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 THE QUEEN  
 v.  
 MCKENZIE.  
 ———  
 Bruce, J.

There is absolutely no evidence that the magistrates were disqualified on the ground of bias. In order to shew that, it must be apparent that they had some substantial interest in the result of the proceedings. I agree, however, that this rule must be made absolute to quash the conviction on the first ground.

*Rule absolute.*

Solicitors for justices: *Tufnell Southgate & Son, for Barker, Sunderland.*

Solicitors for informant: *Botterell & Roche.*

Solicitor for defendant: *J. J. Bentham, Sunderland.*

A. P. P. K.

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 1892  
 Jan. 20;  
 May 26.

[IN THE COURT OF APPEAL.]

RATCLIFFE v. EVANS.

*Defamation—Words not Actionable per se—Publication of Falsehoods about a Business—Special Damage—Evidence—General Loss of Business.*

In an action for words not actionable per se, but constituting an untrue statement maliciously published about the plaintiff's business, which statement is intended or reasonably likely to produce, and in the ordinary course of things does produce, a general loss of business as distinct from the loss of particular known customers, evidence of such general loss of business is admissible, and sufficient to support the action.

MOTION to enter judgment for the defendant, or for a new trial, by way of appeal from the judgment entered by Mr. Commissioner Bompas, Q.C., in an action tried with a jury at the Chester Summer Assizes, 1891.

The statement of claim in the action alleged that the plaintiff had for many years carried on the business, at Hawarden in the county of Flint, of an engineer and boiler-maker under the name of "Ratcliffe & Sons," having become entitled to the goodwill of the business upon the death of his father, who, with others, had formerly carried on the business as "Ratcliffe & Sons"; that the defendant was the registered proprietor, publisher, and printer of a weekly newspaper called the *County Herald*, circulated in Flintshire and some of the adjoining counties, and that the plaintiff

had suffered damage by the defendant falsely and maliciously publishing and printing of the plaintiff in relation to his business, in the *County Herald*, certain words set forth which imported that the plaintiff had ceased to carry on his business of engineer and boiler-maker, and that the firm of Ratcliffe & Sons did not then exist.

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At the trial the learned commissioner allowed the statement of claim to be amended by adding that "by reason of the premises the plaintiff was injured in his credit and reputation, and in his said business of an engineer and boiler-maker, and he thereby lost profits which he otherwise would have made in his said business." The plaintiff proved the publication of the statements complained of, and that they were untrue. He also proved a general loss of business since the publication; but he gave no specific evidence of the loss of any particular customers or orders by reason of such publication. In answer to questions left to them by the commissioner, the jury found that the words did not reflect upon the plaintiff's character, and were not libellous; that the statement that the firm of Ratcliffe & Sons was extinct was not published *bonâ fide*; and that the plaintiff's business suffered injury to the extent of 120*l.* from the publication of that statement. The commissioner, upon those findings, gave judgment for the plaintiff for 120*l.*, with costs.

The defendant appealed.

*Bowen Rowlands, Q.C.*, and *E. H. Lloyd*, for the appellant. The learned commissioner ought to have entered judgment for the defendant. The evidence given by the plaintiff of a general loss of business ought not to have been admitted. In order to support the action, which is not an action for slander of the plaintiff in the way of his business, but an action on the case, special damage must have been alleged and proved. If the plaintiff had brought his action for slander, he must have proved special damage by calling witnesses to say that they had withdrawn their custom from him. He ought not to be in a better position by having brought an action on the case in the nature of an action for slander of title. In such an action there must, in order to support it, be an express allegation of some particular

