

10-1962

## The "Reception" of Defamation By the Common Law

Colin R. Lovell

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vlr>



Part of the [Common Law Commons](#)

---

### Recommended Citation

Colin R. Lovell, The "Reception" of Defamation By the Common Law, 15 *Vanderbilt Law Review* 1051 (1962)

Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol15/iss4/1>

This Article is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Law Review by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact [mark.j.williams@vanderbilt.edu](mailto:mark.j.williams@vanderbilt.edu).

## The "Reception" of Defamation By the Common Law

COLIN RHYS LOVELL\*

*Professor Lovell outlines the historical background of libel and slander and traces the separate conception and development of the two torts through the various courts of early England, explaining the reasons for ultimate division of defamation into two distinct actions.*

The rather low opinion held by Mr. Bumble concerning the logic of the law must be set off by the Holmesian reminder that not "logic," but "experience" has kept the law viable. The warning has peculiar applicability in looking at the common law doctrines on defamation. Only the experience of history can explain why, in contrast to Roman civil law systems with their view that all defamations and insults are *injuriae*, with a single remedial action, the common law has no interest in mere bad language<sup>1</sup> and goes on to have two separate actions for defamation. Moreover, these are quite artificially distinguished by the form of the defamation, with each action having different definitions, requirements, and defences, the result being that occasionally the mere form determines whether the common law will give any relief for a defamatory statement.

If Richard Roe calls John Doe a "card sharp" clearly and explicitly before fifty members of their club, the board of governors will probably ask for Doe's resignation; he will have to resign his commission in the Guards; and he may even have to emigrate to the colonies as a remittance man. But Doe will learn from his solicitor that the law affords him no relief against Roe and would do so only if he, Doe, were a dealer at Monte Carlo. If, however, Roe should choose to write on a small piece of paper that Doe *acts like* (not actually *is*) a card sharp, rather than speak his charge, and

---

\*Professor of History, University of Southern California.

1. See Wade, *Tort Liability for Abusive and Insulting Language*, 4 VAND. L. REV. 63, 64 (1950).

shows this statement to the club steward, Doe can bring an action against Roe. Should Roe flatly call Doe a "lying horsethief" in the presence of the club's charwoman, the common law will take no note of the imputation concerning Doe's veracity, but it will regard as actionable the charge of this type of theft (however unlikely in this year of 1962).

In the subsequent actions Roe will find that although the common law supposedly places the burden of proof in a civil action upon the plaintiff, somehow it is he, Roe, who will be regarded with doubt by the court, while Doe will sit in outraged rectitude after proving that Roe did, indeed, "publish" his defaming words. Roe will also discover that his logical defense of "justification," setting up the truth of his allegations, however defamatory, is not so simple under the rules of law, which actually make it easier for him to justify his explicit verbal charge than his mere written insinuation. Clearly Mr. Bumble has the advantage, unless history explains why the common law is apparently so devoid of logic when it looks at defamation.

The modern treatment of defamation in two separate actions with different doctrines is the end result of long centuries of ignorance of the entire subject by the common law. Not until long after its formative years closed toward the beginning of the 14th century did forces and circumstances outside the law force it to recognize defamation. It then "received" defamation in two sudden, but quite separate, gulps, which still have yet to be completely digested by it.

#### I. THE CANON LAW THROUGH EDWARD I

Although Anglo-Saxon customary law gave a required monetary substitute for direct revenge for insults, it gave scant attention to defamation—the imputation to the injured party of some wrongful deed. Defamation fell to the canon law, which, however, was applied before 1066 by the same courts which employed secular law, and in the same manner. The only difference was that when the hundred (and later the manorial) or shire court dealt with matters falling under ecclesiastical law, the priest or bishop, respectively, presided to explain the law of the Holy Church to the assembly, which, however, as in secular cases, arrived at its decisions by a consensus of opinion. Essentially, the injured party in these defamation actions was seeking vindication of his character; and this he received in the form of a public apology from the person guilty of making the false allegation, if proof by compurgation or ordeal went in his favor.

This "remedy," however, was unlikely to satisfy great men, whose "honor" demanded a direct justice in the equity of arms; but such "satisfaction" was likely to lead to the very disorder which Church and monarch wished to abate. The Laws of Alfred the Great<sup>2</sup> (compiled about 880), a

---

2. 1 ENGLISH HISTORICAL DOCUMENTS 372 (Whitelock ed. 1955).

typical collection of some of the customary law, gave required alternatives to such direct revenge:

If anyone is guilty of public slander, and it is proved against him; it is to be compensated with no lighter penalty than the cutting off of his tongue, with the proviso that it be redeemed at no cheaper rate than it is valued in proportion to the wergild.<sup>3</sup>

This doom stands out in such solitary grandeur in the midst of the indifference about defamation in other collections of Anglo-Saxon law that it is possible that Alfred with his strong personality and interest in order, although he denied his ability to do so, may have actually intruded this "solution" for defamation into the dooms set down at his command.

The doom does not make clear whether upon proof of the false words the assembly or the injured party was to select the penalty. However, the doom is an interesting foreshadowing of later common law views on defamation, although there is no direct historical connection between them. There is first of all the requirement of "publication" of slander before it is actionable, and it is fairly clear that even at this early date the defence of truth was not highly regarded by a government with the basic aim of maintaining social order. What must be proved (by compurgation or ordeal, not by evidence, which Anglo-Saxons shunned) was the *making* of the statement, not its truth or falsity. Finally, although the translation of the Latin of the doom as "slander" is as good as any, it is not the slander of the later common law, oral defamation. Although prevailing mass illiteracy meant that most defamations would be of this category, the doom's "slander" would also cover the few written imputations; so that Anglo-Saxon law did not know a differentiation of actions distinguished by the form of the defamation as would the later common law.

Undoubtedly, the doom was utterly ineffectual in its purpose of keeping order. Despite the satisfaction which a man might have in seeing his defamer mutilated, or in receiving his wergild during his own lifetime, this doom did not provide a "remedy" of much appeal to "honorable" men, who at all times have preferred the "affair of honor" to the courts for dealing with defamation. Furthermore, even a strong Anglo-Saxon monarch, such as Alfred, had no juridical-administrative agencies to enforce any doom, even on the central level of government; and on the local level few men could ever have heard of this doom.

