he was positive that you was, and he gave me a description of you.

Q. Was there any doubt left in your mind then?

A. There must have been some doubt, for I wrote in
10 the article that it was stated that you had something to do with the case, and I meant that it was stated on the information of Justice Streng.

Q. Then why didn't you inquire where my office was and inquire whether he was correct or not?

A. One reason was I didn't have time.

Q. How many editions of that paper were issued on that day?

A. Four.

Q. When does the second edition go to press?

20 A. Between two and three o'clock.

Q. When does the third?

A. About three o'clock.

Q. When does the last edition?

A. About four o'clock.

Q. Then you had three hours and a half to inquire where my office was and ascertain whether this was true or not after you wrote that article, didn't you?

A. I wrote the article about two o'clock.

30 Q. Didn't you think it was a sensational item and it was better to rush it over to the paper and get it in the first edition?

A. No, sir.

Q. Didn't you have two hours to inquire as to the truth of the article before the second edition was issued?

A. I didn't know where to inquire, and I suppose Justice Streng was reliable authority when he showed me the affidavits.

Q. What made you think Justice Streng was mistaken?

40 A. Because I had heard of you and had known of you.

Q. It didn't enter into your head to inquire as to the truth or falsity of that article?

A. No further than I did.

Q. Would there have been any trouble in your ascertaining where my office was?

A. There would have been trouble that day, because I had made arrangements to go away, and I was to take a certain train in the afternoon and to go about 150 miles, and I ran over to the office and made the arrangements for a substitute and some other incidentals and got right 10 away.

JOHN P. McCORMICK a witness produced on behalf of the defendant, being sworn, testifies as follows:—

Q. Are you a reporter for *The Argus* newspaper?

A. I am.

Q. And were prior to June last and in June last and 20 are still?

A. Yes, sir.

Q. Is that a newspaper published in Jersey City?

A. Yes, sir.

Q. Were you present with Mr. Seide in the morning of June 18th last at Justice Streng's office?

A. I was.

Q. What was your object there?

A. We go in every day to gather news; it is one of the important news points in the City of Hoboken. 30

Q. You were gathering news for *The Argus*?

A. Yes, sir.

Q. Did you get any news there that day?

A. We got the story that Justice Streng gave here.

Q. Did you write an article for publication?

A. I did.

Q. And based upon the facts he gave you?

A. Yes, sir.

Q. Was it published in *The Argus*?

A. Yes, sir. 40

Q. Now state what the Justice told you, so far as it had reference to proceedings before him in which McDermott was concerned ?

A. I think he remarked to us that he had a good case; and then he went on and described the seizure, the taking of this silk mill and tearing the silk from the loom ; that some party named McDonald had a revolver and stood at the gate, and some man claiming to hold a warrant went to the door, and I believe they refused to allow
 10 Bowery, the complainant, to go out at all ; they took these things away, and the complaint was for larceny ; and in the affidavit made by Bowery he mentioned two names, I think, and four persons unknown as the assailing party ; and the Justice said that one of these parties mentioned there as being unknown is the Corporation Attorney, McDermott ; I think Mr. Seide asked him if he was certain about it, and he said, yes, that this Bowery had given him a description of Mr. McDermott, or rather gave him a description of this man who held the warrant
 20 and it corresponded with the description of McDermott ; he said that man who personated the officer was McDermott, that he went there and waved a piece of folded paper or something of that sort and pretended that he had a warrant.

Q. Did the Justice tell you whether or not he had issued warrants for the arrest of these people ?

A. I think he said warrants would be issued ; I am not certain that he said warrants had been ; I think he said they would be.

30

Cross-examined by Mr. McDermott :—

Q. When did you next hear of the case ?

A. In the shape of your card in the *Journal* ; and then I made inquiry, I think, afterwards of Justice Streng.

Q. Were you present during the examination of the complaint in Justice Streng's office ?

A. No ; I think I came in just as the case was being
 40 closed—just as the case had been concluded ; I think you were in there at the time.

Q. Did you ever publish or write a retraction of what you wrote ?

A. I am not certain whether I wrote the retraction or not ; I think that after that examination that you speak of, that a retraction was made ; I am not certain whether I carried the information to the office and the retraction was written there, or whether I wrote it myself.

Q. Did you make any particular inquiry to find out whether the statement of Justice Streng was true or not ?

10

A. Justice Streng had been furnishing us with information for a long time, and we always found him truthful, and never had any occasion to investigate him.

Q. Answer my question ?

A. I think not.

Q. You knew where my office was ?

A. I think I did.

Q. Have you been in my office ?

A. I have recently.

Q. Didn't you ask me to not make a criminal charge 20 in this case ?

A. No ; I said if there was any criminal charge at all it would be against me.

Defendant offers in evidence *The Evening Journal* of June 22, 1880, the article which counsel had read in evidence. It is marked as "Exhibit D 3."

Also offers in evidence in the *Journal* of the 30 19th June, 1880, an article referred to.

ALLAN L. McDERMOTT, the plaintiff, being sworn in his own behalf, testifies as follows :—

I am the plaintiff in this case ; on the date in which the article alleges that a silk factory in this city had been broken into I was in the City of Philadelphia ; I don't 40

know where the silk factory is; I had no knowledge of the parties who went there; no one went there under my direction; I never saw any of the parties named in the warrant until after the warrant had been issued; I never authorized anybody from my office to go there, and my first knowledge of the fact that there had been any trouble at that silk factory or any other place mentioned in this "Mixed-up case," as the article is called, was when I saw the article in the paper; I then wrote to
 10 the proprietors of *The Evening Journal* a letter dated June 18th, 1880, of which I took a press copy, and this which I produce is the press copy.

Plaintiff offers the copy in evidence and reads it.

On the following day there appeared in *The Evening Journal* an article under this caption: "The Mixed-Up Case.—Corporation Attorney McDermott contradicts the statement concerning him in an article yesterday," &c.
 20

Witness reads the article.

