# CHAPTER IX.

## CRIMINAL LIABILITY.

THE next point to be considered is the persons who may incur liability under section 124A. In other words who can be included under the comprehensive term "Whoever." Now as regards 'words spoken,' it is clear that the speaker himself is responsible for the language which he uses. But in the case of 'words written,' or matter disseminated through the Press, or by 'signs,' or 'visible representation,' a variety of persons may incur liability. It may be said briefly that all persons who wittingly take part, whether actively or passively, in the dissemination of seditious matter are responsible, in proportion to the part taken by them.

The principles of joint criminal liability are laid down by the Indian Penal Code in sections 34—37. They may, for convenience, be paraphrased thus :—When a criminal act is done by several persons in furtherance of the common intention of all, or when an offence is composed of several acts, which are committed, either singly or jointly, by several persons, each of the persons who so co-operates, intentionally, in the commission of such criminal act or offence, is liable individually for the commission of it, as though he had done it alone. But this, again, is subject to the limitation that, when criminal knowledge or intention is an essential element in the offence committed, the persons who join in the commission of it must be shown to have such knowledge or intention before they can be held liable.

These are but the principles of the English law relating to the joint liability of persons who participate in the commission of a felony. "If two persons," said Erskine, J., in *R.* v. *Hurse* (2 M. & Rob., 360), "having jointly prepared counterfeit-coin, planned the uttering, and went on a joint expedition and uttered, in concert and by previous arrangement, the different pieces of coin, then *the act of one would be the act of both*, though they might not be proved to be actually together at each uttering" (Russell).

In the *Bangobasi* case, where the proprietor, the editor, the manager and the printer were together placed on their trial in respect of the seditious articles charged (see *Ch. iv*), Sir C. Petheram, C. J., was of opinion that, whoever the writer might be, 'the persons who used them for the purpose of exciting disaffection' were guilty under the section.

In Tilak's case ( see *Ch. v*) Justice Strachey referring to these observations said :—"It has been held by the late Chief Justice of Calcutta, Sir Comer Petheram, that it is not only the writer of the alleged seditious article, but whoever uses in any way words or printed matter for the purpose of exciting feelings of disaffection to the Government that is liable under the section, whether he is the actual author or not; and I entirely agree with him."

In this case the two accused were respectively the proprietor, editor and publisher, and the acting manager and printer of the *Kesari*. On the question of their individual responsibility for the publication of the articles the learned Judge said :— "The prisoner Tilak is the proprietor and editor of that paper and he is also the publisher. He has not attempted to dispute that, but has admitted it. He has also in his statement before the committing Magistrate, admitted that he was cognisant of the fact that the paper was despatched to various places, including Bombay. It is further in evidence that before any matter is published in the *Kesari*, proofs are submitted to him. Upon the evidence you would be justified in holding that he is the publisher of this paper, and also the publisher of these particular articles in the paper."

This evidence in the opinion of the learned Judge was sufficient to fix the accused with responsibility *qua* publisher, but in addition to this he had signed a declaration as such under Act XXV of 1867 (see *Appx.*) and the declaration was in evidence. "Under that Act," the learned Judge continued, "in the absence of any evidence to the contrary, you will be justified in holding that the prisoner Tilak was the publisher of every article and every word in the *Kesari*. He published it through his servants, and it must be taken as a fact, until the contrary is proved, that he authorised them not only to print it, but to give it out to the world and to distribute it in Poona and various

other places, among them being Bombay.'' Upon these facts Tilak was found guilty.

