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Equitable Relief in Libel and Slander

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Some courts hold that the marriage in violation of a statute is voidable even in the absence of fraud or concealment.

There seems to be ample authority to the effect that an annulment will be granted on proof of fraudulent concealment of epilepsy. In Massachusetts, however, fraudulent concealment of epilepsy is not a ground for an annulment.

RALPH M. KIRSCH

EQUITABLE RELIEF IN LIBEL AND SLANDER

Ever since 1818 when the English decision by Lord Eldon in the case of *Gee v. Pritchard*[1] propounded the feudalistic dictum that injunctions can only be granted in cases involving property rights, the American courts have had an extremely difficult time granting injunctive relief to those who are suffering primarily only a loss to their names and reputations. That the rule in *Gee v. Pritchard*[2] was only dictum, and that the English courts ceased to worry about it long ago,[3] seems to make little impression here. If our courts can find no property right involved in a case, they will quite probably refuse injunctive relief.[4] This dictum of the English court seems especially unfortunate when, after stating it, they then went on in the case to find a property right in a personal letter written by the plaintiff to the defendant, and on this theory proceeded to grant an injunction against the publication of the letter by the defendant. Many courts today do not really insist on this property right to give equitable relief, but they do follow the dictum to the extent of refusing relief in cases which show no more than an injury to personality alone, as in libel and slander.

The dictum has become such strong authority that many times the courts of this country have decided a case with the flat statement that it is a well settled point of law that equity will not act to enjoin libel or slander where no propery rights are involved in the issue.[5] Other courts have refused the relief by deciding that they would be violating the constitutional rights of freedom of speech and the press and to a trial by jury.[6] This, of course, was the reasoning behind the dictum in the English case.

However, many of the courts today, realizing that the law remedy for damages in cases of libel or slander is often so uncertain and impossible as to be no remedy at all, have found a number of exceptions to the dis-

1. Gee v. Pritchard, 2 Swanst. 402, 36 Eng.Rep. 670 (1818).
2. Ibid.
3. Dixon v. Holden, L.R. 7 Eq. 488, 20 L.T. 357, 17 W.R. 482 (1868); Bonnard v. Perryman, 2 Ch. 269 (1891).
4. Francis v. Flinn, 118 U.S. 385, 30 L.Ed. 165, 6 S.Ct. 1148 (1885); Covell v. Chadwick, 153 Mass. 263, 26 N.E. 856, 25 Am.St.Rep. 65 (1890); Brandreth v. Lance, 8 Paige (N.Y.) 24, 34 Am.Dec. 368 (1839); Kwass v. Kersey, ...W.Va. ....., 81 S.E.2d 237 (1954).
5. Ibid.
6. Brandreth v. Lance, supra note 4; Kwass v. Kersey, supra note 4.

carded English rule, though still generally accepting it. Most important among these exceptions are the right of privacy, the presence of malice, conspiracy, coercion or intimidation and a previous jury decision on the same question of libel or slander.

The right to privacy has served as an exception on the theory that it is as much a constitutional right as that of freedom of speech and the press.[7] A number of states have statutes assuring this right to a greater or lesser degree.[8] Other states have court decisions which have found the right of privacy to be a constitutional one.[9] In the states which have found this right libel and slander have been enjoined as an incident to its protection, under the reasoning that where an injunction should be granted for one cause, the courts will not refuse it because it incidentally involves enjoining libel or slander.[10]

A fairly recent and leading case on the right of privacy is the New Jersey case of *McGovern v. Van Riper*.[11] This case involved the rights of a man accused of a crime and awaiting trial. His photograph and fingerprints were about to be sent all around the country to various police and law enforcement agencies. The New Jersey Court of Equity granted an injunction against the publication of the plaintiff's photograph and fingerprints until he had had a trial. Their reasoning was that he had not yet been convicted of any crime, and unless he was so convicted he had an inalienable, absolute and immutable right to privacy. They further stated that the fact that the premature dissemination of such criminal identification records would amount to libel if he were not convicted, in no way prevented a court of equity from granting an injunction.

Other cases in which a right to privacy has been found to be grounds for granting injunctions against the publication of what could in all probability be proven to be libelous matter involve letters,[12] birth certificates,[13] photographs[14] and a person's name in advertising matter.[15]

In cases in which malice, conspiracy, coercion or intimidation are present a majority of courts have stated that they would grant injunctions

