THE HISTORY AND THEORY OF THE LAW OF DEFAMATION.

II.

In its vital aspect the right to reputation is not concerned with fame or distinction. It has regard, not to intellectual or other special acquirements, but to that repute which is slowly built up by integrity, honorable conduct, and right living. One's good name is therefore as truly the product of one's efforts as any physical possession; indeed, it alone gives to material possessions their value as sources of happiness.

It is to be observed that it is reputation, not character, which the law aims to protect. Character is what a person really is; reputation is what he seems to be. One is composed of the sum of the principles and motives—be they known or unknown—which govern his conduct. The other is the result of observation of his conduct—the character imputed to him by others. It is, therefore, reputation alone that is vulnerable; character needs no adventitious support. Not only are the two not synonymous, but they may be directly contrary to each other. A man may have a good character and a bad reputation, being unjustly judged by the public; or he may have a bad character and a good reputation, standing in a false light before the public. In most cases reputation reflects actual character. Such is the condition which best serves the interests of society, and which the individual may reasonably demand. Since the right is only to respect so far as it is well founded, it is obviously not infringed by a truthful imputation. But the law justly deems any derogatory imputation false until it is shown to be true. Moreover, while the law requires a certain degree of proof to overcome this presumption, it also recognizes the human mind's propensity to believe evil upon slight evidence; hence those representations which tend to influence public opinion in that respect are deemed to have done so.[1]

[1] Kinkead on Torts, i, 759.

In the present state of the law the right to reputation is a confused one. So far as written defamation is concerned, the right to reputation, like the right to personal security, may be said to be an absolute right, to be respected at peril.[1] The publication of defamatory words is so manifestly detrimental that a person publishes them at the peril of being able to justify them in the sense in which the public will understand them. Whenever words "sound to the disreputation" of a person they are defamatory on their face. But where it is not clear from the words themselves that they must have injured the plaintiff's reputation, proof of some special damage is required to show that as a matter of fact, the words have had that effect. The injury to the reputation is the gist of the action; special damage is but evidence of loss of reputation, and is necessary only where without some evidence it would not be clear that reputation had in fact been injured. But the injury must be appreciable, that is, capable of being assessed by a jury. Hence no action lies for mere vulgar abuse, or for words which have inflicted no substantial injury: *de minimis non curat lex.*[2]

This view, however, is by no mean universally accepted. Mr. Townshend asserts that pecuniary loss is the gist of the action; that the rule of law that certain language is *per se*, and without other evidence, conclusive proof of pecuniary loss, is only a rule of evidence, while the rule of law remains that pecuniary loss must be shown to entitle one to a remedy.[3] This theory is not only historically untrue, but would require a further legal fiction. It ignores the fact that where damages are presumed by law from the invasion of a right (as of reputation) no inquiry is allowed into the character of actual harm suffered. Nor can this theory be reconciled with recovery for defamation of a person with

[1] Compare Burt *v.* Advertiser Newspaper Co. (1891) 154 Mass. 238, with Hanson *v.* Globe Newspaper Co. (1893) 159 Mass. 293.

[2] Odgers, Digest of Libel and Slander (1st Am. Ed.) 18. The application of the maxim was explained in Chaddock *v.* Briggs (1816) 13 Mass. 248: "Some words, however, although spoken falsely and maliciously, are not of a nature to produce actual injury, because, being common terms of reproach, more indicative of the temper of the speaker than of any specific defect of character in him of whom they are spoken, it cannot be presumed that they have produced any injurious effect; and therefore to make such words the basis of an action it is necessary to allege and prove that some damage did actually follow the speaking of the words."

[3] Townshend, Slander and Libel (4th Ed.) §57.

respect to an office of honor, without pecuniary emoluments.[1] On the other hand, Mr. Odgers is hardly justified in bringing slander within the rule of absolute right, with the mere distinction that proof of damage is more frequently required in slander than in libel.[2] By reason of the artificially restricted sphere of actionable oral imputations reputation is constantly invaded with impunity.

The law, in fact, is eminently artificial. It has held that certain classes of words in slander and a different (though very comprehensive) class of words in libel are actionable *per se;* that is, invade a simple or absolute right. Upon proof of publication of such words, or in the absence of any defence, the plaintiff must recover at least nominal damages. Where words are not within these classes (*i. e.*, slanderous or libellous *per se*) then they are actionable only on proof of special injury. Upon proof of publication of words not *per se* defamatory, even in the absence of any defence, the plaintiff cannot recover unless he shows that he has suffered harm which conforms to the standard fixed by general rules.[3]

There has been much confusion in the law of defamation concerning malice as an ingredient of the offence. The use of the term may be traced to the ecclesiastical courts. By the canon law a bad intent, called *malitia*, was essential in *injuria;* and it is likely that its use in the spiritual courts was primarily jurisdictional. These courts punished offences which were sinful because they were sinful, the essential element being *malitia*. The defamer was punished *pro salute animæ;* the matter was looked at from a moral, not from a legal, point of view, to see if the speaking of the words were sinful. But it was no more true in the thirteenth century than it is now that an imputation upon a man's character was always or necessarily malicious. Such imputations were known, however, as a matter of common experience, to be malicious in most cases. And upon this presumption (though sometimes contrary to fact) the ecclesiastical jurisdiction was based.[4]

From being a necessary ground of jurisdiction in the spiritual courts, it came to be considered afterwards, when

[1] See Odgers, Digest (1st Am. Ed.) 18–20. [2] *Ib.*, 20.
[3] Jaggard on Torts, i, 487. [4] Am. Law Rev., vi, 596, 597, 609–611.

the civil courts acquired jurisdiction, that malice was the ground of temporal redress, though of course the jurisdiction of the temporal courts was not based upon malice. In other words, the common law adopted the ecclesiastical presumption as the gist of the action. Early cases may be found which proceed strictly upon this basis. Take the case of the clergyman who, in the course of his sermon, quoted, by way of illustration, a story from Fox's Martyrology, how one Greenwood, being a perjured person and a great persecutor, had great plagues inflicted upon him and was killed by the hand of God. Unfortunately for the clergyman, Greenwood had not only not suffered such condign punishment, but was himself actually present at the discourse. But when he brought action for defamation, it was adjudged for the defendant, there being no intent to slander.[1] The court took malice in the moral sense, as importing a malevolent motive.

