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Ethical Basis of the Law of Defamation

That there is a wide discrepancy between the law and first class ethical principles is the general assumption of the lay public and the not infrequent admission of the legal profession. The layman speaks of one's actions as being "just within the law," and the inference therefrom is not ildisguised. It is meant to be anything but complimentary. It immediately suggests that the person indicated is unscrupulous and derelict in his duty, as measured by the ethical canon of the speaker. It is, in fact, the frequent aspersion cast upon the law that the moral principles of our jurisprudence constitute no worthy pattern of conduct for the decent, self-respecting citizen. In short, the failure of the law to coincide with what is generally conceded to represent the highest moral doctrine of the time and place, is assumed to be the shortcoming of the law. High minded men pride themselves upon the breadth of the margin between their conduct and that upon which the

law fixes its penalty, and he who is content to comply only with the letter of the law, incurs their righteous indignation and just censure.

The analytical jurists long ago pointed out the fundamental distinctiono between law and morals.[1] Perhaps the greater danger lies in the failure to recognize the relationship between the two. The layman condemns the law for failing to coincide with morality while the lawyer is apt to boast of the fact that law is one thing, morals another. Either view seems to ignore the correct relation which the one bears to the other. It will not be possible here to consider the manner and method of the incorporation of moral content into legal precepts, depending upon the particular **form** of law in which the legal command is embodied. It is possible, however, to investigate the extent to which some legal rules comply with the demands of ethics, together with what seems to be the reasons therefore. The law of defamation apparently offers some intelligible illustrations of this process in the development of our jurisprudence.

At the outset it should be recognized that a considerable discrepancy should be expected between the law and the doctrines propounded by the more progressive moral thinkers and teachers. The dogma of the law reflects but tardily the spirit and belief of an age and a people. While the law, in some instances, may be suddenly and radically changed by legislative enactment, the broader principles of the common law have evolved for the most part by slow degrees and by gradual processes, and moral and ethical generalities have been incorporated into the law only when they have become thoroughly established by the ex-

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[1]See Pound, Theory of Judicial Decision, 36 Harv. L. Rev. 641, 659 (1923).

perience of men as valid and sound and practical.[2] It follows that ethics, as a science, must precede the law. New and novel principles must prove their worth before they will find a place in the common law. The law, builded as it is on pragmatic considerations, has ever maintained a consistant conservatism, and it is largely this conservative tendency that has given it the stability necessary to perform the functions which society demands of it. In treating the matter of defamation, the law was early brought face to face with a moral problem of great delicacy. The solution which has been worked out slowly and cautiously, while not infallible, may not compare unfavorably with the axioms of many who regard their own moral dogma with scrupulous exactness. Fundamentally, at least, the rights and duties which the law has provided to protect one's interest in his reputation have not been inconsistent in theory with sound moral doctrine, albeit the method adopted by the law to meet the situation may differ from the method of ethics.

Certain defamatory words have been flatly prohibited by the law, being regarded as actionable **per se.** The specific kinds of remarks which constitute defamation **per se** may be largely due to historical accident, but the theory of such words seems sound enough. To falsely accuse one of crime has always been regarded as a wrong which the law would redress with proof of naught but the defamatory words.[3] The legal theory, of course, is that

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[2]For example, the development of tort liability in the action of trespass on the case for intentional, though indirect violations of property rights. Also the development of "motive" as determining liability for damage caused by the exercise of legal rights. Cf. Allen vs. Flood (1898), A. C. 1 with Quinn vs. Leathem (1901) A. C. 495. See also Ames, How Far An Act May Be A Tort Because Of The Wrongful Motive Of The Actor, 18 Varv. L. Rev. 411 (1905). Cf. German Civil Code, sec. 226: The exercise of a right is not permitted, when its sole object is to injure another.

[3]Brooker vs. Coffin, 5 Johns. (N. Y.) 188 (1809); Pollock on Torts, 242 (12th. ed.).

indemnity is provided for the injury to reputation. This is the gist of the action.[4] To accuse one of having a foul or contagious disease is actionable on its face, when false, for the reputation is so injured that ostracism from society is assumed to follow. Thus the court, in an early case, held that the publication of a doggeral accusing one of having the "itch" and "stinking of brimstone" was a libel, for, said the court, "nobody will eat, drink or have any intercourse with a person who has the itch and stinks of brimstone."[5]

So also it is actionable **per se,** for similar reasons, to employ language charging a want of chastity;[6] language calculated to injure one in his business, trade or profession; and words tending to hold one up to disgrace and ridicule before his friends.[8] Thus, it is actionable **per se** to call one a thief;[9] a murderer;[10] an embezzler;[11] a perjurer;[12] to say of one that he is affected of a foul and loathsome disease;[13] to say of one that he is a fornicator;[14] that a woman is a prostitute;[15] that a minister was drunk;[16] that a merchant uses false weights;[17] that a white man is

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[4]See Odgers on Libel and Slander, 1 (5th. ed.).

[5]Villers vs. Monsley, 2 Wils. 403; 95 Eng. Rep. 886 (1769).

[6]Barnett vs. Ward, 36 Ohio St. 107 (1880). The rule was otherwise at an earlier stage of the common law. Roberts vs. Roberts. 5 B. & S. 384; 122 Eng. Rep. 874 (1864). See also Douglas vs. Douglas, 4 Idaho 193; 38 Pas. 934 (1895) . In all states where the particular acts charged are made punishable by the criminal law, the words charging the acts are defamatory **per se,** as imputing the crime. See Newell, Slander and Libel, 140 (th. ed.).

[7]Ostrom vs. Calkins, 3 Wend. 163 (1830); Spence vs. Johnson, 142 Ga. 267; 82 S. E. 646 (1914).

[8]Wandt vs. Hearst's Chicago American, 129 Wis. 419; 110 N. W. 198 (1902).

[9]Little vs. Barlow, 16 Ga. 423 (1858); Van Hoozer vs. Butler 131 Ark. 404; 199 S. W. 78 (1919).

[10]Widrig vs. Oyer, 13 Johns. (N. Y.) 124 (1816).

