Marquette Law Review

Volume 17
Issue 2 *February 1933*

Article 5

Equity Jurisdiction - Freedom of the Press - Libel

Richard McDermott

MARQUETTE
LAW REVIEW

February, 1933

VOLUME XVII MILWAUKEE, WISCONSIN NUMBER TWO

Unless the LAW REVIEW receives notice to the effect that a subscriber wishes his subscription discontinued, it is assumed that a continuation is desired.

An earnest attempt is made to print only authoritative matters. The articles and comments, whenever possible, are accompanied by the name or initials of the writer; the Editorial Board assumes no responsibility for statements appearing in the REVIEW.

Published December, February, April, and June by the students of Marquette University School of Law. $2.00 per annum. 60 cents per current number.

NOTES

EQUITY JURISDICTION—FREEDOM OF THE PRESS—LIBEL—Since a dicta of Lord Eldon in *Gee* v. *Pritchard*[1] to the effect that equity will not enjoin publication of a libel because such publication is a crime and equity has no jurisdiction to prevent crimes,[2] equitable prevention of

[1] 2 Swanst. 402 (1818). There was some previous dicta supporting Lord Eldon's statement, notably Huggonson's Case, 2 Atk. 469; however there were also previous decisions on that point to the contrary. Eldon's view was neither traditional nor backed by authority. For a good analysis see Pound, Equitable Relief against Defamation and Injuries to Personality, 29 Harvard Law Rev. 640 (1916).

[2] A libel is a civil offense, a tort, as well as a crime. Equity today finds no difficulty in enjoining other torts which also happen to be crimes. *Beck* v. *Teamsters' Union*, 118 Mich. 497, 77 N.W. 13 (1899); *Shoe Co.* v. *Saxey*, 131 Mo. 212, 32 S.W. 1106 (1895); *Davis* v. *Zimmerman*, 35 N.Y.S. 303 (1895).

personal libels, as such,[3] has been consistently denied, in the United libelous matter is that such procedure would be unconstitutional. The States at least. The first serious objection to equitable restraint of federal constitution, as well as those of the various states, guarantees freedom of speech and press;[4] whether or not this guarantee grants freedom to libel is an open question. Blackstone, whose theories concerning the common law quite generally prevailed at the time the Bill of Rights was adoptd in the United States, which merely ennunciated among other things the common law doctrine of freedom of speech, holds that freedom of the press consists in laying no previous restraints on publication; everyone having the right to say what he pleases with a corresponding liability, civil or criminal, for libelous or improper matter when published.[5]

---

[3] Equity restrains libels when such are incidental to an unlawful boycott or to an unlawful intimidation of employees. *Gompers* v. *Bucks Stove & Range Co.* 221 U. S. 418, 31 Sup. Ct. 492 (1911); *Emack* v. *Kane* 34 F. 46 (N. D. Ill.) (1888); *Coeur D'Alene Mining Co.* v. *Miners' Union* 51 F. 260 (C. C. Idaho) (1892); *Casey* v. *Cincinnati Typographical Union* 45 F. 135 (1891); *Seattle Brewing Co.* v. *Hansen* 144 F. 1011 (1906); *Shoe Co.* v. *Saxey,* supra 2; *Marx* v. *Watson* 168 Mo. 133, 67 S.W. 391 (1912); *Roraback* v. *Motion Picture Machine etc.* 140 Minn. 481, 168 N.W. 766 (1918); *Paramount Enterprises Inc.* v. *Mitchell* 140 So. (Fla.) 328 (1932).