But when the remedy came to be applied to cases in which there was obviously no actual wrongful intent, the courts resorted, as usual, to a fiction to preserve their consistency. They affirmed that malice was in all cases the gist of the action, but to find malice that did not exist they implied it. The whole doctrine of implied malice, in defamation as in other branches of the common law, is pure scholasticism. Malice if it means anything means malevolence or ill will; any other use of the term is fictitious. But the law was stated in this way: Words spoken without ill-will may be actionable, but in such cases the law is said to imply malice from the act of speaking or publication. This kind of malice which the law is said to imply is called "legal malice," as differing from malevolence, which is called "malice in fact"; and legal malice is said to consist in speaking defamatory matter without legal excuse, because when words are thus spoken the law implies malice.

[1] Greenwood *v.* Prick, Cro. Jac. 91. Of course this would not now be regarded as the law: Greenwood would recover at least nominal damages. See Lord Denman's comment on this case in Hearne *v.* Stowell (1840) 12 A. & E. 719.

See also Crawford *v.* Middleton (1678) 1 Lev. 82, where the defendant was sued for saying he had heard that the plaintiff had been hanged for stealing a horse. On the trial it appeared that the defendant had spoken the words in genuine grief and sorrow at the news. Hobart, J., non-suited the plaintiff on the ground that the words were not spoken maliciously.

But if the occasion be one of qualified privilege, then the privilege arising from the occasion rebuts the *prima facie* presumption of malice, and renders it necessary to prove what is no longer presumed. This is still a common way of stating the law.[1] But the objections to it are many.

In the first place, it states something that is obviously false. Malice is no part of the plaintiff's *prima facie* case; it is only a reply to a particular defence. The gist of the action is the injury done to the plaintiff's reputation by the defendant's words. No plaintiff was ever nonsuited in libel because he had not proved malice, except where the occasion was one of the qualified privilege; where the jury has expressly found that there was no malice the plaintiff has nevertheless recovered. These facts can not be overcome by saying that the law presumes malice. The law presumes nothing of the kind; half the libels are published carelessly, inadvertently or mistakenly, with an entire absence of malice.[2]

In the next place, it is confusing, because the word malice is used in two entirely different senses. The malice which the law is said to presume from the publication of defamatory words is something quite different from the malice which the plaintiff must prove in order to rebut the defence of privilege. Actual malice is ill-will, or wanton

[1] The matter may be looked at from another point of view. Defamation is, as it appeared to the ecclesiastics long ago, commonly malicious, and unless the inference of experience is overturned as not true in the particular case, malice is established and the defendant is liable. Indeed it is in the last analysis malice which gives the publication a natural tendency to harm; with an adequate motive for the publication harm would not generally follow. Hence malice is essential to the plaintiff's case. In this view of the case, malice in law and malice in fact are in substance the same thing, the difference being only in the mode of proof. Christiancy, J., in Hudson *v.* Dale, 19 Mich. 17. It is perfectly consistent with this to say that malice is the want of legal excuse, *i. e.*, that where there is wanting an adequate motive for the publication there is commonly malice, and hence sufficient ground for presuming it in a particular case. This view of implied malice would also explain how punitive damages may be awarded without evidence *aliunde*. The special severity of words actionable without such severity does not in reality make malice; the mere difference of degree of intensity does not create anything; it only shows more malice, or makes clear the malice which an occasion might otherwise have made legally improbable. Dr. Bigelow in Odger's Digest (1st Am. ed.) 5, n.

[2] The doctrine of implied malice is merely a roundabout way of saying that a person makes defamatory statements at his peril. To say that malice is implied is equivalent to saying that the law will not look into the motive at all.

recklessness equivalent thereto. If implied malice means the want of legal excuse, which seems to be the most approved definition of it, then it means so much that it means nothing, for in that sense every act which is the foundation of an action is malicious. Legal malice is a fiction; actual malice is a fact. Since either view leads to the same result, what is the need of bringing into the law the cumbrous machinery of malice for the sole purpose of necessitating the construction of the machinery of legal implication to take it out again? Every consideration of clearness and consistency demands the elimination of the useless fiction of assuming a necessary ingredient for maintaining an action, and then presuming that such an ingredient exists; and trying to distinguish between two kinds of malice, whereas there is and can be only one kind, and that is such as can be proved.

According to the latest and most approved authorities, therefore, except in the case of qualified privilege, no question of malice arises; the plaintiff will recover if he proves that his reputation has been injured by the defendant, whether such injury was malicious or accidental, although malice may be shown to entitle him to increased damages. If the occasion be absolutely privileged, there can be no recovery. If it be one of qualified privilege, then and only then does the issue of malice arise; and in that event the plaintiff will recover if he can prove malice in the defendant; if he cannot, his action fails.[1]

Of those states which have adopted a statutory definition of civil libel, Georgia alone makes use of the term malice; but the statutes of that state further provide that "in all actions for printed or spoken defamation malice is inferred from the character of the charge." In the code states libel is merely "a false and unprivileged publica-

[1] On the subject of malice in general see Odgers, Outline of the Law of Libel, 109 *et seq.*; Odgers Digest (1st Am. Ed.), Dr. Bigelows Notes, 5, 6, 238; *Ib.* (3d Eng. Ed.) Ch. XI; Holmes, Common Law, 138, 139; 18 Am. & Eng. Enc. of Law, 998–1001. The use of the term malice has been vigorously combated by Mr. Justice Gaynor in Prince *v.* Brooklyn Daily Eagle (N. Y. 1896) 16 Misc. Rep. 186, and in Ullrich *v.* New York Press Co. (N. Y. 1898) 23 Misc. Rep. 168. See also Abrath *v.* North Eastern R. R. Co. (1886) 11 L. R. App. Cas. 247, 254, and Holt on Libel, 55. For an indication of further probable development in the law see Mr. Purrington's interesting article in the Albany Law Journal, 57–134, 149. For malice in Roman Law see Law Quar. Rev. xvii, 388.

tion."[1] By statute in Connecticut, "in every action for libel the defendant may give proof of intention; and unless the plaintiff shall prove * * * malice in fact * * * he shall recover nothing but such actual damage as he may specially allege and prove.

