the Act of 1905 by themselves, I should find my opinion opposed to the respondents' view. Searching the enactments further, I find the distinction between appeal and reference most carefully preserved throughout. "Reference" is always used as a primary independent act on the part of the Minister, whether of a revisory nature or purely initiatory. Instances of the latter class are found in the Act of 1908, secs. 4, 39 and 40. So that to identify "appeal" with "reference" for one purpose, would necessitate a dual use of the word "reference" itself in the legislation, which adds to the improbability.

The passage in sec. 24 of the Act of 1912 by which sec. 17 of the Act of 1884 is amended, was referred to by Mr. *Owen* as supporting his view. I can only say that as I read that amendment it tells in favour of the appellant. And in the same section an amendment to sec. 20 of the Act of 1884 is made by which a most careful and unmistakable distinction is maintained between "appeal" and "reference" in relation to revisory proceedings. The distinction is so strongly established that even in the *Pastures Protection Act* 1902 (No. 111), sec. 67, it is preserved and acted upon. See also the *Pastures Protection (Amendment) Act* 1906 (No. 20), sec. 37.

For these reasons I am of opinion the appeal should succeed, and the questions be answered as suggested by my brother *Barton*.

GAVAN DUFFY J. I concur.

RICH J. I concur.

Appeals allowed. Questions answered as stated in the judgment of Barton A.C.J. Orders appealed from discharged except as to costs. Appellant to pay the costs of the appeals.

Solicitor, for the appellant, *J. V. Tillett*, Crown Solicitor for New South Wales.

Solicitor, for the respondent Whitfeld, *Borthwick & Butler, Inverell.*

B. L.

[HIGH COURT OF AUSTRALIA.]

NORTON . . . . . APPELLANT;
DEFENDANT,

AND

HOARE . . . . . RESPONDENT.
PLAINTIFF,

[No. 1.]

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Sept.* 17, 18; *Oct.* 14.

Barton A.C.J., Isaacs, Gavan Duffy, Powers and Rich JJ.

Defamation—Libel—Defence—Privileged occasion—Injurious statement published in defence of property—Reply in newspaper to attack made in newspaper.

Practice—High Court—Appeal from Supreme Court of State—Interlocutory judgment—Refusal of leave to amend pleadings—Judiciary Act 1903-1912 (*No.* 6 *of* 1903—*No.* 31 *of* 1912), *sec.* 35.

It is a good defence to an action for libel that the defendant published the words complained of *bonâ fide* and without malice in reasonable and necessary defence of his property against injurious statements made by the plaintiff concerning that property.

Therefore, where an action for libel was brought by a journalist against the owner of a newspaper in respect of an article published in that newspaper,

Held, that the defendant was entitled to plead as a defence that the plaintiff published in another newspaper an article attacking and insulting the defendant and attacking his newspaper, whereby the defendant was brought or was likely to be brought into public hatred and contempt, and had suffered or was likely to suffer damage both personally and also in respect of his property or interest in his newspaper; and that the defendant published the words complained of as part of an article in reply to the article published by the plaintiff and *bonâ fide* for the purpose of vindicating his character against the plaintiff's attack, and in reasonable and necessary defence of himself and his property or interest in his newspaper without any malice towards the plaintiff.

A refusal by a Judge to grant leave to amend pleadings is an order from which an appeal lies, by leave, to the High Court under sec. 35 of the *Judiciary Act*.

Decision of the Supreme Court of Victoria (*Hodges* J.) reversed.

APPEAL from the Supreme Court of Victoria.

The plaintiff, Benjamin Hoare, brought an action in the Supreme Court against the defendant, John Norton, for libel in respect of certain words contained in an article published in the defendant's newspaper *Truth*, on 1st February 1913. The defendant by his defence alleged in paragraph 6 that prior to that date he had published a series of articles in *Truth*. The defence then contained the following paragraphs:—

"7. The plaintiff wrote and published or caused to be published an article in *The Tribune* newspaper of 25th January 1913, under the heading 'Under the Limelight: With the Genial Alchemist,' violently, falsely and maliciously attacking and insulting the defendant, his said series of articles and his newspaper *Truth*, whereby the defendant was brought into public hatred and contempt.

"8. The said newspaper, *The Tribune*, has a large circulation in the State of Victoria, and also in the other States of the Commonwealth of Australia.

