CHAPTER X.

WHAT IS NOT SEDITION.

THE latter part of section 124A, which is comprised in the second and third Explanations, states in express terms what is to be excluded from the purview of the first part.

The substance of these two Explanations may be conveniently formulated thus :—

'Comments expressing disapprobation of—

(*a*) the measures of the Government, with a view to obtain their alteration by lawful means, or

(*b*) the administrative or other action of the Government,

without exciting or attempting to excite harted, contempt or disaffection, do not constitute an offence under this section.'

The object of the provision contained in clause (*b*), as has been already pointed out, was to include comments upon past action of the Government which was irrevocable. The former explanation which, as will be remembered, had given rise to misconceptions in more than one trial, was recast in 1898. In its present form its meaning is clearer, though its purpose is still the same.

In commenting on this branch of the section, in Tilak's case, Justice Strachey said :—"You will observe that the section consists of two parts : first, a general clause, and then an explanation. e object of the explanation is a negative one, to show that acts which might otherwise be regarded as exciting or to excite disaffection are not to be so regarded." ject of the explanation," he continued, "is to rnalism and *bonâ fide* criticisms of public measures ith a view to their improvement, and to the ces and abuses ; and to distinguish this pen or disguised, to make the people as a journalist observes this distinc-

"It seems to me," he added, "that this view of the law secures all the liberty which any reasonable man can desire, and that to allow more would be culpable weakness, and fatal to the interests not only of the Government but of the people."

An analysis of this branch of the section reveals the fact that it is composed of two essential elements. The first is that the matter in question must in fact consist of comments, and, secondly, that the disapprobation which they may express shall be within certain limits.

This again has been expounded by Justice Strachey in the clearest terms as follows:—"The most important point for you to bear in mind is that the thing protected by the explanation is 'the making of comments on the measures of the Government' with a certain intention. This shows that the explanation has a strictly defined and limited scope. Observe that it has no application whatever unless you can come to the conclusion that the writings in question can fairly and reasonably be construed as 'the making of comments on the measures of Government.' It does not apply to any sort of writing except that. It does not apply to any writing which consists not merely of comments upon Government measures, but of attacks upon the Government itself. It would apply to any criticisms of legislative enactments, such as the Epidemic Diseases Act, or any particular tax, or of administrative measures, such as the steps taken by the Government for the suppression of plague or famine. But if you come to the conclusion that these writings are an attack not merely upon such measures as these, but upon the Government itself, its existence, its essential characteristics, its motives or its feelings towards the people, then you must put aside the explanation altogether, and apply the first part of the section."

It will thus be seen, in the first place, that the protection afforded by the second branch of the section is only extended to what may be legitimately called "comments" on the action of the Government. If the matter in question is really only an attack on the Government itself, under the guise of criticism, the saving clause would have no application at all.

Then, in the second place, the disapprobation expressed in the comments, if in fact they be such, is strictly circumscribed.

It is subject to the restrictions imposed by the first part of the section, and if it violates these it is sedition. It must not excite, or tend to excite, disaffection.

The distinction between exciting "disapprobation" and exciting "disaffection" has been also very clearly demonstrated by Justice Strachey, as follows:—"This distinction is the essence of the section. It shows clearly what a public speaker or writer may do, and what he may not do. A man may criticise or comment upon any measure or act of the Government, whether legislative or executive and freely express his opinion upon it. He may express the strongest condemnation of such measures and he may do so severely, and even unreasonably, perversely and unfairly. So long as he confines himself to that he will be protected by the explanation. But if he goes beyond that, and, whether in the course of comments upon measures or not, holds up the Government itself to the hatred or contempt of his readers—as, for instance by attributing to it every sort of evil misfortune suffered by the people, or dwelling adversely on its foreign origin and character, or imputing to it base motives, or accusing it of hostility or indifference to the welfare of the people—then he is guilty under the section, and the explanation will not save him."