In some states "motive" and "intention"[2] enter into the civil offence when truth is pleaded in defence. In Massachusetts, by statute in both civil and criminal libel, truth is a sufficient justification, "unless malicious intention is proved." In West Virginia and in Wyoming, likewise, by constitutional provision, in both civil and criminal cases, truth is a sufficient defence "when published with good motives and for justifiable ends." In Maine and Delaware motive is material in civil actions where the truth is pleaded.[3]

The sense in which the term "malice" is used in the statutory definition of criminal libel is explained in the statutes of several states: "An injurious publication is presumed to have been malicious if no justifiable motive for making it is shown."[4]

Perhaps in no other respect has there been a wider departure from ancient methods than in the construction of language. The early cases abound in the most absurd subtleties and refinements. The slanders might have been legal writs, so precise were the judges in their construction. This was due not alone to the manifest policy of discouraging this class of litigation, but also to the scholastic bent of the early judges. The peculiar mode of framing declarations in actions of defamation, by which the words were thrown into a direct proposition by means of an averment

[1] California, North Dakota and South Dakota.

[2] As to the use of these terms see Pollock, First Book of Jurisprudence, 138 *et seq.*; Innes on Torts. 29, 30.

[3] There has always been a difference of opinion as to whether truth should be a complete defence in civil defamation. It is, of course, desirable that culprits should appear in their true colors; and some men may be deterred from dishonesty by the knowledge that their offences may always be brought up against them. But where a man has retrieved his reputation by a long course of good behavior, it is at least morally wrong for one who knows of the past delinquencies to blast a reputation which has been fairly earned.

[4] Arizona, California, Idaho, North Dakota, Oklahoma, South Dakota; and Utah. In Oregon the statute reads "justifiable end or good motive"; in New York and Minnesota it is "justification or excuse."

and innuendoes[1], sometimes led the judges to apply logical tests to spoken words, as if the words were propositions in themselves, and as if as such they were a distinct subject of predication. They often lost sight of the question whether the matter was defamatory in seeing whether the matter could be stated logically as a proposition true in fact.[2] For instance, where the words used were: "Thou art as arrant a thief as any is in England," judgment was arrested because the plaintiff had not averred that there was any thief in England.[3] Here if the bystanders understood that the plaintiff was called a thief, he was slandered whether there were or were not any thieves in England.[4] One judge put the query seriously whether, in the case of a libel imputing to one the attributes of Satan, averment and proof of the existence of a devil would not be necessary.[5]

Whenever words were capable of being used in two senses, it was the rule that they were to be taken *in mitiori sensu;* and general words nearly always seemed to admit of this *beneficium.* Thus were the words: "He hath delivered false evidence and untruth in his answer to a bill in chancery," no action lay; for, though every answer to a bill in chancery was on oath and was a judicial process, still, in most chancery pleadings, "some things are not in dispute between the parties," and "it is no perjury although such things are not truly answered."[6] This sort of construction was naturally distasteful to the nobles in actions on the

[1] It has been suggested that this form was probably adopted for the purpose of showing the court that it had jurisdiction of the subject matter to which the defamation was regarded as an accessory. Am. Law Rev., vi., 611.

[2] *Ib.* [3] Foster *v.* Browning (1625), Cro. Jac. 688.

[4] See also March on Slander, 113, and Thayer, Preliminary Treatise on Evidence, 288, 289.

[5] In Dacy *v.* Church (1661) Sid. 53, the words were: "As sure as God governs the world, or King James this kingdom, you are a thief." The defendant's counsel moved in arrest of judgment on the ground that there was no averment of these facts; but the court said they were so apparent that this was not necessary.

[6] Mitchell *v.* Brown, 3 Inst. 167; 1 Roll. Abr. 746. A collection of exploded cases may be found in the first volume of Viner's Abridgment. See also Holt *v.* Astrigg (1611) Cro. Jac. 184; Reeves *v.* Templar (1838) 2 Jur. 137, and Goodrich *v.* Davis (1846) 11 Met. 473; Hoyle *v.* Young (Va. 1793) 1 Wash. (Va.) 150.

statute De Scandalis Magnatum, and the changed attitude of the courts was influenced by the decision in the celebrated action of Lord Townshend *v.* Dr. Hughes[1] that "words should not be construed in a rigid or in a mild sense, but according to the general and natural meaning, and agreeable to the common understanding of all men." This is now the law.[2] The ancient maxim never gained a foothold in this country.[3]

Many attempts have been made to define libel. The difficulty in framing a real definition is inherent in the nature of the subject matter; and the very wide generality of a comprehensive definition renders it practically useless for the purposes for which a definition is sought. In the criminal code of a majority of the American Commonwealths libel is defined by statute. The favorite definition is:

"A libel is a malicious defamation, expressed either by writing, printing, or by signs, or pictures, or the like, tending to blacken the memory of the one who is dead, or to impeach the honesty, integrity, virtue or reputation, or to publish the natural defects of one who is living and thereby expose him to the public hatred, contempt or ridicule."[4]

In several states the definition is at once more specific and more comprehensive, embracing, in the case of defamation of a living person, the "tendency to provoke him to wrath," and "to deprive him of the benefits of public confidence and social intercourse"; and in the case of defamation

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[1] (1693) 2 Mod. 150, 159.