The case of the other accused was different. He was the head printer in charge of the Arya Bhushan Press at which both the *Kesari* and the *Mahratta* were printed. He was at the time the acting manager and printer of the *Kesari*, but not its registered printer. It was not his business to correct proofs, but merely to receive and pass them on to a proof corrector, who in turn submitted them to Tilak. "That being the state of facts," said his lordship, "how have you to deal with the question of his responsibility? You have to deal with it in this way. As he was the manager and superintendent in bringing out the matter—which was ditsinct from having a control over the literary department—as he was printer of it, you may presume that he was acquainted with what he was printing and distributing. You have to find whether he authorised the insertion of these articles or their distribution. It is a pure question of fact. If you are not satisfied that the prisoner was cognisant of the particular articles, or that he directed or authorised the insertion or distribution of them, then I will advise you to find him not guilty, because you must have regard to the section which requires distinct proof by the Crown against him. You must be satisfied that for printing or using the words that were published he was responsible, and that he used those words for the purpose of exciting disaffection. If you come to the conclusion that he knew nothing about these articles, then it is a question for you to consider whether you can properly say that he used those words with that purpose in his mind. It is entirely for you to consider whether you believe his uncontradicted statement that he was absolutely ignorant of what appeared in those articles.'' Upon these facts the jury found the second accused not guilty.

From so lucid an exposition of the law it is abundantly clear that where publication is unquestioned or beyond controversy, the only question left to be decided is the meaning of the language employed. On the meaning will depend the intention, and if the Court, whether judge or jury, comes to the conclusion that the words used are calculated to excite disaffection, there is an end of the matter. If, on the other hand, publication is denied, and there has been no declaration, the individual responsibility

of each accused will have to be established by distinct evidence, in the usual manner.

In the Full Bench case of Ramchandra Narayan (see *Ch. vi*), otherwise known as the 'Satara case,' the two accused were respectively the editor and the proprietor of a newspaper called the *Pratod*. The defence set up by each is briefly summarised by Sir C. Farran, C. J., as follows:—"It is not denied that the first accused Ramchandra Narayan is criminally responsible for the publication of the libel, if its contents contravene the provisions of section 124A of the Penal Code; but for him it has been contended that the libel does not transgress the law enacted in that section. The same contention has been made on behalf of the accused No. 2; but in his case the defence has also been urged that although he is the registered printer and publisher of the *Pratod* newspaper, he had ceased to take any part in its management long before the publication of the libel, and that he is not criminally responsible for its publication, even though seditious matter is contained in it."

As the article was found to be seditious the conviction of the first accused was duly affirmed. "As to the second accused," his lordship continued, "he is admittedly the proprietor of the *Pratod*. He is its declared printer and publisher. *Primâ facie*, therefore, he is responsible for what is published in it. When the prosecution has proved these facts, the *onus* is thrown upon the accused to rebut the inference whch arises from them. *Ramasami* v. *Lokanada* (9 Mad., 387) is, I think, an authority in favour of this view of the law. I think that its reasoning is applicable to a prosecution under section 124A. From his own statement, corroborated as it is by the evidence of some of the witnesses for the prosecution, I think it is established that the accused No. 2 now leaves the general management of the *Pratod* to the first accused, but I am not satisfied that he is not from day to day cognisant of the more important matters which appear in it. This being so I am not prepared to upset the conviction in his case. His offence appears, however, to me to have consisted rather in passively acquiescing in, and negligently allowing the publication of the libel in question than in actively directing it."

The case cited by his lordship was one which came up for revision before the Chief Justice of Madras and Justice Muttasami Ayyar. The Sessions Judge of Tanjore had set aside a conviction by a Magistrate for defamation on the ground of want of proof of publication. "All that is alleged," he said in his judgment, "is that the accused was technically the publisher for the purposes of Act XXV of 1867, not that he actually knew of the publication." In reversing this order, Sir A. Collins, C. J., said :—"It is no doubt true that in order to sustain a conviction for defamation, it must be shown that there was a publication by the accused in fact. But the Judge has apparently overlooked the provisions of section 7 of Act XXV of 1867" (see *Appx.*).

His lordship after citing the section proceeded :—"This Act was passed, like 38 Geo. III, c. 78, s. 14, for the purpose of preventing the mischief arising from printing and publishing newspapers by persons not known, and it was intended to facilitate proceedings, civil and criminal, against the persons concerned in such publications. The intention was to constitute the declaration into *primâ facie* evidence of publication, and thereby throw on the accused the burden of showing that the actual publisher of the libel was not the person mentioned in the declaration. The declaration was then *primâ facie* evidence of publication by the accused, and if no contrary evidence was produced, or if the contrary evidence produced by him was not true, as held by the Magistrate in this case, it became conclusive so as to sustain the conviction."