[11]Johnson vs. Shields, 25 N. J. L. 116 (1855).

[12]Cole vs. Grant, 18 N. J. L. 327 (1841).

[13]Monks vs. Monks, 118 Ind. 238; 19 N. E. 418 (1888); McDonald vs. Nugent, 122 Iowa 651; 98 N. W. 506 (1904).

[14]Page vs. Merwin, 54 Conn. 426; 8 Atl. 675 (1886).

[15]McKinney vs. Roberts, 68 Cal. 192; 8 Pas. 857 (1885); Klewin vs. Bauman, 53 Wis. 244; 10 N. W. 398 (1881).

[16]Hayner vs. Cowden, 27 Ohio St. 292 (1875).

[17]Pfeily vs. Henry 269 Pa. 533; 112 Atl. 768 (1921).

a negro.[18] All these have been held actionable as being defamatory **per se.**

The theory in holding such language actionable without proof of utterance, is that it has actually injured the reputation. The law seeks only to redress actual wrong, but as the experience of mankind has warranted some insults are regarded as so outrageous that the law assumes that they cannot fail to injure the reputation, so the defamed person will not be required to show how he has been injured, which, in some instances, might conceivably be hard to do.

On the other hand, words with less discourteous import have not been construed by the law to so shock the sense of decency that injury will be presumed to necessarily attend their utterence, and in this type of defamation, the injured party must show how and to what extent he has actually suffered, for the words are not actionable **per se.**[19] This distinction is based upon the theory, sound enough it would seem, that the law is in no sense a petty weapon which one may employ at his pleasure to retaliate for every provocation which he may suffer in his dealings with others.[20] If there be no actual damage to his reputation, he must stay out of court. Consequently to call one a "bluffer" has been adjudged not actionable **per se.**[21] It is true that one may not feel distinctly flattered to be called a "bluffer," but the expression is not so oprobrious that the law can assume that the reputation is materially injured thereby. Many men are notorious bluffers and enjoy enviable reputations in their community. Neither has it been adjudged as slanderous **per se** to say of one that he is a "bogus peddler;"[22] or to accuse one en-

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[18]Flood vs. News and Courier Co., 71 S. C. 112; 50 S. E. 637 (1905).

[19]Dailey vs. Bobbs-Merrill Co., 136 N. Y. S. 570; S. C. S. T. (1912).

[20]Walker vs. Tribune Co. 29 Fed. 827 (1887).

[21]Eislie vs. Walther, 4 N. Y. S. 385 (1889).

[22]Pike vs. Van Wormer, 5 How. Pr. (N. Y.) 171 (1850).

gaged in an ordinary calling of being drunk;[23] or to say of one that he has had consumption.[24] No moral turpitude or degradation is hereby connoted to an extent justifying an assumption that the person has suffered an injury to his reputation, so proof of such an injury is required to warrant a recovery in damages. Just where the line is to be drawn is, in theory, partly a matter of policy and partly one of accurate application of legal principles. The latter is in no sense a moral issue. Of the former we shall have more to say later.

All this is, of course, perfectly well known law. The distinction between words actionable **per se** and those requiring proof of special damages is significant here to indicate the real moral basis of the law with respect to defamation. Morally, perhaps, men should not say unkind things about their neighbors. Surely they should not say unkind things which operate to actually injure the reputation unless they are prepared to justify them. The law prohibits the latter, i. e. the actual injury to reputation. The advantages of undue litigation preclude the law from forbidding remarks of a mere discourteous import. Petty squabbles and the calling of names not positively vile, should not be carried to law for the mere sake of vindicating the feelings of the aggrieved person. The line must be drawn somewhere, so the law has flatly prohibited certain language, the effect of which may reasonably be expected to produce injury, by making them actionable on proof of utterence alone. Any other language must be shown to result in actual injury before the law will undertake to redress. In all cases, the effect of liability for defamation is to lend particular emphasis to that excellent admonition of scriptural morality—judge not lest ye be judged. In any event, it places upon one the onus of adjudging correctly, which is not an altogether bad moral

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[23]Torres vs. Huner, 150 App. Div. 798; 135 N. Y. S. 332 (1912).
[24]Rade vs. Press Pub. Co., 37 Misc. 245; 75 N. Y. S. 298 (1902).

principle.

Of more ethical significance is the attitude of the law toward the immemorial practice of gossip-monging. To report what someone else has said, for what it is worth, is often justified by the most circumspect gossipers, as a perfectly ethical pastime. More critical moralists, however, condemn it, as does the law. The law does not free from culpability him who but reports the defamatory language of another.[25] It has been invariably held that each repetition of a slanderous or libellous statement amounts to a fresh publication.[26] By repeating it, one thereby makes the defamatory matter his own. Perfectly logical, of course, is this rule, for it must be remembered that in every case the law is redressing an injury to reputation. Surely the broadcasting by continued repetition of injurious language affects the reputation quite as much, if not more than the original publication. The rule is well fixed in this regard, so that ingenuity in the manufacture of defamatory rumor is no more culpable than perseverance in repeating it. The rule is undoubtetdly in accord with the highest ethical principles and its development has been influenced by purely moral considerations.

Of more significance, perhaps, than this clipping of the wings of gentle Fama, is the matter of truth as a defense in actions for defamation. Here a tremendous moral problem is presented, and the solution which has been worked out would seem to reflect singular credit to the law. Formerly the truth of the statements charged was regarded as a complete defense.[27] As observed by a court in one of the older cases in this country, "no general principles of right to damages can be founded in a publication of the truth, from the consideration that the reason for awarding damages fails. The right to compensation . . . is founded upon

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[25]Morse vs. Printing Co., 124 Iowa 707; 100 N. W. 867 (1904); Haines vs. Campbell, 74 Md. 158; 21 Atl. 702 (1891); Darling vs. Mansfield, 222 Mich. 278; 192 N. W. 595 (1923).

[26]Brewer vs. Chase, 121 Mich. 526; 80 N. W. 575 (1899).