"9 The defendant published the words complained of as part of an article or articles in reply to the said article written and published by the plaintiff as aforesaid, and *bonâ fide* for the purpose of vindicating his character against the plaintiff's attack and of informing the public on matters they were concerned to know and in order to prevent the charges made by the plaintiff from operating to the prejudice of the defendant and his said newspaper *Truth* and in reasonable and necessary self-defence without any malice towards the plaintiff."

On the application of the plaintiff, *Madden* C.J. ordered the defence to be amended by striking out paragraph 6, by striking out of paragraph 7 the words "his said series of articles and his newspaper *Truth*," and by striking out of paragraph 9 the words "and of informing the public on matters they were concerned to know," and the words "and his said newspaper *Truth*."

The defendant subsequently applied by summons for liberty to amend paragraphs 7 and 9 of his defence so as to read as follows:—

"7. The plaintiff wrote and published or caused to be published an article in *The Tribune* newspaper on 25th January

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1913 under the heading 'Under the Limelight: With the Genial Alchemist' violently, falsely and maliciously (*a*) attacking and insulting the defendant, and (*b*) attacking his newspaper *Truth and certain articles written by him in such newspaper*, whereby the defendant was brought or was likely to be brought into public hatred and contempt and suffered or was likely to suffer damage both personally and also in respect of his property or interest in the said newspaper *Truth*."

"9. The defendant published the words complained of as part of an article or articles in reply to the said article written and published by the plaintiff as aforesaid and *bonâ fide* for the purpose of vindicating his character against the plaintiff's attack and in order to prevent the charges made by the plaintiff from operating to the prejudice of the defendant and in reasonable and necessary defence of himself and his property or interest in the said newspaper *Truth* without any malice towards the plaintiff."

The summons was heard by *Hodges* J., who, after consulting with *Madden* C.J., dismissed it, stating that the matter proposed to be added by the amendment was practically the same as that which *Madden* C.J. had already ordered to be struck out. His Honor also refused leave to appeal from his decision to the Full Court.

From this decision the defendant now, by leave of the High Court, appealed to the High Court.

McArthur K.C. (with him *S. R. Lewis*), for the appellant.

H. I. Cohen, for the respondent, moved that the order granting leave to appeal should be rescinded. The refusal of leave to amend the pleadings was not a judgment, decree or order. It was an appeal to the discretion of the Judge, and he made no order. This is not a case in which leave to appeal should have been granted. When leave was granted this Court was not informed that leave to appeal had been refused by the Judge. See sec. 35 of the *Judiciary Act*. It was not shown to this Court that substantial injustice would be done by allowing the decision to stand: *Perry* v. *Smith* (1).

(1) 27 V.L.R., 66; 23 A.L.T., 14.

McArthur K.C. There is nothing else that this can be but a judgment, decree or order. [He was stopped.]

BARTON A.C.J. Speaking for myself, this purports to be an order, and I do not know why we should not take it to be one. The other points we overrule.

ISAACS, GAVAN DUFFY, POWERS and RICH JJ. concurred.

McArthur K.C. The defence that the words complained of were published as a reply to an attack on the appellant's property is open to him. The defence is analogous to that of self-defence. It is a branch of the defence of privilege raised by a statement made in a matter in which the defendant is interested to persons who also have an interest in that matter: *Odgers on Libel and Slander*, 5th ed., pp. 249, 291; *Laughton* v. *Bishop of Sodor and Man* (1); *Spencer Bower on Actionable Defamation*, p. 134; *Fraser on Libel and Slander*, 4th ed., p. 155; *Blackham* v. *Pugh* (2); *Baker* v. *Carrick* (3); *Kœnig* v. *Ritchie* (4).