I had asked the Evening Journal Association for a retraction through my letter, and dissatisfied with that retraction I issued a summons; on the morning after the summons was issued Mr. Dear came to my office upon some other business wholly unconnected with this publication; I forget what the business was, but as Mr. Dear was
 30 about to leave the office I said, "I have sued your Association;" he said, "Yes? So!" I told him I had sued them because they had published the article upon which I have brought this suit; he asked me what the particulars in the case were; I told him simply then, "I know nothing about the case; I have asked you for a retraction, and inasmuch as you have not deemed it worth your while to give the retraction, I have brought suit; I have no objection to any political articles that may appear in
 40 your paper, nor to any attacks which you may make upon me politically, but inasmuch as my profession is my means

of livelihood I do not propose to be libelled in it by you or any other newspaper;" Mr. Dear then left the office saying, "that is so; it is wrong to publish matters that way;" and on the following evening—I think it was the following evening—no, I am incorrect about that—it was the afternoon of that same day that Mr. Dear was in the office *The Evening Journal* published an article which has been read here.

Q. You are an attorney and counsellor at law in this State and Corporation Attorney of Jersey City? 10

A. I am not a counsellor at law of this State; I am a counsellor at law of the State of New York, an attorney of this State, and Corporation Attorney of Jersey City.

Q. Had there not been other articles in *The Evening Journal* previous to this time published with reference to you?

A. There had.

Mr. Collins objects to the last question and 20 answer as irrelevant.

[The Court.]—Adverse articles in the same paper on the question of malice?

[Mr. Hoffman.]—Yes, sir.

[Mr. Collins.]—Then it should have been part of the affirmative case before he rested, and we 30 object to such questions.

[Mr. Hoffman.]—We propose to show that there had been other publications in this paper against Mr. McDermott—defamatory.

Mr. Collins objects to the question on the ground that it is incompetent, being a part of the plaintiff's affirmative case if at all competent, and also on the general ground that it is not competent to 40

prove previous articles, counsel for the plaintiff having declared them to be defamatory, and "we object to the offer made."

[The Court].—The answer as it has been given may stand.

Defendant prays an exception may be allowed.

10 Whereupon the defendant prays that this his bill of exceptions may be sealed, and it is sealed accordingly.

M. M. KNAPP, *J.* [SEAL.]

Q. Have you those articles here?

A. I have; upon April 10th, 1879, an article appeared—

Interrupted by objection.

The Court overrules that article.

20

[Mr. Hoffman].—It was an attack upon the professional character of this witness, and these articles commence about the time suggested by the witness, and from that time down such articles, such attacks, have been made upon the professional character of this witness, and the article which we propose to offer are partly of the same character—that is, attacks upon the professional character of the witness.

30

[The Court].—I will look at the articles.

Mr. Hoffman shows to the Court an article dated April 10, 1879.

[The Court to the witness].—What part of it refers to you?

[The Witness].—The whole of the article.

40

[Mr. Hoffman].—We offer that article.

[Mr. Collins.]—We object to it for several reasons.

[Mr. Collins to Mr. Hoffman.]—You claim the article to be defamatory, do you, Mr. Hoffman?

[Mr. Hoffman to Mr. Collins.]—I offer that article now, not characterizing it at all for the present.

[Mr. Collins to the Court.]—We had a right to be apprised of all their case when they made their affirmative case to the jury, in order that we might meet it. Where are we to be placed with reference to these articles now? Are we to try the libel in the declaration and then these other articles after the defendant has rested his case? It is a surprise to us. We are not prepared to meet it at this stage of the case, and how can we meet these different articles now? Perhaps we might prove the truth of some of these articles, but we were not apprised of them; I submit further that this article is of too early a date and is a mere criticism upon the fitness of an official appointment. It has no connection, either directly or indirectly, near or remote, with the article in question. But the special point is this: that it was offered distinctly as a defamatory article, and if it be a defamatory article, the cases all show that it cannot be admitted; the reason is that a man would be getting damages twice for the same thing. And another thing, it is only a fair criticism of a newspaper upon a political appointment.

The Court admits the article and allows the defendant an exception.

Whereupon the defendant prays that this, his bill of exceptions may be sealed, and it is sealed accordingly.

M. M. KNAPP, J. [SEAL.]

The plaintiff reads the article.

Q. Turn to the next one; on the following date, April 11, 1879—

[Mr. Collins.]—We make the same objections as to the previous one.

Same ruling and exception.

[The Witness]—The next appeared on the 15th of 10 April; there are two items.

Same objection, ruling and exception.

Plaintiff offers the articles in evidence.

[The Witness]—There are numerous articles of a political nature which I do not desire to introduce; the next article I desire to put in evidence is January 27, 1880, 20 on the editorial page of the paper.

The Court examines the article and excludes it.

[The Witness]—There is nothing more but a series of political articles which I do not desire to introduce.

Cross-examined.

Q. I think you stated you were not a counsellor-at-law 30 of this State?

A. I am not; I am a counsellor of the State of New York.

Q. And you were not when the appointment of Corporation Attorney was made?

A. Certainly not.

Q. You were admitted as an attorney in November, 1877?

A. Yes, sir.

Q. And could not be a counsellor until three years had 40 elapsed?

A. I could not, under the rules of the Court.

Q. And as a matter of legal practice could not act as counsellor-at-law, and are not permitted to argue causes at the bar of the Supreme Court and the Court of Errors and Appeals?

A. By request and the courtesy of the Court, I have acted in both of those Courts.

Q. As a matter of fact, persons not counsellors are not permitted to argue causes at those Courts?

A. If not counsellors-at-law of this or some other State, I suppose not.

Q. Don't you know that the Court did establish a rule that one who was a counsellor of another State, and also an attorney at law of this State would not be afforded the courtesy of speaking here—the case I refer to is that of George Putnam Smith, of New York; when he was admitted as attorney the Court announced the rule as I have stated—are you aware of that rule?

A. I have never had any intimation that there was such a rule, and will state that I was a counsellor of the State of New York, and asking the privilege of appearing in the Supreme Court and in cases in which the city was interested, and I have been allowed that privilege, and have appeared in all the cases for two years.

Q. It was a matter of courtesy by reason of your being a counsel of another State?

A. Certainly.

Q. It was a courtesy of the Court?

A. Certainly.

Q. You were not aware of the rule which I have referred to in Mr. Smith's case?

A. I am not aware that any such rule has been established.

Q. You say you knew nothing of these parties who had the difficulty at the silk factory until after the warrants were issued—did you then know something of them?