[27]Odgers on Slander and Libel, 181 (4th. ed.).

deception and fraud to the detriment of the plaintiff. If the imputation is true, there is no deception or fraud and no right to compensation."[28] This may ignore the essential nature of the action, but the rule of law stated is in strict conformity with common law doctrine. Perhaps the sounder basis was expressed by another court, opining that "unless the charge made by the defendant against the plaintiff was false as well as malicious, the plaintiff has no right to recover damages from him. The falsehood of the charge is a necessary element in the plaintiff's case. He cannot complain of anyone for speaking of him nothing but the truth."[29]

This reasoning was cogent enough for the common law for a long time. It is not without merit. Inasmuch as damages are allowed for defamation by reason of injury to reputation, it may well be asked by what moral law one may insist upon the integrity of a better reputation than his character warrants. If it is not better than his character, statements of the truth can in no wise injure his reputation, and the truth should constitute a complete defense to an action for slander or libel.

When Puritanic ideals of ethics and morality began to give way in their harshness to more humanitarian doctrines, it became apparent that the truth was not necessarily a moral justification. It was a vicious principle, after all, which endorsed the telling of a nasty tale on the sole grounds that it was a true one. Men began to realize, too, that there was a double aspect to the situation. It was frequently unfair and, in some instances a great hardship upon the person defamed, and at the same time subversive of the public morals to permit such promiscuous and extravagant slanders. In many situations it was neither advantageous to the defamer nor to the public at large. On the other hand, there were some circumstances under which the public not only could justly demand know-

[28]Castle vs. Houston, 19 Kan. 417 (1877).
[29]Ellis vs. Buzzell, 60 Me. 209 (1872).

ledge of the deficiencies in character of individuals, but it became one's obvious duty to furnish such information of this kind as came within his ken.

The law, then, had two conflicting interests to weigh. There was the interest of society in restricting foul and unnecessary evil talk and there was the interest of society in acquiring information of the infirmities of any of its members insofar as those shortcomings were likely to affect the public. The first interest was augmented by what appeared to be kindness and forbearance with respect to the individuals directly concerned, whereas the latter social interest was emphasized by the peril of those members of society who might deal with the persons in question to their sorrow. Some principle was demanded for this complex problem of moral issues which would adequately protect every interest involved. By degrees, the doctrine took shape and form, since expressed in statutes in a number of our states, that the truth, in actions for defamation, should constitute a complete defense only when accompanied by proof of good motives and evidence that the statements were made for justifiable ends, unless such statements were made under what has been called an absolute privilege. It is thus that a complete absence of malice, a typically moral situation, is necessary to vindicate defamatory remarks, although they be, in fact, true. As stated by the chief justice of the supreme court of Oregon, "every injurious publication of and concerning another, if it contains libellous matter, is presumed to have been made maliciously and this presumption continues until it appears that the matter charged as libellous is in fact true, and was published with good motives and justifiable ends."[30]

Here is complete accord between legal doctrine and first hand moral principles. It must be clear that in the main there is a great difference between the methods of

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[30]State vs. Mason, 26 Oregon, 273, 277; 38 Pac. 130 (1894).

ethics and jurisprudence. Ethics is eternally subjective, whereas the law is predominantly objective.[31] Ethics looks to the inner life of man; it seeks to perfect the motives of conduct; it strives to make man pure in heart. The law, on the other hand, has always been an institution primarily concerned with actual, manifest conduct. The purpose of the two sciences are different although the material dealt with, in many cases, is the same.[32]

Sometimes the law becomes apparently subjective, but usually the subjectivity is more apparent than real. Thus the criminal law seeks to ascertain the intent, but not the motive, in the commission of an act charged as criminal. Frequently, however, intent is but a fiction. The law often **presumes** intent from actual conduct; it insists that one committing certain acts under certain circumstances shall be deemed to have done so with a criminal intent, so that, after all, an objective standard constitutes the test for both conduct and intent, and the legal theory of things obscures the reality.[33] In treating the present problem of defamation, the law apparently compromises in method. It adopts the ethical viewpoint and looks to the motives of the defamer. The concession again is only partial, for certain presumptions must make it difficult for the slanderer to justify motives in situations where the subjective basis therefore is too highly intangible. The law must not wander too far from the path of objectivity, for it is by faithful preseverance here that the bulwarks against ignorance and stupidity are created and maintained. No man shall be permitted to deny the intent to produce the natural consequences of his own acts although it makes gulity him who may be, in truth and in fact, morally guiltless. The law is designed to protect society not only from the lusts of evil minds but as well from the stupidity of stunt-

[31]See on the externality of the law, Holmes, Common Law, 110 ff. (1909).

[32]As to "identity of material and diversity of purpose," see Stammler, Theory of Justice, 44 (1925).

[33]See Salmond, Jurisprudence, 83 (7th. ed.).

ed intellects. For these reasons the ordinary prudent man or the hypothetically reasonable person is a spectre that haunts the "good" but thoughtless.

The exigencies of modern society which raise a moral duty for one to speak are so many that the law has concocted the ingenious device of privilege to rebut the presumption of malice which is raised by the utterance of words actionable **per se.** Privilege rests upon the moral grounds that some circumstances arise which justify the use of what would otherwise be defamatory language, regardless of the injury to individuals, by reason of the importance of the information thus conveyed to the public or to other individuals. One might be obligated by the highest ethical considerations to make statements which but indicate a suspicion on his part of another's depravity, the suspicions themselves eventually proving to be ill founded. One may speak on such occasions with impunity. It is thus that a legislator is absolved from blame and liability for remarks made upon the floor of the legislative chamber, be they ever so slanderous, providing, of course, that they are made in the course of legislative business and official proceedings.[34] And the privilege is a defense even though the statements be false.[35] The law regards the complete freedom from civil liability under these circumstances as more important than compelling the speaker to adhere strictly to what he knows to be true. There are political remedies for abuses of the privilege or lack of discretion in invoking it.

It is by reason of privilege also that one may feel free to criticize the government and those occupying positions of public trust and confidence. Particularly is this consistent with the political theory of representative government as well as such ethical principles as may support our doctrines of political science. As observed in the case of

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[34]Coffin vs. Coffin, 4 Mass. 1 (1808).
[35]Odgers, Slander and Libel, 231, 232.

