J. H. ASHDOWN (PLAINTIFF).....APPELLANT ; 1891

AND

THE MANITOBA *FREE PRESS* COMPANY (DEFENDANTS).....RESPONDENTS.

*Mar. 12.
*Nov. 17.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, MANITOBA.

Libel—Provisions of act relating to newspapers—Compliance with—Special damages—Loss of custom—50 Vic. cc. 22 and 23 (Man.).

By section 13 of 50 Vic. c. 22 (Man.), "The Libel Act," no person is entitled to the benefit thereof unless he has complied with the provisions of 50 Vic. c. 23, "An Act respecting newspapers and other like publications." By section 1 of the latter act no person shall print or publish a newspaper until an affidavit or affirmation made and signed, and containing such matter as the act directs, has been deposited with the prothonotary of the Court of Queen's Bench or Clerk of the Crown for the district in which the newspaper is published ; by section 2 such affidavit or affirmation shall set forth the real and true names, &c., of the printer or publisher of the newspaper and of all the proprietors ; by sec. 6 if the number of publishers does not exceed four the affidavit or affirmation shall be made by all, and if they exceed four it shall be made by four of them ; and sec. 5 provides that the affidavit or affirmation may be taken before a justice of the peace or commissioner for taking affidavits to be used in the Court of Queen's Bench.

Held, 1. That 50 Vic. c. 23 contemplates, and its provisions apply to, the case of a corporation being the sole publisher and proprietor of a newspaper.

2. That sec. 2 is complied with if the affidavit or affirmation states that a corporation is the proprietor of the newspaper and prints and publishes the same. Gwynne J. dissenting.

3. That the affidavit or affirmation, in case the proprietor is a corporation, may be made by the managing director.

4. That in every proceeding under sec. 1 there is the option either to swear or affirm, and the right to affirm is not restricted to members of certain religious bodies or persons having religious scruples.

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*PRESENT :—Sir W. J. Ritchie C. J., and Strong, Fournier, Gwynne and Patterson JJ.

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5. That if the affidavit or affirmation purports to have been taken before a commissioner his authority will be presumed until the contrary is shown.

By sec. 11 of the Libel Act actual malice or culpable negligence must be proved in an action for libel unless special damages are claimed. *Held*, that such malice or negligence must be established to the satisfaction of the jury, and if there is a disagreement as to these issues the verdict cannot stand.

Held, further, that a general allegation of damages by loss of custom is not a claim for special damages under this section.

Per Strong J.—Where special damages are sought to be recovered in an action of libel, or for verbal slander where the words are actionable *per se*, such special damage must be alleged and pleaded with particularity, and in case of special damage by reason of loss of custom the names of the customers must be given, or otherwise evidence of the special damage is inadmissible.

APPEAL from a decision of the Court of Queen's Bench, Man. (1), setting aside a verdict for the plaintiff and ordering a new trial.

This was an action against the Manitoba *Free Press* Company for publishing in the *Daily Free Press* and and in the *Weekly Free Press* an article alleged by the plaintiff to be libellous and to have caused him damage by loss of reputation and by injury to his business. The facts of the case are sufficiently set out in the above head-note and in the judgment of this court.

The plaintiff obtained a verdict for $500 which the full court set aside and ordered a new trial. From that decision he brought the present appeal.

McCarthy Q.C. for the appellant. The defendants should have pleaded the statute 50 Vic. ch. 22 if they wished to obtain the benefit of it. Folkard on Libel (2) states what evidence is admissible under a plea of not guilty.

The declaration was not made by the proper person. *Bank of Toronto* v. *McDougall* (3); *Freehold Loan & Savings Co.* v. *Bank of Commerce* (4).

(1) 6 Man. L.R. 578.
(2) 4 ed. pp. 372-374.
(3) 15 U.C.C.P. 475.
(4) 44 U.C. Q.B. 284.

The learned counsel also contended that it was incumbent on the defendants to prove the truth of the affidavit and that it conformed to the requirements of the act.

Robinson Q.C. for the respondents cited, as to the contention that the statute should have been pleaded, *Williams* v. *The East India Co.* (1); *Sissons* v. *Dixon* (2); and as to the declaration being sufficient, *Moyer* v. *Davidson* (3); *DeForrest* v. *Bunnell* (4); *Mowat* v. *Clement* (5).