A. Mr. Heller and the owner of the silk, Mr. Camp, came to me to defend them in the case before Justice Streng; I went before Justice Streng to defend them in

the criminal case and also in a civil suit which had been commenced in trespass ; the testimony was taken in the civil suit, and there was not one word of testimony taken in the criminal proceedings ; I did defend Mr. Heller and Mr. Camp, I think.

Q. Had they not sought to employ you, in your absence, prior to that time ?

A. I don't know ; I never saw them before.

Q. Don't you know from the business of your office
10 that such was the fact ?

A. No, sir ; I think not ; my employment from them came from the fact that on reading the newspaper article I went to Justice Streng's office and asked him if he had issued a warrant for me ; he said, " No ;" I think I met the parties there for the first time.

Q. Do you know Charles W. McLean ?

A. Yes, sir ; he is a clerk in my office, and has been for two or three years.

Q. Do you know whether or not he did accompany
20 these men to the silk factory ?

A. Of course I do not know.

Q. Do you mean that you don't know because you have no right to rely on information from others, or do you mean you have no information on the subject ?

A. I don't know where he went or what he did ; and he never had any authority from me, and I asked him whether he ever represented a constable there, and he said he never did anything more than to go to the place and demand the goods ; I read this article to him and
30 asked him, and he said he had been engaged in the case ; and I asked him, " Did you go there and represent yourself as a constable ?" and he said " No ; certainly not ;" said I, " Did you use my name ?" he said, " I never used your name ;" and I believe I asked him that question subsequent to the trial of Justice Streng's, and subsequent to my going to Justice Streng's ; I remember asking him at the time the article was lying upon my desk, and I think subsequent to my visit to Justice Streng's, in which I ascertained that whatever he did was perfectly legal ;
40 that the goods belonged to the parties in New York who now have them.

Q. You are or have been an editor yourself, haven't you, of the *Jersey City Herald*?

A. Yes, sir.

Q. And are still?

A. No, sir; and have not been for years.

Q. What is your age?

A. Twenty-seven.

Q. You are a member of the present Legislature, and also of the coming one?

A. Yes, sir.

10

Re-direct examination :—

Q. You never were sued for libel?

A. No, sir; I never published or wrote one.

Re-cross examination :—

Q. Wasn't your conversation with Mr. Dear much longer than you now state? 20

A. I stated the facts as they appeared in his contradiction or retraction; I stated to him that I was engaged that day in taking testimony in Philadelphia upon a suit by John C. Copper against the Mayor and Aldermen of Jersey City; a suit brought upon a bond stolen by Alexander Hamilton some years ago.

Q. The facts which he published in this so-called retraction of the 22d, were communicated by you to him?

A. I should judge that every allegation or statement in there was communicated to him during our conversation, but he does not publish all that I told him; but all that he has published I told him; I also told him that a newspaper had no right to assail the character of any man without inquiry into the truth of the matter published. 30

CASE CLOSED.

WHEREUPON THE SAID JUDGE CHARGED THE JURY AS
FOLLOWS:—

In controversies of this character, gentlemen, there are involved rights which the law holds in peculiar regard. On one side is the right to speak and write freely and publish on all subjects one's sentiments, being responsible for an abuse of that right; and our Constitution provides
10 that no law shall be passed to restrict or abridge the liberty of speech or of the press; and on the other side the law holds in as tender a regard the reputation of its citizens; this cannot be assailed without the law takes cognizance of it at the instance of the injured party to punish. Every man has a right to be secure in his reputation from all unjust attack or aspersion, and while the press, within its province, is free and ought to be so, it goes outside of its province whenever it uses that powerful instrument as an engine to oppress the individual.

20 When it attacks private character it stands on no higher plane than the private defamer who does the same; indeed, if moral responsibility is regarded, the power that it wields is one of the most cogent reasons why care should be exercised in dealing with the private citizen. It is to settle a right of this kind alleged to have been violated that this suit is brought. The plaintiff says that this defendant, a corporation publishing a newspaper with a large circulation, has as against him unlawfully published a libelous article, thereby injuring his reputation in
30 the community where he lives, and where he was entitled to the protection of the law. In cases of this kind the law has placed peculiar power in the hands of the jury. The Constitution, as you have been told, provides that in suits of this character the jurors shall be judges of the law and of the fact. Of course that does not relieve the Court from the responsibility of stating to the jury those legal principles which govern them in deciding causes of this kind. But it is declared to be in practice as a kind of case peculiarly within the province of the jury, and I
40 have no desire to entrench upon your domain. In inves-

tigations of this class, of course, the question that lies at the foundation is whether the article published is a libel; that is the first question to be settled here—whether the publication on which the complaint is made is libelous or not; this is a matter that the jury have a right to determine. If it be not a libel—if it be not defamatory of the defendant, then, of course, this case is ended. If it contains matter injurious to him, reflecting upon the plaintiff in a damaging way; if its natural and probable effect is to expose him to public hatred or suspicion, or ridicule, 10 contempt or disgrace, or to the charge of crime, it is libelous in its character and the defendant would be responsible. Question has been raised in this case as to whether an action would lie against a corporation. With that question the Court alone deals, and it has been ruled already in this case that such an action will lie, and such you should regard as the law. If you conclude that the article in question is of the illegal quality stated, the defendant, although a corporation, should be held liable unless the publication is one of the class usually denom- 20 inated privileged publications.