Chicago vs. Chicago Tribune,[36] "when the people became sovereign as they did when our government was established under our Constitution, and the ministers became servants of the people, the right to discuss government followed as a natural consequence."[37] It is also privilege that subjects to what frequently amounts to the most galling criticism all purveyors of literary and artistic creations.[38] One who submits his efforts in art, philosophy, literature, music and the like, to the public for appraisal must not complain if that unfeeling and caustic abstraction receives them in a manner by no means reassuring to the author or composer. When, however, expressions of opinion and what purports to be criticism becomes wholly unfair and amounts to a personal attack upon the artist's character, the privilege is lost and the injured party may have his action.[39] An attorney, for language employed necessarily in the trial of a cause, may likewise invoke the protection of privilege,[40] as may witnesses for answers fairly made to questions while on the witness stand.[41] The theory, in each case, is the community of interests of the speaker and the auditor. In speaking with reference to an alleged slanderous charge of theft, a southern judge stated the grounds in the following terms:

> [42]"Words falsely spoken to another, imputing a criminal offense are actionable **per se,** and the law presumes malice in their utterance, therefore it is not necessary in such case for the plaintiff in an action for slander to prove express malice, unless the words spoken constitute a privileged communication.
> "A communication, although it contains criminatory matter, is privileged when made in good faith upon any subject in which the party communicating

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[36]307 Ill. 595; 139 N. E. 86 (1923).
[37]139 N. E. 86, 88.
[38]See Newell, Slander and Libel, 547.
[39]Fraser vs. Berkley, 7 C. & P. 621; M. & R. 3 (1836).
[40]McDavitt vs. Boyer, 169 Ill. 475; 48 N. E. 317 (1897).
[42]Abraham vs. Baldwin, 52 Fla. 154; 42 So. 591 (1906).

> has an interest, or in reference to which he has a right or duty, if made to a person having a corresponding interest, right or duty and made upon an occasion to properly serve such right, interest or duty, and in a manner and under circumstances fairly warrantetd by the occasion and the right, duty or interest, and not so made as to unnecessarily or unduly injure another, or to show express malice."

It will be seen that privilege has well defined limits beyond which one passes at his peril. The conception of privilege is nothing more than a theoretical device which legal doctrine has originated to refute the legal inference of malice, that is, the defamatory statements are not made with good motives. The law has rightly placed the burden of prooving good motives upon him who defames, but privilege removes the burden by suggesting that the particular circumstances of the utterance were such as to justify the language used. It is seen, then, that the essential element in defamation is malice, and malice is a matter of **moral** right and wrong. Originally the fact that the defamatory language was true was sufficient to repel the inference that words slanderous **per se** were uttered maliciously. Perhaps the effect of the law under this rule was to make legal malice impossible, regardless of actual malice. The law later developed to the point where it was not only necessary to show the truth of the statements, but an absence of malice must be shown as well, or, in other words, good motives and justifiable ends. The privilege, however, accomplishes the object of negative malice, and this even when the words used are false. "The term privilege," it has been said,[43] "as applied to a communication alleged to be libellous, means simply that the circumstances under which it was made are such as to repel the legal inference of malice, and to throw upon the plaintiff the bur-

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[43]Rotholz vs. Dunkle, 53 N. J. L. 438; 22 Atl. 193 (1891).

den of offering some evidence of its existence beyond the falsity of the charge."

Thus, although privilege is a defense, even though the words used be false, the magical effect of the protection may be lost. The refutation of malice is only **prima facie.** If the refutation can be overcome and malice actually shown to exist, the words, if false, become actionable, the privilege disappears and the defamer is liable.[44] This holds true for practically every privilege except that of the legislator and the judge when performing official duties.[45] In these two exceptions, the privilege is said to be "absolute," and the refutation of malice raised by the circumstances is impregnable. In other words, the presumption in these cases that no malice exists is a conclusive presumption, regardless of whether malice exists in fact or not. As has been suggested, the importance of immunity from civil proceedings and the existence of other remedies influence the law to devise the absolute privilege here, but in substantially all other cases of privilege there is but a qualified protection which is lost the moment actual malice is proved.

Thus it is that the machinery of the law of defamation functions. In the first place defamation is, in substance, injury to reputation. Certain kinds of language have come by such an accepted slanderous meaning that their very utterance constitutes defamation, regardless of actual injury—the law conclusively presumes injury. The law also presumes malice in the case of words defamatory **per se.** If defamatory words are to be justified by their truth, an absence of malice must be shown and the presence of justifiable ends. Every ingredient of defamation is then lacking; there is no **false** charge, **maliciously** made. If words are false, or if they are defamatory on their face, the

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[44]See Cardoza, J., in Andrews vs. Gardner, 224 N. Y. 440, 447; 121 N. E. 341 (1918).

[45]See Liddon, J., in Coogler vs. Rhodes, 38 Fla. 240, 248; 21 So. 109 (1897). See also Sloss, J., in Gosewisch vs. Doran, 161 Cal. 511, 514; 119 Pac. 656 (1911).

law presumes malice unless the existence of a privilege refutes this presumption, but if the privilege is negatived by proof of actual malice, the protection is lost and the elements of actionable defamation are present.

From the part which falsity and malice play in determining liability, it is readily seen that the fundamental considerations involved are of an essentially ethical nature. No moral code places its stamp of approbation upon false witness or upon malicious or wanton wrong. To this extent, then, the law is enforcing, not moral precepts, but legal precepts which have been developed by the weight of ethical considerations. The law has come into accord with morals to this extent.