A declaration under section 5 may of course be withdrawn under section 8, by means of a fresh declaration, and the production of a copy of the latter would be a complete answer to the former. But, unless and until it is withdrawn, it would be good evidence of publication, and sufficient to cast on the accused the burden of proving his want of complicity. It would, moreover, have to be met by reliable evidence.

As to what would be sufficient to rebut the evidence of a declaration, his lordship observed :—"It was then urged for the petitioner that it was not sufficient for the accused to show that the libel was published without his knowledge or privity, but that he must go further and prove that the publication did

not also arise from want of due care or caution on his part, and our attention was called to the provisions of 6 and 7 Vic. c. 96, s. 7. It was pointed out by Lush, J., in *The Queen* v. *Holbrook* (4 Q. B. D., 42) that under the Common Law of England the proprietor of a newspaper was criminally responsible for the publication of a libel in its columns, whether the libel was inserted with or without his knowledge, that the intention of the Legislature in passing the Statute 6 and 7 Vic. c. 96, was to mitigate the rigour of the Common Law, and to give the proprietor the benefit of the presumption that, when a person employs another to do a lawful act, he is taken to authorise him to do it in a lawful and not in an unlawful manner, and that the Statute declared for that purpose that it was competent to the proprietor to prove that the libel was published without his authority, consent, or knowledge, and that the publication did not arise from want of due care or caution on his part. In substance the Statute modified the grounds on which the proprietor was criminally liable for a libel published in his paper according to the Common Law of England. But we cannot hold that the provisions of that Statute are applicable to this country, and we must determine, whether the accused is, or is not, guilty of defamation with reference to the provisions of the Indian Penal Code. We consider that it would be a sufficient answer to the charge in this country if the accused showed that he entrusted in good faith the temporary management of the newspaper to a competent person during his absence, and that the libel was published without his authority, knowledge, or consent."

This important decision was followed again by the Bombay High Court a few years later. In the year 1899 two notable trials (already referred to) were held before Sir L. Jenkins, C. J., probably the first to take place after the legislation of 1898, which are very fully reported in the Bombay Law Reporter (Vol. II pp. 286—322). Both trials arose out of certain seditious articles which appeared in a vernacular newspaper, published in Bombay, called the *Gurakhi*. In the first, *Queen-Empress* v. *Luxman*, the accused was the sub-editor of the paper, and there was direct evidence to show that he was also the writer of the articles in question. Sir L. Jenkins, C. J., in his charge to the jury, thus describes it :—" The evidence before you is to the effect that

this man composed the articles; that they were written out by him; that they were handed over by him for publication; and that they were subsequently printed." "If you believe that evidence," his lordship added, "there is sufficient to justify you in holding that there was a case within the terms of the section." The prisoner was found guilty.

In the second case, *Queen-Empress* v. *Vinayck*, the accused was the proprietor, editor, printer, and publisher of the *Gurakhi*. In dealing with the question of his responsibility for the publication of the articles charged as seditious, his lordship said:—"It is not disputed that the accused is the publisher of the paper, and you have evidence before you to the effect that he is its proprietor and editor and manager. His relation, therefore, to the paper in which the articles appeared is such that he clearly comes within that rule which makes a man *primâ facie* liable for what appears in his paper. A publisher is *primâ facie* liable for that which appears in his paper, and if he seeks to get rid of that liability the *onus* lies on him. It is for him to prove such circumstances as would justify him in asking you not to fasten responsibility on him. It will be for the accused to convince you on the evidence before the Court, by the probabilities of the case, that his *primâ facie* liability is displaced. What is necessary for him to establish at least is this: that the paper was published without his knowledge, authority, or consent, and without any acquiescence, or connivance on his part. The case he has asked you to believe is that at the time the last two articles were published he was not in Bombay. Mere absence itself is obviously insufficient to constitute an answer to the charge. There must be more than that. Nor is it enough that he should show merely a want of particular authority. It is not enough for him to say: 'I never authorised the publication of this particular article.' And in this connection I will read what has been said by a very eminent Judge." His lordship then cited the observations of Sir Alexander Cockburn, C. J., in *Reg.* v. *Holbrook* (4 Q. B. D., 42) as follows:—"'Where a general authority is given to an editor to publish libellous matter at his discretion it will avail a proprietor nothing to show that he had not authorised the publication of the libel complained of.'" The prisoner was found guilty.