Free men continued to use the remedy of the sword for defamation. As their number declined with the growth of manorial jurisdictions, the number of people theoretically incapable of bearing arms increased. For these

---

3. 1 ENGLISH HISTORICAL DOCUMENTS, *op. cit. supra* note 2, at 378 (Law No. 32). It must be emphasized that despite the title, these dooms were not "made" by the monarch, but instead collected under his direction.

servile persons the remedy for hard words became monetary, as determined by their fellows in manorial courts.<sup>4</sup> Since much of this "defamation" was merely vituperative language and its monetary satisfaction depended on orders of courts composed of and serving the less-than-free, mere insult sank below the level of true defamation as recognized by both canon and later the common law. Modern common law jurisdictions possessing a tort of abusive and insulting language distinguish it from the defamatory torts and invariably have it as the result of relatively recent legislative intervention in the law.<sup>5</sup>

This situation was not changed by the Norman Conquest except that the establishment of separate Church courts by William I, who otherwise confirmed English law for his English subjects, placed the administration of the canon law remedy for defamation in tribunals with different procedures from either the English or Norman feudal assembly courts. A single judge, after the Norman Conquest a canonist, staffed each of the ecclesiastical courts, which rose in hierarchical order from the court of the archdeacon through those of the bishop and archbishop, although these latter two busy prelates rarely appeared, instead giving this duty to a chancellor. Unlike the secular courts, the jurisprudence of the Church recognized appellate jurisdiction, exercised by the latter two courts, along with some partially overlapping original jurisdiction, with possible final appeal (with royal permission) to the papal *curia*. However, the great bulk of ecclesiastical cases began and ended in the archdeacon's court.

This hierarchical arrangement indicated a considerably more sophisticated jurisprudence for the ecclesiastical than for customary secular law, and the Norman Conquest coincided with the beginning of a great burgeoning of canon law, which grew rapidly away from its Roman law base. Combining Holy Writ (particularly the New Testament), the decrees of the early Church councils, and papal decretals into a single entity, canon law became capable of codification by the 12th and 13th centuries.<sup>6</sup>

Canon law regarded defamation as part of its jurisdictional competence over the "cure (or care) of souls." Like its Roman law ancestor, it was indifferent as to whether the defamation were oral or written, although the general illiteracy of the time meant that most of it would be the former. Unlike early Roman law, which viewed defamation as an *injuria*, requiring compensation to the injured, or later Roman law, which regarded certain types of defamation as crimes to be punished,<sup>7</sup> canon law considered it to

---

4. Wade, *supra* note 1, at 65.

5. *Id.* at 80-81 & nn.121 & 122.

6. The codification by Gratian indicates a law, which within the areas of its competence was remarkably coherent and surprisingly sophisticated. See also Veeder, *The History of the Law of Defamation*, in 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 446 (1909).

7. *Id.* at 468.

be a sin, demanding penance before there could be absolution of the sinner. The remedy of ecclesiastical courts was thus the correction of the sinner, not the indemnification of the party injured by the false statement nor the punishment of the criminal. Canon law knew that however unfortunate and wrong bad language might be, it was not defamatory unless and until it made allegations of a crime cognizable by it.<sup>8</sup> Thus to call a man a "dog" was unfortunate; to call him a "thief" defamatory.

As in other ecclesiastical actions, procedure in defamation cases turned on the character of the single judge as one of both fact and law. Initiation of the action came on the *accusation* by the injured party or his defamer before the court; or the complainant could make a private *denunciation* to the judge, who might then act. The judge, himself, could initiate proceedings by an *inquisition*, an inquiry, usually on the basis of information from his apparitors (similar to the later Masters in Chancery), who in time, therefore, would incur vast unpopularity for their Paul Pry activities.<sup>9</sup>

Once initiated, the action moved rapidly, with the judge taking sworn oral testimony, sworn written statements (including those from his apparitors), and applying the ex-officio oath of canon law, whereby both parties could be compelled to testify.<sup>10</sup> Such pleading as there was in the archdeacon's court, which disposed of the bulk of defamation cases, usually followed at the close of evidence. Determination of the facts fell to the judge, who then applied canon law in rendering his decision. If it were one of guilt, the convicted person as a sinner was liable to do public penance. Wrapped in a white shroud and holding a lighted candle while kneeling, he acknowledged his "false witness" in the presence of the priest and parish wardens and begged the pardon of the injured party,<sup>11</sup> who as a Christian was bound to forgive. The whole affair ended with the absolution of the sinner. Should he prove contumacious, the Church court could order his excommunication; and should he prove so hardened in sin that this dire penalty did not move him, the spiritual court could call upon the royal sheriff to seize and hold his goods until he should truly repent and do the bidding of the court. This ultimate method of enforcement of ecclesiastical sentences, recognized by the Constitutions of Clarendon in 1164,<sup>12</sup> bespoke the medieval ideal of the division between things of God and Caesar, with Caesar to assist God.

---

8. FIFOOT, *HISTORY AND SOURCES OF THE COMMON LAW—TORT AND CONTRACT* 126 (1949).

9. Carr, *English Law of Defamation*, 18 L.Q. REV. 255, 269 (1902); Veeder, *supra* note 6, at 452.

10. For a vitriolic attack on this ex-officio procedure shortly before its abolition see MORICE, *BRIEF TREATISE ON OATHS* (Circa 1590).

11. Carr, *supra* note 9, at 272.

12. The inclusion of the method in the Constitutions is significant in that they represented the customs of William I as to relations with the Church, as expressed to Henry II by a particularly large session of *curia regis*.

The canon law definition of defamation turned on whether the allegation was of a wrongful act under that law. This allegation had to be made to a third party, that is, "published"; urbane Churchmen knew that allegations heard only by the parties in interest might not have been heard at all. While canon law did not particularly favor the defendant in any action, it provided him a sure defence in defamation—truth—for the simple reason that if the allegation were true, it could not have been false.<sup>13</sup> Having thus provided this defence, however, canon law then laid the burden of proving the truth of the statement upon the defendant for the logical reason that he had made it.