[2] Button *v.* Hayward (1722), 8 Mod. 24; Peake *v.* Oldham, 6 Cowp. 277; Roberts *v.* Camden (1807) 9 East 93.

[3] "There was a time when courts thought it a duty to understand words charged to be slanderous in the most mild and inoffensive sense, when they adopted unnatural and strained constructions of the language for the purpose of proving that it did not necessarily and with absolute certainty impute a crime. But that day has long since gone by, and the rule of common sense has become the rule on this subject. Judges and jurors now read the words in court as they would read them elsewhere; they no longer resort to those constructions which make that language innocent in the halls of justice which was full of calumny when spoken or published out of doors." Turrill *v.* Dollaway (N.Y. 1837) 17 Wend. (N. Y,) 426, 428,

[4] Arkansas, Arizona, California, Colorado, Georgia, Idaho, Illinois Montana, Nevada, Utah, and Wyoming. The Pennsylvania statute is substantially similar. The Arizona statute adds, "any malicious falsehood"; the Illinois statute, "financial injury." In Arkansas and Wyoming the offence is supplemented by a statutory penalty for publishing another as a coward, or using any other opprobrious or abusive language, for refusing to accept a challenge to a duel.

of the dead, adding the "tendency to scandalize or provoke the surviving relatives or friends."[1]

The clearest definition is that of New York and Minnesota:

"A malicious publication by writing, printing, picture, effigy, sign, or otherwise than by mere speech, which exposes any living person, or the memory of any person deceased, to hatred, contempt, ridicule, or obloquy, or which causes or tends to cause any person to be shunned or avoided, or which has a tendency to injure any person, corporation or association of persons, in his or their business or occupation, is a libel."

In North Dakota and South Dakota "any malicious injury to good name, other than by words orally spoken" is a libel. In Ohio and Nebraska provision is made for the punishment of false and malicious libels, without defining such. Other states provide penalties for various imputations without attempting any formal definition.[2]

[1] Iowa, Kansas, Maine, Missouri, Oklahama, Tennessee, and Washington. The Oklahoma statute adds, "or injure him in his business."

The Louisiana statute provides that "whosoever shall without probable cause, defame or slander any person of good repute, or shall impute to such person the commission of any criminal or wrongful act or deed, or who shall do any act, or give currency to any report or statement, or use any words intended to bring a person of good repute into public contempt, or to subject such person to ridicule, injury or damage, and whoever shall do or assist therein, shall be deemed guilty of a misdemeanor."

[2] Alabama has no formal statutory definition, but provides punishment for the publication of a libel of another which may tend to provoke a breach of the peace; the sending of a threatening or abusive letter, which may tend to provoke a breach of the peace; written imputations of want of chastity in the case of women, and of accusations of felony or any other indictable offence involving moral turpitude.

In Michigan it is a misdemeanor "falsely and maliciously by word, writing, sign, or otherwise, to accuse, attribute, or impute to another the commission of any crime, felony, or misdemeanor, or any infamous or degrading act, or to impute or attribute to any female a want of chastity."

Oregon provides for the punishment of "any person who shall wilfully, by any means other than words orally spoken, publish or cause to be published of or concerning another any false and scandalous matter, with intent to injure or defame such other person. * * * Any allusion to any person or family with intent to injure, defame, or maliciously annoy such family, shall be deemed to come within the provisions of this section."

The Texas statute provides that he is guilty of libel who, with intent to injure, makes, writes, prints, publishes, sells or circulates any malicious statement affecting the reputation of another in respect to any matter or thing therein specified. The ideas that the statement must convey are specified thus: that the person to whom it refers has been guilty of some penal offence; or, that he has been guilty of some act or omission which, though not a penal offence, is disgraceful to him as a member of society, and the natural consequence of which is to bring him into contempt among honorable persons; or that he has some moral vice or physical defect or disease which renders him unfit for intercourse with respectable society, and such

It has sometimes been assumed that the definition of the offense in the criminal code was applicable as a general definition.[1] But this is surely an error; the more restricted scope of the civil offense is definitely settled. Very few states have adopted a statutory definition of the tort. In California, North Dakota, South Dakota, and Oklahoma, civil libel is defined as:

> "A false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation."

In Georgia it is defined simply as "false and malicious defamation." In Virginia, West Virginia and Mississippi, "all words which, from their usual construction and common acceptation, are considered as insults, and lead to violence and breaches of the peace," are actionable.[2]

Neither the statutory nor the common law definitions state the distinguishing features of libel and slander with absolute precision. The usual form of stating the distinction is that libel is addressed to the sense of sight, slander to the sense of hearing. And slander is, no doubt, generally published by word of mouth; libel, by writing, printing, pictures and the like. But the sign language of the deaf and dumb is addressed to the eye; yet it is not on that account libel. On the other hand, the raised letters of the blind, which are read by the sense of touch, would

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as should cause him to be generally avoided; or that he is notoriously of bad or infamous character; or that any person in office, or a candidate therefor, is dishonest, and therefore unworthy of such office, or that while in office he has been guilty of some malfeasance rendering him unworthy of the place. Special provision is also made for the punishment of persons who shall publish another as a coward, or use toward him any other opprobrious language; if such publication be in consequence of a refusal to fight a duel, the punishment is more severe.

[1] See the criticism in the Bishop, Non-Contract Law, 117, of the definition given in Steele *v.* Southwick (1812) 9 Johns. (N. Y.) 214 (repeated in 1 Denio (N. Y.) 359.) Compare Clark *v.* Anderson (1890) 11 N. Y. Supp. 729, and McFadden *v.* Morning Journal Assn. (1898) 28 App. Div. (N. Y.) 508, with Schoepflin *v.* Coffee (1900) 162 N. Y. 12, 20.