The complicated machinery of the law, involving privilege, burden of proof, presumptions, actual malice, legal malice and the like, are simply devices, awkward perhaps, but nevertheless effective, to aid in the practical application of legal doctrine to the affairs of men. Sometimes the effect of these technical agencies seems to disregard the realities of life and to ignore truth and fact. Yet this very objectivity of the law, this externality, is necessitated by a bigger reality than the particular instance of application. If the truth and facts of the specific instance seem to be ignored, by the force of legal presumptions, it must be because the law has its eye upon the truths and facts of life as a whole, and in the long run, the experience of many men is regarded as the only safe grounds upon which to fashion rules for the guidance of the conduct of society. It is no indictment of the law that it fails to accord with ethics in the specific instance. Law pertains to conduct; ethics to thinking. It is enough if the fundamental grounds for distinction and the basis for fixing liability are not inconsistent with ethical postulates. "As a man thinketh in his heart, so is he" to the moralist, but the law must confine its chief scrutiny to conduct. When precepts are laid down to govern conduct, it is not the heart subjective that must be considered, but the heart objective, the heart

of the average man, as indicated by his conduct. In law, thoughts are evidenced by actions. If men live together peaceably, jurisprudence must be content to let them live nobly, and perchance go to heaven, in some other way.

Insofar as ethical considerations have influenced the law to bring about a conformity between law and morals, rules of law are in accord with ethical principles. The purpose of law, however, is different, as is the method adopted to attain that purpose. We have seen that so far as the law of defamation is concerned, the rules of law are fundamentally based upon ethics. The operation of these rules, however, are peculiarly legal, and it is here that law and morals diverge. It might be helpful, however, to recognize the limitations of each science, and, by noting carefully the extent to which the one overlaps the other as well as the point of departure, to thereby ascertain some notion of the true relationship between the common law and Christian morality.

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MOOT COURT

DOLAN VS. DUNCAN

Title To Land—Adverse Possession—Rights of Cestuis Que Trust—Limitations Running vs. Cestuis Non-Sui Juris.

STATEMENT OF FACTS

Land was conveyed to X, in trust for John Dolan and his children, their heirs and assigns. John had but one child, three others were born later, one of whom, William, is the plaintiff. During John's life time, Duncan entered on the land having no claim to it but a forged instrument purporting to be made by John. After a possession by Duncan of 15 years, John Dolan died. Ten years thereafter, Duncan continuing in possession, this action of ejectment is brought for an undivided fourth.

Lewis, for Plaintiff.
Shay, for Defendant.

OPINION OF THE COURT

Rubenstein. J. The contention by counsel for the plaintiff that John Dolan had by the instrument, vested in him an equitable life estate, and his children being the remaindermen thereof is not only erroneous but absolutely unwarranted by the words of the instrument. The major premises being wrong, the conclusion will naturally be likewise.

According to the terms of the instrument, John Dolan and his children were co-beneficiaries in the trust, the question then arises as to whether the Statute of Limitations running against the trustee runs also against the beneficiaries regardless of any defense that they might have, as for instance, coverture or as in this case infancy.

The case of Meeks vs. Olpherts, 100 U. S. 569, cited by counsel for the defendant holds that whatever doubt may have existed at one time on this subject, there remains none at the present day, that whenever the right of action in the trustee is barred by the Statute of Limitations, the right of the cestui is also barred.

We come then to any defenses which the beneficiaries may have. The rule that when a trustee holding the legal title is barred by adverse possession from asserting his right in the trust estate, the cestui is also barred is equally applicable whether the cestui is sui juris or not, 2 L. R. A. 50 and cases therein cited.

Thus in 51 Ga. 139, wherein it appeared that certain property conveyed by a husband in trust for his wife and her children was afterwards conveyed by a void deed by the husband as trustee for wife to a third person who held it for the requisite period to acquire title by adverse possession; it was held that the actual trustee who had stood by and allowed the trust property to be entered and possessed adversely was barred from bringing an action for recovery and so likewise was the infant cestui que trust. In this case the general rule was laid down when the legal title is vested in a trustee, who can sue for it and fails to do so within the time prescribed by law, his right of action is barred, the infant cestui who has only an equitable interest in the property will also be barred.

The trustee may be presumed to be of required capacity and under no disabilities. He is the proper person to sue and be sued and the estate is, therefore, subject to his actions. It was the trustee's duty to start proceedings against the adverse possessor and if he refused or failed the beneficiary could force the trustee to start proceedings. Thompson vs. Charmical, 122 Pa. 478.

Judgment for the defendant.

OPINION OF SUPREME COURT

The legal title was in X. Possession adverse to him and to all the **cestuis que trust,** was taken by Duncan. We think that, when such possession had continued for 21 years, it barred the title of X and of all the cestuis que trust. The personal disabilities of any of them could not be considered. It was the right and duty of X to take steps to recover the possession. He could have been compelled by the cestuis que trust to do so. The general rule, says 37 C. J. 719, is that "whenever the right of action in a trustee, who is vested with the lgeal estates, is barred by limitation, the right of the certui que trust is also barred, and this rule applies whether the cestui que trust is **sui juris,** or under disability during the period of limitation." It cites, with other authorities, Similie vs. Biffle, 2 Pa. 52. Compare also Warfield vs. Fox, 53 Pa. 382.

The judgment for the defendant must then be affirmed.

JONES VS. STAR MOTOR CO.

Bailment Leases—Possession—Pledge or Sale by Pledgee—Right of Owner to Pursue Property—Act of May 12, 1925 P. L. 603.

STATEMENT OF FACTS

The Star Motor Company by bailment lease delivered a number of cars to Johnson, a dealer of Stars in Berwick, Pa. Johnson being indebted to Jones to the extent of $1000, pledged two of the cars to him as collateral. Johnson failed to make payments to the Star Motor Company. They re-took the cars and Jones brings replevin, alleging that he had no knowledge or notice of the bailment. Johnson had exhibited the cars in his sales-room, and had claimed to own them.

Perrella, for Plaintiff.

Mincemoyer, for Defendant.

OPINION OF THE COURT

Lewis, J. It is strongly urged by the learned counsel for the plaintiff that "possession of the property in the bailee for hire so clothes him with an apparent title to dispose, as to create an estoppel preventing the owner from asserting his title." It will be noted that possession is a fundamental requisite or incident of a good bailment, McBride vs. McNally, 243 Pa. 206, and Lakeshore & Mich. R. Co., 85 Pa. 283, hold that "Possession of a chattel is merely prima facie evidence of ownership." The case of O'Connor vs. Clark, 170 Pa. 318, cited by the counsel for defense, holds that "apparent ownership must appear affirmatively from the evidence in the case, and the burden of proof is on the plaintiff." In the case at bar, no such evidence appears.