Meanwhile, the common law in its growth, which was particularly rapid during the 13th century when new writs, pleading, and *stare decisis* greatly enlarged and refined its remedies, did not "know" defamation. Royal judges, usually churchmen until the last quarter of that century,<sup>14</sup> had little reason to bring into that law actions which were producing revenue for them in their own ecclesiastical courts. The common law remedy of monetary payments for damages, assessed by local juries, did not lend itself to a simple application in the measurement of damages to such an intangible as a man's reputation. The further concern of the common law for free tenures, and so free men, meant that even as royal courts with this law were breaking feudal jurisprudence, they still took no notice of the monetary damages being awarded to the large number of servile people by manorial courts for insulting epithets.<sup>15</sup>

Toward the close of this early formative period of the common law, it explicitly denied any interest in defamation. In 1285 royal justices assisted Edward I in the formulation of the statute, *Circumspecte Agatis*,<sup>16</sup> which in its definition of ecclesiastical jurisdiction included defamation actions, "providing that money be not demanded, but the suit is prosecuted for punishment of sin." The unwillingness of the king and justices to enlarge traditional canon law remedies to include payments to the injured party did not indicate common law readiness to provide this remedy. In 1295 a defamation case between two Irish gentlemen came before Parliament as the highest court, which asked the justices for their views. In a unanimous opinion the justices declared that the common law, and so its courts, had

---

13. Carr, *supra* note 9, at 268.

14. Edward I (1272-1307) gradually secularized the bench, in part due to his quarrel with Pope Boniface VIII over exactions to be imposed on the clergy.

15. 8 HOLDSWORTH, A HISTORY OF ENGLISH LAW 335 (1926) [hereinafter cited as HOLDSWORTH]; see also Wade, *supra* note 1, at 65.

16. 13 Edw. 1, c. 1 (1285). The wording of the statute, "It has been granted already," makes it clear that the crown was declaring existing ecclesiastical jurisdiction, not in any way creating a new portion of it. It has been argued that the quoted words may refer to a promise to the Church by Edward following the Baronial War, but that the words could refer to the practice relative to ecclesiastical jurisdiction since William I.

no jurisdiction over defamation, which instead fell to ecclesiastical tribunals.<sup>17</sup>

Although this opinion was entered on the Rolls of Parliament, this was not the Parliament of later years, either in structure or function. While it is true that this Parliament of 1295 had borough and county representatives,<sup>18</sup> along with proctors for the lower clergy, joined with the great nobles and the royal Council in Parliament, the late 13th century definition of Parliament was a body consisting of the king, his Council (including the justices), and great nobles receiving individual summonses for this temporary enlargement of the "official" element. Non-noble elements were not essential to this definition of Parliament, and, in fact, appeared at only a few of the meetings denoted as "Parliament" during the reign of Edward I. Not for another fifty years would county and borough representatives be essential elements of Parliament.

During the reign of Edward I there was no reason for these non-noble persons to be at every Parliament, because its chief function during that reign was judicial.<sup>19</sup> Non-noble elements had no claim to participate in this business, which usually consisted of giving general directions for the ultimate disposition of a particularly knotty case. However, normally the noble legal amateurs took the advice, as they did here, of the justices, who thus controlled the principal business of late 13th century Parliaments. Neither taxation, which the crown could accomplish by negotiations with affected groups, nor legislation, which the king after the breakdown of feudal limitations promulgated on his own authority, was the business of Parliament for a long time. To say, therefore, that Parliament acquiesced in this judicial self-denial of competence over defamation by failing to legislate to the contrary implies that Parliament possessed this power, which would have surprised (and shocked) its members in 1295.

Furthermore, there is no certainty that the members of this Parliament ever heard the judicial opinion. Parliament often discussed issues, which it then frequently turned over to the Council for ultimate disposition, in this instance by the Council's judicial element. However, the royal clerks, with attitudes toward work procedures anticipatory of those of their bureaucratic descendants, entered the disposition of all issues raised in Parliament on its Rolls, even though the members might have been long

---

17. Veeder, *supra* note 6, at 456; 2 HOLDSWORTH 366 (1923).

18. And for that reason called the "Model Parliament" as foreshadowing the later composition of that body.

19. This was the function it inherited as the descendant of *curia regis*, the ultimate source of all courts and Parliament. It may be noted here that this writer's view as to Parliamentary reaction, or rather the lack of it, does not agree with the view of Holdsworth. 2 HOLDSWORTH 366 (1923). Although it is not easy to part with his opinion, this author feels that researches done on Parliament after Holdsworth had written give support to the differing view expressed here.



gone when the decision on a particular question was finally given and entered.

By the close, therefore, of the early formative period of the common law, it offered no remedies for defamation. Canon law offered the remedy of public penance, and so vindication of the injured. For servile persons the manorial courts gave damages for bad language, which in manorial jurisprudence approached more from the view of insults than of any real damage suffered by the complainant from hard words. The great man, therefore, dissatisfied with the type of vindication offered him by ecclesiastical courts and unable (and unwilling) to secure the monetary relief given by courts for his social inferiors, still found that his only real satisfaction for defaming words was his own sword.

## II. INFLUENCE OF MERCANTILE DEVELOPMENT

Soon after the firm molding of the common law by the great statutes of Edward I, changes in the economic and social facts of English life produced a small but vocal middle-class, whose mercantile attitudes made them aware of how defamation could hurt them in their most tender portions—their purses. Such men, however, by training and personal disposition, were unlikely to seize their weapons to maintain their financial reputation. Simultaneously, the ranks of the servile began to thin, particularly after the Black Death in the mid-14th century wrecked both serfdom and the old manorial courts, although the latter would linger, half-forgotten, until the early 19th century.<sup>20</sup> Defamation being unknown to the common law and provided with no real relief from the moribund manorial courts, these facts led to an increase of such actions in the Church courts, which until the latter part of the 15th century did a brisk business in them.<sup>21</sup> The crown did not object to this tendency and sought to remedy the great weakness of ecclesiastical relief—at least to the new middle-classes—namely, its failure to provide real deterrence to potential defamers in the commercial world of the 14th century. In 1315 a statute authorized Church courts in addition to penance (by then of questionable deterrent value) to order corporal punishment, that is, whipping, of offenders against the canon law prohibition of false witness, but with the proviso that this punishment could be commuted to a fine, set by and paid to the particular prelate “owning” the court.<sup>22</sup>

This secular statutory reinforcement of the canon law view that defamation was a sin to be punished did give greater deterrence value to the “remedies” afforded by ecclesiastical courts. Some ingenious persons, after

20. As the courts leet.

21. FIFOOT, *op. cit. supra* note 8, at 126-27; HICKSON & CARTER-RUCK, *THE LAW OF LIBEL AND SLANDER* 7 (1953).

22. *De diversis Libertatibus Clero concessis*, 9 Edw. 2, c. 4 (1315).