Cohen. There is a distinction drawn between an attack on a man's character and an attack on his property. Where his character is attacked he may retort, because the public has an interest in his character; but they have no interest in his property, or their interest is not sufficient to justify a counter-attack. Self-defence is only one phase of the defence of qualified privilege, and arises only when the circumstances bring the case within the definition of a privileged occasion. See *Halsbury's Laws of England*, vol. XVIII., p. 686. The person to whom a communication in self-defence is made must have a common interest in the subject matter with the person who makes the communication: *Force* v. *Warren* (5); *Laughton* v. *Bishop of Sodor and Man* (6). The extent of the publication determines whether the occasion is privileged or not. Another reason why a distinction should be drawn between attacks on a man's character and attacks on his property, is that in the former case no compensation in damages can be made, and in the latter the law

(1) L.R. 4 P.C., 495.
(2) 2 C.B., 611, at p. 620, 626.
(3) (1894) 1 Q.B., 838.
(4) 3 F. & F., 413.
(5) 15 C.B.N.S., 806.
(6) L.R. 4 P.C., 495, at p. 504.

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can give the man the precise damages which he has sustained. [He also referred to *Australian Newspaper Co. Ltd.* v. *Bennett* (1); *Spencer Bower on Actionable Defamation*, p. 122; *Odgers on Libel and Slander*, 5th ed., p. 298; *O'Donoghue* v. *Hussey* (2).]

[RICH J. referred to *Kerr on Injunctions*, 4th ed., p. 439; *Dicks* v. *Brooks* (3).]

[BARTON A.C.J. referred to *Macintosh* v. *Dun* (4).]

McArthur K.C. was not called on to reply except as to costs.

Cur. adv. vult.

Oct. 14.

BARTON A.C.J. read the following judgment:—This is an appeal by the defendant from an order of *Hodges* J. refusing leave to make certain amendments in his defence to an action for libel. The publication sued on was an article in the appellant's newspaper *Truth*, published on 1st January last. In his defence the appellant pleaded that the plaintiff (now respondent) had on 25th January published in a newspaper called *The Tribune* an article "violently, falsely and maliciously attacking and insulting the defendant *his said series of articles and his said newspaper Truth*," and that the appellant published the words complained of as part of an article or articles in reply to the plaintiff's article of 25th January "and *bonâ fide* for the purpose of vindicating his character against the plaintiff's attack *and of informing the public on matters they were concerned to know* and in order to prevent the charges made by the plaintiff from operating to the prejudice of the defendant *and his said newspaper Truth* and in reasonable and necessary *self-defence* without any malice towards the plaintiff."

On an application in Chambers *Madden* C.J. ordered the amendment of the defence by the striking out of the following words: —(*a*) "His said series of articles and his said newspaper *Truth*;" (*b*) "and of informing the public on matters they were concerned to know"; (*c*) "and his said newspaper *Truth*."

We are not in possession of his Honor's reasons for ordering these amendments; but since this portion of the defence as it came before him was apparently limited to pleading that the

(1) (1894) A.C., 284.
(2) I.R. 5 C.L., 124.
(3) 15 Ch. D., 22, at p. 40.
(4) (1908) A.C., 390.

appellant's article had been published in protection of his own reputation, his Honor probably considered the words so dealt with to be irrelevant to that purpose. The appellant on 14th August asked this Court for leave to appeal from the order of the learned Chief Justice. This Court, however, intimated that it did not seem to it that the pleading as originally drawn did clearly raise the question of the protection of the appellant's proprietary interest in his newspaper, and the application for leave to appeal was not pressed, it having been further intimated by this Court that as the appellant's counsel avowedly desired to raise that additional defence, it was open to him to apply to a Judge of the Supreme Court to grant amendments specifically raising it.

The appellant then applied to *Hodges* J. in Chambers on 29th August for leave to amend the defence. He did not ask to have the words which the learned Chief Justice had struck out restored, but he sought the following amendments:—(1) The insertion after the words "attacking and insulting the defendant" of the words "*and attacking his newspaper Truth and certain articles written by him in such newspaper*," adding that the defendant thereby "*suffered or was likely to suffer damage both personally and also in respect of his property or interest in the said newspaper Truth*"; (2) the alteration of the words "self-defence" into "*defence*," and the insertion thereafter of the words "*of himself and his property or interest in the said newspaper Truth*"—retaining the remaining words "without any malice towards the plaintiff."

After hearing argument, his Honor consulted the learned Chief Justice, who expressed the opinion that the amendments proposed by the appellant were substantially identical with the matters which the learned Chief Justice had struck out on 30th June. Adopting that view, *Hodges* J. dismissed the summons with costs.