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damage: *Malachy v. Soper*. (1) The analogy of actions for slander in which damage is the gist of the action applies. If the slander is not actionable per se, then, if the plaintiff may prove general damage, he can recover because the defendant's statement has been repeated by others; but the decisions in *Ward v. Weeks* (2) and *Dixon v. Smith* (3) are founded on the principle that the defendant cannot be made liable for repetitions of the statement he has made. It is conceded that in a certain class of cases—of which *Evans v. Harries* (4) may be one—where from the nature of the case the plaintiff cannot give evidence of special or particular damage, the jury may infer such damage from the fact that the plaintiff's business has gone; but *Evans v. Harries* (4) differs from the present case, because there was there a personal imputation on the plaintiff; it was never treated as an action on the case. In *Riding v. Smith* (5), also, though the Court held that special damage must be proved in order to support the action, they thought, under the circumstances of that case, that it might be proved by giving general evidence of the falling off of the plaintiff's business, without shewing that particular persons, who had heard the defendant's statements, had ceased to deal with the plaintiff. The principle of *Malachy v. Soper* (6) should be applied here. [They also referred to *Western Counties Manure Co. v. Lawes Chemical Manure Co.* (7); *Clarke v. Morgan*. (8)]

*F. Marshall*, for the respondent. The evidence of the plaintiff's general loss of business was admissible, and it was evidence of special damage sufficient to support the action. The defendant's statements were published in a newspaper which was widely read in Wales, and the natural consequence would be to prevent persons who were, or intended to be, customers of the plaintiff, and who read the statements, from giving him further orders.

From the nature of the case, it was impossible that the plaintiff could give other than general evidence of his loss of business; and this comes within the class of cases in which it has been held

(1) 3 Bing. N. C. 371, judgment of Tindal, C.J., at p. 382.

(2) 7 Bing. 211.

(3) 5 H. & N. 450.

(4) 1 H. & N. 251; 26 L. J. (Ex.) 31.

(5) 1 Ex. D. 91.

(6) 3 Bing. N. C. 371

(7) Law Rep. 9 Ex. 218.

(8) 38 L. T. Rep. (N.S.) 354.

that such evidence is sufficient evidence of special damage to support the action. *Malachy v. Soper* (1) is not in point here. The Court did not intend to lay down a general rule; they thought that, under the circumstances of that case, there was no sufficient allegation or proof of special damage. [He referred also to *Thomas v. Williams* (2); *Dicks v. Brooks*. (3)]

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*Cur. adv. vult.*

May 26. The following judgment of the Court (Lord Esher, M.R., Bowen, and Fry, L.JJ.), was read by

BOWEN, L.J. This was a case in which an action for a false and malicious publication about the trade and manufactures of the plaintiff was tried at the Chester assizes, with the result of a verdict for the plaintiff for 120*l*. Judgment having been entered for the plaintiff for that sum and costs, the defendant appealed to this Court for a new trial, or to enter a verdict for the defendant, on the ground, amongst others, that no special damage, such as was necessary to support the action, was proved at the trial. The injurious statement complained of was a publication in the *County Herald*, a Welsh newspaper. It was treated in the pleadings as a defamatory statement or libel; but this suggestion was negatived, and the verdict of the jury proceeded upon the view that the writing was a false statement purposely made about the manufactures of the plaintiff, which was intended to, and did in fact, cause him damage. The only proof at the trial of such damage consisted, however, of evidence of general loss of business without specific proof of the loss of any particular customers or orders, and the question we have to determine is, whether in such an action such general evidence of damage was admissible and sufficient. That an action will lie for written or oral falsehoods, not actionable per se nor even defamatory, where they are maliciously published, where they are calculated in the ordinary course of things to produce, and where they do produce, actual damage, is established law. Such an action is not one of libel or of slander, but an action on the case for damage wilfully and intentionally done without just occasion or excuse, analogous to an action for

(1) 3 Bing. N. C. 371.

(2) 14 Ch. D. 864.

(3) 15 Ch. D. 22.

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slander of title. To support it, actual damage must be shewn, for it is an action which only lies in respect of such damage as has actually occurred. It was contended before us that in such an action it is not enough to allege and prove general loss of business arising from the publication, since such general loss is general and not special damage, and special damage, as often has been said, is the gist of such an action on the case. Lest we should be led astray in such a matter by mere words, it is desirable to recollect that the term "special damage," which is found for centuries in the books, is not always used with reference to similar subject-matter, nor in the same context. At times (both in the law of tort and of contract) it is employed to denote that damage arising out of the special circumstances of the case which, if properly pleaded, may be superadded to the general damage which the law implies in every breach of contract and every infringement of an absolute right: see *Ashby v. White*. (1) In all such cases the law presumes that *some* damage will flow in the ordinary course of things from the mere invasion of the plaintiff's rights, and calls it general damage. Special damage in such a context means the particular damage (beyond the general damage), which results from the particular circumstances of the case, and of the plaintiff's claim to be compensated, for which he ought to give warning in his pleadings in order that there may be no surprise at the trial. But where no actual and positive right (apart from the damage done) has been disturbed, it is the damage done that is the wrong; and the expression "special damage," when used of this damage, denotes the actual and temporal loss which has, in fact, occurred. Such damage is called variously in old authorities, "express loss," "particular damage": *Cane v. Golding* (2); "damage in fact," "special or particular cause of loss": *Law v. Harwood* (3); *Tasburgh v. Day*. (4)