In this connection the observations of Sir L. Jenkins, C. J., at the trial of Vinayek (2 Bom. L. R., 307) must be referred to. His Lordship's remarks have reference to the explanation after it was recast in 1898, and were as follows:—"It has always been the policy, and is the policy of the law to allow free criticism, and almost, one may say, unrestrained criticism and comment on officers of State, on Judges, on measures of Government, and on Government itself, but it is subject to this qualification that this freedom must not be abused, so as to become a source of danger to the State. It is only when a man oversteps these very wide bounds and limits that he brings himself within the reach of the law. With a view to securing this freedom and liberty the second and third explanations have been framed, from which you will see that measures of administration and other action of Government are open to an expression of disapprobation, subject only to this that if the expression of disapprobation evidences an attempt to excite feelings hostile to

Government, of the kind indicated in the section, then its author is liable to be punished."

Similar views were expressed by Justice Batty, a few years later, in the case of *Emperor* v. *Bhaskar* (8 Bom. L. R., 441). "Changes in policy," he said, "and changes in measures are liable to criticism, and to criticise and urge objections to them is the special right of a free Press in a free country. The British nation has always specially boasted that it had a free Press, but the freedom of that Press is conditional upon one thing; every liberty is given to all men to express their opinions so long as they do not misuse or abuse that power to the injury of others, including among injuries to others, injury to the State. It is only on that condition that it is possible to have a free Press."

It is the same in England (see *Chs. ii—iii*).

It may be said, then, that the second branch of section 124A which is comprised in the second and third explanations prescribes the limits of free criticism by speech or pen, in terms which are no longer ambiguous. The restrictions imposed have, moreover, been so clearly explained by judicial authority, that misapprehension is hardly possible.

In this connection, however, it is necessary to bear in mind a fact which has been well established since the days of Lord Mansfield. It is that on a charge of seditious libel, the plea can never be taken either that the libel was true or for the public benefit. In this respect it differs from a common libel, and it is well that it should be so, in the interests of the State.

This proposition has been stated by Sir L. Jenkins, C. J., in Luxman's case (2 Bom. L. R., 298) as follows:—"Even if there were a grievance, and even if it could be said that the articles are based on that which is true, still if these articles are such as to create feelings of hatred, contempt, or disaffection the truth would be no answer to the charge, though it might influence the measure of punishment which it would be proper to inflict. The truth of a grievance constitutes no excuse for seditious or criminal publications or writings which it calls into existence."

And so also Sir John Edge, C. J., in delivering the opinion of the Full Bench in the case of *Amba Prasad* (see *Ch. vii*) said:—

"When it is ascertained that the intention of the speaker, writer, or publisher, was to excite feelings of disaffection to the Government established by law in British India, it is immaterial whether or not the words spoken, written, or published could have the effect of exciting such feelings of disaffection, and it is immaterial whether the words were true or were false."

There are, moreover, certain well-established rules, prescribed by judicial authority, which are always observed, for the construction of seditious matter, and in particular that which professes to be merely critical.

The first is a rule which was laid down in Sullivan's case in 1868 by Lord Fitzgerald (see *Ch. ii*). It is that in forming an opinion as to the character of any matter charged as seditious, it must be looked at as a whole, freely and fairly, without giving undue weight to isolated passages.

His lordship charged the jury in these terms :—"In dealing with the articles you should not pause upon an objectionable sentence here, or a strong word there. It is not mere strong language, or tall language, or turgid language that should influence you. You should, I repeat, deal with the articles in a free, fair, and liberal spirit."

Sir C. Petheram, C. J., in the *Bangobasi* case, referred in his charge to these weighty observations as follows :—"It will be for you to come to a decision on the tone of these articles. You must not look to single sentences or isolated expressions, but take the articles as a whole, and give them a full, free, and generous consideration, as Lord Fitzgerald has said; and even allowing the accused the benefit of a doubt, you will have to say whether the articles are fair comments and merely expressions of disapprobation, or whether they disclose an attempt to excite enmity against the Government."

Justice Strachey, in Tilak's case, charged the jury in precisely similar terms when he said :—"In judging of the intention of the writer or publisher, you must look at the articles as a whole giving due weight to every part. It would not be fair to judge of the intention by isolated passages or casual expressions, without reference to the context. You must consider each passage in connection with the others, and with the general drift of the whole. A journalist is not expected to write with the accuracy

and precision of a lawyer or a man of science; he may do himself injustice by hasty expressions out of keeping with the general character and tendency of the articles. It is this general character and tendency that you must judge the intention by looking at every passage so far as it throws light upon this."