I think the dismissal was made under a misapprehension. The original order of *Madden* C.J. was made, and rightly, if, speaking with great respect, I may say so, upon a state of the pleadings in which the necessary protection of the appellant's proprietary interest, as a defence in addition to that of the necessary protection of his character, was either not raised at all, or

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was at the best obscurely and ambiguously raised. The words used were quite open, and indeed more open, to the construction that they were in unnecessary or irrelevant amplification of the defence which, unless the amendments now asked for are allowed, will now stand alone. But the amendments tendered before *Hodges* J. on 29th August would, if allowed, have raised the additional defence clearly and specifically.

If, then, such a defence may be well pleaded as a matter of law, there is no reason why even at this stage the appellant should not be allowed to raise it. Of course, it will fail if upon the trial the plaintiff shows that the article upon which the defendant is sued exceeds legitimate bounds in the vindication either of character or proprietary interest. That is a matter of evidence, even in cases where a jury may find such evidence in the publication sued upon. On that question we cannot pronounce an opinion in this appeal.

Counsel for the appellant admitted that they could not find a case quite in point in support of the validity in law of the defence which they wished to add, but they contended that it rested on a sound principle. They adopted as their own a statement in the recent text-book of Mr. *Spencer Bower* K.C., at p. 134, in which the learned author places the following defences in the category of "defeasible immunity," which corresponds with the "qualified privilege" of other writers, namely: "Where the defendant published the defamatory matter in assertion or defence of his, or his employer's or principal's or client's property, rights, or interests against any infringement or demand or claim by the plaintiff, or in defence of his, or his employer's, principal's, or client's reputation or character against any charge, imputation, or attack made by the plaintiff," &c. Counsel contended that it was open to the appellant to plead that the publication sued on was in defence not only of the appellant's character, but of his proprietary interest, against an attack upon his character and an infringement of that interest, both being contained in the respondent's article in reply to which the alleged libel was published. It may be questioned whether the learned author used the word "infringement" in the sense which Mr. *McArthur* attributed to it. However that may be,

counsel urged that to the extent of reasonable necessity for its purpose, every published statement made with the object of fairly protecting some interest of the writer is the subject of qualified privilege. He cited the case of *Blackham* v. *Pugh* (1) (approved in *Baker* v. *Carrick* (2)), in which *Tindal* C.J. said (3):—"In any point of view, this case appears to me to fall within the range of that principle by which a communication made, by a person immediately concerned in interest, in the subject matter to which it relates, for the purpose of protecting his own interest, in the full belief that the communication is true, and without any malicious motive, is held to be excused from responsibility in an action for a libel." In the same case *Erle* J. said (4):—"The defendant contends that he is within that class of the cases where the presumption of malice is rebutted by the occasion, which is grounded on consideration of the private interest of the party publishing: and I think that he is, because he believed, with reasonable cause, that the communication was required in prudence to protect his rights." In *Coward* v. *Wellington* (5) *Littledale* J. said:—"If a man *bonâ fide* writes a letter in his own defence, and for the defence and protection of his interests and rights, and is not actuated by any malice, that letter is privileged, although it may impute dishonesty to another; but in such cases, malice may either be proved by the letter itself, or by other evidence." A leading case on this subject, also cited, is *Laughton* v. *Bishop of Sodor and Man* (6); but it does not, nor did any other case cited, deal with the position which arises when the attack repelled by the publication complained of not merely asperses the character of the defendant, but involves injury or probable injury to his property, as, for instance, a newspaper. It may be true that a newspaper cannot be libelled in the ordinary sense; but false statements maliciously made, that is, made intentionally and without just cause or excuse, "where they are calculated in the ordinary course of things to produce, and where they do produce, actual damage" to the plaintiff personally, or to his business

(1) 2 C.B., 611.
(2) (1894) 1 Q.B., 838.
(3) 2 C.B., 611, at p. 620.
(4) 2 C.B., 611, at p. 625.
(5) 7 C. & P., 531, at p. 536.
(6) L.R. 4 P.C., 495.