7. Vanderbilt v. Mitchell, 72 N.J.Eq. 910, 67 A. 97, 14 L.R.A., N.S., 304 (1907); McGovern v. Van Riper, 137 N.J.Eq. 24, 43 A.2d 514 (1945).
8. N.Y. Civil Rights Law, §§ 50 and 51; Va. Code Ann., § 5782 (1942); Utah Code Ann. § 103-4-8, 9 (1943).
9. Read v. Real Detective Pub. Co., 63 Ariz. 294, 162 P.2d 133 (1945); Cason v. Baskin, 155 Fla. 387, 20 So.2d 243 (1944); Mavity v. Tyndal, 224 Ind. 364, 66 N.E.2d 755 (1946); Flake v. Greensboro News Co., 212 N.C. 780, 195 S.E. 55 (1938); Hinish v. Meier & Frank Co., 166 Ore. 482, 113 P.2d 438 (1941).
10. Supra note 7.
11. McGovern v. Van Riper, 137 N.J.Eq. 24, 43 A.2d 514 (1945).
12. Kerby v. Hal Roach Studies, 53 Cal.App.2d 207, 127 P.2d 577 (2d Dist. 1942); Baker v. Libbie, 210 Mass. 599, 97 N.E. 109, 37 L.R.A., N.S., 944, Ann.Cas. 1912D, 551 (1912); Woolsey v. Judd, 4 Duer. (N.Y.) 379 (1855).
13. Vanderbilt v. Mitchell, supra note 7.
14. Barber v. Time Inc., 348 Mo. 1199, 159 S.W.2d 291 (1942); Flake v. Greensboro News Co., supra note 9.
15. LaFollette v. Hinkle, 131 Wash. 86, 229 Pac. 317 (1924); Edison v. Edison Polyform Mfg. Co., 73 N.J.Eq. 136, 67 A. 392 (1907).

against libel or slander.[16] This exception, however, is more often dicta than the rule of the case. In the Illinois case of *Garieppy v. Springer*[17] the defendant was distributing and mailing false circulars concerning an attorney and his association with another attorney convicted of contempt and misappropriation of funds. After a hearing before a master proved the libel and slander as well as malice and damages, an injunction was granted. On the appeal of this decision the court said "equity is without jurisdiction to restrain the publication of libel, except in cases involving conspiracy, intimidation or coercion,"[18] but refused to uphold the injunction because the plaintiff's proof of the continuing nature of the libel was not considered sufficient. The court also held that the defendant was entitled to a jury trial on the matter of damages.

The quoted language of this case was favorably cited in the recent West Virginia case of *Kwass v. Kersey*,[19] which again involved the defamation of an attorney both in statements and in circulation of mimeographed letters. Conspiracy, intimidation and coercion had all been alleged, but the court felt that the defendant was entitled to a jury trial. The majority held that the English dictum still controlled, and that the personality of a lawyer was so inseparable from his calling that only a personal right and not a property right was involved. A strong dissent found the amended complaint more than sufficient to give equity jurisdiction and overcome the right to a trial by jury.[20]

In the cases where a jury has already decided on the falsity of the libelous matter there is no question of the case being a proper one for equitable relief; as the defendant has already had his jury trial.[21] No question of a constitutional right to a jury arises where the libeler has already had his day in a court of law; as his offense merely becomes a continuation of the old one which has previously been condemned.

In addition to these exceptions to the rule against enjoining libel and slander, the courts have found another situation in which an injunction against libel or slander will lie. This, simply enough, is where an injury to a property right, fictitous or real, can be found in the publication. There are not very many cases in which a property right cannot be found, if the court wants to go to the trouble of finding it. In the case of *Gee v. Pritchard*,[22] which started most of the trouble in the first place, the English court found that the author had a property right in a purely personal letter.

16. Garieppe v. Springer, 318 Ill.App. 523, 48 N.E.2d 572 (1942); Kwass v. Kersey, supra note 4; Lohse Door Co. v. Fuelle, 215 Mo. 421, 114 S.W. 997, 128 Am.St.Rep. 499 (1909).
17. Garieppe v. Springer, supra note 16.
18. Ibid. at 48 N.E.2d 573, 575.
19. Kwass v. Kersey, supra note 4.
20. A full discussion of this right to a jury and citing of cases is found in 13 Cal. L. Rev. 345 (1925).
21. Bonnard v. Perryman, 2 Ch. 269 (1891); Wolf v. Harris, 267 Mo. 405, 184 S.W. 1139 (1916) dictum; Flint v. Hutchinson Smoke Burner Co., 110 Mo.Loc.Cit. 500, 19 S.W. 804, 33 Am.St.Rep. 476 (1892) dictum.
22. Gee v. Pritchard, supra note 1.

The contents of letters ever since the case have been found to be the property of the author.[23] Wyoming has affirmatively decided that the author of a letter has the sole property right to everything in it except for the paper itself.[24] Thomas A. Edison was found to have a property interest in his name; so as to prevent a patent medicine firm from using his name in the name of the firm.[25] In a Georgia case a property right was found violated by demands for money, applying for too many railroad passes, and disturbing guests by pounding on the plaintiff's door.[26] The Georgia court also found a property right in a daughter's services to her father, in granting an injunction against her being seduced.[27] New Jersey enjoined the false birth certificate both on privacy grounds and a property interest in future inheritance questions.[28]