Also injunctions issue when such libelous publications are made for the purposes of extortion, *Nat'l. Life Ins. Co.* v. *Myers,* 140 Ill. App. 392 (1908); contra, *Marlin Fire Arms Co.* v. *Shields,* 171 N. Y. 384, 64 N.E. 163 (1902), or of intimidating plaintiff's customers by wrongful threats of infringement suit, *Emack* v. *Kane,* supra 3, *Farquhar* v. *Nat'l. Harrow Co.* 102 F. 714 (C. C. A.) (1900); *Electric Renovator Co.* v. *Vacuum Cleaner Co.,* 189 F. 754 (1911); *Bell* v. *Singer Mfg. Co.* 65 Ga. 452 (1880); *Atlas Underwear Co.* v. *Cooper Underwear Co.* 210 F. 347 (1914), or of generally injuring or destroying plaintiff's business, *Shoemaker* v. *South Bend Spark Arrester Co.,* 135 Ind. 471, 35 N.E. 280 (1893); *Reyer* v. *Middleton,* 36 Fla. 99, 17 So. 937 (1895); *Sherry* v. *Perkins,* 147 Mass. 212, 17 N.E. 307 (1888); *Gilly* v. *Hirsh,* 122 La. 966, 48 So. 422 (1909). In the words of a recent case, *Dehydro Inc.* v. *Tretolite Co.* 53 F. (2) 273 (U. S. D. C. Okla.) (1931), "where the gravamen of the action is to enjoin unfair competition, and the libel or slander is only incidental thereto and does not characterize the action, an injunction will issue."

Also libels are enjoined in contempt proceedings to insure proper administration of justice, *Resp.* v. *Oswald,* 1 Dall. (Pa.) 319 (1788) a leading case; but see *Dailey* v. *Superior Court,* 112 Cal. 94, 44 P. 458 (1896).

[4] United States Constitution, Amendments, Article I.

Wisconsin Constitution, Article I, Section 3. "Every person may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of speech or of the press." This part of the provision is similar to those contained in the constitutions of other states.

[5] 4 Blackstone's Comm. 151-152, ed. Lewis (1902) this theory has been criticized not only for denying all previous restraints, but also for allowing too wide a

Another theory of freedom of the press is advanced by Cooley who holds that the constitutional guarantee does not give one the right to publish whatever he pleases, including libels, but only what is not harmful in its character, when judged by such standards as the law affords.[6] Under this interpretation previous restraints of libels would not violate the Constitution.[7]

In the United States Blackstone's theory has been chiefly urged in dicta[8] with the exception of *Brandeth* v. *Lance*,[9] a case which, though turning on this very point, assumes without citing any authority that a previous restraint would infringe upon the liberty of the press. The statement that equity will protect only property rights is also made in this case; whatever is the fact or should be the fact[10] is of little import here. Although the right to a good reputation is personal, it is also a right of substance.[11] Infringement of that right through defamation

---

scope for tyranny and practical censorship through punishment for whatever administrators or legislators might deem improper publications. Pound, supra 1 at p. 651; Hughes, C. J. in *Near* v. *Minn.* 283 U. S. 697 at pp. 714-15; Cooley, 2, Constitutional Limitations, 883-86, (8th ed.) (1927).

[6] Cooley, 2 Constitutional Limitations, 883-86 (8th ed.) 1927.

[7] Pound, supra 1, at pp. 651-55, discusses this point thoroughly, arriving at the conclusion that both tradition and reason dictate that equity in enjoining libels will not violate the Constitution.

[8] *Commonwealth* v. *Blanding,* 3 Pick. (Mass.) 304 at 313 (1866); *Patterson* v. *Colorado,* 205 U. S. 455 at 462 (1907); but see Brown, J. in *Robertson* v. *Baldwin,* 165 U. S. 275, (1896) quoted by Pound, supra 1, at p. 651 in footnote 29.

[9] 8 Paige 24, 34 A. D. 368 (1839). This case has been followed; *Marlin Fire Arms Co.* v. *Shields,* supra 3; *Howell* v. *Bee Publishing Co.,* 100 Neb. 39, 158 N.W. 358 (1916). For a criticism of the case see Pound, supra 1, at p. 649 et sequentia.