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give him a cause of action on the case (*Ratcliffe* v. *Evans* (1), *per Bowen* L.J.). Then, is not the owner of a business, such as a newspaper, entitled to repel at once a false and malicious attack upon it, even where actual damage has not yet been done, provided that the attack is in the ordinary course of things calculated to produce that result? And, if so, is there any difference where the thing attacked is correctly described in his pleading as his proprietary interest in a newspaper? This I take to be the real question in this case. It comes before us purely as one of principle; for there is no authority in direct support of the appellant's argument, and certainly there is none the other way, either. True, it is not strictly within the principle laid down as to qualified privilege by *Erle* C.J. in the passage so often cited from *Whiteley* v. *Adams* (2). But neither is the protection which the law allows to the honest repulse by defamatory matter, believed to be true, of a public attack on a defendant's character. That, I think, stands on the same ground as the reasonably necessary return of physical blows in self-defence against aggression, and the degree of protection given is limited in a closely analogous way. But property also may be reasonably defended against forcible attack, nor is the response in either case confined within the narrowest limits of necessity. In this view the matter rests upon as sound a ground as the right of a defendant to repel by counter-publication a libellous attack upon his own character. In such cases there is no question of community of interest, or of corresponding interest, as in other cases of privilege. The defendant is allowed to defend himself in the same field in which the plaintiff has assailed him—if the attack is through the press, then again the press may be used in answer: See *Laughton* v. *Bishop of Sodor and Man* (3). The aggressor cannot, as Mr. *Odgers* puts it (5th ed., at p. 292), "subsequently come to the Court as plaintiff, to complain that he has had the worst of the fray." But in such cases the defendant must see to it that his retort, if vigorous, is fair; that is, that it does not go beyond the occasion.

It is not to the purpose at this stage to question whether the

(1) (1892) 2 Q.B., 524, at p. 527. (2) 15 C.B.N.S., 392, at p. 418.
(3) L.R. 4 P.C., 495, at p. 504.

attack is of the character which the appellant assigns to it in his pleadings, for that can only appear on the trial; nor whether his retort exceeds the limit of defence. Whether or not the occasion gives the privilege is a question of law for the Judge; but whether the party has fairly and properly conducted himself in the exercise of it, is for the jury: *Per* Lord *Campbell* C.J. in *Cook* v. *Wildes* (1). The appellant pleads such a defence at an obvious risk, not only as to the character of the attack, but as to that of his reply.

With some hesitation I think the principle contended for is within the reasons of policy upon which the law protects a publication in fair answer to an attack upon character.

I am therefore of opinion that the appeal must be allowed.

The judgment of ISAACS, GAVAN DUFFY and RICH JJ. was read by

ISAACS J. In this case it is extremely important to point out the precise question the Court has to determine.

It is whether the facts, if existing as alleged by the defendant in the action—the appellant here—give rise to what the law terms "a privileged occasion."

We have not to decide whether the defendant's allegations are true; we have not to say whether the plaintiff did write the alleged article in the *Tribune* of 25th January 1913, nor whether that article attacked the defendant's newspaper *Truth*, nor whether in consequence of any such attack the defendant did in fact suffer or was likely to suffer damage, nor whether the defendant's purpose in writing the article complained of in the action was *bonâ fide* to protect his property, or was in reasonable and necessary defence of his property or interest in his newspaper. All these matters are for the determination of the Court and jury at the trial. And, among other things, therefore, it is no part of our duty to consider whether the article upon which the defendant is sued was "a privileged communication."

We have simply to consider, on the assumption that all the defendant's allegations are true, whether the "occasion" was a privileged one—that is, whether it was one which entitled him to

(1) 24 L.J.Q.B., 367.

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defend himself by writing his own article. This is a pure question of law.

The case was argued on both sides with great clearness and force, and it was strenuously contended by learned counsel for the plaintiff that the law did not recognize the occasion as privileged, on the short ground that no man has a right to attack another man's character merely to repel an attack upon his own property.

The proposition was pressed that you cannot use physical force against a man merely because he is attacking your property—the reason given being that the person is superior to property. Therefore, it was urged, that, as the reputation is an inseparable adjunct of the person, it was equally sacred from injury in defence of mere disparagement of property.

And it was further urged that the cases where the defamatory communications were held privileged, though in defence of property, were limited to cases where the person making and the person receiving the communication had a common interest in the subject matter of it.