It is not attempted in this case to justify the truth of the charges that the plaintiff thinks are indicated in this article. The defense rests mainly upon the ground that this is a privileged communication and one that, as the distributors of public news, the defendant had a right to publish; and although it might contain matter damaging to the reputation of the plaintiff, yet they, publishing the same as a truthful report of a judicial proceeding without malice, have in that a defense—and such, gentle- 30 men, is the law respecting such a publication. Privileged communications are such as debates of members of legislative bodies, arguments of counsel in causes in Court, the proceedings in Courts of Justice, the verdicts of juries—although they may reflect in the severest way upon the characters of parties, are privileged. The proceedings in Courts and public judicial tribunals, are not and cannot be made the ground of civil actions. It is to this class also that the reports and publication of judicial proceedings belong. Our Courts are generally open and 40

public places where all may hear who desire to hear, and therefore, ordinarily there can be no just objection to making those proceedings known to others by their utmost publication, the condition of such publication being that the actual proceedings be fairly, impartially and correctly reported. The fair and *bona-fide* statement of the proceedings in a Court of Justice where the proceedings are between parties having their differences considered and adjusted, and this in an open way by

10 their own volition,—such honest, impartial publication should be privileged when no malice is shown to move the publisher; but under the pretence of making such publication, one may not garble or discolor the proceedings by comments and constructions of his own so as to effect the purpose of aspersing the character of those concerned. There are some exceptions to the rule of free publication of judicial proceedings, cases where Courts or Magistrates for purposes relating to public or private concern, restrict such publication, but of these it

20 is not necessary now to speak. I can perceive no good reason why proceedings had between parties before Magistrates and Police Courts are not as well subject to examination and cognizance of the public as proceedings in the other Courts; but in cases of *ex parte* applications before committing magistrates there is just ground for the application of a more guarded rule, and I can conceive of no greater public mischief, than can come from the reports of loose words and unsworn accusations of everyone who may besiege the doors of such offices.

30 Such talk is in no proper sense a proceeding in Court. What is the proceeding in such cases which partakes of the judicial character? A complainant who believes he has cause, may make complaint on oath of crimes or misdemeanors against other citizens, and on such complaint the Justice is bound to issue his precept for the arrest of the accused, and to bail or commit, and this is the whole proceeding,—the complaint under oath and the issuance of the warrant. The accused is not there to be heard; as yet the law holds him to be innocent,

40 and he has no intimation, nor has the public any intima-

tion of any charges against him ; there is no cause, neither parties nor trial, and all beside the complaint—and that which is necessarily incident to it—is, so far as he is concerned, outside of the Court ; and slanderous utterances aside from the legitimate proceedings in the making of the complaint and procuring of the warrant are as much slanders there and libels when published as if they had been uttered on the street or in a drinking saloon. Beside I can find no case where such an *ex parte* proceeding or report of defamatory words there used have ever 10 been justified as a report of judicial proceedings ; on the contrary, numerous dicta are to be found of eminent judges and writers making such proceedings exceptional. This case is no inapt illustration of the impropriety of and mischief arising from such public expositions. Here we have as the publication of a judicial proceeding the loose talk, interpreted by the Justice, of a party not under oath who has come there to make a complaint. Now what is the proceeding ? It is all in this paper which I hold in my hand. 20

What the complainant there said under oath before the Magistrate was a proper part of the proceeding ; receiving that, and filing it and issuing his warrant was the end and the total of all the judicial action that was before him.

Now, what comes out of that ? Why, a story told not under oath, remembered by the Justice and by him retailed to a reporter, that goes into the public print, and is said to be the report of a judicial proceeding ; when you look at the complaint, not a word is said of this 30 plaintiff. When the party whom it is said spoke of the plaintiff comes to sworn before the Magistrate not a word is uttered about the plaintiff ; other parties were named but the plaintiff not. It is said that the Justice made a mistake in his relation of the proceedings to the reporter. If the reporter, instead of being in Court for himself, takes the responsibility of reporting from the statement of the magistrate and others, he must bear the consequences of mistake, and if he draws his information from erroneous sources, those who publish must take the conse- 40 quences of the error.

From what I have already remarked, it would be necessary to say anything further on the impropriety of a magistrate pursuing a course like that indicated by the testimony. The mischievous consequences resulting in this instance ought alone to make it manifest.

If this is not a report of judicial proceedings that took place before the magistrate, a truthful and correct report, then the defense growing out of that which the defendant claims fails. I have said that a party making such
 10 a report has no right to interpolate expressions or constructions of his own. As against the defense in this case, the question is raised whether this publication is not subject to criticism in that regard. It starts with the words, "A mixed-up case—stealing goods from a silk factory—Counsellor McDermott represent a constable;" it is said by counsel that this was not intended to charge McDermott with stealing; perhaps it was not; that is for the jury to determine; they may look for aid on this
 20 point at the interpretation which the defendant puts upon these words in the article published four or five days after.

Another criticism is made against this as not being a report of what took place; that there is an allegation that a warrant was issued for the arrest of the plaintiff, and the proof seems to be that no such warrant had been issued, or as the Justice says contemplated; indeed, so far as the proceedings show, the name of the plaintiff is entirely foreign to them all. If you should find the article
 30 to be libelous, one injuriously affecting the reputation of the plaintiff, and no legal justification be found on the ground stated, then the next question should be what damages should be awarded to the plaintiff for the injuries sustained. It is difficult in cases of this kind where no injury to property results to lay down a rule of damage which can furnish you an exact measure. It is left in a great degree to the sound discretion of the jury under the rule that the plaintiff should be compensated for those natural and probable injuries that result to him from the libelous publication. Where special damages
 40 are alleged—there are none in this case—it is necessary

to show that the averred special injury is incurred. But here the case goes upon the ground that the article is libelous in itself, and in such cases the jury must give such measures of damage as will pecuniarily compensate the party for the injury to his reputation which he may have received from the defamatory publication. Aggravation of damages oftentimes springs out of attending circumstances, and so damages are mitigated by the conduct and action of the parties. Where malice is actually shown to have influenced the defendant in his conduct 10 the jury are warranted, in their judgment and discretion, to punish—to increase their damages and punish the act. Where actual ill-will is not shown, or where its absence is made to appear by circumstances, that is ground for mitigating damages. The law presumes malice in unlawful publication, but there is a difference between that and actual ill-will moving the defendant, and if there is an absence of that it would be a circumstance in mitigation. So also where a party, on being informed of the wrong he has done, readily and promptly, fully retracts, that is 20 always regarded as a ground to mitigate the damages to be found against him. Gentlemen, that is all I need say to you in this case. Determine the question whether the article is libelous or not, and whether the defense offered is a defense or not. If the plaintiff is entitled to recover, then say what is the fair measure of damages under all the circumstances.

Defendant prays an exception to that part of the charge which instructed the jury that the war- 30 rant constituted the whole proceedings, and that any statement of facts before the magistrate not reduced to writing and sworn to, is not a judicial proceeding before him.

Whereupon the defendant prays that this, his bill of exceptions, may be sealed, and it is sealed accordingly.