[2] In Tennessee "if any person challenged to fight a duel decline to accept the challenge, and the author or bearer charge him with being a coward, poltroon, or use other words insinuating such charges, whether spoken to a third person or published in a newspaper, or printed notice, such words are slanderous, on which an action may be supported against the speaker or publisher."

undoubtedly be classed as libel, as would also a phonographic record. The true distinction seems to be that in libel the defamatory matter is embodied in some permanent form, while in slander it is fleeting or evanescent.

The law with respect to written defamation has been from the beginning a comprehensive doctrine. In theory its most vulnerable principle is the false basis of criminal libel. The criminal action was from the outset professedly based upon the supposed tendency of the offence to create a breach of the peace. To the application of this principle is directly attributable the more extensive application of the criminal than of the civil action. Thus a libel of a class, or of the dead, is criminal because of its tendency to rouse the feelings to violence; publication to the person defamed alone is sufficient on the same theory; likewise there can be no justification, for "the greater appearance there is of truth in any malicious invective, so much the more provoking it is," or, as Lord Mansfield put it, "the greater the truth, the greater the libel." The prevailing distinction as to justification between criminal and civil libel indicates very clearly the fictitious basis of the criminal action. It was laid down in the case *De Libellis Famosis*[1] that if the matter was defamatory the court would permit no inquiry into its truth. The sweeping application of this rule was due, as has been pointed out, to the indiscriminate use of a rule of Roman law which was applicable only to certain modes of publication, with the addition of the reason that libels tended to create a breach of the peace. Whatever may have been the semblance of justification for this interpolation at the time it was made, as a principle of law in a settled and civilized community it is plainly irrational and unscientific. This was clearly demonstrated by Brougham, Campbell and others during the long struggle in England over the right to prove truth in evidence.[2] Yet in England, and in this country, in the absence of statute, the fiction is still observed.

Nothing could be more absurd in itself, or more inconsistent with the analogies of the law, than to look beyond the immediate nature of an offense for the grounds of punishment. It is absurd in itself; for why not admit at

[1] 5 Rep. 125, a. [2] See Edinb. Rev., xxvii, 102.

once that the destruction of a man's reputation is a crime? Why deny to reputation a protection so largely afforded to every other possession? Why hold a person guiltless who ruins a fair name and destroys the peace of a family, when the stealing of five shillings in the house they inhabit was punishable with death? It is inconsistent with the other principles of the law of libel; for the person who could not prosecute for the injury done to his character as such, might bring his action and have that very injury valued in money.

But it was said in the case *De Libellis Famosis*, and constantly repeated, that if a man has any charge to bring against another he should prefer it in the form which the law prescribes for the purpose of bringing delinquents to punishment, and not revenge himself either by the odious course of libelling or otherwise. This argument is hardly specious. How does it apply to charges which are not subject to prosecution, or which are barred, or which have been once punished? In the case of criticism of public officers, for instance, it is seldom that actual crime is charged; in the vast majority of cases such criticism is concerned rather with misconduct or incapacity, for which public discussion is practically the only remedy. It is precisely this class of cases in which freedom of discussion is most important, not alone because there may be a large measure of misconduct which may not be strictly criminal, but also because there may be much criminal misconduct without sufficient legal proof, or lack of disposition to institute criminal prosecution.

Surely, then, the sanctity of reputation, not the danger to the peace, forms the real and only rational basis of the criminal action. The other view is a fiction, and is no more the real ground of punishment than many other fictitious principles which have been put forward as the technical ground of judicial proceedings which unquestionably depend upon very different considerations. For it is to be observed that where an adherence to the fiction would lead to mercy it was wholly abandoned. If, for example, it were urged in mitigation of punishment that, under the circumstances of the case, no reasonable apprehension could be entertained of a breach of the peace, such a consideration was promptly

rejected, although the defendant was at the same time held to have been convicted solely because his act tended to incite a breach of the peace. In like manner the fiction was lost sight of when matters of aggravation were brought forward. Then, what becomes of this regard for the public peace when a man might make the most calumnious charges against his neighbor to a multitude of persons by word of mouth without fear of punishment.[1] But to show at once that the danger to the peace has never been in modern times the real ground of the proceeding, let the heavy punishments so long inflicted for acts thus tending to a breach of the peace be compared with the trifling penalties attendant upon the actual breach.

The danger to the public peace from certain forms of defamation is still taken into account in the criminal code of some states,[2] and it may be desirable that it should be so. But the real and fundamental basis for the sanctions of the criminal law is the sanctity of individual reputation. To insure its adequate protection the criminal law must be at least coextensive with the civil remedy. The bankrupt libeller must not be suffered to enjoy immunity; nor, on the other hand, should the opulent defamer, whether an individual or a corporation, be allowed to indulge in insolence in proportion to his wealth. Gibbon tells us that Veratius stalked through the streets of Rome striking inoffensive passers-by, while his attendant purse-bearer ostentatiously proffered the legal tender of twenty-five pieces of copper. The insolence of some modern defamers is at least as conspicuous.

Not until 1843[3] was the English law changed by statute so as to allow a private individual to prove the truth on a

[1] In this country many forms of oral imputation have been made misdemeanors by statute. In Alabama, Michigan, Minnesota, Missouri and North Carolina the statutory provisions concern principally reflections upon the chastity of women. In Arkansas and Louisiana the provisions of the criminal code in this respect are quite comprehensive.

[2] The statutory definition in Maine, Iowa, Missouri, Kansas, Tennessee, Washington and Oklahoma includes the "tendency to provoke to wrath," and in Alabama, "the tendency to provoke a breach of the peace." See also the statutory provision in Arkansas, Texas and Wyoming as to imputations of cowardice in connection with a refusal to accept a challenge. The tendency of insults to lead to violence is the basis of the statutory civil remedy in Virginia, West Virginia and Mississippi.