In the case of *Emperor* v. *Bhaskar* (8 Bom. L. R., 421), the accused was proprietor, editor, and publisher of a Marathi newspaper called the *Bhala*, in which there had appeared the celebrated article entitled 'A Durbar in Hell.' He had made a declaration as publisher of the paper under Act XXV of 1867, s. 5. He admitted publication, but denied the authorship of the article in question. He also admitted responsibility but pleaded ignorance of the character of the article, and the absence of any evil intention. On the question of responsibility Justice Batty charged the jury as follows :—"It is not sufficient for a person who has published matter calculated to excite hatred, contempt, or disaffection, to say : 'This is not my work,' because, the adoption of the means, the publishing thereof, was in itself his work ; therefore it is that the printer or publisher of an article which is open to these objections is always to be held liable. In the Madras case which has been cited to you it was held that a declaration under s. 5 of Act XXV of 1867 (an Act requiring all printers and publishers to register their names), in the absence of proof to the contrary, is proof of publication by the person making the declaration, unless he can prove that the matter was published in his absence and without his knowledge, and that he had in good faith entrusted the temporary management of his business to a competent person. That is to say for every thing that appears in his paper the editor, printer, or publisher is as responsible as if he had written the article himself."

"No doubt," his lordship added, "circumstances may considerably mitigate the penalty which has to be imposed. But his liability to conviction under the section is not affected by the circumstance that the publisher who used the words did not originate them." He then cited the dictum of Sir C. Petheram, C. J., quoted above : "Whoever the composer might be, whoever wrote or caused it to be written, the person who used it for purposes of exciting disaffection is guilty of an offence under section 124A." The same principles had been laid down by Sir L. Jenkins, C. J., in the case of *Queen-Empress* v. *Vinayek*, and his lordship proceeded to cite also the passage quoted above to the jury. In conclusion Justice Batty observed :—"The same rule of law obtains in England, and I think you will recognise how very necessary it is to make responsible the editor or publisher who gives forth to

the whole world articles which are of a dangerous character.'' The jury found the prisoner guilty, and he was sentenced to six months' imprisonment and a fine of one thousand rupees.

It is difficult to reconcile these weighty observations on the efficacy of Act XXV of 1867 with the views expressed in the case of *Apurba Krishna Bose* v. *Emperor* (35 Cal. at p. 155), as to the inefficacy of the same measure. The learned Judges who decided that case, in dismissing the petition of the printer of the *Bande Mataram*, said :—'' Forty years ago it was never anticipated that a mere printer would be punished, with the aid of the Act, for the publication of seditious matter,'' without regard to the fact apparently that the mere writer of seditious matter could not be punished at all, unless and until it was published.

'' It is unfortunate,'' the learned Judges continued, '' that the person or persons really responsible for these seditious utterances remain undetected.'' It is difficult to see why they should remain undetected—either with or without the aid of the Act—having regard to the large number of convictions of really responsible persons which are reported to have taken place between the years 1897 and 1906. Strangely enough the only case of acquittal reported during that period was that of the unregistered acting printer of the *Kesari* in Tilak's case. The learned Judges conclude in the full assurance that the Act will be amended so as to reach the more guilty persons, but as no suggestion is offered as to how this can be done, the problem remains unsolved. It is by no means easy to conjecture how the benefits of registration under the Act could be extended to the casual contributor and the unknown journalist, however guilty they might be.