M. M. KNAPP, *J.* [SEAL.]

Filed Feb. 15, 1881.

BENJ. F. LEE, 40
Clk.

Plaintiff's Exhibits

[Article June 18th, 1880, in *The Evening Journal*.]

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A MIXED-UP CASE.

STEALING GOODS FROM A SILK FACTORY—COUNSELOR M'DERMOTT REPRESENTS A CONSTABLE.

Louis Bowery, proprietor of a silk factory in Griffith street, Jersey City Heights, appeared before Justice Streng, at Hoboken, and narrated a singular and interesting story. He represented that he was in partnership in the silk manufacturing business with a man named Kamp, residing in New York. Owing to a misunderstanding, Bowery determined to sever all connection with his silent partner, so he authorized the latter to remove the goods and material belonging to him. Instead of complying with the request, Bowery alleges that Kamp and four others, among them Allen McDermott, Corporation Attorney for this city, and McDonald, a New Yorker, besieged the place several days ago, and demanded an unconditional surrender and a prompt delivery of the goods and machinery in the establishment. Bowery disputed the right of the men to molest him or make a forcible entrance into the place, but he was rudely thrust aside and cautioned to keep quiet. It is stated that Counselor Allan McDermott represented himself as a constable, and pretended to read a warrant which authorized him to take the goods out of the place. Bowery darted out of the factory to summon the police, but he was confronted at the gate by McDonald, who pointed a revolver at him, and forced a retreat. Then it is alleged that the marauders took a large quantity of silk and some valuable machinery out of the place and made their escape. While the men

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were in the factory they cut and ruined a large quantity of silk belonging to a Mr. Kellerer who has already instituted a civil suit for damages before Justice Streng. The Justice has issued warrants for the arrest of all the parties concerned, including the Counselor, both civilly and criminally.

[Article of April 10th, 1879, in *The Evening Journal*.]

AN IMPROPER APPOINTMENT.

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The three-fifths of the Board of Finance, who did not run away last night, elected Allan McDermott to be Corporation Attorney of the city. Ex-Mayor Traphagen is the present Corporation Attorney. We think this action of the Board was illegal, and improper, and unwise even if it had been legal. We do not deem it illegal because Messrs. Mullins and Taussig stalked out of the meeting when they found they could not fix the slate for the election of Assessors to suit them; for Mr. President Mullins' arbitrary declaration that the Board was adjourned when he had not allowed any member to vote on the question, did not adjourn it, and the three members who remained and transacted business constituted a legal meeting. The city charter provides, that the Corporation Attorney shall hold his office at the pleasure of the Board. But the Board last night did not take the orderly and proper steps. They did not declare any vacancy, as they should have done, before proceeding to elect McDermott. Mr. Traphagen was not, therefore, removed from his office, and he can *certiorari* the action of the Board in appointing McDermott and keep him out. The proceeding of the Board was clearly defective and illegal. But, aside from this, McDermott is not a proper or duly qualified person to hold the office of Corporation Attorney. Of his personal fitness we do not now desire to speak, or of his capacity as a lawyer. These points are quite well understood by the members of the bar, and McDermott is not the sort of man or lawyer, who would be selected by our best lawyers, or

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judges, as a Corporation Attorney. But the point is this: McDermott is not a Counselor and therefore cannot appear in the Supreme Court, or the Court of Errors and Appeals in any case. He would not be allowed to open his mouth in either of these courts, and most of the cases in which the city is interested are tried and decided in these courts. McDermott could not, were he ever so well qualified to attend to the business, serve the city in the places where a Corporation Attorney's services are
10 oftenest and most needed. It may be said that Mr. Abbett, Corporation Counsel, will attend to all that. But that is not the requirement of the law. The city charter (see 55, supplement of March 24, 1873), expressly provides that the Corporation Council shall "*assist* the Corporation Attorney in the trial or argument of any cause in which the city or any of its boards may be a party, etc.," and it also just as expressly directs that the Corporation Attorney shall "prosecute and defend any
20 action, etc." The Corporation Attorney, not the Corporation Counsel, is the "attorney of record" in all these cases, and this McDermott cannot be because he is not a Counselor, and has no more standing in the Supreme Court or Court of Errors than any private citizen who is not a lawyer. His appointment is therefore an improper and unwise one. The Board of Finance went too fast in trying to shove McDermott into the office, which they even forgot to first vacate in order to make room for anybody in Mr. Traphagen's official shoes. Their action is practically null and void, and if it were not it should be
30 rescinded for the reasons we have here stated.

[*Article of April 11th, 1879, in The Evening Journal.*]

Some of the members of the Board of Finance, who were in such haste to shove McDermott into the office of Corporation Attorney, now wish that they had gone a little slower, since they have found out that he is not qualified to appear for the city as counsel in the courts
40 where most of the cases are tried.

[*Articles of April 15, 1879, in The Evening Journal.*]

We would like to wager a big Hudson River shad that Allan L. McDermott will never, as Corporation Attorney, prosecute or defend in any suit in which this city is a party.

In one suit at least which is pending in the Supreme Court, the city will have to hire an extra lawyer—a third hand, as it were. Mr. Abbett is an interested party and, of course, cannot act, and McDermott would not be allowed to talk at all in that Court.

Defendant's Exhibits.

[*Article of June 19th, 1880, in The Evening Journal.*]

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THE "MIXED UP CASE."

Corporation Attorney McDermott contradicts the statements made concerning him in an article yesterday entitled "A Mixed Up Case," and wishes to say that they are false. Justice Streng, of Hoboken, was our authority for the statement made yesterday.

[*Article of June 22, 1880, in The Evening Journal.*]

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THAT "MIXED-UP" CASE.

A MIXED UP JUSTICE—UNFOUNDED CHARGES AGAINST CORPORATION ATTORNEY MCDERMOTT.