having been acquitted of crimes in the royal courts, hailed all members of the grand jury which had indicted them before ecclesiastical courts on charges of defamation!<sup>23</sup> Such a practice could stultify royal criminal jurisdiction, and a statute of 1327 authorized and required the Chancellor and royal justices to direct writs of prohibition to Church courts against their hearing such "defamation" actions.<sup>24</sup>

The juridical situation whereby in practice Church courts alone dealt with defamation for free persons meant that mercantile persons wishing monetary relief for defamation had to turn to their own courts of the great fairs, the courts of pie powder, which used summary procedures so that merchants could move on to the next fair. A report of 1295<sup>25</sup> tells how the pie powder court of St. Ives dealt with a charge by one merchant that another one (probably his chief competitor) had called him "a thief and a worthless merchant," very serious allegations for a man of his calling. Unable to use a jury, the sole property of the royal courts, the pie powder court of merchants at the fair employed the older proof by compurgation, which it awarded to the defendant. Upon his failure to make this proof, it ordered him to pay the plaintiff 12d, a moderate sum for that time.

### III. STAR CHAMBER

The lack of a substantial remedy at common law for defamation became a matter of concern for the crown, which disliked the settlement of defamation issues by means of the duel, which produced family feuds and internal disorder. Simultaneously, the crown was concerned with criticism of its policies by newer middle-class men, who did not hold to the traditional view that government was ordained of God. The two concerns joined in the statute of Edward I, *De Scandalum Magnatum* of 1275,<sup>26</sup> which directed itself against the spreading of "false gossip" (largely by word-of-mouth, but not excluding written expression) about the great persons of the kingdom, described as being all prelates, dukes, earls, barons, and the Chancellor, Treasurer, Clerk of the Council, Lord High Steward, justices, and other great officials of the kingdom. The statute decreed that persons spreading gossip about such persons should be imprisoned until the originators of the stories could be found, then to be dealt with, presumably, by the sedition laws.

The only satisfaction the statute gave to great men outraged by such "gossip," which could be valid criticism, was to see those spreading it

---

23. PLUCKNETT, *CONCISE HISTORY OF THE COMMON LAW* 462 (4th ed. 1948); FIFOOT, *op. cit. supra* note 8, at 127.

24. 1 Edw. 3, c. 11 (1327).

25. *Woodfool v. Pors*, 23 Selden Soc. 71 (Fair Court of St. Ives 1295). This case is also discussed in FIFOOT, *op. cit. supra* note 8, at 138-39.

26. Statute of Westminster I, 3 Edw. 1, c. 34 (1275).

lodged in jail. The statute also depended upon the common law courts for its application; and while the justices were willing to construe the statute as including the later-appearing rank of viscount,<sup>27</sup> they hesitated in the troubled 14th century to deal with critics of public officials, since these critics, themselves, might be holding office in a short time. In 1389, against a background of seething lower-class discontent, the recent Peasants' Revolt, and struggling noble factions, Parliament re-enacted the statute, but significantly gave its enforcement to the Council.<sup>28</sup> The substitution was typical of prevailing Parliamentary belief that conciliar jurisprudence was less subject to pressures by great magnates than were common law courts and juries.

As the historical source of these courts and Chancery, the Council retained residual jurisdiction, which it exercised in a summary, administrative manner by *ad hoc* committees, whose decisions the overworked Council approved in a pro forma manner. In its eriminal equity business, of the type conferred by the statute of 1389, the Council could order fines, with imprisonment for failure to pay, and occasionally corporal punishment, but never punishments of life or limb. During the 14th century the *ad hoc* committee handling criminal equity became institutionalized as the Court of Star Chamber, from the name of the room with stars painted on its ceiling where this committee met. In 1486 Star Chamber received statutory recognition in a law which indicated that the Chief Justices of King's Bench and Common Pleas were permanent members,<sup>29</sup> and that Star Chamber could summon other common law justices to assist it.

From the mid-14th century down to 1540 Star Chamber reports were entered on the Council Roll,<sup>30</sup> so that it is often difficult to determine whether Star Chamber, the Council, or both took a certain action. After that date Star Chamber had its separate record, but its personnel continued to interlock with the Council.

Inevitably, the enforcement of the statute of 1389 fell to Star Chamber, which viewed this duty, as also its others in criminal equity, in an administrative manner. For Star Chamber, as with the entire Council, the great administrative duty and problem was the maintenance of internal order; and Star Chamber regarded defamation as highly productive of disorder so that it was criminal, or at the least, quasi-criminal. In implementing this attitude, Star Chamber quickly came to ignore most oral defamations as being numerous, but too fleeting to be of much effect. It was written defamation, the poems, pamphlets, and squibs, in which 15th and 16th

---

27. Carr, *supra* note 9, at 261.

28. 12 Rich. 2, c. 11 (1388).

29. 3 Hen. 7, c. 1 (1486). The wording of the statute clearly indicates the previous existence of the court.

30. Carter, *Court of Star Chamber*, 18 L.Q. REV. 247, 248-49 (1902). See also *Star Chamber Cases*, 39 Camden Society.

century England abounded, which came under Star Chamber's stern view. The personnel and overriding attitude of the court made it view any criticism of the government as a wrong to be punished. So consistent was this policy that "libel," hitherto anything printed, came to mean a "false" written statement, "scandalous," because it touched government policy.<sup>31</sup>

With its grounding in *raison d'état*, Star Chamber regarded any such political libel as meriting a heavy fine. However, the court soon extended its work into non-political, private libels, because they could produce breaches of the peace, the thing Star Chamber was bound to preserve. For upper-class men injured by defamatory imputations on their "honor," Star Chamber with one hand offered deterrence from the duel and with the other presented a required alternative. The court would fine duellists heavily, but it would compensate the injured party by ordering his defamer, or libeller, to pay him heavy damages.<sup>32</sup> In its assessment of these damages Star Chamber came close to the Roman law view that it was not the actual damage, but the degree of insult which determined the exact figure to be paid.