[3] 6 & 7 Vict., c. 96.

prosecution for criminal libel, provided it was for the public benefit that the charge should have been published. Lord Campbell's Act and the prior statute known as Fox's Libel Act,[1] by which juries were authorized to determine the issues in libel, are the great land marks in the history of criminal libel in English law. In this country the law has developed along similar lines. The English doctrines were first exhaustively combated by Andrew Hamilton, of Philadelphia, in his defence of Peter Zenger,[2] a New York printer, who was charged with a libel on the local government. Half a century later the policy of the law was again arraigned with great power by Alexander Hamilton in the case of Croswell,[3] who was indicted for a libel on President Jefferson. The judges were evenly divided on the issue, but the case led to a statutory enactment in New York, in 1805. The rights of defendants and the powers of juries are now covered in this country by either constitutional or statutory enactments. The constitutional provision of New York is typical:

"Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions or indictments for libels the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact."[4]

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[1] 32 George III, c. 60. The consequences of this Act have been enormous, but they concern the development of free speech, with which the present article does not undertake to deal. The Act has been held to be simply declaratory of the common law. "For a very long period—ever since I have been acquainted with the law," said Baron Parke in Parmiter *v.* Coupland, 6 M. & W. 105, "I have understood the correct practice in cases of libel, as in other cases of a criminal nature, to be for the judge to give the jury a legal definition of libel, and to leave it to them to say whether, in the particular case, the facts necessary to constitute a libel are proved to their satisfaction. And there is no difference in this respect between a libel which is the subject of a criminal prosecution and one which is the subject of a civil action. * * * Mr. Fox's Libel Act is a declaratory act, and did not, in my opinion, introduce any new principle; the rule was the same in civil as in criminal cases." See, however, Stephen, Hist. of the Criminal Law, ii, 333 *et seq.*

[2] 17 How. St. Tr. 678. [3] (1803) 3 Johns. Cas. (N. Y.) 337.

[4] In a few states motives are not mentioned in connection with the truth as a defence; some add that the jury shall decide the issue "under the direction of the Court."

The law with respect to slander leaves much to be desired. It is obvious that the class of slanders which are most dreaded, which inflict the greatest amount of pain, which occur most frequently, and which are most likely to lead to breaches of the peace and other evils abhorred by the law, are not those imputations comprised within the fourfold rule of actionable slander, but imputations of breaches of social code, the code of honour—untruthfulness, cowardice, treachery, and the like. And yet for such slanders the law provides no redress whatever, for they are not within the list of words actionable *per se*, nor are they likely to lead to such consequences as the law contemplates under the term special damage. It is actionable to say of a man that he is physically diseased; but you may call him a liar with impunity. You may not say of a surgeon that he is a bad operator, or of a lawyer that he is ignorant of the law; but you may tell any stories you please about his private life and to the discredit of his personal character. And, most scandalous of all, in England, until very recently, any one was at liberty to slander a woman by the vilest forms of oral imputations upon her chastity, and the law gave her no redress.[1]

If, now, taking the law of slander as we find it, we examine the basis of the actionable quality of the particular imputations of which it is made up, it will be found to be as irrational and inconsistent as the selection itself. The principle of selection is past finding out. The one thing that is clear is that the right to reputation seems to have been completely lost sight of. Certain imputations are actionable not

[1]This remarkable state of the law may be explained by reference to the common use of gross language as late as the beginning of the eighteenth century, and to the fact that for centuries the ecclesiastical courts had jurisdiction over such charges. See Ogden *v.* Turner (1704) Holt 40; 6 Mod. 104. The local courts of the City of London took cognizance of such imputations because of the local custom of carting and whipping prostitutes. When the ecclesiastical courts lost their jurisdiction, such imputations might be made with entire immunity from legal action. In Lynch *v.* Knight (1861) 9 H. L. Cas. (577) 593, Lord Campbell commented upon the "unsatisfactory" state of the law; Lord Brougham denounced it as "barbarous." See also Jones *v.* Herne (1759) 2 Wils. 87, and Roberts *v.* Roberts (1864) 5 B. & S. 384. By the Slander of Women Act of 1891 (54 & 55 Vict., c. 51) the English law reached the plane of the Mosaic system. In this country such imputations were in many jurisdictions held to be actionable in the absence of statutory enactments, but the matter is now commonly covered by statute.

because they are defamatory, but for some other reason. It is barely possible that the earlier judges may have had a general principle more or less clearly in their minds when they decided the cases from which these rules were drawn, and never meant *expressio unius* to be *exclusio alterius*. If so, however, the detailed rules became stereotyped, while any idea of a broader principle was forgotten. We may now glance at the principles of actionability.[1]

An imputation of an indictable offence is said to be actionable *per se* because it tends to subject one to legal penalties, or, as it was put later, to degrade him in the public estimation. The application of the rule is anomalous. Sometimes the consequence was that the falser the slander the less actionable it was; for it was not actionable to say of A that he murdered B so long as B was in life, since A would be in no jeopardy. But it is actionable to charge one with having committed a crime and having been already punished for it; for example, to say of a person that he is a returned convict. Yet by such an accusation he is not endangered in point of law. Is it the social degradation to which he is exposed? To call him a rogue, a rascal, a swindler, surely exposes him to degradation; but such accusations are not actionable because they do not endanger him in point of law. For the same reason it is said that it is not actionable to impute a criminal intention without an overt act. And it has been held that no action lay for charging one with the commission of a crime against nature, where such an offense was not indictable. Sometimes it is said that the social degradation is the gravamen of the action, and that the imputation of a crime is the test by which to determine whether the words are actionable. This is to say in effect only that words which tend to degrade one are actionable when they charge a crime—which is returning to the starting point instead of giving a reason.

It is actionable to impute certain contagious disorders, because they tend to exclude a person from society on the ground of physical, not of moral, taint. It is actionable to charge one with having the plague, leprosy, or syphilis; but it is not actionable to charge one with having had these

[1] For a criticism of these rules see Am. Law Rev. vi, 595, 596.

diseases, or with having any other than those named.[1] A person is not degraded by having leprosy or the plague, as he is by having syphilis; and it is as disgraceful to have any other venereal disease as to have syphilis. The rule has also been put upon the ground of an unfitness to be admitted into society. This would apply equally to small-pox, or an infectious fever, neither of which is actionable.