Now, in the first place, these cases are clearly inconsistent with the first proposition relied on; and, next, the law as to the limits of the right to protect one's interests by means of written or oral communication has been laid down in terms too broad to admit of the suggested limitation. In *Macintosh* v. *Dun* (1) Lord *Macnaghten*, for the Judicial Committee, quoted from *Toogood* v. *Spyring* (2) the classical passage in which *Parke* B. refers to the qualified privilege of a person to make defamatory statements "in the conduct of his own affairs, in matters where his interest is concerned." Then, using his own words, the learned Lord refers to the communication being "made in the legitimate defence of a person's own interest." It was contended before us that the word "interest" did not include an interest in property, but referred solely to personal character or reputation. There is no such limitation suggested in any of the cases. On the contrary, several of the standard decisions would be meaningless if the word were so limited, as, for

(1) (1908) A.C., 390, at pp. 398, 399. (2) 1 Cr. M. & R., 181, at p. 193.

instance, *Blackham* v. *Pugh* (1); *Somerville* v. *Hawkins* (2). It would be tedious to review the long list of similar references.

As to common interest, that is not a test, but an instance. The test is whether the person making, and the person receiving, the communication have a *corresponding*—not a common—interest in the subject matter. This is the rule laid down and emphasized in *Hunt* v. *Great Northern Railway Co.* (3). The interest which the Court of Appeal held sufficient to protect the defendants who made the statement complained of, was an interest in their business, to protect it from damage, whereas the interest of the persons to whom it was made was the interest of their employment in the defendants' service. The respective interests were not common but reciprocal, and therefore corresponding.

Having regard to the wide terms in which the rule has always been laid down, and to the principle on which the protection is founded—see *Macintosh* v. *Dun* (4),—it appears to us of necessity to answer the objections so earnestly made by Mr. *Cohen*. It is, however, a fact that neither the industry of counsel on both sides, nor the knowledge of the Court, has been able to indicate a precedent precisely in point. But we cannot entertain any doubt that the principle of the plea is correct.

It is law as old as the time of Henry VII. that a man may justify an assault and battery on another in defence of his dog, of the possession of which the other was endeavouring to deprive him (*Rastell's Entries*, p. 611 (b), sec. 10).

In Charles II.'s reign the limitation of this right was laid down in the case of *Wright* v. *Ramscot* (5). That was an action for stabbing the plaintiff's mastiff so that it died. The defendant pleaded that the mastiff attacked and bit the dog of the defendant's mistress, and therefore the defendant killed the mastiff that it might not do further mischief. Saunders, counsel for the plaintiff, demurred. He admitted that on the case in *Rastell's Entries* the act might be justified, yet the plea must state that the defendant could not otherwise part or take off the mastiff from worrying the other dog; and, added counsel, if he had said so, that would have altered the case, and he might have justified

(1) 2 C.B., 611.
(2) 10 C.B., 583.
(3) (1891) 2 Q.B., 189.
(4) (1908) A.C., 390, at p. 399.
(5) 1 Saund., 84.

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the beating of the mastiff to preserve his dog, but not the killing of him unless it could not otherwise be prevented. The Court agreed with him, and judgment was given for the plaintiff.

These cases and others, such as *Janson* v. *Brown* (1) and notably *Blades* v. *Higgs* (2), show that in defence of property an assault on the person or the property of another may be justified, if necessary for the protection of the defendant's property. And see *Halsbury's Laws of England*, Criminal Law, vol. IX., p. 609, sec. 1231. Though couched in somewhat different terms, the rule is substantially based on the same fundamental considerations as that with regard to privileged communications formulated in *Toogood* v. *Spyring* (3), which, as *Parke* B. says (4), must be "fairly warranted by any reasonable occasion or exigency," and, of course, honestly made, and these facts must, by analogy to *Wright* v. *Ramscot* (5), appear in the plea.

It would be a severe reflection on the good sense of English common law if the ordinary right of self-defence were subject to such an exception as is suggested. Incalculably more harm may be done to a person by a false statement, printed and circulated by the thousand, concerning a man's business or other property, than by an attempt to physically injure it. If the latter species of wrongdoing may be intercepted and prevented by appropriate means, why not the more serious attempt? And it may be that the best, or even the only efficacious, means of averting injury is to warn the persons to whom the first injurious statement is made, of the character or the untrustworthiness of the aggressor.