Even the rule that "where one of two innocent persons must suffer, the loss must fall on him whose act or ommission made the loss possible," has no application with respect to a pledge. The pledgee stands in no better status than a person who innocently buys, leases, or acquires property that has been sold. The owner may follow through and reclaim it. Miller Piano Co. vs. Parker, 155 Pa. 208. In the case of Hayden vs. McMiller, 79 Super. 14, the court held that unauthorized declarations by the bailee do not estop the owner from asserting his title.

Leitch vs. Sanford Motor Co. 279 Pa. 160 is a case exactly analogous to that at bar. In that case the Motor Co., by bailment

lease delivered a truck to one Nicholson, who kept same in his sales room on display. Being indebted to the Westmoreland National Bank of Pittsburgh, he pledged the truck to the said Bank, who stored it in a garage. Nicholson failed to make the necessary payments. The Motor Co. took possession of the truck, and the bank sued in replevin. The decision was rendered in favor of the Motor Co., on the ground that "the unauthorized pledge of bailed goods will not defeat the title of the bailor."

Undoubtedly Leitch vs. Sanford settled the law in Pennsylvania up to the year 1925. However, we are confronted with the passage of the Conditional Sales Act of May 12, 1925, P. L. 603. The question which arises is "whether a bailment lease can be construed as a conditional sale?" We do not think the act above referred to has abolished the distinction between them, and that a bailment lease is still in force in Penna. The said Act of 1925 as adopted by the Penna. legislature differs from the Conditional Sales Act as adopted by the Commissioners on Uniform Acts. In the Act as advocated by the Commissioners we had a clause in Sec. 1, "that any contract for the bailment or leasing of goods by which the bailee or lessee contracts to pay compensation a sum substantially equivalent to the value of the goods, and by which it is agreed that the bailee or lessee is bound to become, or has the option of becoming the owner of such goods upon full compliance with the terms of the contract," whereas, the act as adopted by our legislature reads as follows: Sec. 1, "that in this act conditional sale means, any contract for sale of goods under which possession is delivered to the buyer and the property in the goods is to vest in the buyer at a subsequent time upon the payment of part or all the price, or upon the happening of any contingency, or upon the performance of any other condition." And in Sec. 5 makes mention only of the words Conditional Sales, "as being void of any purchaser or creditor." Further, the Sales Act of June, 1915, P. L. 866, Sec. 8, defines a conditional sale in virtually the same way as the Act of 1925. And since the Act of 1915 failed to abolish the difference between a bailment lease and conditional sale, coupled with the omission by our legislature to adopt the original draft of the present Uniform Conditional Sales Act, we feel that the Legislature never intended to abolish the distinction, and we therefore render our decision for the defendant.

OPINION OF SUPREME COURT

Little need be added to the opinion of the learned court below. Its clear exposition of the law as it was before the Uniform Con-

ditional Sales Act and as it is since that act is manifestly correct.

We would like to distinguish this case from several somewhat similar cases since decided. In Commercial Motors Mfg. Corp. vs. Waters, 280 Pa. 177, the court held that the mere placing of a truck on exhibition in a sales-room where the bailee was engaged in buying and selling cars, would not of itself, estop the owner from asserting his title. That is the situation in our case. But this fact plus the fact that a close confidential relationship existed between the parties would so estop the owner. No such additional fact appears here.

Also in T. T. and Fwd. Co. vs. Baker et al, 281 Pa. 145, the court clearly distinguished it from our case in that the Co. there was never a bailee.

The case of Leitch vs. Sanford Motor Co., 279 Pa. 160 furnishes ample authority for the holding. The deduction from the failure to include in the Pa. Conditional Sales Act the clause mentioned is doubtless correct.

The judgment of the learned court below is affirmed.

Y BANK VS. DAVIDSON

Promissory Notes—Wife as Accomodation Maker—Evidence—Surviving Party to Contract—Act of May 23, 1887, P. L. 158.

STATEMENT OF FACTS

Mrs. Davidson made a promissory note for $500.00 payable on demand to the order of Mr. Davidson (her husband). He endorsed it and on March 1st sold it to "Y" Bank. He died July 1st. On August 1st, the "Y" Bank sued Mrs. Davidson on the note. She alleges that she was an accomodation maker and received no consideration. She attempted to prove this by her testimony, by entries in the books of her husband as of March 15th, and by declarations made by her husband on April 1st. The court refused all this evidence and directed a verdict for the plaintiff. The defendant appeals and assigns the exclusion of this evidence as error.

Householder, for Plaintiff.

H. Johnston, for Defendant.

OPINION OF THE COURT

R. Laird, J. The question raised is whether the court erred in excluding certain evidence offered by the defendant. Defendant

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Householder, for Plaintiff.

H. Johnston, for Defendant.

OPINION OF THE COURT

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has been sued on a note of which she is maker, and sets up as her defense the statutory protection granted a married woman under provisions of the Act of June 8, 1893, P. L. 344, providing that a married woman "may not become endorser, maker, guarantor, or surety for another." The court has excluded all the evidence offered by her in proof of her allegation, and unless the court erred in so doing, her defense falls; for the burden of proof rests upon her to show that the contract in question does clearly fall within the above cited provision of the Act. The purpose of this Act was to give to a married woman a general capacity to contract aside from certain enumerated exceptions, hence unless it is shown that one of the outlined exceptions governs, every contract of a married woman is now presumed to be valid. Bank vs. Poore, 231 Pa. 362.

We do not believe that the court erred in excluding the evidence offered by the defendant to prove that she was an accomodation maker of the note. Defendant offered as proof (1) her own testimony, (2) entries in the books of her husband as of March 15th, and (3) declarations of her husband made April 1st.