On Friday last we published, under the heading of a "Mixed-up Case," an item of news, in which it was stated, on the authority of Justice Streng, that a complaint had been made before him, in which, while the 40

larceny of a quantity of silk was charged on certain parties, Mr. Allan McDermott was also charged with having aided the larceny, and further, with having personated a constable, and that thereupon a warrant was, or was, to be issued for his arrest. Such was the statement of the Justice to our reporter, and in seeing it in the JOURNAL, Mr. McDermott, on Saturday morning, called on Justice Streng, saying that having heard he had issued a warrant for his arrest, he had come to save
 10 him the trouble of serving it. Thereupon the Justice said he had issued no warrant and had made no such statement! This point of veracity we leave Justice Streng to settle with the reporters of the JOURNAL and *Argus*, to both of whom he made a similar statement. In point of fact it appears that there was not the least foundation for the charge against Mr. McDermott, who, on the day on which the seizure took place, was absent in Philadelphia taking testimony in a suit brought there
 20 against this city, on some of the bonds stolen by Hamilton when City Treasurer. As to the complaint of larceny made by Bowery against Camp, out of which the allegations arise, it seems that Bowery was the consignee of a lot of silk sent from New York by Copperthwaite & Co., through Camp as their agent, under the usual agreements as to entry and retaking without legal proceedings. Copperthwaite & Co., apprehensive that the silk was not being duly accounted for, ordered Camp to retake it under the agreement. This he did, but as some
 30 of the silk had been wound on bobbins preparatory to weaving, the bobbins were necessarily taken with the silk, and on this pretext the charge of larceny was made.

STATE OF NEW JERSEY, }
 HUDSON COUNTY. } ss :

[SEAL.] *To any Constable of said County:—*

Whereas it appears to me, by the oath of Louis Bowery, of Jersey City, that on the 12th day of June,
 40 1880, at Jersey City, four hundred spools of the value

of \$10, twelve rolls of the value of \$24, six small rolls of the value of \$20, a lot of yellow silk of the value of \$20, the goods and chattels of said Louis Bowery, were then and there feloniously stolen and carried away out of his possession, and that one Barthold Ehler, one I. H. Camp, one McDonald, one Butterfield, and four other men whose names are not known, did feloniously take and carry away the same, against the peace of the State; whereas, therefore, in the name of the State of New Jersey, to authorize and command you to apprehend the 10 said Ehler, Camp, McDonald, Butterfield and the said four men, if they be found in your bailiwick, and then forthwith bring, or cause to come before me to answer said complaint and be dealt with as the law directs.

Hereof you are not to fail, and for so doing this shall be your warrant.

Given under my hand and seal at Hoboken, County aforesaid, this 14th day of June, 1880.

GUSTAV STRENG,

Justice of the Peace. 20

NEW JERSEY SUPREME COURT.

THE EVENING JOURNAL ASSOCIATION,
Plaintiff in Error,

vs.

ALLAN L. McDERMOTT,
Defendant in Error.

*In Error to
Hudson Circuit.*

*Assignment of 30
Errors.*

Afterwards, that is to say, as yet of the Term of February in the year of our Lord one thousand eight hundred and eighty-one, in the Supreme Court of the State of New Jersey, comes the said The Evening Journal Association, by Collins & Corbin, its attorneys, and say that in the record and proceedings aforesaid, and also in 40

the matters recited and contained in the said bills of exceptions, and also in giving the verdict and judgment aforesaid, there is manifest error in this, to wit:—

That the declaration aforesaid and the matters therein contained are not sufficient in law for the said Allan L. McDermott to have his said action against the said The Evening Journal Association.

There is also error in this, that the Judge of the Circuit Court of the County of Hudson, before whom, &c.,
 10 at and upon the aforesaid trial of the said issues so joined between the parties aforesaid, refused to non-suit the said Allan L. McDermott, although lawfully thereunto moved in behalf of The Evening Journal Association.

There is also error in this that the Judge of the Circuit Court of the County of Hudson, before whom, &c., at and upon the aforesaid trial of the said issue joined between the parties aforesaid, admitted irrelevant, incompetent and illegal evidence, in favor of the said Allan L. McDermott, against rejection in behalf of the said The Evening
 20 Journal Association, namely, that there had been other articles in The Evening Journal, previous to the alleged libel sued on, published with reference to the said Allan L. McDermott, which were adverse to and defamatory of him, and refused to strike out said evidence when thereto moved in behalf of the said The Evening Journal Association.

There is also error in this that the Judge of the Circuit Court of the County of Hudson, before whom, &c., at and upon the aforesaid trial of the said issue joined
 30 between the parties aforesaid, admitted irrelevant, incompetent and illegal evidence in favor of the said Allan L. McDermott, against objection in behalf of the said The Evening Journal Association, namely, the articles published in The Evening Journal on April 10th, 1879, April 11th, 1879, and April 15th, 1879, respectively, as referred to and set out in said bills of exceptions.

There is also error in this, that the Judge of the Circuit Court of the County of Hudson, before whom, &c., at and upon the said trial of the said issue so joined
 40 tween the parties aforesaid, charged the jury between the

said parties as follows:—"In cases of *ex parte* applica-
 "tions before committing magistrates, there is just
 "ground for the application of a more guarded rule, and I
 "can conceive of no greater public mischief than can
 "come from the reports of loose words and unsworn ac-
 "cusations of every one who may besiege the doors of
 "such offices. Such talk is in no proper sense a proceed-
 "ing in court. What is the proceeding in such cases
 "which partakes of the judicial character? A com- 10
 "plainant who believes he has cause, may make com-
 "plaint on oath of crimes or misdemeanors against other
 "citizens, and on such complaint the justice is bound to
 "issue his precept for the arrest of the accused, and to
 "bail or commit, and this is the whole proceeding—the
 "complainant under oath and the issuance of the warrant.
 "* * * * * Now what is the proceeding? It
 "is all in this paper which I hold in my hand. What
 "the complainant there said under oath before the mag-
 "istrate was a proper part of the proceeding; receiving
 "that and filing it and issuing his warrant was the end 20
 "and the total of all the judicial action that was before
 "him."

There is also error in this that by the record aforesaid
 it appears that judgment in the plea aforesaid was given
 for the said Allan L. McDermott against the said The
 Evening Journal Association, when by the law of the
 land judgment in the said plea ought to have been for
 said The Evening Journal Association against the said
 Allan L. McDermott.

And the said The Evening Journal Association prays 30
 that the judgement aforesaid for the errors aforesaid and
 other errors in the said record and proceedings may be
 reversed, annulled, and altogether for nothing holden, and
 that it may be restored all things which it has lost by oc-
 casion of the said judgment.