McCarthy Q.C. in reply referred to *The King* v. *Hart* (6).

Sir W. J. RITCHIE C.J.—Ch. 23 s. 5 of 50 Vic. (Man.) directs that "such affidavit or affirmation shall be in writing and signed by the person or persons making the same, and may be taken before any justice of the peace or commissioner for taking affidavits to be used in the Court of Queen's Bench."

If this document was sworn or affirmed before such a commissioner then the act was complied with, because the act to which alone we can look gives such a commissioner the necessary authority to administer or take the affirmation, just as the statute might have authorized the swearing of the affidavit or the affirmation to be taken before a notary public, or any other person that the legislature deemed suitable to act in such a capacity. We can only look to the act and be governed by it and by it alone.

Whether the documents were sworn to, as Mr. Luxton thinks they were, or were solemnly declared and affirmed, as the contents state and as Mr. McKilligan's verification at the bottom indicates, does not

(1) 3 East 192.
(2) 5 B. & C. 758.
(3) 7 U.C.C.P. 521.
(4) 15 U.C. Q.B. 370.
(5) 3 Man. L.R. 585.
(6) 10 East 95.

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appear to me material, inasmuch as either swearing or affirming would be a compliance with the statute, though I should, if it were necessary to determine this point, certainly be prepared to hold that the contents of the document which states that "I, William F. Luxton, &c., do solemnly declare and affirm that," &c., and the attesting clause "solemnly declared and affirmed before me at, &c., John B. McKilligan, a commissioner, &c.," should be taken, in the absence of any positive evidence to the contrary, as proof that the documents were affirmations and not affidavits.

I think if a certified copy of the affidavit or affirmation is to be received in evidence as *primâ facie* proof of such affidavit or affirmation, and that the same was duly sworn or affirmed, as provided by section 13 of the act which is as follows:

> 13. In all cases a copy of any such affidavit or affirmation, certified to be a true copy under the hand of the prothonotary or deputy clerk of the Crown and Pleas having the custody of the same, shall be received in evidence as *primâ facie* proof of such affidavit or affirmation, and that the same was duly sworn or affirmed, and of the contents thereof; and any such copy so produced and certified shall also be received as evidence that the affidavit or affirmation of which it purports to be a copy has been sworn or affirmed according to this act and shall have the same effect for the purposes of evidence as if the original affidavit or affirmation had been produced and had been proved to have been duly so certified, sworn and affirmed by the person or persons appearing by such copies to have sworn or affirmed the same.

a fortiori, the original must be held to have a similar, if not greater effect.

I think there is nothing in the other objections raised and I therefore agree with the court below that defendants are within the protection of the statute; that special damages are neither claimed nor proved, and consequently to enable plaintiff to recover it was necessary for him to prove actual malice or culpable negligence, on neither of which questions were the

jury enabled to agree; and therefore the jury having disagreed on both of these two questions, one or the other of which it was essential to plaintiff to establish to enable him to recover, I think there should be a new trial, and therefore this appeal will be dismissed.

STRONG J.—I am of opinion that Mr. Luxton, the managing director of the company, was the proper person to make the affidavit or affirmation required by secs. 1 and 3 of 50 Vic. ch. 53 (Manitoba). The stat. 50 Vic. ch. 22 (Manitoba) which requires the proof of actual malice or culpable negligence where special damages are not claimed is expressly made applicable to corporations by sec. 13 which enacts that "no person, persons or corporation who has or have not complied with the 'Act respecting newspapers and other like publications' passed in the present session shall be entitled to the benefit of this act," and sec. 3 of 50 Vic. ch. 53, by which last mentioned statute the affidavit or affirmation is made requisite, is to the same effect; "no person or persons or corporation who has or have not complied with the provisions of this act shall be entitled to the benefit of any of the provisions of the act respecting the law of libel passed during the present session."

It is therefore very plain that an affidavit was required in the case of publication by an incorporated company. Then who was the person to make such an affidavit? The statutes give no indication of this. The corporation itself clearly could not make the affidavit and the provisions of the 6th section are not applicable to corporations but to ordinary partnerships. It seems, therefore, that the affidavit or affirmation must be made by some principal officer of the corporation, and if this be so I am opinion that the managing director was

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the appropriate person. The case of *Kingsford* v. *The Great North-Western Railway Co.* (1) is an authority for this conclusion.