Scandal of a person in the way of his profession, or trade, or means of livelihood, is actionable, because his pecuniary emoluments may be lost. Apart from the conduct of his business, you may freely impute to a merchant all the moral vices; but you must not call him a bankrupt. Still, holders of honorary offices are likewise protected against imputations which relate to their offices, although no pecuniary considerations are involved.

Finally, any defamatory words spoken of one become actionable upon proof of special damage. In this and in the scandal of a person in relation to his means of livelihood, the law is based squarely upon a pecuniary test. An exclusive consideration of these two instances has led to the conclusion that pecuniary loss is in all cases the gist of the action. But it must be borne in mind that in the case of words actionable *per se*, it is not open to the defendant to prove that the speaking was followed by no pecuniary loss; in fact, such words would be actionable even if it could be proved that they were followed by a pecuniary benefit. At other times it is said that pecuniary loss was originally the gist of the action, and that the law has been extended by a fiction to embrace opprobrious words in other cases where there has really been no pecuniary loss. But the progress of law appears to have been in a contrary direction. The earliest cases proceed upon the ground of injury to reputation; in none of them was pecuniary loss deemed the gist of the action.

The rule that any slander becomes actionable if followed by special damage sounds like a saving clause; but, having regard to the plain limitations of special damage, it really affords small relief. The law requires that this special damage shall be of a material nature. So eminently prac-

[1] This rule, as well as the scope of oral defamation in general, has been more or less extended—in some states by statute.

tical is the law, that no amount of mental suffering counts in its estimation, while the loss of a dinner gives an immediate claim to redress. There must be an actual pecuniary injury, like the loss of custom by a tradesman, or at least the loss of some temporal and worldly advantage capable of being estimated in money, as the loss of a marriage by a woman has been said to be. The mental suffering caused by a slander, and the loss of the world's respect and regard, is no ground of action. So far has this doctrine been carried that in a well known case[1] the most eminent judges of England and Ireland were divided in opinion upon the question whether, in a case where, in consequence of a derogatory imputation, a husband turned his wife out of doors, this would be sufficient special damage to sustain an action. It was asserted that it would not, because the disgraced wife would only lose the pleasure of her husband's society; he would still be bound to support her, and consequently she would sustain no loss which could be expressed in money.

Again, this special damage must be the natural consequence of the slander; it will not suffice if it be capricious. Hence, where in consequence of a charge of levity (but not of incontinence) a husband turned his wife out of doors, it was held that no action lay; the damage was not the natural result of the slander, but arose from the rashness or idiosyncrasy of the husband.[2] If, therefore, in consequence of an insult which the law does not allow you to avenge, you can show that all your friends have cut you in consequence of the charge, or from your toleration of it, you may not recover in a legal proceeding. The law in its wisdom deems such conduct on the part of your friends very unreasonable: so much so that it will not recognize it as the natural consequence of the calumny of your traducer. The caprice of your friends is in legal contemplation too remote, and it will not avail you to prove the immediate connection. The law classes broken hearts and blasted hopes with wounded vanity and soured tempers, and protests that it cannot deal with such sentimental considerations. Hence the increasing sensibility of people to insult, which becomes greater as

[1] (1861) Lynch *v.* Knight, 9 H. L. Cas. 577. [2] *Ib.*

the social organization becomes more complex, obtains no legal recognition. Nor can this sensibility be put aside as vain or morbid; it is founded in great measure on the general knowledge and experience of the fact that, in the present state of public opinion, reputations which once surmounted openly avowed scandal are now demolished effectually by a breath. Nevertheless, it remains the law that to charge a man with having a contagious disease, for instance, is actionable because it is likely to exclude him from society; yet if you show beyond all doubt that other slanderous words have in fact excluded him from society, this does not make them actionable, for the law takes no note of such special damage.

There are three obvious methods of reforming the law of slander.[1] The method commonly adopted among English speaking people is to leave intact the general distinction between libel and slander, and merely remove its worst hardships by extending the list of defamatory imputations which are actionable *per se* when published orally. This course has been adopted in England with respect to imputations upon the chastity of women; but there it has stopped. Such imputations are believed to be universally actionable in this country. In some states further additions have been made by statute to the list of oral imputations which are actionable: adultery or want of chastity in general[2]; impotence[3]; incest and crimes against nature[4]; false swearing[5]; all words, which from their usual construction and common acceptation, are considered as insults, and lead to violence and breaches of the peace.[6]

This patch-work plan is quite in accordance with the spirit of English law reform, but it has little else to commend it. No doubt it is an improvement in the law simply to enact that imputations upon chastity, and some other

[1] See on this subject Solicitors, Journal, xi, 1053, 1054.

[2] Arkansas, California, Illinois, North Carolina, North Dakota, Oklahoma, South Dakota, and Tennessee. The Georgia statute allows an action in general terms for imputations of any debasing act which may exclude a person from society, and specifically provides for a charge "against a free white female of having sexual intercourse with a person of color."

[3] California, North Dakota, Oklahoma, South Dakota.

[4] Indiana and Washington. [5] Arkansas and Illinois.

[6] Mississippi, Virginia and West Virginia.

additions of a like nature, shall be actionable *per se*. But this course does nothing towards removing the theoretical absurdity of the existing law; it would be, moreover, at best merely temporary and imperfect. The injury and annoyance inflicted by particular imputations vary in different classes of society, in different places and circumstances, and especially at different periods. No possible foresight in the enumeration of actionable slanders could make the law reasonably just and equal, even for the present generation; and the next generation would have to do the whole work over again to meet altered conditions. Moreover, no change of this kind could give the relief required without a change also with regard to the special damage sufficient to support an action of slander. Any list of actionable slanders could only include such as are ordinarily likely to produce serious discomfort and loss of credit and respect; but manifestly there must be cases in which those evils would in fact result from other imputations not included in such a list. Yet to extend the protection of the law in such cases by changing the definition of special damage would be quite impracticable. To say that mental distress and loss of the opinion of others, with consequent exclusion from society, should be sufficient special damage to support an action, would be in effect to say that all slanders should be actionable.