COLLINS & CORBIN,
Atty's of Plff in Error.

The Supreme Court affirmed the judgment of the Circuit, and defendant brought writ of error to this Court, and filed the same assignments of error, with the following additional assignment, viz :

There is also error in this, that by the record aforesaid it appears that the judgment in the plea aforesaid, recovered in the Circuit Court of the County of Hudson, was upon writ of error affirmed in said Supreme Court, whereas by the law of the land the said judgment in said plea ought to have been reversed in said Supreme Court, and the said The Evening Journal Association by said Court be restored to all things which it had lost by reason of said judgment in said Circuit Court. 10

Plaintiff filed the common joinder in error.

The following is the opinion of the Supreme Court :

NEW JERSEY SUPREME COURT,

NOVEMBER TERM, 1881.

20

ALLAN L. McDERMOTT

v.

THE EVENING JOURNAL ASSOCIATION.

1. An action for libel will lie against a corporation.
2. The publication of a statement made by a justice of what had been said by persons applying to him for a warrant, which statements do not appear in any affidavit nor were made as part of a hearing, are not privileged. 30
3. Separate publications made concerning the plaintiff, which are not themselves actionable, are admissible in an action for libel.
4. If they are actionable, it seems that they are still admissible whenever the question of malice in fact is to be left to the jury. 40

This action was brought against a corporation publishing the *Evening Journal*, a newspaper published in Jersey City, to recover damages resulting from the publication of an alleged libellous article concerning the plaintiff. The record brought up by this writ of error contains a judgment upon a verdict taken at the Hudson Circuit, with certain exceptions sealed at the trial.

Argued at June Term, 1881, before BEASLEY, *Ch. J.*,
10 and J. J. SCUDDER, KNAPP and REED.

G. COLLINS for plff. in error.

A. L. McDERMOTT for deft. in error.

The opinion of the Court was delivered by REED, *J.*

Upon the close of the plaintiff's case at the Circuit, a motion was made that the plaintiff be nonsuit, which motion was overruled. To this refusal an exception is
20 sealed, and upon it error is assigned. The points presented below and again here, upon which the nonsuit was moved, were these: first, that the article published was not libellous; second, that it was the proceedings of a Court and privileged; and third, that a corporation is not responsible in an action for a libellous publication.

As to the first point the article was clearly libellous. It charged that the plaintiff, an attorney-at-law, went with others to a silk factory to search for stolen goods, and
30 while there falsely personated a constable and read a warrant, which, as constable, he pretended to execute. A more disgraceful proceeding could with difficulty be charged, and it needs no statement of the elements of a libel to perceive at once that this article was libellous.

The second point taken is grounded upon the rule that reports of judicial proceedings are privileged.

It is true that fair reports of the proceedings taken in a court, published without material addition or suppression of facts, are entitled to this privilege. The advantage to
40 the public arising from the publicity of such proceedings

is so great that the occasional inconvenience of the citizen must yield to the general good.

Curry *v.* Walter, 1 Bos. & Pul., 525.

Wason *v.* Walter, 38 L. J. Q. B., 34.

The publication now in question purported to be the particulars of a complaint made *ex-parte* before a justice of the peace, for the purpose of obtaining a warrant against the parties who made the search for stolen goods. No warrant was issued, nor any subsequent action taken 10 against the plaintiff.

Whether a judicial account of an *ex-parte* proceeding which is preliminary to an investigation still unfinished is privileged, has been the subject of much judicial discussion and ruling. The weight of authority in the English courts is against the privilege whenever the matter is still pending in any shape. The reason assigned is that such publications tend to a prejudgment of the case and a poisoning of the sources of justice.

Starkie on Libel, pp. 189-191.

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Lord Cockburn, however, in the case, Wason *v.* —, *supra*, said *obiter* that another test might be applied to such publications to determine their character, namely: whether it was an honest report of what had taken place, published simply with a view to the information of the public, and innocent of an intention to do an injury to the reputation of the person affected.

Whenever an *ex-parte* proceeding has terminated, either by a failure to arrest or by a discharge of the defendant, 30 and there is an end of the prosecution, and so no injury can arise from its tendency to prejudge the cause, the publication seems to be privileged.

Lewis *v.* Levy, E. B. E., 37.

The difficulty in the present case exists from the fact that it is impossible to bring the present publication within this principle. It was not a report of even an *ex-parte* proceeding. The only part of the proceeding appearing, namely, the affidavit and warrant, do not even 40

mention the name of the plaintiff. The article was written up from loose statements made by the justice to the reporter of what had previously been said by certain persons in his office, not under oath, and no more a part of any judicial proceeding than is the talk of a crowd around the door of a court-house discussing the merits of a case on trial within.

The third point raised a fundamental objection, as it challenged the right of any person to bring an action of
 10 libel against a corporation. This view is not without considerable judicial support. There was an early impression that inasmuch as malice was an element in every libel, and as it was thought that a corporation was an entity without mind, so no bad mind or malice could be attributed to a corporate body. This was the view taken by Baron Alderson in the case of *Stevens v. The Midland Counties Railway Co.*, 10 Exch., 352, a case decided as late as the year 1854. It was an action for malicious prosecution. The same view was taken by some
 20 of the courts of this country. In the case of *Childs v. The Bank of the State of Missouri*, 17 Mo., 203, decided in 1852, it was held that an action for malicious prosecution would not lie against a corporation, because it was incapable of malice.

In the case of *Owsley v. The Montgomery and West Point R. R. Co.*, 37 Ala., 560, decided in 1861, it was held that while an action for false imprisonment would, an action for malicious prosecution would not, lie against
 30 a corporation. The distinction was drawn between acts creating liability without regard to motive, and conduct which without motive creates no liability. The expressions in the opinions in these cases exhibit the strength of the sentiment against the possibility of holding a corporation responsible in any action in which malice was an element.