The view of Star Chamber that no defence was possible for a political libel came rapidly to include private ones also. Thus the government, public official, or private complainant had a great advantage in Star Chamber, whose only question was whether the defendant had published, or had caused to be published, the offending remarks. By the close of the 16th century the law of libel as developed and applied by Star Chamber was extremely sharp. Private litigants, at least plaintiffs, had real inducement to turn from the by-then rather meaningless remedy of penance of the Church courts and from the monetary damages of the moribund manorial courts, to Star Chamber. Its consistent favoring of the plaintiff and the certainty that its orders for compensation payments by the defendant would be enforced made it a popular tribunal for growing numbers of people smarting under written imputations about their characters. In addition to these advantages, Star Chamber was so concerned about the need to maintain order that the death of one, or even both of the parties, did not end a defamation cause before it.<sup>33</sup> Unlike the common law courts, where actions terminated on the death of either party, Star Chamber would press on in behalf of and/or against the heirs and personal representatives of the parties.

The plaintiff in a libel cause before Star Chamber began and ended his own efforts when he filed a bill with its clerk. From that point the court took over the entire proceeding. As with the ecclesiastical courts, mem-

---

31. 8 HOLDSWORTH 336 (1926); FIFOOT *op. cit. supra* note 8, at 463; Veeder, *supra* note 6, at 453, 455, 466.

32. Veeder, *supra* note 6, at 455; 5 HOLDSWORTH 211 (1927).

33. 5 HOLDSWORTH 211 (1927).

bers of Star Chamber were judges equally of fact and law; and the essentially administrative adjudication of the court made it less concerned about the latter than in getting the former. Sworn oral testimony and affidavits, the "paper-proof" so scored off by the common law, were grist for the mill of Star Chamber, which could also order the ex-officio oath for the principals, particularly the defendant. If the court heard pleading at all, it was by its own counsel, not of the litigants.<sup>34</sup> On the basis of its findings, usually the mere fact of publication, Star Chamber issued its order, generally against the defendant, requiring him to pay a fine to the government, or compensation to the plaintiff, or both. The order operated as a directive to the sheriff to collect the money or distrain the goods of the defendant until paid.

Crucially for the history of the law of libel, and probably inevitably considering its basic orientation, Star Chamber gave short shrift to truth as a defence.<sup>35</sup> There could never be "truthful" written criticism of the gracious sovereign and his officials, and the truthfulness of a libel against a private person would not prevent his issuing a challenge and so breaching the peace. The only "fact" therefore of much concern to Star Chamber was that of publication; truth availed the defendant in a libel action but little in Star Chamber.

In exercising its jurisdiction over libel, Star Chamber was assisted by the practice of the government, consonant with general European practice, of licensing the press.<sup>36</sup> Since 1416, when Caxton had set up the first press in England at Westminster, the control of printing had been under the government, which rightly regarded it as important in a time when the number of literate persons, although not large, was increasing. Government control of the press was enhanced by the monopoly on printing granted in 1557 to the new Stationers' Company, except for the interesting and significant exceptions of royal documents and the Law Reports, printed by the order, respectively, of the crown and the judges. Even material printed by authority of the Stationers' Company had to pass the scrutiny of either the Archbishop of Canterbury or the Bishop of London, who could apply to the Council (actually Star Chamber) for enforcement of their orders. Unauthorized publications, and their printers and authors, fell under the heavy displeasure of Star Chamber, which from time to time drafted press regulations that when promulgated by the Council aimed at checking the rash of pamphleteering during the religious and political controversies of

---

34. Actually, the counsel of Star Chamber were frequently its investigating agents and therefore resembled the Masters of Chancery or the Masters of Requests more than they did the common law counsel.

35. 8 HOLDSWORTH 336 (1926). However, he points out that in the very few cases of oral defamation coming before Star Chamber, the defence of truth was permitted, although its proof was extremely difficult.

36. Veeder, *supra* note 6, at 462.

the Tudor and early Stuart periods. In 1637 very detailed press regulations placed authorized publications under minute restrictions and subjected the authors and printers of unauthorized ones to the penalties of libel imposed by Star Chamber.<sup>37</sup>

#### IV. COMMON LAW COURTS—SLANDER

It was the lack of a monetary remedy for oral defamation which caused the common law to take its first notice of any kind of defamation, long after its doctrines were rigid. The Abridgements of the Year Books, which closed in 1536, to be replaced by semi-official Law Reports, failed to show any common law interest in defamation,<sup>38</sup> whose oral variety thus fell to the ecclesiastical courts applying "remedies" of scant merit to pushing middle-class merchants or nobles with touchy "honors." In the last year of the Year Books the justices refused to accept a suit of defamation between anonymous parties in which one had called the other a "heretic," on the grounds that the allegation, if true, would have fallen to the Church courts, which as a consequence had sole jurisdiction over this particular defamation. However, went on the justices, had the charge been one of a crime indictable at common law, they would have accepted the action if the plaintiff had alleged (and ultimately proven) temporal damages resulting from the imputation.<sup>39</sup>

Thus, as the canon law had previously defined defamation by the criterion of offenses under it, so now the common law applied the criterion for defamation by allegations of crimes indictable under it,<sup>40</sup> thereby excluding, as had canon law, merely violent or offensive language from its definition of defamation. This invitation to bring defamation actions before the common law courts also indicated that the justices had solved their previous dilemma as to how to measure damages for non-physical words by approaching defamation as an action on the case. And while the

---

37. *Id.* at 463; 6 *HOLDSWORTH* 363, 367-68 (1927).

38. Carr, *supra* note 9, at 388. It is true that the Year Books do hint of 10 possible defamation actions between 1327 and 1536, when they closed. But the Abridgements simply do not mention defamation as a common law action.

39. Y. B. Mich. 27 Hen. 8, pl. 4 (1536), cited in 3 *HOLDSWORTH* 411 n.2 (1923).

40. This requirement that the allegation be of a crime indictable at common law could produce some odd results for remedies for defamation. Thus a statute of 1570 gave jurisdiction over usury to the Church courts (An Act Against Usury, 13 Eliz. 1, c. 8), so that imputation of usury would likewise fall to them and would not be susceptible of monetary compensation for any damages caused thereby. Allegations of certain sexual offenses, capable of producing extreme damage, were in the same category. Thus charges of fornication, an offense "unknown" to the common law, would receive no remedy from it. And until 1908, when incest was made a secular crime (Punishment of Incest Act, 1908, 8 Edw. 7, c. 45), an allegation of it would receive no notice from the common law. In fact, between the abolition of defamation jurisdiction of the ecclesiastical courts in 1855 (18 & 19 Vict., c. 41) and the latter date, there was no remedy anywhere for such a false charge!

invitation did not distinguish between oral and written defamation, the realities of the situation, whereby Star Chamber gave swift and certain remedies for libels, meant that if the invitation were accepted, the great bulk of defamation cases flowing into the law courts would be of the oral type, slander.