As regards the sufficiency of the paper filed with the prothonotary as an affirmation I have had some doubts, but I have arrived at the same conclusion on this point as the court below. There was a literal compliance with the terms of the act. The statute requires an affirmation and an affirmation was made and filed. I do not think we are to read into the statute the qualification that an affirmation was only to be sufficient when the person making it was a Quaker, or one of the class who, having conscientious scruples about swearing, have the privilege given them of affirming. That would be to add to the statute in a way which upon consideration (although I at first thought differently) would be inadmissible having regard to the principles of strict construction which now prevail.

The objection that "John B. McKilligan" before whom the affirmation purports to have been made was not proved to have been a commissioner having authority to take affidavits is answered by the rule "*omnia præsumuntur rite esse acta*" and by the authorities quoted in the judgment of the learned Chief Justice in the court below, particularly what Lord Abinger C. B. says in *Burdekin* v. *Potter* (2); and *Cheney* v. *Courtois* (3), which last case appears to be exactly in point. There an affidavit was, in order to the validity of a bill of sale, required by statute to be filed with the bill of sale in the Court of Queen's Bench. The affidavit purported to have been sworn before a Commissioner of the Court of Exchequer, and it was objected that the party relying on a due compliance with the statute was

(1) 16 C. B. N.S. 761. (2) 9 M. & W. 13.
(3) 13 C. B. N.S. 639.

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bound to prove that the person signing as a commissioner was in fact one. Erle C.J. there says:

> I am of opinion that the statute intended to require the formality and sanction of an oath, and unless it were shown to my satisfaction that the person before whom the affidavit was sworn had no power to administer an oath I should be bound to presume *omnia rite esse acta*. It was the duty of the officer of the Court of Queen's Bench not to file the bill of sale unless it was accompanied by an affidavit properly sworn and attested. We must presume that he has done his duty.

Applying what was thus laid down as law by Chief Justice Erle to the present case, I say it was the duty of the prothonotary not to file this affidavit unless he was satisfied that Mr. McKilligan was a commissioner, a fact which he could easily have ascertained by a reference to the rolls or records of the court of which he was himself the custodian. In the case of an affidavit filed with a deputy clerk of the crown that officer, if he has any doubt, can easily resolve it by a reference to the prothonotary. There was, therefore, a *primâ facie* presumption that the affirmation was regularly taken before a person having authority to receive it, and it was for the plaintiff to displace that presumption if able to do so.

As regards the substance of the declaration there is, in my opinion, a literal and exact compliance with the requirement of the statute. The 2nd section of the act prescribes what must be the contents of the declaration or affidavit. It requires that the real and true names, addresses, descriptions and places of abode of the printers and publishers as well as of the proprietors of the newspaper shall be set forth. This in the case of a newspaper published by an incorporate company as the *Free Press* is, and printed by the company itself, is sufficiently complied with by stating, as the declaration does, the fact that the corporation is the proprietor of the paper and that the corporation itself prints and publishes it. This is so plain and self-evi-

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dent that I do not feel called upon to take up time and space in the reports by entering upon a demonstration to show that as regards proprietorship in the case of a corporation the names of the shareholders and a statement of their shares and interests need not be given as in the case of a partnership or unincorporated company; and further that when the corporation is stated in the declaration (or affidavit) to be its own printer and publisher, as in the present case, there is no necessity for stating the names of the persons, viz.: The foreman, proof-readers, type-setters, press-men, and newsboys, employed in the mechanical work of printing and in the publication and sale of the newspaper.

The defendants have, therefore (subject only to the question of pleading which I will refer to hereafter), brought themselves within the protection of the statute unless we can hold that the plaintiff is within the exception excluding from its operation cases where special damages are claimed. I take it to be clear that where special damages are sought to be recovered in an action for libel, or in an action for verbal slander where the words are actionable *per se*, such special damage must be alleged and pleaded with particularity, and that in case of special damage by reason of loss of custom the names of the customers must be given or otherwise evidence of the special damage is not admissible, and that this rule is not confined to cases of verbal slander where the words are not actionable *per se*, cases in which special damage is a necessary ingredient in the cause of action. In Odgers on Libel (1) I find the following passage which appears to me applicable as showing that the allegations at the conclusion of the third and fourth counts are averments of general and not of special damages. The learned writer says:

(1) 2nd ed., p. 302.