Sir L. Jenkins, C. J., in Luxman's case (2 Bom. L. R., 298) enunciated the same rule in these terms :—" These three articles, or translations of them, have been placed before you, and what I shall ask you to do is to read them through yourselves and consider them carefully in order to determine what is their true construction, what is their real tendency, and what is their natural effect upon the minds of those into whose hands they come. I must warn you that you must not fasten upon a single strong phrase or a single strong word, but you must consider the articles as a whole—each article as a whole and all three together —and, reading them in a liberal spirit, it will be for you to say whether you think there is any doubt that they were in fact an attempt to create feelings of hatred, contempt. or disaffection against the Government."

The meaning of this rule appears to be that, in construing an article or a speech, due weight must be given to every part of it and undue weight to none. But this does not mean that particular passages, probably couched in stronger language than the rest, are therefore to be disregarded. Experience shows that particular passages frequently give the whole article or speech its character. It often happens, in cases where the meaning is studiously veiled, that a particular passage will give the necessary clue to a proper construction of language which would be otherwise unintelligible. An illustration of this may be found in numerous articles which have appeared in the reported cases, and notably in a case decided by the Calcutta High Court (see *Chs. xiv—xv*), and known as the *Rungpur Bartabaha* case (38 Cal., 214).

On the other hand, it is obvious that the accused must not be prejudiced by the improper use of such passages. " It would not be fair," as Justice Strachey says, " to judge of the intention by isolated passages or casual expressions without reference to the context." But that is quite another thing.

Another important rule, and one which is invariably put in practice in trials for sedition, authorises the use of collateral matter, which is not within the charge, for the purpose of showing the *animus* of the accused, and of throwing light on the meaning of the language employed by him.

Section 14 of the Evidence Act provides that "Facts showing the existence of any state of mind—such as intention, knowledge, good faith, negligence, rashness, ill-will or good-will towards any particular person"—are relevant and may be proved; while illustration (*c*) of the same says that when "*A* is accused of defaming *B* by publishing an imputation intending to harm the reputation of *B*, the fact of previous publications by *A* respecting *B*, showing ill-will on the part of *A* towards *B*, is relevant, as proving *A's* intention to harm *B's* reputation by the particular publication in question." And so also it is open to the defence to prove the contrary, for the purpose of showing the absence of any such intention.

In the *Bangabasi* trial articles were put in on both sides for these purposes. In drawing the attention of the jury to this Sir C. Petheram, C. J., said:—"The charges are based on the five articles which are the subject of the indictment. Other articles have been quite properly put in during the trial, but no charges are laid in connection with the latter. They are put in, some by the prosecution, and some by the defence, to prove that their view of the intent of the articles charged was indicated in the others."

In like manner, at the trial of Tilak (*Ch. v*), extracts were used on both sides, not only from the *Kesari*, but also from the *Mahratta* of which he was also the proprietor. Not merely articles, but correspondence was thus admitted in evidence.

Justice Strachey as to this observed:—"I do not think that I can exclude the evidence. As in cases of defamation, the proprietor and publisher would be liable for articles or letters published by him, though purporting to be signed by outsiders, and therefore I think that such contributions are admissible to show his intention and *animus*, as well as articles purporting to represent the views of the paper. It is, of course, open to the accused to put in any contributions of a different tendency

which he may have published, and so to show that those put in by the Crown do not express his intention."

In the Allahabad case of *Amba Prasad* (see *Ch. vi*) Sir John Edge, C. J., in delivering the opinion of the Full Bench said :— "The intention of a speaker, writer, or publisher, may be inferred from the particular speech, article, or letter, or it may be proved from that speech, article, or letter considered in conjunction with what such speaker, writer, or publisher has said, written, or published on another or other occasions."

The same rule applies when the collateral matter sought to be used is contained in speeches, or consists of 'words spoken' and not 'written.'

In the case of *Chidambaram Pillai* v. *Emperor* (32 Mad., p. 14, see *Ch. xii*) where the objection was taken by the defence that such matter was irrelevant, Sir A. White, C. J., and Justice Miller said :—"We are of opinion that where there is a series of speeches or lectures on one topic, all delivered within a short period of time, one may be considered for the purpose of throwing light on the real meaning and intent of another, and on the state of mind of the speaker with reference to the object matter of the other speeches. This principle is recognised in illustration (*e*) to section 14 of the Indian Evidence Act, and has been acted on in cases of prosecutions for sedition in all the other High Courts in India." Their lordships cited the cases of the *Bangobasi*, Tilak, and the *Jugantar*, already referred to.