Another method is to substitute for the present distinction, on the ground of mere form, some other classification of a more rational character, applicable to slander and libel alike, founded upon real and substantial distinctions, such as the nature of the imputation, the degree of publicity given to it, or other circumstances surrounding its utterance. In such a method the essential points would be the nature of the imputation and the degree of publicity given to it. This method was adopted in France by the Law of May 17th, 1819. Defamatory publications were divided into two classes, *diffimation* and *injure*, the latter being in turn subdivided into two kinds; and each of these three kinds of defamation constituted a distinct offence, and was subject to a prescribed measure of punishment. *Diffimation* is defined as "*toute allegation ou imputation d'un fait qui porte atteinte à l'honneur ou à la consideration de la*

personne ou du corps au quel le fait est imputê." And to constitute the graver offence it must be made publicly, that is to say, "*par des discours, des cris, ou menaces proferés dans les lieux ou réunions publics soit, par des écrits, de imprimés, des dessins, des gravures, des peintures ou emblêmes vendus ou distritnes, mis en vente ou exposés dans les lieux ou réunions putné soit, par des placards et affiches exposés aux regards du public.*" *Injure* is "*toute expression outrageante, terme de mepris, ou invective, qui ne referme l'imputacion d'aucun fait.*" And *injure* is subdivided into that which imputes *un vice determine*, and is publicly made; and that which either does not impute *un vice determine*, or is not publicly made. A classification according to the nature of the imputation is made by the Michigan statute which enacts that "in any suits brought for the publication of a libel in any newspaper in this state the plaintiff shall recover only actual damages if it shall appear that the publication was made in good faith and did not involve a criminal charge," &c. Mich. Pub. Acts of 1885, p. 353.

This classification is certainly an improvement upon a clumsy distinction as to mere form, but it is objectionable in going to the other extreme of needless refinement—an evil which is already too conspicuous in our legal system.

The third method, which is alike the simplest and the best, is to abolish at once the distinction between libel and slander, and assimilate the law of slander to that of libel. Its advantages are evident. It would put an end at once to the theoretical absurdity of the present law; it would be free from the mischiefs of needless refinement; it would be an efficacious and complete remedy for the mischief to be met; and it would, so far as appears, be a final and lasting settlement of the question. The only plausible objection to it seems to be that it might tend to encourage litigation and lead to oppressive and vexatious actions. These objections apply with quite equal force to the present law of libel. Moreover, in Scotland, where the remedy is alike whether the defamation be oral or written, there has been apparently no serious complaint on this score, and Scotchmen are not less litigious than other people. And such a system has long worked well in the state of Louisiana. Actions of libel are controlled by the law with respect to

privilege and by the law of costs. In the case of writings these have been found sufficient to protect the interests of the public and of individuals, and to prevent frivolous actions, and they would do the same with oral publications.

It has been more than once attempted to make this change in English law. In 1816 Brougham introduced a bill in the House of Commons providing that all words, whether spoken or written, which were "in any way injurious to the character and reputation of the plaintiff," should be actionable. But the measure was lost because it contained clauses affecting state prosecutions for libel which raised party questions.[1] The task was again essayed in 1843 under the competent guidance of Lord Campbell. The very important act which bears his name was the final result of recommendations which embraced other points than those enacted, among which were the following:

"With a view to afford protection to fair fame, to guard honorable men from vexatious litigation, and effectually to put down traffic in calumny, the committee have come to the following resolutions, to wit.

1. That an action should be maintainable for any words, spoken without just cause, tending to injure the reputation of another—*e.g.*, words imputing want of chastity to a woman, or want of courage or veracity to a man.

2. That in an action for words, unless the words impute an indictable offence, it shall be open to the jury, under the plea of not guilty, or *non damnificatus*, to consider whether, under the circumstances when the words were spoken, they were likely to injure reputation; and if they think that they were not, to find a verdict for the defendant, without any special justification."

The grounds of these proposals were thus stated in the report of the committee:[2]

"At present, while for any words reduced into writing which in any way tend to injure reputation, though communicated to only one individual, the law gives a remedy, there is no remedy without proof of special damage for mere words, however injurious to reputation, and however publicly spoken, unless they impute an indictable offence, or apply to a man in his business, or import that he is laboring under an infectious disease; so that, falsely and malici-

[1] In 1834 Daniel O'Connell introduced a bill on this subject; but it was very loosely drawn, and, whether so designed or not, would in fact have assimilated the law of libel to that of slander.

[2] The report is printed in the Law Times, i. 341.

ously to impute, in the coarsest terms and on the most public occasion, want of chastity to a woman of high station and unspotted character, or want of veracity or courage to a gentleman of undoubted honesty and honor, cannot be made the foundation of any proceeding civil or criminal; whereas an action may be maintained for saying that a cobbler is not skilful in mending shoes, or that any one has held up his hand in a threatening position to another. The committee conceive that these distinctions, which are quite peculiar to the law of England, do not rest on any solid foundation, and that wherever an injury is done to character by defamation there ought to be redress by action.

There might be a danger of frivolous actions for words if costs were to be recovered by the plaintiff where the jury award only nominal damages, and if the jury were obliged to find a verdict for the plaintiff for all defamatory words without considering whether on the occasion when they were spoken they were likely to make any impression on the bystanders; but the committee think that this danger will be obviated by the existing regulation, which takes away the right to costs where the damages are under forty shillings, and by allowing the jury to consider, in the cases in which an action is now given, whether, under the circumstances, the words were likely to injure reputation, and, without a special justification, to find a verdict for the defendant."

VAN VECHTEN VEEDER.