I do not think that this view has the countenance of the correct application of legal rules, or is now supported by the weight of authority. The great and increasing
 40 space filled by corporations in our present commercial and industrial life, the fact that they enter into contracts

and become tort-feasors, that they transact business for profit in like manner as natural persons, makes it seem desirable that they should, like natural persons, answer for their acts. An individual who publishes a newspaper and libels another, must respond. Why should not a corporation, with the power conferred by an aggregation of capital and energy, be equally responsible? Certainly, the reasons for discrimination in favor of the latter should be substantial, not technical. I think that there is no reason why there should exist any immunity for corporations for malicious torts. For all torts not malicious it is held by a uniform line of cases, I think without a single exception, that a corporation is responsible.

Add. on Torts, 1117.

Cooley on Torts, 119.

The reason assigned in some cases, as I have already observed, for the exception of malicious torts from the general rule is, that a corporation has no soul or mind. But it is obvious that mind in its legal sense means only the ability to will, to direct, to permit or assent.

A corporation exerts its mind each time it assents to the terms of a contract. It is true that the corporate mind must gain expression in accordance with the method provided by its charter, and must be exercised upon a matter within the range of its corporate authority. It is equally true that it must act through the intervention of agents; but if the agent's act is induced by a direction given by the corporate will, either by a direct order to do the act or an order to do some other act which comprises in its execution the doing of the act, then the corporation is answerable in the same manner that any other principal under like conditions is responsible for the acts of his servant.

The corporation is considered a principal, and its responsibility for the torts of its servant is the responsibility imposed upon every master for similar acts. The line dividing the class of torts which does, from the class which does not, burden the principal with a responsibility for their results, is drawn by Judge Cooley in his work

on Torts (p. 120), and by Mr. Justice Depue in his opinion in the case of *Brokaw v. The N. J. R. R. and Trans. Co.*, 3 Vroom, 228.

The only matter which concerns us at present, is the fact that this responsibility of corporations to answer for the torts of their servants does exist. In view of such responsibility, if we consider the law of libel in one of its phases at least, it is impossible to suggest a reason why a corporation as principal should not answer for the publi-
 10 cation of a libel by its agent.

I allude to the class of libels in which the existence of malice is legally implied.

This class includes all such injurious publications as are not privileged, and for which no excuse or justification can be show by the defendant. The term malice, as applied to this class of libels, means simply an intent to do the wrongful act without legal excuse. No state of mind need be shown on the trial, except a mind which directly or indirectly ordered the act which is injurious,
 20 and this is the ground upon which the liability of a corporation to answer for other torts rests.

Upon the principle of *respondeat superior*, an individual master is responsible for the libellous acts of his servant committed while acting in the line of his employment, although the master was entirely ignorant in fact of his servant's act. Here the law imputes to the principal the intent of the agent to do the act, and from the intent raises the implication of malice. In this instance the liability of the master seems to arise from his negligence
 30 in the selection of his servant, and motive has no influence upon the presence or absence of responsibility. Admitting then the responsibility of corporations for the acts of non-feasance and misfeasance of their servants, it seems impossible to discriminate between this character of libellous publication, where malice is a legal inference, and any other tort. This conclusion has the sanction of judicial recognition in the case of *Whitefield v. S. E. Railway Co.*, 1 E. B. E., 115. As already appears, the libel, for damages for the publication of which the present action is brought,
 40 is within this class of libels—there being no legal justifica-

tion; and malice is legally implied from the fact of its publication.

I am convinced, however, that the responsibility of corporations is not limited to a publication of this class of libels. If it were essential to prove express malice I do not see why a corporation cannot be fixed with a malicious intent in the same manner as any other principal.

If the corporation has the mind to order a wrongful act so as to incur responsibility, I think it is possible for it to have knowledge that the act is illegal, and that will 10 constitute malice.

In the case of *Whitefield vs. S. E. Railway Company*, *supra* Lord Campbell expressed a strong conviction that express malice could be proven against a corporation.

In a later case the question directly arose in an action against a corporation for wrongfully and maliciously placing and running their stages so as to obstruct and interfere with those of the plaintiff. It was held that the action was well laid against the company.

Green v. The London General Omnibus Co., 20
7 C. B. N. S., 290.

But the question whether malice can be proven against a corporation in this State is at rest in this Court since the decision in the case of *Vance v. The Erie R. R. Co.* 3 Vroom, 334.

It was an action for malicious prosecution; an action in which the showing of express malice is part of the plaintiff's case. It was held that the action would lie. 30

I do not perceive that there was error in the refusal of the Court to nonsuit.

Another error assigned is that the trial judge admitted other articles published previously to the one in suit, which criticised unfavorably the appointment of the plaintiff to the office of Corporation Attorney of Jersey City. It is contended that the admission of these articles was erroneous, under a rule enunciated by many courts that proof of distinct slanders and libels cannot be proven, because it is impossible to prevent a jury from 40

assessing damages not only for the one in suit but for all proven.

Frazer *v.* McCluskey, 60 N. Y., 337.

Bodwell *v.* Swan, 3 Pick., 376.

Leonard *v.* Pope, 27 Mich., 145.

The rule, as stated, has not received the uniform approval of the courts of this country.

State *v.* Riggs, 39 Conn., 498.

Stearns *v.* Cox, 17 Ohio, 590.

- 10 In England there was for a time a tendency toward the exclusion of all separate libels in all cases.

Defrees *v.* Davis, 7 C. & P., 112.

But whenever the presence of express malice is involved in the cause, the rule is now stated to be that separate libels are provable as showing the malicious motive of the defendant.

Pearson *v.* Lemaitre, 5 M. & G., 700.

Barrett *v.* Long, 3 H. L. C., 395.

- 20 The jury should be told that they must not give damages for such separate libels or slanders because they might be the subject matter of a separate action.

But the omission of the judge to give such a caution is not misdirection.

Darby *v.* Ouseley, 1 H. & N., p. 1.

- Mr. Odgers, in his concise digest of the law of libel and slander, states the rule in the English courts now to be this: Whenever the intention of the defendant is equivocal, whenever the question of malice or *bona fides* is properly about to be left to the jury, evidence of any previous or subsequent libel is admissible.
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But it is perceived that the rule which excludes in any event rests upon the ground that they may be the subjects of separate actions. Whenever, therefore, the separate publications are not actionable the rule is inoperative.

This was the character of the separate articles admitted in this case. They contained observations upon an appointment to a public office, which observations were within the limit of legitimate criticism.

- 40 I find no error in the record, and the judgment is affirmed with costs.