Foremost in the libel cases in which a property right has been held to be involved are the so-called "trade libel" cases.[29] In these cases the courts have decided that although no real property is involved, a merchant or businessman has a definite property interest in his means of livelihood. For example, the purchaser of an automobile has been held to be injuring the property rights of the dealer by decorating the car with lemons and signs disparaging the dealer and his product.[30] Painting a white elephant on the car has also been held to be enjoinable as a trade libel and injurious to property rights.[31] Threatening customers with suits for patent infringments by the seller has been enjoined as violative of property rights of the seller, and also as unfair competition.[32] Labor pickets also can be enjoined from displaying untrue signs about the employer.[33]

With professional men the courts have been a little more reluctant to find a property right.[34] However, even here, the courts are beginning to come to the conclusion that an injury to the reputation of a doctor or lawyer may do more than harm his personal feelings; usually finding a property right not in his reputation but rather in his license to practice.[35]

The most straightforward treatment of the courts' ability to discover property rights in almost anything was given in the Texas case of *Hawks*

23. Baker v. Libbie, supra note 12.
24. King v. King, 25 Wyo. 275, 168 Pac. 730 (1917).
25. Edison v. Edison Polyform Mfg. Co., supra note 15.
26. Blanton v. Blanton, 163 Ga. 361, 136 S.E. 141 (1926).
27. Stark v. Hamilton, 149 Ga. 227, 99 S.E. 861 (1919).
28. Vanderbilt v. Mitchell, supra note 7.
29. See Annotation: 148 A.L.R. 853.
30. Menard v. Houle, 298 Mass. 546, 11 N.E.2d 436 (1937).
31. Carter v. Knapp Motor Co., 243 Ala. 600, 11 So.2d 383, 144 A.L.R. 1177, Annotation 1181 (1943).
32. Emack v. Kane, 34 F. 46 (Cir.Ct.U.S., N.D.Ill. 1888).
33. Sachs Quality Furniture Co. v. Hensley, 269 App.Div. 264, 55 N.Y.S.2d 450 (1945); Magill Bros. Inc. v. Building Service Employees Union, 20 Cal.2d 506, 127 P.2d 542 (1942); contra: Montgomery Ward & Co. Inc. v. United Retail, Wholesale and Department Store Employees of America, 330 Ill.App. 49, 70 N.E.2d 75 (1946).
34. Garieppe v. Springer, supra note 16; Wolf v. Harris, supra note 21.
35. Unger v. Landord's Management Corp., 114 N.J.Eq. 68, 168 A. 229 (1933); State v. Chapman, 69 N.J. Law 464, 55 A. 94 (1903); Sloan v. Mitchell, 113 W.Va. 506, 168 S.E. 800 (1933); Cook v. John Mathias Co., 61 A.2d 585 (N.J.Eq. 1924).

v. Yancey.[36] In this case the plaintiff's reputation was being visciously and systematically ruined by her spurned lover, and the lower court had denied her an injunction on the ground that there were no property rights involved. The Court of Civil Appeals held that the property right doctrine was notable mainly by its breach rather than its observance, and proceeded to enjoin the defendant from ever again speaking or writing to the plaintiff, or from ever speaking or writing about her to anyone else, or from ever molesting her in any way. The court refused to look for the usual fictitous property right and granted the injunction on the grounds that a person's personal life is worth just as much to her as her property, and is equally deserving of protection. Coercion, malice and intimidation, as well as a right of privacy could also have been found in this case, but the court chose to ignore them all, and relied on a statute allowing injunctive relief in any proper case.[37] The court felt that justice was more important than preserving an outmoded rule with fictions and exceptions.

With a little backsliding here and there[38] this opinion represents the tendency of the courts today. The realization that prevention of libel and slander in a proper case is far superior to a questionable cure in the law side of the court is becoming a fact. Whether the courts issue the injunction on the finding of a property right, or the finding of one of the exceptions to the rule requiring a property right, or only because they want to prevent a gross injustice, there is a trend in this country away from the outdated English dictim.

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REACHING THE CHARITABLE INSTITUTION

In 1846 an English court stated in a dictum that an institution performing a charitable function was not liable in a tort action for damages instituted by the injured plaintiff.[1] Twenty years later the English courts reversed themselves[2] but the American courts, evidently overlooking the reversal, resurrected the then dead rule.[3] So rose the doctrine of charitable immunity, which came to be sustained under such a varied rationale that it became an almost impregnable defense barring plaintiff's recovery. The increased application of the rule and the resulting failure of plaintiffs to avoid it was noted with growing concern. Both lawyers and judges have called upon their contemporaries and the legislature to analyze its value in the twentieth century world. A few courts have recently repudiated the doctrine,[4] but the change has been gradual and the number of juris-

36. Hawks v. Yancey, 265 S.W. 233 (Tex.Civ.App. 1924).
37. Ibid. at 265 S.W. 237.
38. Kwass v. Kersey, supra note 4.

1. Heriot's Hospital v. Ross, 12 Cl.&Fin. 507 (1846).
2. Mersey Docks v. Gibbs, 1 L.R.H.L. 93, 11 H.L.Cas. 686 (1866).
3. McDonald v. Massachusetts General Hospital, 120 Mass. 432, 21 Am.Rep. 529 (1876).
4. Prosser, Torts (1955), p.787, notes 68-85.