The term "special damage" has also been used in actions on the case brought for a public nuisance, such as the obstruction of a river or a highway, to denote that actual and particular loss which the plaintiff must allege and prove that he has sustained

(1) 2 Ld. Raym. 938; 1 Sm. L. C.  
9th ed. p. 268, per Holt, C.J.

(2) Sty. 169.

(3) Cro. Car. 140.

(4) Cro. Jac. 484.

beyond what is sustained by the general public, if his action is to be supported, such particular loss being, as is obvious, the cause of action: see *Iveson v. Moore* (1); *Rose v. Groves*. (2) In this judgment we shall endeavour to avoid a term which, intelligible enough in particular contexts, tends, when successively employed in more than one context and with regard to different subject-matter, to encourage confusion in thought. The question to be decided does not depend on words, but is one of substance. In an action like the present, brought for a malicious falsehood intentionally published in a newspaper about the plaintiff's business—a falsehood which is not actionable as a personal libel, and which is not defamatory in itself—is evidence to shew that a general loss of business has been the direct and natural result admissible in evidence, and, if uncontradicted, sufficient to maintain the action? In the case of a personal libel, such general loss of custom may unquestionably be alleged and proved. Every libel is of itself a wrong in regard of which the law, as we have seen, implies general damage. By the very fact that he has committed such a wrong, the defendant is prepared for the proof that some general damage may have been done. As is said by Gould, J., in *Iveson v. Moore* (1), in actions against a wrong-doer a more general mode of declaring is allowed. If, indeed, over and above this general damage, further particular damage is under the circumstances to be relied on by the plaintiff, such particular damage must of course be alleged and shewn. But a loss of general custom, flowing directly and in the ordinary course of things from a libel, may be alleged and proved generally. “It is not special damage”—says Pollock, C.B., in *Harrison v. Pearce* (3)—“it is general damage resulting from the kind of injury the plaintiff has sustained.” So in *Bluck v. Lovering* (4), under a general allegation of loss of credit in business, general evidence was received of a decline of business presumably due to the publication of the libel, while loss of particular customers, not having been pleaded, was held rightly to have been rejected at the trial: see also *Ingram v. Lawson*. (5)

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(1) 1 Ld. Raym. 486.

(3) 32 L. T. (O.S.) 298.

(2) 5 M. &amp; G. 613.

(4) 1 Times L. R. 497.

(5) 6 Bing. N. C. 212.

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Akin to, though distinguishable in a respect which will be mentioned from, actions of libel are those actions which are brought for oral slander, where such slander consists of words actionable in themselves and the mere use of which constitutes the infringement of the plaintiff's right. The very speaking of such words, apart from all damage, constitutes a wrong and gives rise to a cause of action. The law in such a case, as in the case of libel, presumes, and in theory allows, proof of general damage. But slander, even if actionable in itself, is regarded as differing from libel in a point which renders proof of general damage in slander cases difficult to be made good. A person who publishes defamatory matter on paper or in print puts in circulation that which is more permanent and more easily transmissible than oral slander. Verbal defamatory statements may, indeed, be intended to be repeated, or may be uttered under such circumstances that their repetition follows in the ordinary course of things from their original utterance. Except in such cases, the law does not allow the plaintiff to recover damages which flow, not from the original slander, but from its unauthorized repetition: *Ward v. Weeks* (1); *Holwood v. Hopkins* (2); *Dixon v. Smith*. (3) General loss of custom cannot properly be proved in respect of a slander of this kind when it has been uttered under such circumstances that its repetition does not flow directly and naturally from the circumstances under which the slander itself was uttered. The doctrine that in slanders actionable per se general damage may be alleged and proved with generality must be taken, therefore, with the qualification that the words complained of must have been spoken under circumstances which might in the ordinary course of things have directly produced the general damage that has in fact occurred. *Evans v. Harries* (4) was a slander uttered in such a manner. It consisted of words reflecting on an innkeeper in the conduct of his business spoken openly in the presence of divers persons, guests and customers of the inn—a floating and transitory class. The Court held that general evidence of the decline of business was rightly receivable. “How,” asked Martin, B., “is a public-house keeper, whose only