Her own testimony was properly excluded in accordance with the provisions of Act of May 23, 1887, P. L. 158, Section 5 of which Act provides "Where any party to a thing or contract in action is dead, or has been adjudged a lunatic and his right thereto has passed, either by his own act or by the act of law, to a party on the record who represents his interest in the subject in contraversy, shall any surviving or remaining party to such thing or contract, or any person whose interest shall be adverse to said right of deceased be a competent witness to any matter occurring before the death of said party." Defendant is the surviving party to the contract here sued upon, and the rights of the deceased party did pass by his own act prior to his death to the present plaintiff. Counsel for the defendant seeks to show that under the section cited above of the Act of 1887 a witness is disqualified only when such witness in addition to being "a surviving party to a contract in which the interest of the deceased party has passed to another" has "an interest adverse to the right of deceased party." We hold this argument not to be in point. Here any interest remaining in the deceased (or his estate) is in fact merely contingent. The "interest" contemplated by terms of the Act is an actual and present interest. Consequently the question of whether the surviving party defendant has an interest adverse to the interest of the deceased party is irrelevant. The testimony of the defendant was properly excluded. F. and M. Bank vs. Donnelly, 247 Pa. 518.

Defendant's second offer was entries in the books of her husband as of March 15th. It does not appear what the nature of these entries was, but regardless of their nature, we hold that they were properly excluded under the so-called "hearsay rule" of evidence. It is true that if it were possible for defendant to prove that said entries were made by deceased party against his own interest, they would be admissable. But since they were made fifteen days after he had passed to present plaintiff all his actual rights in the contract, they cannot be held to be made against his own interest in the contract. He had no interest when entries were made; at least no more than a conjectural interest, and entries made when the maker had no actual or present interest are not such evidence as is admissable under the exception to the hearsay rule cited by counsel for defendant. F. and M. Bank vs. Donnelly, supra.

The third offer of defendant was declarations of her husband made April 1st. Here again the defendant seeks to use the declarations of deceased as "declarations against his interest" and consequently admissable under the exception to the hearsay rule of evidence. Again we must hold that since the declarations were made a month after the deceased party had passed his actual interest in the contract to another, they were not declarations against his interest. Such declarations cannot "afford an inference against the maker's interest" when the maker no longer has an interest. The reasons given in our treatment of assignment of error (2) apply with equal force here.

The assignments of error are overruled and judgment affirmed.

OPINION OF SUPREME COURT

The well-written opinion of the learned court below correctly disposes of the issues involved. One statement, however, must be corrected. The court says, "the question of whether the surviving party defendant has an interest adverse to the interest of the deceased party is irrelevant." This question, on the contrary, is very material. It is not merely that a party is a surviving one but that he has an interest adverse to the deceased. Every requirement of the Act of 1887 must be met to disqualify a witness, for competency is the general rule. Thus while the question of an adverse interest is relevant, Mrs. Davidson clearly had such an interest and is incompetent under the act.

Farmers and Merchants Bank vs. Donnelly, 247 Pa. 518, whose authority has not been derogated from, sustains the holding of the learned court. The judgment of the court below is affirmed.

AVONDALE VS. WATER CO.

Public Service Companies—Rates—Due Process—Constitutional Law —Appeals—Superior Court—Abuse of Discretion.

STATEMENT OF FACTS

The Water Co. issued a schedule of rates and filed it with the Public Service Commission. Complaints were filed against the rates and after hearings, the Commission issued a schedule which, in their judgment, allowed a reasonable return upon the fair value of the property used in public service. The Water Co. appealed to the Superior court and they directed an increase in valuation of a pumping station, an increase in the value of a purchased competing line, and a separate allowance of "going value" which the commission had allowed, but not separately. The findings of the Commission had been based upon competent evidence but the Superior court thought the allowance too small. The Commission has appealed to the Supreme court asking for a reversal of the Superior court's order.

Miss McCrea, for Plaintiff.

Morgan, for Defendant.

OPINION OF THE COURT

Potamkin, J. The doctrine seems to be definitely settled that a decision of the Public Service Commission is appealable, and that the appellate court cannot confine itself to a review of the law involved, but can also pass upon the wisdom of the finding of the Commission in view of both the law and the findings of fact determined by it.

The Public Service Act of July 26, 1913, P. L. 1374 as amended by the Act of June 3, 1915 P. L. 779 gives the right to a complete judicial review on independent judgment where a company is agrieved by an order of the Public Service Commission through an appeal to the Superior court and thence by special allowance to the Supreme court.

In the case at bar, the only question to be decided is as to the legality of the Superior court's act in increasing what the Commission thought a fair value of the amount of property being used in Public Service. Under the doctrine of the N. Y. and Penna. Co. vs. N. Y. Cent. R. R. 281 Pa. 287 we believe that increasing the amount allowed on the value of the property of the defendant named by the Commission as the court did in the case at bar was an exercise

of such power and review and hence legal under the doctrine of the case stated.

A much stronger argument in support of the court's exercise of such powers is to be found in the case of Ben Avon Borough Co. vs. Ohio Valley Water Co. which is reported in 271 Pa. 346. The facts are similar with the exception that therein the Supreme court of Penna. affirmed a decision of the Superior court which increased the value of the Companies' property used in Public Services in five instances instead of three. Among these five were the increase in valuation of a pumping station, an increase in the value of a purchased competing line and a separate allowance for going value, all of which were allowed in the case at bar. The case was first reported under the same name in 260 Pa. 289. In that case the Superior court was reversed by the Supreme court in regard to the five items mentioned above. The court held that since there was evidence to support the values found by the Commission, they should be considered as established. The case was appealed by the Water Co. to the Supreme court of the U. S. which held in Ohio Valley Water Co. vs. Ben Avon Borough, 253 U. S. 287 that (1) due process required a State to furnish an opportunity for such judicial review, and (2) that Appellant (Water Co.) was deprived thereof in violation of the fourteenth amendment to the Constitution of the U. S., if the conclusions of the Commission were final as the State Supreme court had held. Due to that decision the Supreme court of Penna. was compelled to reverse itself and in the case first cited (271 Pa. 346) held that it was proper for the Superior court to so review the findings of the Commission. The court said "Now, better advised, we give that effect (findings of the Commission having been given the effect of a jury verdict in a former opinion) to the findings of the Superior court, because it is the judicial tribunal whose independent judgment is required under the Constitution of the U. S., in order that the Statute may not violate due process of law."