It may be noted that the method adopted of proving such speeches by means of the notes of Police Officers who were examined as witnesses in the case was also approved by the Court. It was the same in the case of *Leakut Hossein Khan* v. *Emperor* (App. No. 214 of 1908), which however is unreported (see *Ch. xii*). In this case the Calcutta High Court made use of similar evidence for the purpose of throwing light on the meaning of a printed leaflet or circular. The appellant who was "a well-known speech maker on Swadeshi and similar topics in Calcutta," visited Barisal in Eastern Bengal, with the avowed object of circulating a printed leaflet among the Mahomedans of that province, and of expounding to them the doctrines set forth therein. One of the doctrines

which the leaflet purported to teach was that according to the sacred Koran Mahomedans owed no allegiance to non-Moslem rulers. At the appeal it was contended for the prisoner that the "allegiance" referred to was intended to mean merely a spiritual or religious allegiance, and nothing more.

The answer to that, in the opinion of the Court, was contained in the evidence of his speeches "which were certainly not concerned only with religious matters, in Calcutta, both before and after his visit to Barisal," and in which "he referred to that visit apparently as part of the work he was then engaged on."

In a more recent case, *Emperor* v. *Ganesh Damodar Savarkar* (34 Bom., 394) the same principle has been applied to a book of poems, only four of which formed the subject-matter of a charge of sedition. On appeal the contention was raised, on behalf of the prisonor that none of the four poems charged contained anything seditious. Justice Chandavarkar said:—"On examining the series of poems in the book, exhibit 6, containing the four poems, it appeared to us that there were other poems in it besides those four which throw light on the intent of the writer; and that, as the whole book had been allowed in the lower Court to go in as evidence, without any objection, all the poems in the book could be referred to for the purpose of determining the intention, character, and object of the poems selected as the basis of the charges. We adjourned the hearing for an official translation of the whole series of poems in the book into English, and also to enable the appellant's legal advisers to argue the appeal with reference to the bearing of the whole series on the poems forming the subject-matter of the charges."

This principle was also applied in two other cases in the Calcutta High Court, *viz.*:—The cases of the *Jugantar* (35 Cal., 945), and tho *Rungpur Bartabaha* (App. No. 509 of 1910, see *Ch. xiv*). In the latter case three articles were made the subject of the charge, while six others, taken from the same paper, were referred to for the purpose of throwing light on the meaning of the first, and of showing the character of the paper and the intention of the writer.

In cases when the meaning of the writer is veiled, as it frequently is, under the cloak of religious rhapsody, it is important to ascertain the general tone of the paper, and to see whether it is really religious or not. These appear to be the rules for the admission of collateral matter and the purposes for which it may be used.

On the other hand the case of Monmohan Ghose (App. No. 744 of 1910), otherwise known as the "*Karmajogin* case," affords an instance of the exclusion of such matter from consideration. In this case the appellant who was the printer and publisher of a newspaper, called the *Karmajogin*, had been convicted by the Chief Presidency Magistrate of Calcutta under section 124A. The article which formed the subject of the charge, the publication of which was not disputed, purported to be "an open letter addressed by one Arabindo Ghose to his countrymen." For the purpose of elucidating the meaning of certain expressions employed in the letter it was sought, on behalf of the Crown, to refer to other letters or articles which had previously appeared in the same paper, and were alleged to form part of a series of contributions on similar topics. These were excluded by the Court from consideration, on the ground, apparently, that the identity of the writer of them had not been established. The reasons are set forth in the judgment of Justice Holmwood as follows:—"Now in this case although the prosecution alleged that a series of articles had been written by one individual, and had those articles produced by a Police-officer who said that it was his duty to read them, and if objectionable to forward them to his superiors, no evidence was offered who that individual was, nor whether all the articles were by the same author."