[10] It is true that today this position is losing ground; it came into existence through another dicta of Lord Eldon in the same case of *Gee* v. *Pritchard,* which case nevertheless protected by injunction a personal right. Personal rights, as such or disguised, are protected by equity courts; *Itzkovitch* v. *Whitaker,* 115 La. 479, 39 So. 449, 39 L.R.A. (N.S.) 1147 (1905); *Vanderbilt* v. *Mitchell,* 72 N.J.E. 910, 67 A. 97 (1907); *Brex* v. *Smith,* 104 N.J.E. 386, 146 A. 34 (1929); *Bazemore* v. *Savannah Hospital,* 171 Ga. 257, 155 S.E. 194 (1930). There is no reason why a threatened libel should not be subject to the same equitable relief as other threatened torts, Walsh on Equity (1930) pp. 132-88 and 213-51. If equity could practicably enjoin negligence, it probably would do it; unfortunately such a course is impossible by reason of forces outside the court's control. Such difficulties are not present in libel cases; equity can practicably enjoin threatened defamation.

[11] Pound, Interests of Personality, 28 Harvard Law Rev. 343 (1915) at p. 349 and pp. 445-53. Malins, V. C., in *Dixen* v. *Holden,* L.R. 7 Eq. 488, quoted at p. 647, Pound, supra 1, says: "What is property? One man has property in lands, another in goods, another in business, another in skill, another in reputation; and whatever may have the effect of destroying property in any one

invariably involves economic loss to the person defamed; equity will protect an individual's business or occupation or other substantial rights of property,[12] and a personal libel brings with it as an inevitable condition, disparagement of property.

The essence of freedom of the press is surely not the absence of all previous restraint;[13] it is rather the freedom to publish what is lawful in its character. No one should be allowed to complain in a court of law that he is being deprived of a Constitutional right when he is prevented from libeling another and deliberately destroying that person's good name. However, in a recent case Blackstone's theory was invoked by the Federal Supreme Court[14] to declare unconstitutional a state statute providing injunctive relief against all newspapers or other publications becoming a nuisance through habitual publishing of scandalous, obscene, and defamatory matter. It is probably true that policy demands that such legislative interference be deemed an infringement

---

of these things (even in a man's good name) is, in my opinion, destroying property of a most valuable description. But here it is distinctly sworn to, and cannot be denied, that the effect of this will be seriously damaging to the plaintiff's business of a merchant.

"Now the business of a merchant is about the most valuable kind of property that he can well have. Here it is the source of his property. But I go further, and say if it had only injured his reputation, it is within the jurisdiction of this Court to stop the publication of a libel of this description which goes to destroy his property or his reputation, which is his property, and if possible, more valuable than other property."

[12] Walsh on Equity (1930) pp. 213-51; *International News Service* v. *Associated Press,* 248 U. S. 215, 39 Sup. Ct. (1918) where it is said that equity "treats any civil right of a pecuniary nature as a property right." contra: *Boston Diatite Co.* v. *Florence Mfg. Co.,* 114 Mass. 69, 19 Am. Rep. 310 (1873) which states that equity has no jurisdiction over cases of libel or slander, or of false representations as to the character or quality of the plaintiff's property, or as to his title thereto, which involved no breach of trust or of contract. The decision is founded upon Blackstone's theory and upon authority which is clearly dicta, rejecting without fair discussion the only real authority in existence. Pound, supra 1, at pp. 658-61.

[13] We have seen, supra 3, that libels incidental to other harmful acts or effects are restrained without the thought that such restraint infringes on the liberty of speech or press. Pound, supra 1, at pp. 652-53, lists four main instances where libels are restrained, (1) intimidating publications; (2) immoral or indecent publications; (3) publications interfering with the course of justice; (4) publications dangerous to the conduct of military operations during war. The Federal Supreme Court seemed definitely to reject Blackstone's theory in upholding prosecutions under the Espionage Act during the World War. *Schenck* v. *United States,* 249 U. S. 47, 39 Sup. Ct. 247 (1919); Walsh on Equity, p. 265, note 13. For a criticism of the court's stand see Willis, Freedom of Speech and Press, 4 Ind. Law J. 445 (1929); 31 Col. Law Rev. 1148 (1931).