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And here note the distinction between the loss of individual customers and a general diminution in annual profits. Loss of custom is special damage and must be specifically alleged and the customers' names stated in the record. If that be done the consequent reduction in plaintiff's annual income can easily be reckoned. But if no names be given, it is impossible to connect the alleged diminution in the general profits of plaintiff's business with defendant's words; it may be due to fluctuations in prices, to change of management, to a new shop being opened in opposition, or to many other causes. Hence, such an indefinite loss of business is considered general damage and can only be proved when the words are spoken of the plaintiff in the way of his trade and so are actionable *per se*. For there the law presumes that such words must injure the plaintiff's business and therefore attributes to those words the diminution it finds in plaintiff's profits. See *Harrison* v. *Pearce* (1).

The learned writer is no doubt here referring to cases of verbal slander, but it must be the same in cases of actions for written defamation as in those where the cause of action is for words spoken which are actionable *per se*. This consideration gets rid of any difficulty which might seem to arise from *Evans* v. *Harries* (2) and *Riding* v. *Smith* (3), which were both actions for verbal slander of the plaintiff in his trade and in which it was held that evidence of loss of custom generally was admissible under similar allegations to those in the present case as proof of general damages. It is therefore clear, both on authority and principle, that the declaration does not claim special damages and that the plaintiff did not bring himself within the exception of such cases provided for by the 11th sec. of ch. 22.

The question for decision is therefore (apart from the point of pleading) reduced to this: Did the plaintiff prove to the satisfaction of the jury either actual malice or culpable negligence on the part of the defendants in publishing the articles complained of?

(1) 1 F. & F. 567.

(2) 1 H. & N. 251.

(2) 1. Ex. D. 91.

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I do not see how it is possible to say, in the face of the fact that the jury were unable to agree to an answer to the second and third questions put to them by the learned judge, that they have found at all upon these vital questions. It is apparent upon the record before us that upon these the essential points they differed, and that there was no finding. The questions were clearly and explicitly framed, in these words:

Question 2. Was the defendant guilty of actual malice in the publication of the article complained of?

Question 3. Was the defendant guilty of culpable negligence in its publication?

The jury declare that by reason of difference of opinion amongst them they are unable to answer either.

I agree with the Chief Justice of Manitoba that after this positive declaration of an inability to agree to answers to these two direct questions it is impossible to hold that a negative answer to them is to be implied from the affirmation elicited by the 5th question, which inquired whether Mr. Luxton *bonâ fide* believed the publications to be true. It appears therefore that the real issues, viz., whether there was malice or negligence, have never been passed upon by the jury and that being so no other alternative was open to the court but to send the action down for a new trial.

As regards the question of pleading I think the onus must always be on the defendants, in cases under this statute, to bring themselves within the provisions in question by showing that they had filed the affidavit or affirmation, and as it is for them to prove this it is also incumbent on them to plead a compliance with the prescribed requirements. But it would be out of the question to determine this appeal on any such ground as this. The point does not seem to have been

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taken either at the trial or before the court in *banc*. The notice of appeal to the Court of Queen's Bench, indeed, does not even assign it as a ground of objection. It was therefore taken here for the first time, and that being so of course no effect ought to be given to it. I think, however, it would be better to make the record perfect by adding the plea, and for that purpose I should be prepared to give leave to amend.

Subject to a variation of the rule of the court below by directing an amendment for the purpose above mentioned I am of opinion the appeal should be dismissed with costs.

GWYNNE J.—The only question which, in my opinion, arises in this case that it is necessary to consider is whether or not the defendants are entitled to the benefit of the provisions of the Manitoba Statute, 50 Vic. ch. 22, an act respecting the law of libel. By the 13th section of that act it is enacted that:

> No person, persons or corporation who has or have not complied with the act respecting newspapers and other like publications passed in the present session shall be entitled to the benefit of this act.

Now by that act respecting newspapers, &c., 50 Vic. ch. 23, Manitoba, it is enacted in its 3rd section that:

> No person or persons or corporation who has or have not complied with the provisions of this act shall be entitled to the benefit of any of the provisions of the act respecting the law of libel passed during this present session.