Act XXV of 1867, however, seems to have received more considerate treatment the following year, in the same High Court, at the hands of Justice Rampini, A. C. J. This was in the case of *Emperor* v. *Phanendra Nath Mitter* (35 Cal., 945), commonly known as the *Jugantar* case. The accused was the printer of the newspaper known by that name. In this case the accused had withdrawn his declaration, under section 8,

but the seditious articles had appeared in the paper a few days before the revocation. The presumption raised by section 7 was duly applied by the learned Judge, in the manner prescribed in the case of *Ramasami* v. *Lokanada*.

His lordship is reported to have approved of the ruling in that case, but to have dissented from the observations in Tilak's case. The point of difference is not stated, so that it is difficult to say what it is—the more so as the two rulings appear to be in complete harmony. With respect to Tilak's case the learned Judge is reported to have charged the jury as follows :—" It is an old case, as it is a case under the Indian Penal Code, before it was altered by the legislation of 1897 :" meaning no doubt the legislation of 1898, but apparently overlooking the fact that the law had not been really altered, not at least so as to affect the liability of printers. Then, his lordship is reported to have said :—" This is a case in which the provisions of section 7 of Act XXV of 1867 have not been considered." But with due respect to the learned Judge, it will be found on reference that the provisions of section 7 were not only considered but cited by Justice Strachey, and also explained to the jury in the plainest terms (see *ante*).

The same principles have been followed in the appeals of *Surendra Prasad Lahiri* v. *Emperor* (38 Cal., 227) and *Joy Chandra Sircar* v. *Emperor* (38 Cal., 214). The former was the declared printer and publisher, and the latter the proprietor and editor of a newspaper called the *Rungpur Bartabaha*.

The declaration, however, which is required from the owner of a printing press under section 4 of the Act seems to stand on a somewhat different footing. Section 7, which attaches responsibility for everything which is published in a newspaper or periodical to the printer and the publisher who have signed a declaration under section 5, makes no reference to the liability of the keeper of a press who has made a declaration under section 4. But, it is said, " the law would not require an owner to make a declaration for nothing," and some liability must attach, although the Act does not expressly say so.

And so it has been held that a declaration under section 4 is intended by the legislature to have the effect of fastening res-

ponsibility for the conduct of the press on the person declaring, when public interests are involved. Therefore, when a book complained of as seditious is printed in a press, the Court may presume that the owner had a hand in the printing and was aware of the contents and character of the book. But the presumption is not conclusive ; it is not one of law, but of fact, and it is open to the accused to rebut it : *Emperor* v. *Shankar Shri Krishna Dev* (35 Bom., p. 59).

It has already been seen that the mere writing of seditious matter without publication would be no offence. Just as a man might think what he liked, so long as he did not preach sedition to others, so a man might write what he liked, so long as he did not communicate what he wrote to any one. The offence clearly lies in communicating seditious thoughts to other people, by any means, for the purpose of creating disaffection.

Now this would seem to hold good even if the seditious writing came to be published inadvertently, but through no fault of the writer. The illustration lies in the somewhat extreme case put by Lord Esher in *Pullman* v. *Hill* (1891, 1 Q. B., 527) where he said :—" What is the meaning of publication ? The making known the defamatory matter after it has been written. If the writer of a letter locks it up in his own desk, and a thief comes and breaks open the desk, and takes away the libel and makes its contents known I should say there would not be a publication." In such a case the writer could hardly be made responsible, for it would not be his act.

But, on the other hand, it is difficult to conceive a journalist writing a seditious article except for the purpose of publication, and, in the event of its taking place through inadvertence or by mistake, the *onus* would be on him to prove the fact. Section 114 of the Evidence Act provides that—" The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in relation to the facts of the particular case :" *e.g.*, " that the common course of business has been followed in particular cases." There would certainly be a strong presumption in favour of a journalist intending to publish what he had written, and of authorising its publication if it were published.

"If a person," says Mr. Mayne, in his 'Criminal Law of India,' "writes seditious words, intending them to be published, and they are afterwards published, though in a different way, and to a greater extent than he had contemplated, this completes his offence. It is also to be remembered that the act of publication is complete as soon as the contents of the writing have been communicated to any person." From this it would appear that if an intention to publish can be established, it makes no difference whether the original object is attained or not, so long as it is communicated in some way, so as to be likely to excite disaffection.