The court went on to say that "unless it has been abused the Supreme court will not reverse the exercise of discretion given by the Public Service Co. Act to the Superior court, in determining appeals from the Commission to either reverse the Commission or to remit the record to it for further proceedings, if upon the findings of the Superior court, the rates under consideration are reasonable, it is not an abuse of discretion to reverse the Commission and dismiss the complaint." Affirmed.

OPINION OF SUPREME COURT

The opinion of the learned court below amply answers the questions suggested by this case. No additional comment by us could be of any aid and it is affirmed.

WRIGHT VS. READING COMPANY

Common Carriers—Interstate Commerce—Uniform Live Stock Contract—Limitation of Liability—Cummin's Amendment.

STATEMENT OF FACTS

On January 1, 1917 Wright delivered three horses to the defendant company to carry from Harrisburg to New York. The defendant was a common carrier in interstate commerce. The car was wrecked in Pennsylvania and two of the horses were killed and the third injured. The plaintiff sued in trespass for the loss sustained. The defendant filed no affidavit of defense. At the trial the defendant put in evidence a copy of the contract signed by the plaintiff when he delivered the horses. The value of the horses was here set at $200 each and a lower rate was thereby secured. The plaintiff objected to the evidence, claiming that since no affidavit of defense setting forth the contract had been filed, the defendant could not now use it. The court admitted the evidence. The horses killed were racing horses worth $100 each and the one injured a racing horse worth $500 before the accident and $200 after the accident. The court allowed a recovery of $200 each for the horses killed and nothing for the one injured. The plaintiff has appealed.

Wiest, for Plaintiff.

Cramer, for Defendant.

OPINION OF THE COURT

Turik, J. The first question presented by the case at bar is whether the failure to file an affidavit of defense in a trespass suit, precludes the defendant from putting into evidence, a copy of the contract made by the plaintiff and defendant. This question has been decided in the negative in Leonard vs. Coleman, 273 Pa. 62. In that case, the plaintiff sued in trespass for the death of her husband. The defendant failed to file an affidavit of defense. The court permitted the defendant to introduce into evidence a copy of

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a release of damages given by the plaintiff to the defendant, declaring that section thirteen of the "Practice Act" of 1915, P. L. 487, does not require a defendant in a trespass suit to file an affidavit of defense. The act merely states that upon failure of defendant to file an affidavit of defense, certain prescribed facts shall be deemed to be true.

The second and final point of our consideration deals with the proper measure of damages where a contract calling for an interstate shipment of goods, declares the goods to be of a certain specified value, and the goods are in fact of a greater value. May the plaintiff recover the actual amount of the injury or is he limited to the value specified in the contract? The Pennsylvania decisions prior to 1915 declare that where a shipper delivers goods to a carrier in Pennsylvania, to be transported to another state under a bill of lading which limits liability to the value of the goods set forth in the bill of lading, the carrier is only liable for the value of the goods as specified in the contract. Wright vs. Adams Express Co., 54 Super. 485.

Under the act of Congress of March 4, 1915, known as the Cummin's Amendment the shipper of goods was allowed to recover the full amount of the damage to the goods regardless of any specified value in the contract. This act was amended by the Federal act of August 9, 1916, 39 St. at Large 441, the relevant portions of which are as follows: "The provisions of the Cummin's amendment respecting liability for full actual loss for damage or injury, notwithstanding any limitation of liability or recovery, or representation or agreement, or release as to value, and declaring any such limitation to be unlawful and void, shall not apply . . . to property, excepting ordinary live stock, to be received for transportation concerning which the carrier shall have been or shall hereafter be expressly authorized or required by order of the interstate commerce commission to establish and maintain rates dependant upon the value declared in writing as the release value of the property, in which cases such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released. The term "Ordinary Livestock" shall include all horses except such as are chiefly valuable for racing purposes."

This act distinguishes between race horses and horses which are classified as "ordinary livestock." It declares that the contract value shall determine the amount of recovery in case of race horses. The actual damage sustained shall govern the amount of recovery, when the horses involved are included in the term "Livestock." The facts admit that the horses in the case at bar are race horses and

therefore the measure of damage to the plaintiff is the stipulated value in the bill of lading or $200 for each horse. The lower court has allowed the plaintiff $200 for each horse killed, and to that extent we affirm the court below.

The court below refused to allow damages for the horse injured. In this respect the court below fell in error. A fair construction of the Federal act cited above, leads to the conclusion that congress intended the shipper to recover the actual damage sustained by him, except that he was not to recover damages greater than the stipulated value of the goods shipped. Under such a rule the shipper recovers no greater damages than he has declared his goods to be worth, and the carrier incurs no greater liability than he has agreed to assume by the bill of lading. Therefore plaintiff may recover $200, the stipulated value of the horse injured. Wilson vs. Adams Express Co., 72 Super. 384.

We affirm the court below as to the measure of damages adopted in respect to the horses killed, but reverse it as to its refusal to allow damages for the horse injured. The total recovery allowed to the plaintiff is $600.

OPINION OF SUPREME COURT

The able opinion of the learned court below amply discloses the law of Pa. on the points involved. Re-discussion by us is superfluous.

We woudl like to point out an inaccuracy in the opinion of Justice Head, in Wilson vs. Adams Express Co., 72 Super. 384, at p. 389 and inquire if it was noticed by the learned court below.

Judge Head says, "with that amendment in force, (The Cummin's Amendment) the federal law would have been brought into harmony with the law of Pennsylvania as it had always been declared, thus denying to the carrier, by the terms of the statute, the benefit of a defense which had always been denied to it in the State of Pennsylvania on the ground of public policy." But even before the passage of this amendment, the law of Pennsylvania had been declared by the same Justice to allow the carrier such a defense. Wright vs. Adams Express Co., 54 Super. 485, (1913) at p. 491. This of course has no effect on the decision of the case but is an interesting example of judicial forgetfullness.

The opinion of the learned court below is affirmed.