Now the force of these two clauses of these acts is to make every provision of the act respecting newspapers, 50 Vic. ch. 23, apply to the case of corporate bodies equally as to individuals who should seek the benefit of any of the provisions of 50 Vic. ch. 22, and precisely in the same manner and to the same extent, the object of the legislature, in my opinion, being to

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provide for every person who should be libelled in a newspaper the same means of redress by criminal or civil process, and the same power of selection of the person or persons against whom such redress should be sought, namely, either against some individual persons filling the position of printer, or of publisher, or of owners or part owner of the newspaper in which the libel is published, and who derive profit from its publication, whether such proprietors or proprietor should or should not constitute a body corporate. This reasonable intention of the legislature is, to my mind, abundantly apparent from the language used. It never could have been their intention that a corporate body should have greater license than non-corporate proprietors of a newspaper to publish, or greater facility in escaping responsibility if they should cause to be published, libels in their paper. The first section then of the act 50 Vic. ch. 23, although it commences with the words, "no person shall print or publish," &c., must, by force of the above section 3 of the same act and of section 13 of 50 Vic. ch. 22, be read thus:

No person, persons or corporation shall print or publish, or cause to be printed or published in Manitoba, any newspaper, pamphlet or other paper containing public news or intelligence or serving the purpose of a newspaper, or for the purpose of posting for general circulation in detached pieces as such newspaper, until an affidavit or affirmation, made and signed as hereinafter mentioned, shall have been delivered to the prothonotary of the Court of Queen's Bench or the Deputy Clerk of the Crown and Pleas for the district in which such newspaper, pamphlet or other paper is printed or published.

Then section 2 enacts that:

Such affidavit or affirmation shall set forth the real names, additions, descriptions and places of abode of every person who is or is intended to be the printer or publisher of the newspaper, pamphlet or other paper mentioned in such affidavit or affirmation, and of all the proprietors of the same, and also the amount of the proportional shares of such proprietors in the property of the newspaper, pamphlet or other paper, and the true description of the house or building

wherein such newspaper, pamphlet or other paper is intended to be printed, and the titles of such newspaper, pamphlet or other paper.

Then by section 6 it is enacted that:

Where the persons concerned as printers and publishers of any newspaper, &c., together with such number of proprietors as are hereinbefore required to be named in such affidavits or affirmations as aforesaid do not altogether exceed the number of four persons, the affidavit or affirmation required shall be sworn, affirmed and signed by all the said persons, and when the number of all such persons exceeds four the same shall be signed and sworn, or affirmed by four of such persons, but the same shall contain the real and true names, description and places of abode of every person who is or who is intended to be the printer or printers, publisher or publishers, and of so many of the proprietors as are hereinbefore for that purpose mentioned, of such newspaper, pamphlet or other such paper as aforesaid.

Then by the 8th section it is provided that such affidavits and affirmations shall in all cases or proceedings touching or concerning any matter or thing contained in any such newspaper, &c., which may be taken against every person who has signed and sworn or affirmed such affidavit or affirmation, and against every person who has not signed or affirmed the same but who is mentioned therein to be a proprietor, printer and publisher of such newspaper, &c., shall be admitted as sufficient evidence of the truth of the matters which are by the act required to be set forth in such affidavit or affirmation, and which are therein set forth.

Then by the 10th section it is provided that in some part of every newspaper, pamphlet or other such paper aforesaid there shall be printed the real name, addition and place of abode of every printer and publisher thereof, and also a true description of the place where the same is printed, subject in case of default to a penalty of $80.00, to be recovered from the person who knowingly and wilfully prints or publishes any such newspapers, &c., not containing the particulars aforesaid.