It is important to consider also, in this connection, the liability of a somewhat different class of persons, who may, wittingly or unwittingly, become the medium of publication of seditious matter. These are the booksellers and newsvendors through whose hands dissemination is usually effected.

"Every sale, or delivery of a written or printed copy of a libel is a fresh publication" (Odgers). The law as to this was very clearly laid down in the case of *R.* v. *Almon* (5 Burr., 2686). Almon, who was a bookseller, had been convicted of selling a publication known as 'Junius's Letters,' and moved for a new trial on the ground of the want of any proof against him of *criminal intention* or *knowledge* as to the sale of the books. On the motion it was alleged—"That he was not at home when they were sent to his shop. That the whole number sent to his shop was 300. That about 67 of them had been sold there, by a boy in the shop, but without Almon's own knowledge, privity, or approbation. That as soon as he discovered it, he stopped the sale." These facts, however, do not appear to have been established by Almon at the trial. One of the jurymen propounded the following question to the Judge :—"Whether the bare proof of the sale in Almon's shop, without any proof of privity, knowledge, consent, approbation, or *malus animus*, in Almon himself, was sufficient in law to convict him criminally of publishing a libel ?" Lord Mansfield replied "that this was conclusive evidence." At the hearing of the motion his lordship explained this in these terms :—"Mr. Mackworth's doubt seemed to be 'whether the evidence was sufficient to convict the defendant, in case he believed it to be true.' And

in this sense I answered it. *Primâ facie* 'tis good, and remains so till answered. If it is believed, and remains unanswered, it becomes conclusive."

His lordship then proceeded to expound the law further, as follows:—"The buying the pamphlet in the public open shop of a known professed bookseller and publisher of pamphlets, of a person acting in the shop, *primâ facie* is evidence of a publication by the master himself, but that is liable to be contradicted, when the fact will bear it, by contrary evidence tending to exculpate the master, and to show that he was not privy nor assenting to it, nor encouraging it."

In this view of the law the Judges unanimously concurred. Justice Aston, in particular, laid down the same maxim, as being fully and clearly established, in these terms: "This *primâ facie* evidence (if believed), is binding till contrary evidence be produced. Being bought in a bookseller's shop, of a person acting in it as his servant, is such *primâ facie* evidence of its being published by the bookseller himself: he has the profits of the shop, and is answerable for the consequences. If he had a sufficient excuse he might have shown and proved it."

These principles were formulated by Statute seventy years later. Lord Campbell's Act (6 & 7 Vic., c. 96, s. 7) provides that whenever, upon the trial of an indictment for a libel, "evidence shall have been given which shall establish a presumptive case of publication against the defendant by the act of any other person by his authority, it shall be competent to such defendant to prove that such publication was made without his authority, consent or knowledge, and that the said publication did not arise from want of due care or caution on his part."

And so, in a more recent case, where the defendants were newsvendors, and sold in the ordinary course of business copies of a newspaper which contained a libel, and there was evidence to show that they were ignorant of the character of the paper and of the existence of the libel, and that there was no negligence or want of care on their part, it was held that they "had not published the libel, but had only innocently disseminated it" (*Emmens* v. *Pottle* (C. A.) 16 Q. B. D., 354).

And so also where the defendants were the Trustees of the British Museum whose duty it was to receive copies of all

publications for the Library, and to supply them to readers through their librarians, it was held that they could not be made liable if such books happened to contain libels. "It would be different," said Baron Pollock, "if the books were sold across the counter, or delivered to be sold in the street. It was laid down, on the ground of social policy, that if a man chose to sell books or papers he must take the consequences of his acts, if he knew that they contained libellous matter:" (*Martin* v. *Trustees of the British Museum*, 10 Times L. R., 338).

The Madras High Court, it is true, have held, in the case of *Ramasami* v. *Lokanada* (9 Mad., 387) already referred to above, that Lord Campbell's Act has no application to India, but they have themselves laid down very similar principles to be observed in cases of innocent publication, and these may be adopted instead (see *ante*).