(1) 7 Bing. 211.

(2) Cro. Eliz. 787.

(3) 5 H. &amp; N. 450.

(4) 1 H. &amp; N. 251.

customers are persons passing by, to shew a damage resulting from the slander, unless he is allowed to give general evidence of a loss of custom?" *Maccloughlin v. Welsh* (1) was an instance of excommunication in open church. General proof was held to be rightly admitted that the plaintiff was shunned and his mill abandoned, though no loss of particular customers was shewn. Here the very nature of the slander rendered it necessary that such general proof should be allowed. The defamatory words were spoken openly and publicly, and were intended to have the exact effect which was produced. Unless such general evidence was admissible, the injury done could not be proved at all. If, in addition to this general loss, the loss of particular customers was to be relied on, such particular losses would, in accordance with the ordinary rules of pleading, have been required to be mentioned in the statement of claim: see *Ashley v. Harrison*. (2) From libels and slanders actionable per se, we pass to the case of slanders not actionable per se, where actual damage done is the very gist of the action. Many old authorities may be cited for the proposition that in such a case the actual loss must be proved specially and with certainty: *Law v. Harwood*. (3) Many such instances are collected in the judgments in *Iveson v. Moore* (4), where, although there was a difference as to whether the general rule had been fulfilled in that particular kind of action on the case, no doubt was thrown on the principle itself. As was there said—in that language of old pleaders which has seen its day, but which connoted more accuracy of legal thought than is produced by modern statements of claim—"damages in the 'per quod,' where the 'per quod' is the gist of the action, should be shewn certainly and specially." But such a doctrine as this was always subject to the qualification of good sense and of justice. Cases may here, as before, occur where a general loss of custom is the natural and direct result of the slander, and where it is not possible to specify particular instances of the loss. *Hartley v. Herring* (5) is probably a case of the kind, although it does not appear from the report under

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(1) 10 Ir. L. Rep. 19.

(3) Cro. Car. 140.

(2) 1 Esp. 50.

(4) 1 Ld. Raym. 486.

(5) 8 T. R. 130.



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what circumstances, or in the presence of whom, the slanderous words were uttered. But if the words are uttered to an individual, and repetition is not intended except to a limited extent, general loss of custom cannot be ordinarily a direct and natural result of the limited slander: *Dixon v. Smith* (1); *Hopwood v. Thorn*. (2) The broad doctrine is stated in Buller's *Nisi Prius*, p. 7, that where words are not actionable, and the special damage is the gist of the action, saying generally that several persons left the plaintiff's house is not laying the special damage. Slanders of title, written or oral, and actions such as the present, brought for damage done by falsehoods, written or oral, about a man's goods or business, are similar in many respects to the last-mentioned class of slanders not actionable in themselves. Damage is the gist of both actions alike, and it makes no difference in this respect whether the falsehood is oral or in writing: *Malachy v. Soper*. (3) The necessity of alleging and proving actual temporal loss with certainty and precision in all cases of the sort has been insisted upon for centuries: *Lowe v. Harewood* (4); *Cane v. Golding* (5); *Tasburgh v. Day* (6); *Evans v. Harlow*. (7) But it is an ancient and established rule of pleading that the question of generality of pleading must depend on the general subject-matter: *Janson v. Stuart* (8); *Lord Arlington v. Merricke* (9); *Grey v. Friar* (10); *Westwood v. Cowne* (11); *Iveson v. Moore*. (12) In all actions accordingly on the case where the damage actually done is the gist of the action, the character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by

(1) 5 H. &amp; N. 450.