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Now as the act declares that "no person, persons or corporation" shall be entitled to the benefit of the act respecting the law of libel, viz., 50 Vic. ch. 22, who has not or have not complied with the provisions of 50 Vic. ch. 23, it is, in my opinion, obvious that the provisions of the latter act in every particular apply to corporate bodies equally as to individual proprietors of newspapers, and we have no right to hold that some only of those provisions apply to corporations and others to individuals, and so render the security or facilities for obtaining redress the public were intended to have in the case of libels published in newspapers less efficient in the case of a libel published in a newspaper owned by a body corporate than in the case of a libel published in a newspaper owned by persons not incorporated; and we must, in my opinion, hold that in the case of a body corporate being proprietors of a newspaper the same necessity exists for giving the real names and addresses of some individual persons or person as printers or printer, publishers or publisher, and proprietors or proprietor, or owners of shares in such body corporate equally as in the case of a newspaper owned by persons not incorporated; and if this be not done in the case of a corporation equally as in the case of a newspaper owned by persons not incorporated the act 50 Vic. ch. 23 is not complied with, and the corporation in such case is not entitled to the benefit of 50 Vic. ch. 22.

Now the document filed as and by way of the affidavit or affirmation required by the statute is an affirmation made by a Mr. Luxton, who styles himself managing director of the defendant company, who affirms that the Manitoba *Free Press* Company, a company incorporated under the laws of Manitoba, is the printer, publisher and sole proprietor of the newspaper named *The Manitoba Daily Free Press* and also of *The*

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Manitoba Weekly Free Press in which respective papers of the dates of the 25th and 30th May, 1889, were published the libels complained of, and in that published on the 25th of May the only notice professing any compliance with sec. 10 of 50 Vic. ch. 23 that was inserted was as follows :

Manitoba *Free Press* published every day except Sunday at 6 a.m. at Winnipeg by the Manitoba *Free Press* Company.

W. F. LUXTON,
Managing Director and Editor in Chief.

while in that of the 30th of May, 1889, the only notice inserted was as follows :

MANITOBA FREE PRESS,
WEEKLY EDITION.

Published every Thursday at the Manitoba *Free Press* building, Winnipeg, Man., by the Manitoba *Free Press* Company.

W. F. LUXTON,
Managing Director and Editor in Chief.

Now neither the affirmation so filed nor the notices published in the respective newspapers in which the libels complained of appeared constituted, in my opinion, a compliance with the provisions of the 50 Vic. ch. 23; they were rather, in my opinion, in plain contravention of the requirements of the act. The defendants, therefore, in the present case, were not entitled to the benefit of 50 Vic. ch. 22, and the plaintiff is entitled to retain his verdict and to have judgment in his favour entered thereupon. The appeal therefore, in my opinion, should be allowed and judgment be ordered to be entered in the court below for the plaintiff on the verdict rendered in his favour. In this view of the case it is a matter of no importance that the jury have not answered the question put to them as to actual malice in the publications complained of.

PATTERSON J.—This is an action of libel. The de-

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claration contains four counts. The first and second counts are alike but refer to different publications of the article charged as libellous, the first count being for the publication of the article in the *Manitoba Weekly Free Press*, and the second for publication of the same article in the *Manitoba Daily Free Press*, and both of those counts charging generally that the defendants falsely and maliciously printed and published of the plaintiff the words contained in the article, not alleging special damage, and indeed not containing any allegation of damage.

The third and fourth counts, again, are alike, charging the same publications of the article but each beginning with the averment that the article was published in relation to the plaintiff and to the carrying on by him of his business of a hardware merchant, and concluding:

> Whereby the plaintiff has been and is greatly injured in his credit and reputation, and also has been greatly injured in his credit and reputation as a hardware merchant and in his said business, and has experienced and sustained sensible and material diminution and loss in the custom and profits of his said trade and business by divers persons, whose names are to the plaintiff unknown, having in consequence of the committing of the said grievances by the defendants avoided the plaintiff's said shops, stores and warehouses, and abstained from being customers of the plaintiff as such merchant as aforesaid, as they otherwise would have been but for the committing of the said grievances by the defendants.

And the declaration concludes with a general claim for $10,000 damages. The pleas are: 1st. Not guilty; 2nd. As to the third and fourth counts, that the plaintiff did not carry on the business of hardware merchant as alleged; 3rd and 4th, held bad on demurrer; 5th, that the defamatory allegations are true.

The questions upon this appeal turn upon two statutes of Manitoba. One statute (1) enacts that:

(1) 50 Vic. ch. 22.

11. Except in cases where special damages are claimed the plaintiff in all actions for libel in newspapers shall be required to prove either actual malice or culpable negligence in the publication of the libel complained of.