Above all, in great contrast to the libel doctrines of Star Chamber, which were close to the Roman law view of *injuria*, the common law, even while bringing defamation, largely slander, to it by way of the doctrine of action on the case, insisted that damages be alleged and proved before it would give relief.<sup>41</sup> Although Sir Frederick Pollock would later greatly regret that the common law had used the damage approach,<sup>42</sup> it is difficult to see how else the common law, long-formed by the mid-16th century, could have come to grips with defamation, even of merely the slander variety—particularly since it had no legislative, statutory assistance in recognizing the tort action of slander.

The judicial invitation fell on the waiting ears of the middle-classes, utterly dissatisfied with ecclesiastical reliefs for defamation and completely delighted with those for libel accorded by Star Chamber. The result for the common law courts was in inundation of slander actions in the latter part of the 16th century. The justices, overworked with other litigation and their duties in Star Chamber, the Council, and even Parliament, tried to stem the flood they had unleashed by establishing limiting doctrines to the remedy at law for defamation, in theory without regard as to whether it was written or oral, but practically, in view of the exigencies of the situation, applicable only to the tort of slander. The application of these limiting rules only to slander actions would have major results for the common law treatment of defamation.

Borrowing from canon law principles, the justices in their endeavor to check the flood of slander actions insisted that the allegation had to be precise as to the common law crime and the person thereby imputed to have committed it. Vagueness on either count meant dismissal of the action. The imputation, as also in canon law, had to be "published" to a third party for the plaintiff to have suffered any damage. The words thus spoken could be susceptible of no other meaning, a doctrine in great contrast to the grim view taken by Star Chamber of any written words. In their own courts, however, common law justices sought to check the number of slander actions by applying the doctrine of *mitior sensus*, whereby supposedly defamatory words, upon reconsideration and analysis by the *justices* (who were very careful not to let the jury perform this function) turned out to be no such thing, and so could not be actionable for the excellent reason that these harmless, even laudatory words could not have

---

41. 8 HOLDSWORTH 346 (1926).

42. POLLOCK, TORTS 193 (14th ed. 1939).

produced damage. Some remarkable judicial acrobatics in applying *mitior sensus* did check the flow of slander actions, which was frankly admitted by Chief Justice Wray in 1585 to be the purpose of the doctrine.<sup>43</sup>

Only if the plaintiff surmounted these obstacles might his allegations that the words had been uttered and had caused him damage go to the jury for determination as issues of fact, with the measurement of damage to be made by the jury as the final issue of fact. But here, completely different from the libel doctrines of Star Chamber, and like the canon law of ecclesiastical courts, the common law gave the defendant the complete defence of truth. Canon law had permitted this defence for the reason that a true allegation, no matter how defamatory, could not be false and so was not the sin of false witness. The common law permitted the defence of truth for the different reason that a true statement, regardless of its defamation, could not have caused damage.<sup>44</sup> However, in letting the defence of truth go to the jury as an issue of fact, the common law justices in their own courts recognized a freedom of speech in slander actions which they consistently refused to accept in the libel cases coming before them in Star Chamber. The result was that where Star Chamber refused to consider truth in libel proceedings, a common law jury could find for the defendant in its verdict by finding the truth of his imputations.

After the initial flood of slander actions had subsided, partially because of these judicial doctrines, the common law justices during the first half of the 17th century refined their doctrines on slander, so that certain types did not have to be proven on the case, but were slander per se, certain to cause damage by virtue of the relationship of the particular imputation to the common law. Here the plaintiff, while having to allege the damages, need not prove them, although their actual measurement was by the jury. Thus the allegation of an indictable crime was slander per se, because if true, the charge would have deprived the plaintiff of his liberty and even his life. Similarly, the allegation of a loathsome, contagious disease (initially leprosy, although later enlarged to include venereal disease) was slander per se, because if true, it would have caused the issuance against the plaintiff of the writ *de leproso amovendo*, cutting him off from society. The third type of slander per se, reflecting middle-class concern about commercial fiscal standing, was the imputation of unfitness of the plaintiff in his trade or profession, including, interestingly, judicial office, as to cause prejudice to his position and so rendering him liable to a reduction in income.<sup>45</sup> This judicial reasoning as to results was probably the reverse

---

43. 8 HOLDSWORTH 353-55 (1926); Carr, *supra* note 9, at 257-58. The doctrine of *mitior sensus* apparently first applied in *Stanhope v. Blith*, 4 Co. Rep. 15 a, 76 Eng. Rep. 891 (K.B. 1585), produced some remarkable judicial "logic," such as viewing a "forger" as simply an honest blacksmith and a "coiner" as an employee of the Mint.

44. Veeder, *supra* note 6, at 458.

45. *Ibid.*; Carr, *supra* note 9, at 257. Also see for 17th century views on slander



of middle-class attitude of the early 17th century, but the inclusion of imputations upon judicial competence was obviously a self-protective device created by royal justices who were finding that middle-class self-assurance extended to criticism of the bench.

With the exceptions of the actions of slander per se, slander remained an action on the case, with the plaintiff required to allege and prove a precise connection between the defamatory words and the damages suffered by him. In both types of slander actions the jury could as a practical matter mitigate damages and could find for the defendant by finding that his words had been true. Although the common law did not say that its doctrines on defamation applied only to the oral type, the realities of the juridical situation in the early 17th century caused them to govern only the tort of slander. Libel fell almost entirely to Star Chamber, which only rarely took note of oral defamation. Practically, therefore, by the mid-17th century there were three separate systems of jurisprudence for defamation. That of the canon law, viewing defamation as a sin to be corrected, had lost most of its jurisdiction because of the inadequacy and uncertainty of its remedies for middle-class people. The two active juridical systems were the administrative one of Star Chamber and the common law. The former, largely for libel, had severe doctrines; the latter, almost entirely for slander, had somewhat more moderate ones. But the functional difference between the courts applying their doctrines on defamation as to libel and slander respectively meant an accentuation in the difference between libel and slander law.