[14] *Near* v. *Minn. ex rel. Olson,* 283 U. S. 697, 51 Sup. Ct. 625 (1931).

of the freedom of the press; there would be too much room for abuse.[15] Chief Justice Hughes, in writing the majority opinion, admitted that there could not be an absolute absence of all previous restraint[16] and expressly limited the decision to a denial of previous restraints imposed by statutes such as the one in question[17] by stating that the court is not "concerned with questions as to the extent of authority to prevent publications in order to protect private rights according to the principles governing the exercise of the jurisdiction of courts of equity.[18]

With this re-assurance, and considering the tendency of courts, particularly of recent years, to restrain libels when incidental to other property damage, it probably could be said that no constitutional provisions forbid a court in a civil case to restrain threatened publication or republication of what is clearly libelous as "judged by such standards as the law affords."

The second serious objection[19] to enjoining libelous matter centers around the question of jury trials. It is a well settled policy in the United States to try the truth of defamatory statements by a jury.[20] This should cause no difficulty; if there is a question as to whether certain published matter, further publication of which is threatened, is libelous or not, the jury can still be the proper instrument of determination. If they find it to be a libel, the court should enjoin further publication.[21] Or, if the jury finds that certain matter, which the defendant, intends to publish, would, if published, be libelous, the court should enjoin such intended publication. Or, if the plaintiff seeks a

---

[15] For a good discussion of this case and the principles involved see 31 Col. Law Rev. 1148 (1931); also 14 Minn. Law Rev. 787 (1930); 17 Corn. Law Q. 126 (1931).

[16] Citing the exceptions noted in 13 supra.

[17] Commented on in 31 Col. Law Rev. 1148 at p. 1155. The statute, Mason's 1927 Minn. Statutes, Sec. 10123 (1), was held constitutional by the state court. 174 Minn. 457, 219 N.W. 770 (1928); 14 Minn. Law Rev. 787.

[18] 283 U. S. 697 at p. 716.

[19] There are other objections, chiefly traditional equity procedure that (1) only property rights will be protected, and (2) that personal libels do not come under this heading. See note 10 supra.

[20] Pound, supra 1, at pp. 656-57. This is true where the action is at law for damages for a libel already published; but where the restraint of a threatened libel is sought, the jurisdiction is clearly that of equity, and the defendant has no right to a jury. When equity enjoins a public nuisance, the defendant has no right to a jury even though the public nuisance in question also happens to be a crime. *State exrel. Crow* v. *Canty,* 207 Mo. 439, 105 S.W. 1078 (1907); *Carleton* v. *Rugg,* 149 Mass. 550, 22 N.E. 55 (1889).

[21] Equity will restrain further publication of what has already been established as a libel in an action at law. *Flint* v. *Hutchinson Smoke Burner Co.,* 110 Mo. 492, 16 L.R.A. 243 (1892); *Wolf* v. *Harris,* 267 Mo. 405, 184 S.W. 1139 (1916), dicta to that effect.

restraining order or temporary injunction for certain libelous matter which the defendant intends to publish for the first time or continue publishing, an injunction should issue only where such matter, as determined by the court, is so clearly libelous that if a jury later did not so find, the court would set aside the verdict as unreasonable.[22] As a practical matter in many of the cases seeking injunction, the libelous character of the threatened publication is palpable or else admitted;[23] no jury is needed in such cases and the judge should enjoin without hesitation. Actually then, the well settled policy of the law is not altered by allowing injunctions in the cases set out above; no one is deprived of any rights he has under the jury trial nor is he subjected to the possibility of judicial tyranny unless such person is a subscriber to the absurd proposition that it is subversive of American ideals to entrust to the discretion of the judiciary any of the people's sacred and inalienable rights.[24]

Since 1916[25] apparently no court in the United States has made any definite move either by its action or its statements, to advance the proposition that equity can and should enjoin personal libels when the facts warrant equitable relief;[26] but on the contrary many of them

---

[22] This is the rule in England, *Bonnard* v. *Perryman,* (1891) 2 Ch. 269; *Monson* v. *Tussaud's Ltd.,* (1894) 1 Q.B. 671. In *Bonnard* v. *Perryman* it was decided that equity has jurisdiction to enjoin libels because of the uniting of the common law and equity systems, giving law courts power to grant injunctions in all personal actions of contract or tort and equity courts power to hear all actions. It is suggested that the Codes of the various states are open to the same interpretation. Walsh on Equity, pp. 265-66.