13. No person, persons or corporation, who has or have not complied with the "Act respecting Newspapers and other like publications," passed in the present session, shall be entitled to the benefit of this act.

The other is the act thus referred to in section 13 (1). The provisions in question are contained in sections 1, 3 and 5 :

1. No person shall print or publish, or cause to be printed or published in Manitoba any newspaper, pamphlet or other paper containing public news or intelligence, or serving the purpose of a newspaper, or, for the purpose of posting for general circulation, in detached pieces as such newspaper, until an affidavit or affirmation, made and signed as hereinafter mentioned, containing the matters hereinafter mentioned, shall have been delivered to the prothonotary of the Court of Queen's Bench, or the Deputy Clerk of the Crown and Pleas for the district in which such newspaper, pamphlet or other paper is printed or published.

3. No person or persons or corporation, who has or have not complied with the provisions of this act, shall be entitled to the benefit of any of the provisions of the act respecting the law of libel passed during this present session.

5. Every such affidavit or affirmation shall be in writing, and signed by the person or persons making the same, and may be taken before any justice of the peace or commissioner for taking affidavits to be used in the Court of Queen's Bench.

Section 4 prescribes the contents of the affidavit and I think nothing turns upon it. In my opinion the section is satisfied by this document.

Section 6 requires that when the persons concerned as printers and publishers of any newspaper, together with the proprietors, do not exceed four in number the affidavit or affirmation must be made and signed by them all, but if they are more than four then it is to be made and signed by four of them. That does not appear to be applicable to a case like this one

(1) 50 Vic. ch. 23.

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where the sole proprietor and publisher is a corporation. Therefore there is no reason for denying that an affidavit or affirmation by the managing director of this corporation satisfies section one, which does not say who is to make it.

There was no finding of actual malice or culpable negligence. The jury gave a general verdict for the plaintiff for $500 but did not answer three out of the five questions left to them by the judge. Two of those three questions on which the jury could not agree asked if the defendants were guilty of actual malice or culpable negligence in the publication of the article, the third related to the affidavit and will be noticed presently. The two on which they agreed were the following:

4. Was the article complained of merely a fair and reasonable defence against attacks previously made upon the defendant company or its publications by the publishers of the *Sun* newspaper ?

To which they answered "No"; and

5. Did Mr. Luxton when the publications in question were made *bonâ fide* believe them to be true in fact? If it is not proved to your satisfaction that he did not so believe, answer the question in the affirmative.

They answered this question in the affirmative. Mr. Luxton was the writer of the article and the managing director of the company.

A new trial was ordered on the ground that the jury had really disagreed. The appellant contends that that is an erroneous view of the matter and that he is entitled to retain his verdict for $500.

The first question is whether the statute was complied with in respect of the affidavit or affirmation so as to dispense with proof of actual malice or culpable negligence.

There was, no doubt, evidence of actual malice sufficient to go to the jury, and perhaps, also, of cul-

pable negligence; but I apprehend that when the statute makes proof of those things, or of one of them, essential to the maintenance of the action the issue thus thrown upon the plaintiff is, like any other issue, to be proved to the satisfaction of the jury. If that is not done, as it was not done in this case, the issue is not proved and the plaintiff fails. Hence the importance of the inquiry whether the defendants have brought themselves within the protection of the statute.

Now let us look at the affidavit or affirmation.

It is made by Mr. Luxton. It commences thus :

I, William Fisher Luxton, of the city of Winnipeg, in the county of Selkirk, journalist, do solemnly declare and affirm :

And after stating all that the statute requires it to state, it concludes :

And I make this solemn declaration conscientiously believing the same to be true and by virtue of the "Act respecting Extra-Judicial Oaths."

Solemnly declared and signed before me at the city of Winnipeg, in the county of Selkirk, this 19th day of December, A.D. 1887. } (Sgd.) W. F. LUXTON.

(Sgd.) JOHN B. MCKILLIGAN,
A commr., &c.