This division was agreeable to the common law justices, who saw no reason to add libel actions to those of slander in their clogged courts. The monopoly by Star Chamber over libel cases was approved by that champion of the common law, Sir Edward Coke, who as Chief Justice of Common Pleas had participated in the handling by Star Chamber of the *Libellis Famosis* case, which Coke reported in 1609 with an obvious satisfaction amounting to personal relish.<sup>46</sup> The cause arose out of an anonymous doggerel about the Archbishop of Canterbury, who died before the case came on before Star Chamber, and his successor, the then Bishop of London. When the anonymous writer and printer of the poem was uncovered, Star Chamber moved with vigorous alacrity. In the subsequent hearing the court refined its doctrines on libel by adopting as its own the later Roman law of *libellis famosus* (which thus gave its name to the case), with Coke's approval. Where earlier Roman law had punished only libels with ascertained authors, later Roman law viewed anonymous publications<sup>47</sup>

---

and slander per se MARCH, ACTION FOR SLANDER (1648); STARKIE, A TREATISE ON THE LAW OF SLANDER AND LIBEL (1813); FOLKARD, STARKIE ON SLANDER AND LIBEL (4th ed. 1877).

46. 5 Co. Rep. 125 a, 77 Eng. Rep. 250 (Star Chamber 1606).

47. Veeder, *supra* note 6, at 464-65.

as being nearly criminal. The application and interpretation by Star Chamber of this later Roman legal dictum in this case moved the English law of libel, at least as applied by Star Chamber, still closer to criminal law and left only licensed publications beyond its possible application. In his report Coke admitted that the injured parties might have applied to the law courts for relief, but he clearly indicated that Star Chamber was the proper tribunal for libels, particularly of this anonymous type:

[F]or in a settled state of Government the party grieved ought to complain for every injury done him in an ordinary course of law, and not by any means to revenge himself, . . . and of such [secret] nature [as poisoning] is libelling, . . . and therefore when the offender is known, he ought to be severely punished.<sup>48</sup>

When the bulwark of the common law held such an attitude, lesser justices were unlikely to add written defamations to the slander actions presently handled by their courts. Coke and his brethren were men of the upper classes, profoundly conscious of how narrow was the line between internal order and anarchy, and they clearly regarded the tort-damage approach of the common law to slander as insufficient to deal with libel. Instead, they preferred to have administrative jurisprudence with much more stringent doctrines deal with libels, rather than seek to assimilate them to the common law tort of slander. Thus by the mid-17th century the common law had come to "know" slander; it had yet to recognize libel.

#### V. SEPARATION OF LIBEL AND SLANDER IN THE COMMON LAW

The Parliamentary onslaught against non-common law tribunals in 1640 forced the common law to take notice of libel. Parliamentary wrath felled both of the other two forums exercising competence over defamation, the ecclesiastical courts and Star Chamber;<sup>49</sup> and while the former were restored in 1661,<sup>50</sup> their procedure of the ex-officio oath, likewise abolished twenty years previously, was not restored<sup>51</sup> thereby leaving the Church courts with their historical jurisdiction over defamation, but without any practical means to exercise it. And while these courts would not formally lose their jurisdiction over defamation until 1855,<sup>52</sup> practically they ceased to exercise any portion of it after 1641. For the law of defamation this cessation of interest by ecclesiastical courts was not serious, inasmuch as they had been moribund for a good century before that date. However,

---

48. *Libellis Famosis*, *supra* note 46, at 77 Eng. Rep. 251. The case is also dated as being in 1606 and is sometimes said to have involved a poem against the Archbishop of York.

49. 16 Car. 1, c. 10, 11 (1640).

50. 13 Car. 2, c. 12 (1661).

51. *Id.* § 4.

52. 18 & 19 Vict., c. 41 (1855).

the abolition of Star Chamber in 1641 and the failure to re-establish it in 1661 meant that after the earlier date there was no remedy for libel, because the common law had not come to "know" it.

After 1661 the common law moved into areas hitherto occupied by royal administrative jurisprudence. In its treatment of defamation the common law thus had a great opportunity to create a single tort by extending its doctrines on slander to libel. Instead, both justices and Parliament ignored the opportunity, so that the common law view of defamation became inexorably different from Roman law systems. The explanation for this apparent common law lapse lies in the turbulent history of the later 17th century.

During the Interregnum, the pre-Civil War alliance between common law supporters and Parliamentary leaders had disintegrated when the latter used their claim of Parliamentary supremacy during the Commonwealth phase of the kingless decade to legislate on the basic law. The experience had turned common law justices into strong supporters of the royal prerogative after 1660, imbuing them with a determination to maintain it against criticism of government, especially of the damaging written variety. Parliamentary leaders, now divided into Whigs and Tories, were willing to see a rigorous treatment of such criticism when it came from their opponents, momentarily the "outs." Thus neither bench nor legislature was in a mood to regard written defamation simply as a tort; each approached it along the historical line that libel was political, or at least quasi-political, with the state justified in suppressing it.

In harmony with this attitude, the government continued the practice of its predecessors, including those of the Interregnum, of licensing the press, a practice receiving statutory authority in 1662 in an act of Parliament embodying the very stringent regulations of 1637 by Star Chamber,<sup>53</sup> which the Council had then promulgated. This act remained in effect until 1679 when it expired in the bitter controversy to bar James, Duke of York, the Catholic heir of Charles II, from the royal succession. Immediately there was a burst of "unauthorized" pamphleteering, largely by Whigs, and often violently opposed to prevailing royal religious and foreign policy. One particularly virulent publication by Henry Carr, *The Weekly Pacquet of Advice from Rome, or the History of Popery*, stirred the king into asking the justices in 1680 whether prosecution of Carr for seditious libel was possible in the absence of statutory authorization to license the press. Headed by Chief Justice Sir William Scroggs of King's Bench, the justices, with their Restoration prerogative orientation, unanimously advised that such a prosecution was possible in that royal power to license the press was not statutorily derived but was part of the royal prerogative.<sup>54</sup> This

---

53. 13 & 14 Car. 2, c. 33 (1662).

54. 7 State Tr. 1111 (Nisi Prius 1680).

was to bring forward the political libel doctrines of the dead Star Chamber. When the government prosecuted Carr for seditious libel, Scroggs went further in instructing the jury that any publication printed without government permission and which was "scandalous" (that is, offensive) to it, public officials, or private persons by conveying "false" news was an indictable offense at common law.<sup>55</sup> Soon afterward in *R. V. Harris*<sup>56</sup> the Chief Justice declared flatly that no public or private dissemination of news was legal without government permission and that lacking such authorization, the dissemination, no matter how narrow or by what means, constituted a breach of the peace.