[23] Pound, supra 1, at p. 657.

[24] Pound, supra 1, at p. 664, footnote 69, says, "It has been suggested that if injunctions were allowed in libel cases, a judicial censorship of the press would result under which one might be punished in a contempt proceeding for publishing an article that was not libelous. There may be a miscarriage of justice in spite of every safeguard. We must inevitably run certain risks in the administration of justice. But if such injunctions are granted only where there is a legal cause of action for defamation or for malicious disparagement of property, (2) there is a case for equity jurisdiction because of the inadequacy of the legal remedy, and (3) there is clearly a libel or a malicious false statement so that there is no substantial call for jury trial, it would seem that review of the decree by an appellate tribunal ought to insure against the evils feared. If not, we may as well revert to the methods of colonial America and cut off all equity jurisdiction for fear of judicial tyranny."

[25] The date when Dean Pound wrote his excellent essay on the subject. He asserted, in summing up, his confidence that presently some strong court would ennunciate the rule that equity has jurisdiction in libel cases.

[26] There are some twelve cases denying in dicta the right of equity to restrain libelous publications; yet many of these cases actually restrain such publication where there is unfair competition, injury to business in labor disputes, conspiracies, etc. Trade libels are no different from personal

have repeated, it seems almost without thinking, that unfortunate dicta of Lord Eldon. Certainly the whole question of reputation is peculiar in this, that society offers no adequate compensation for its loss. Unlike converted personal property, something similar or equivalent to it cannot be purchased with money, nor can it be restored like other matters of substance by the person who has wrongfully taken it. Reputation is necessary for a man to live as befits his nature; injury to it results often in irreparable damage to the individual's personal, economic, and social life. For that reason society owes an urgent duty to preserve it for the individual. Adequate protection can only be given by preventing the cause of damage; money damages are altogether inadequate, just as they are in the case of unique chattels. Today, will some court say that a good name, and honor in the community, merit equitable protection?[27]

RADIO BROADCASTING—LIBEL AND SLANDER—JOINT TORT FEASORS —There is always a certain amount of time elapsing between the enactment of a new law and its interpretation by the court, and the case of the Radio Act of 1927[1] is no exception to the rule. Five years after the passage of this law we find the first interpretation of one of its section,[2] by the supreme court of the state of Nebraska. The court was provided with an opportunity in *Sorenson* v. *Wood*[3] to extend, by analogy, the law of slander and libel to a virgin soil, that of the field of radio broadcasting. A brief review of the above case shows a radio station being joined as a joint tort feasor with a political speaker who

libels in respect to the right of publication; the constitutional guarantee should apply to both. A libelous attack on a man's business will be prevented; but what is more fundamental, a libelous attack on the man's own good name, will not, it seems, be prevented. *Ex parte Tucker,* 110 Tex. 335, 220 S.W. 75 (1920) directly denied equity jurisdiction as being unconstitutional; but *Hawks* v. *Yancey,* 265 S.W. (Tex. Civ. App.) 233 (1924) granted an injunction for slander, distinguishing its decision from the preceding case on the grounds of intimidation, (no property right, other than that of good name, was involved in the case). *Northern Wis. Co-operative Tobacco Pool* v. *Bekkedal,* 182 Wis. 571 197 N.W. 936 (1924) restrained oral solicitations injuring business. *John F. Jelke Co.* v. *Hill,* 242 N.W. (Wis.) 576 (1932) evaded a direct decision on the question upon technical grounds, but asserted that there may be limitations on the right to speak, citing in particular *State ex rel. Olson* v. *Guilford,* 174 Minn. 457, 219 N.W. 770, 58 A.L.R. 607 (1928) and *Near* v. *Minn, ex rel. Olson,* 283 U. S. 697, 51 Sup. Ct. 625 (1931).

[27] See Chafee, Freedom of the Press, for further discussion of the constitutional aspect of the question.

[1] Feb. 23, 1927 C. 169 § 18, 44 Stat. 1170.

[2] 47 United States Court of Appeals § 98, 44 Stat. 1170.

[3] 243 N.W. 82 (Neb. 1932).