One objection made is that John B. McKilligan was not proved to be a justice of the peace or a commissioner for taking affidavits to be used in the Queen's Bench. That is an objection to which we should not pay any attention. It was urged before us stoutly enough, but at the trial where everybody evidently knew Mr. McKilligan there is no trace of it. It was debated whether or not Mr. Luxton had sworn to the statement before Mr. McKilligan or had merely affirmed, and after the judge had charged the jury he was recalled to be further examined about the document. Mr. McKilligan was then mentioned, as he

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had been during the regular examination of Mr. Luxton and of the secretary of the company, the prothonotary who produced the document which had been filed in his office not being asked anything about him any more than the other witnesses, but he was mentioned only in this manner :

His Lordship—Tell the jury what you did on the occasion when you said you swore to these affidavits ?

A. My recollection is that I swore to it, that is, the form being recited to me by Mr. McKilligan and I kissed the book, the ordinary form "So help me God." There are circumstances that go to corroborate that the affidavit or affirmation, whatever it is called, was made in my own office and in my room ; Mr. Campbell, who was acting for me, brought Mr. McKilligan there and I have a bible there and it is used for that purpose. That goes to confirm that circumstance.

It is palpable that witness, counsel, judge and jury knew that Mr. McKilligan was a proper person to administer the oath or take the affirmation.

The main question, and in fact the only question, made at the trial respecting the document is whether it is an affidavit or an affirmation within the meaning of this particular statute.

The jury were asked to find whether it was sworn to or only affirmed, and they could not agree upon the fact.

I speak of the document in the singular though there were two. They were *fac similes*, one of them relating to the daily paper and the other to the weekly.

The argument in support of the objection is that the statute requires an affidavit or sworn statement when the deponent has no conscientious scruples about taking an oath and that the affirmation is permitted only in case of persons who have such scruples, or when the deponent belongs to some religious body the members of which are excused from being sworn.

It may be that some idea of that sort was in the mind of the draftsman who framed the clause of the

statute, but he certainly has not conveyed it by the language he has used. Literally read the clause gives an option to swear or affirm. There are statutes which permit a witness at the trial of a civil or criminal case to make a solemn affirmation instead of giving his evidence on oath, provided he belongs to one of certain religious denominations, or provided he has conscientious objections to being sworn, and the same privilege is extended to some proceedings out of court. The English statutes on the subject down to 17 & 18 Vic. ch. 125 are cited by the appellant in his factum, and may, together with later statutes, be found noticed in Taylor on Evidence (1). We may refer also to such provisions as those contained in the Criminal Procedure Act (2), and in the act respecting oaths of allegiance (3), as examples of greater care in the particular in discussion, the right to affirm in place of swearing being given only to those persons who have that right in civil cases.

The class of persons is thus defined by reference to the legislation concerning the mode of giving testimony in civil actions. There is no assumption of the existence of the right to substitute affirmation for oath as belonging to any class apart from legislation.

But the argument for the appellant requires us to read into this statute something which the legislature has not expressed, in place of understanding the language in its literal meaning which gives the option to swear or to affirm. In this case the deponent has affirmed, he "solemnly declares and affirms," the word "affirm" not being, as it would seem, indispensable, and probably not being intended to be used in a statutory declaration under the Dominion act. I think a declaration under the third section of

(1) 8 ed. p. 1181, sec. 1389. (2) R.S.C. c. 174, s. 219.
(3) R.S.C. c. 112, s. 3.

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that act—the act respecting extra-judicial oaths (1)—would satisfy the Manitoba statute, but in this case the deponent does not merely solemnly declare, he uses the expression given by the Manitoba statute and solemnly affirms.

Thus it appears to me that the statute was complied with by the filing of the document in evidence, even though it may not have been sworn to and although Mr. Luxton may not be a person who could assert a statutory privilege to give his evidence in a civil action on solemn affirmation in place of on oath.

I am unable to see anything in the contention that the statute ought to have been pleaded. There is nothing in question but a rule of evidence. Malice has always to be established. It is of the essence of the charge. But whereas it is in other cases *primâ facie* proved by the publication of the defamatory words a different rule is applied to newspapers. That is the law of the land and the plaintiff knows the law. He has access to the documents filed with the prothonotary and can satisfy himself before he brings his action as to what proof he requires.

I do not see my way to hold that we can properly order a judgment for the defendant, and am of opinion that our proper course is simply to dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for appellant: *Aikins, Culver, Patterson & McCleneghan.*

Solicitors for respondents: *Archibald, Howell & Cumberland.*

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(1) R. S. C. c. 141.