This was to soar on royal prerogative to new heights and to move Star Chamber views on political libel into the criminal side of the common law, so that the Restoration had numerous trials for seditious libel, culminating in that of the *Seven Bishops* in 1688,<sup>57</sup> when the jury thwarted the bench by a verdict simply of Not Guilty. More important for the law of libel was judicial insistence, resting upon the prerogative attitude of the Restoration bench, that the only issue for jury determination in such trials for seditious libel was that of publication; the truth or falsity of the statement was a matter of law for judicial decision.<sup>58</sup> In their decisions on this issue the justices continued the view of Star Chamber that written criticism of the government must always be "false" and so merited condign punishment. For the same reason Restoration justices would not permit the defence of truth any more than had Star Chamber in seditious libel cases.

Thus the Restoration bench was treating seditious libel in a completely different manner from the common law tort of slander. The former was criminal without the defence of truth; the latter was civil with numerous restrictions and with the defence of truth the best possible one. What is interesting is that politicians in Parliament did not object to these strong judicial doctrines on seditious libel. In 1680 a change in the political tides caused the House of Commons to impeach Scroggs on various charges,<sup>59</sup> among them, not that he had enunciated this high prerogative doctrine borrowed from Star Chamber about the press, but that he had applied it to Protestants!<sup>60</sup> Both Whigs and Tories used their sojourns in power to muzzle the press of their opponents. The brevity and acrimony of Parliamentary sessions prevented a renewal of the licensing act until 1685, when one was enacted for seven years,<sup>61</sup> thereby continuing it through the

---

55. *Id.* at 1124-30.

56. 7 State Tr. 926 (Nisi Prius 1680).

57. 3 Mod. 212, 87 Eng. Rep. 136 (K.B. 1688). For a more detailed account, see 12 State Tr. 183.

58. 8 HOLDSWORTH 343 (1926).

59. He was dismissed before being brought to trial.

60. 8 HOLDSWORTH 340 (1926).

61. 1 Jac. 2, c. 17, § 15 (1685).

Revolution of 1688-1689 to 1692, when it was renewed for two years.<sup>62</sup> After 1694, however, neither party was willing to give statutory authority to the crown to license the press, but the common law continued to view printed criticism of the government with doubt, although in the post-Revolutionary climate of Parliamentary supremacy without the prerogative fervor of Scroggs. Nevertheless in 1704 Chief Justice Holt of King's Bench, *The Queen v. Tutchin*,<sup>63</sup> felt compelled to indicate the law's doubt about such printed criticism. Not until 1765 did Chief Justice Lord Camden of King's Bench in *Entick v. Carrington*<sup>64</sup> end common law hesitation about written criticism of government policy by declaring that the views of Scroggs, and by inference the decisions resting on them, had been extra-judicial and invalid.<sup>65</sup>

By that time, however, the nervous concern of Restoration judges about political libel had blocked any possible movement toward the assimilation of libel and slander into a single tort of defamation. With their eyes riveted on the form of defamation and with their concern about political libel, the justices came to view private libel in almost the same manner as had Star Chamber. In 1670 Chief Baron Hale in the case of *King v. Lake*<sup>66</sup> took the crucial step in separating libel and slander in the common law. The action arose from the written statement by the defendant that a petition by the plaintiff, a barrister, was "stuffed with illegal assertions, ineptitudes, imperfections, clogged with gross ignorances, absurdities and solcisms. . . ."<sup>67</sup> Counsel for King urged that these words if spoken would have been slander per se as imputing professional incompetence, so that by analogy they were now actionable as libel. Defence counsel argued that the words would not have supported a slander action as they lacked a precise allegation of such incompetence.

Hale, a Restoration justice, if a particularly independent one, did not flinch and held the word actionable, because "although such general words spoken once, without writing or publishing them, would not be actionable; yet here they being writ and published, which contains more malice, than if they had but been once spoken, they are actionable."<sup>68</sup> Although superficially Hale might have seemed to have joined libel with at least slander per se, actually his ruling had set out libel as a separate tort, with doctrines

62. The statute (4 & 5 W. & M., c. 24 (1692)) renewed various expiring legislation, including that for licensing the press (section 14).

63. 1 Salk. 51, 91 Eng. Rep. 50 (K.B. 1704). For a more detailed account, see 14 State Tr. 1095.

64. 2 Wils. K.B. 275, 95 Eng. Rep. 807 (1765). For a more detailed account, see 19 State Tr. 1030.

65. *Id.* at 19 State Tr. 1070.

66. Hardres 470, 145 Eng. Rep. 552 (Exch. 1670). For an entertaining report of the case see HICKSON & CARTER-RUCK, *op. cit. supra* note 21, at 17-18.

67. *Id.* at 145 Eng. Rep. 552.

68. *Id.* at 145 Eng. Rep. 553. 8 HOLDSWORTH 343 (1926).

apart from those of slander and coming from the extinct Star Chamber. For Hale, the "malice" in this private libel made it different from slander, so that unlike slander, and like slander per se, the plaintiff need not allege and prove resultant damages. But unlike slander per se, and like seditious libel, the issue of fact for jury determination in an action of private libel was not the truth of the allegation but the fact of publication. The most that common law justices, who would not accept truth as a defence in seditious libel, would do for truth in a private libel action was to consider it as a matter of law! The steadfast refusal of justices to permit juries to consider this defence in seditious libel cases made them extend this denial to private libel actions. The result for the common law was that libel became a separate tort with quasi-punitive overtones, possessing much more stringent doctrines than did slander, or even slander per se. Not until 1792 did Fox's Libel Act permit a jury in a libel case to return a verdict simply of Not Guilty,<sup>69</sup> thereby indicating, if indirectly, its belief in the truth of the written defamatory statement.

By that time, however, slander and libel were torts so separate, with such different definitions and defences, that their merger into a single tort of defamation was impossible except by legislative action, and Parliament showed no willingness to move in this direction. The only explanation for their separation was historical, the "reception" of each of them separately by the common law, late and in a hurry because of forces external to it. The division was hopelessly illogical, as Chief Justice Mansfield had to admit in *Thorley v. Lord Kerry*<sup>70</sup> in 1812 (the Bumble view), but also it was now too late to reverse history (the Holmesian antidote).

---

69. 32 Geo. 3, c. 60 (1792).

70. 4 Taunt. 355, 128 Eng. Rep. 367 (Exch. Ch. 1812).