It may be that the material loss occasioned by a slanderous disparagement of a person's property, unless counteracted by disclosure of the baseness of its author, might be irreparable, either because impossible of calculation or because the author's means were insufficient. If that disclosure is a reasonable way to avert the threatened danger, and if the ordinary recognized conditions of privileged communication exist—for *Jenoure* v. *Delmege* (6) decides that no distinction can be drawn between one class of privileged communications and another—then, in our opinion,

(1) 1 Camp., 41.
(2) 10 C.B.N.S., 713; affirmed 11 H.L.C., 621.
(3) 1 Cr. M. & R., 181.
(4) 1 Cr. M. & R., 181, at p. 193.
(5) 1 Saund., 84.
(6) (1891) A.C., 73, at p. 78.

the statement is privileged. There is less difficulty in perceiving this, when the true nature of the wrong done by an unwarranted attack in writing, or orally, upon another man's property is recognized. It is not, strictly speaking, defamation at all. Technically, it is true that you cannot defend your property simply because another has made a defamatory statement about you, for that means it is yourself, and not your property, that has been libelled. It was for that reason, as the pleadings then stood, it was by this Court considered that the order of *Madden* C.J. refusing amendment was right, and that leave to appeal therefrom should not be granted. A verbal attack, whether written or oral, on your property falls, strictly speaking, under the head, not of defamation, but of injurious disparagement of property, or malicious falsehood producing damage.

The distinction was indicated in very clear terms as long ago as 1836 by *Tindal* C.J. in *Malachy* v. *Soper* (1). He pointed out, on the authority of many previous cases going back to James I., that "an action for slander of title is not properly an action for words spoken, or for libel written and published, but an action on the case for special damage sustained by reason of the speaking or publication of the slander of the plaintiff's title." "This action," says the learned Chief Justice, "is ranged under that division of actions in the Digests, and other writers on the text law, and such we feel bound to hold it to remain at the present day," Slander of title applies not only to realty, but also to chattels (*cf. Blades* v. *Higgs* (2)); and being an action on the case—that is, brought to recover damages for loss arising consequentially from the acts complained of (see *Day* v. *Edwards* (3))—the considerations applicable to it are, according to recognized principles, equally applicable to disparagement of goods though the absolute right of property be not challenged.

This conclusion, though inevitably resulting from established doctrines, has from time to time required the efforts of the Courts to prevent its obscuration, and to preserve the distinction that delimits libel and slander from injurious disparagement of property.

(1) 3 Bing. N.C., 371, at p. 383. (2) 10 C.B.N.S., 713, at p. 721.
(3) 5 T.R., 648.

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In *Ratcliffe* v. *Evans* (1) *Bowen* L.J., in delivering the judgment of Lord *Esher* M.R., *Fry* L.J. and himself, found it necessary to advert to the difference between the two classes of wrongs. An action for a false and malicious publication about the trade and manufactures of the plaintiff, said the Lord Justice (2), "is not one of libel or of slander, but an action on the case for damage wilfully and intentionally done without just occasion or excuse, analogous to an action for slander of title. To support it, actual damage must be shown." Later (3) he refers to "an action like the present, brought for a malicious falsehood intentionally published in a newspaper about the plaintiff's business—a falsehood which is not actionable as a personal libel, and which is not defamatory in itself." On a subsequent page (4) he refers to "malicious falsehoods affecting property or trade," and to "an action for falsehood producing damage to a man's trade."

In *White* v. *Mellin* (5) Lord *Herschell* L.C. speaks of "the disparagement of the plaintiffs' goods," and refers to an action "for falsely disparaging another's goods."

Lord *Watson* (6) said the ground of the action was slander not of the plaintiff himself, but of an article of food he manufactured. But throughout his judgment he refers to the "disparagement" of the goods, and says (7):—"In order to constitute disparagement which is, in the sense of law, injurious, it must be shown that the defendant's representations were made of and concerning the plaintiff's goods; that they were in disparagement of his goods and untrue; and that they have occasioned special damage to the plaintiff." So *per* Lord *Shand* (8).

In *Royal Baking Powder Co.* v. *Wright, Crossley & Co.* (9), in 1900, Lord *Davey* drew the distinction between an action for libel or defamation of character, and one which could only be maintained for what is called slander of title, *i.e.*, "an action on the case for maliciously damaging the plaintiffs in their trade by denying their title to the use of a certain label." He added: "The damage is the gist of the action."