(2) 19 L. J. (C.P.) 95.

(3) 3 Bing. N. C. 382.

(4) W. Jones. 196.

(5) Sty. 176.

(6) Cro. Jac. 484.

(7) 5 Q. B. 624.

(8) 1 T. R. 754.

(9) 2 Saund. 412, n. 4.

(10) 15 Q. B. 907; see Co. Litt. 303 d.

(11) 1 Stark. 172.

(12) 1 Ld. Raym. 486.

which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry. The rule to be laid down with regard to malicious falsehoods affecting property or trade is only an instance of the doctrines of good sense applicable to all that branch of actions on the case to which the class under discussion belongs. The nature and circumstances of the publication of the falsehood may accordingly require the admission of evidence of general loss of business as the natural and direct result produced, and perhaps intended to be produced. An instructive illustration, and one by which the present appeal is really covered, is furnished by the case of *Hargrave v. Le Breton* (1), decided a century and a half ago. It was an example of slander of title at an auction. The allegation in the declaration was that divers persons who would have purchased at the auction left the place; but no particular persons were named. The objection that they were not specially mentioned was, as the report tells us, "easily" answered. The answer given was that in the nature of the transaction it was impossible to specify names; that the injury complained of was in effect that the bidding at the auction had been prevented and stopped, and that everybody had gone away. It had, therefore, become impossible to tell with certainty who would have been bidders or purchasers if the auction had not been rendered abortive. This case shews, what sound judgment itself dictates, that in an action for falsehood producing damage to a man's trade, which in its very nature is intended or reasonably likely to produce, and which in the ordinary course of things does produce, a general loss of business, as distinct from the loss of this or that known customer, evidence of such general decline of business is admissible. In *Hargrave v. Le Breton* (1) it was a falsehood openly promulgated at an auction. In the case before us to-day, it is a falsehood openly disseminated through the press—probably read, and possibly acted on, by persons of whom the plaintiff never heard. To refuse with reference to such a subject-matter to admit such general evidence would be to misunderstand and warp the meaning of old expressions; to depart from, and not to follow, old rules; and, in addition to all this, would involve an

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(1) 4 Burr. 2422.

C. A. absolute denial of justice and of redress for the very mischief which  
 1892 was intended to be committed. It may be added that, so far as the  
 RATCLIFFE decision in *Riding v. Smith* (1) can be justified, it must be justified  
 v. on the ground that the Court (rightly or wrongly) believed the  
 EVANS. circumstances under which the falsehood was uttered to have  
 Bowen, L.J. brought it within the scope of a similar principle. In our opinion,  
 therefore, there has been no misdirection and no improper ad-  
 mission of evidence, and this appeal should be dismissed with  
 costs.

*Appeal dismissed.*

Solicitors for appellant: *Hamlin & Co., for Cartwright & Sons, Chester.*

Solicitors for respondent: *Chester & Co., for Henry Jolliffe, Chester.*

W. A.

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[IN THE COURT OF APPEAL.]

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BAWDEN v. THE LONDON, EDINBURGH, AND GLASGOW  
 ASSURANCE CO.

*Insurance—Accident—Principal and Agent—Knowledge of Agent imputed to  
 Principal—Misstatement in Proposal.*

B. effected an insurance with the defendant company through their agent against accidental injury. The proposal for the insurance contained a statement by the assured that he had no physical infirmity, and that there were no circumstances that rendered him peculiarly liable to accidents, and it was agreed that the proposal should form the basis of the contract between him and the company. By the terms of the policy, the company agreed to pay the insured 500*l.* on permanent total disablement, and 250*l.* on permanent partial disablement—the policy stating that by permanent total disablement was meant, *inter alia*, “the complete and irrecoverable loss of sight to both eyes,” and by permanent partial disablement was meant, *inter alia*, “the complete and irrecoverable loss of sight in one eye.”

At the time when he signed the proposal for the insurance the assured had lost the sight of one eye, a fact of which the defendants’ agent was aware, though he did not communicate it to the defendants.

The assured during the currency of the policy met with an accident, which resulted in the complete loss of sight in his other eye, so that he became permanently blind :—

*Held*, that it must be taken, first, that the assured had sustained a complete