If, however, the rule laid down by Sir C. Petheram and Justice Strachey (see *ante*) is to be observed, it would appear that, where publication is established or not denied, the only question left to be determined is, whether the matter published is in the opinion of the Court, whether judge or jury, seditious, *i.e.*, calculated to excite disaffection, or not, and this without regard to its authorship. On this principle evidence was admitted in Tilak's case of collateral matter in the shape of correspondence. The learned Judge there observed:—"The

publisher would be liable for articles or letters published by him, though purporting to be signed by outsiders, and therefore I think that such contributions are admissible to show his intention and *animus* as well as articles purporting to represent the views of the paper.'' And so in the *Bangobasi* case (see *Ch. ix*), where both printer and publisher were on trial, Sir C. Petheram, C. J., observed that if the articles were seditious the persons who used them for the purpose of exciting disaffection were guilty under the section—whoever the writer might be (see *Ch. iv*).

In the *Karmajogin* case, however, the learned Judge went on to add :—"It was urged by the learned Advocate-General that these articles were admissible under sec. 15 of the Evidence Act for the purpose of showing that the publication of the article before us in this case was not accidental, but that has obviously nothing to do with their admissibility for the purpose of showing the intention of the writer. In order to use them for this purpose it was necessary to show who the writer was, and that all the articles produced were by the same hand. This not having been done we are compelled to take the article before us as it stands, without any of the informing commentaries which were sought to be drawn from one previous article in particular by the learned Advocate-General.''

In view of the authorities referred to above, which have been hitherto relied on, it is difficult to see why proof of the identity and intention of the writer should be necessary to establish the liability of the publisher. It is clear that, if the writer himself be on trial, his intention is directly in issue, and if collateral matter is then sought to be used for any purpose, its authorship must be established, but in this case the publisher alone was before the Court.

It will be observed that most of the matter which has hitherto formed the subject of prosecutions for sedition has been in the vernacular, which has necessitated the use of translations. It is therefore desirable to note what has been said by the Courts on this subject.

Here again, as in so many other instances, Justice Strachey's memorable charge to the jury in Tilak's case, furnishes

most valuable directions. "You have heard," his lordship said, "much discussion as to the exact meaning of various expressions in these articles, and the best way of rendering certain passages into English. You must remember that there has been a dispute about the correctness of some of the translations which have been put before you. For most of you the documents that you have to deal with are, in their original form, in a foreign language. I do not intend to trouble you with any criticism of the various renderings which are in evidence. The discussions which have taken place on the subject are, I assume, within your recollection. They, no doubt, were necessary and it is important that we should, as far as possible, exactly understand the true meaning of every word. But it would be a great mistake to let the decision of this case turn upon mere verbal niceties of translation, or discussions as to the best English equivalents of particular Marathi terms. We must look at these articles, not as grammarians or philologists might do, but as the ordinary readers of the *Kesari* would look at them—readers who are impressed, not by verbal refinements, but by the broad general drift of an article."

"Two translations," his lordship continued, "have been put before you, one of which has been called a free, and the other a literal translation. Both are equally official translations. What I would advise you is that whenever there is no dispute about the accuracy of the free translation, where its rendering has not been challenged, you should be guided by the free translation. It is altogether a mistake to suppose that because a translation is literal it is more correct than the translation which is called free. It does not follow that the most literal translation of a passage is that which best conveys its meaning in English. What we want to get at is the way in which an ordinary reader would understand the whole article, and hence to gather the intention with which the article was written and published. An absolutely literal translation from one language to another may give in the second language an extremely imperfect and really inaccurate idea of the meaning and spirit of the original. These documents have been translated by a translator of the Court; a Hindu gentleman, whose capacity to translate cannot for one moment be doubted.

The accuracy of his literal rendering of the articles has not been challenged by the defence; but the defence have found fault with the free translation as regards certain expressions occurring in the articles. The free translation does not profess to give the absolutely literal meaning of the words, but their genuine equivalents in English. As I have said, where the accuracy of the free translation is not disputed, I advise you to be guided by that: where there is any dispute I advise you to compare the literal with the free translation, to look at the context of the disputed passage, and to judge, by reference to that, which conveys the true meaning and intention. Again, where there is a conflict of evidence as to the meaning of a particular expression, I would advise you to give, under the usual rule, the benefit of any reasonable doubt to the accused."

From these observations two conclusions are clearly deducible. One is that a translation should accurately convey the general sense of the original, which is really all that is wanted; and the other, that a free or idiomatic translation is better calculated to do this than a literal one, and is therefore to be preferred.