(1) (1892) 2 Q.B., 524.
(2) (1892) 2 Q.B., 524, at p. 527.
(3) (1892) 2 Q.B., 524, at p. 529.
(4) (1892) 2 Q.B., 524, at p. 533.
(5) (1895) A.C., 154, at pp. 161, 164.
(6) (1895) A.C., 154, at p. 166.
(7) (1895) A.C., 154, at p. 167.
(8) (1895) A C., 154, at p. 171.
(9) 18 R.P.C., 95, at p. 99.

Lord *Halsbury* L.C. said (1):—"There is a class of cases, of which this is one, the true legal aspect of which, however they may be described technically, is that they are actions for unlawfully causing damage. The damage is the gist of the action." In so stating the legal position the learned Lord Chancellor affirmed the view taken by *Tindal* C.J. in *Malachy* v. *Soper* (2). This rule was applied to disparagement of a newspaper in *Lyne* v. *Nicholls* (3).

Then there recently came before the Court of Appeal a case in which the distinction between the two classes of cases received practical recognition. In *Leetham* v. *Rank* (4) the plaintiff, a miller, sued for certain oral statements made about his trade dealings. *Cozens-Hardy* M.R. held that the words were not capable of a defamatory meaning, obviously in a sense of a reflection on the plaintiff personally, and therefore the primary Judge was right in withdrawing that part of the case from the jury. Then he proceeded to consider the part of the case that did go to the jury, namely, whether the words, though not defamatory, were false and malicious, and had led to damage. To this he applied the law as laid down in what he termed "the very remarkable judgment of *Bowen* L.J. in *Ratcliffe* v. *Evans*," quoting the passage (5) to which reference has already been made. The Master of the Rolls, finding there was no actual damage proved, said the plaintiff failed; and the Court so held.

Now, these considerations lead to the conclusion that the law recognizes the right of every man to be protected not merely from false statements, defamatory of himself, but also from false statements in disparagement of his property, certain differences existing as to necessary elements, such as actual damage in the latter case being the gist of the action.

And, if actual damage is the thing to be guarded against or compensated for, it follows that reasonable opportunities and means of self-protection against that damage arising at all are as much within the power of the person whose rights of property are threatened by injurious statements likely to lead to actual damage as in the case of any other threatened wrong.

(1) 18 R.P.C., 95, at p. 104.
(2) 3 Bing. N.C., 371, at p. 384.
(3) 23 T.L.R., 86.
(4) 57 Sol. Jo., 111.
(5) (1892) 2 Q.B., 524, at p. 527.

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The legal principles which govern this portion of our legal system, although, of course, discernible in the older cases upon careful sifting, yet, in their application to modern circumstances, have gradually required of recent years more precise segregation and arrangement, and that is why we are not able to find illustrations exactly in point. This fact has probably led to misconception; but since 1892 the matter has steadily evolved until at last the principles are distinctly seen, and are given their legitimate and appropriate effect, where a false statement injurious to property has been made.

Nothing unreasonable must be done; no unnecessary step, such as personal violence, or assault, must be undertaken; retaliation is not permitted; but the warding off, by exposing the detractor, of injury, not measurable and not capable of definite ascertainment if it should actually happen, may, according to the circumstances in which, and the motive with which, it is done, be most reasonable.

Indeed, it may be more effectual than an injunction, because an injunction may not enlighten the world as to the true value of the assailant's testimony.

For these reasons it is clear that the objections to the amendment have no basis either in authority or principle; but it is desirable to guard against it being supposed that anything is said as to the intrinsic merits of these particular parties or this particular plea, or whether on full examination, in light of the real facts, the plea can be sustained as a privileged communication. The appeal, as a matter of law, must, with an exception, be allowed. That exception is that the following words should be eliminated from the proposed sub-paragraph (*b*) of par. 7 of the defence, that is to say, "and certain articles written by him in such newspaper." Those words set up neither personal defamation, nor disparagement of property. The mere fact that the articles were written by the defendant does not connote property after publication, and the final proposed words of that paragraph claim property, not in the articles, but in the newspaper only.

POWERS J. I concur, for the reasons given in the judgments which my brothers *Barton* and *Isaacs* have just delivered.