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Equity and the Disparagement of Business

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EQUITY AND THE DISPARAGEMENT OF BUSINESS

Generally the intangible that will ultimately determine whether a business will prosper or fail is "good will". To destroy the good will is to destroy the business. Recognizing this, merchants faced with a libelous attack upon one of the components of "good will" have invariably sought to enlist the aid of equity. To them, the only effective relief is an injunction. But the courts of equity, as a general rule, have turned a deaf ear to these pleas and have indicated that the remedy in such cases is to be found in a court of law. Is such a disposition of these cases sound in principle or logic?

In the early New York case of *Brandreth v. Lance*,[1] involving a personal libel, the court refused an injunction on the grounds that it could not assume jurisdiction of the case ". . . without infringing upon the liberty of the press, and attempting to exercise a power of preventative justice which, as the legislature has decided, cannot safely be entrusted to any tribunal consistently with the principles of free government." [2] This refusal to place previous restraints upon publications is a consequence of the theory advanced by Blackstone that freedom of speech and liberty of the press necessarily require that publications be not restrained in advance.[3] The theory was an outgrowth of the collapse of censorship in England which followed the invention of printing and continued until near the end of the seventeenth century.[4] Fear of censorship pervades the theory. American courts have been so influenced by the doctrine that the general rule in this country is to the effect that equity will not restrain a mere libel or slander regardless of the fact that the false statement may injure the plaintiff in his business, profession, trade, credit standing or property.[5] The question remains whether this fear of censorship, which controls the minds of many jurists and causes them to be opposed to equitable intervention in cases of the disparagement of business, is well founded.

Dean Pound revealed a fundamental weakness in Blackstone's theory when he said, "But this view is open to obvious criticism. For if liability for any sort of publication which the legislature chooses to penalize may be imposed upon the publisher after the act, the result may easily be to effectually prevent indirectly and so estab-

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[1] 8 Paige 24 (N. Y. 1839).

[2] *Id.* at 26.

[3] CHASE'S BLACKSTONE 917, 918 (2d ed. 1884).

[4] WALSH, HISTORY OF ENGLISH AND AMERICAN LAW 399-401 (1926).

[5] Robert E. Hicks Corp. v. National Salesmen's Training Ass'n, 19 F. 2d 963 (7th Cir. 1927); Citizens' Light, Heat & Power Co. v. Montgomery Light & Water Power Co., 171 Fed. 553 (N. D. Ala. 1909); Kidd v. Horry, 28 Fed. 773 (E. D. Pa. 1886); Boston Diatite Co. v. Florence Mfg. Co., 114 Mass. 69 (1873); Singer v. Rommerick Realty Corp., 255 App. Div. 715, 5 N. Y. S. 2d 607 (2d Dep't 1938); Marlin Fire Arms Co. v. Shields, 171 N. Y. 384, 64 N. E. 163 (1902); Mauger v. Dick, 55 How. Pr. 132 (N. Y. 1878).

lish a censorship . . . ." [6] Thus it is seen that the legislature, by enacting severe statutes in regard to slander or libel might easily establish, in effect, a censorship, and yet that fact has not caused consternation in legal circles or elsewhere. Apart from this weakness in the theory, it is to be observed that a previous restraint upon a *non-libelous* publication is as effective as is a previous restraint upon a *libelous* publication in establishing a censorship and destroying freedom of speech and of the press and yet the courts have enjoined non-libelous publications.[7] In the case of *Near v. Minnesota* [8] the court laid down the rule that the chief purpose of the constitutional protection of liberty of press is the prevention of previous restraints upon publication. That case involved a statute, which the State of Minnesota had enacted providing for the abatement, as a public nuisance, of malicious, scandalous and defamatory newspapers, magazines or other periodicals. The attorney for the county wherein such a periodical was published was authorized to maintain an action for injunction in the name of the state. The court held that the statute violated the constitutional guarantee of freedom of speech and liberty of the press. However, in its discussion of "previous restraints", the court declared, "The objection has been made that the principle as to immunity from previous restraint is stated too broadly, if every such restraint is deemed to be prohibited. That is undoubtedly true; the protection even as to previous restraint is not absolutely unlimited . . . These limitations are not applicable here. *Nor are we now 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.*" [9] Thus the court did not lay down as a universal rule that it was unconstitutional to place a previous restraint upon a publication; on the contrary, it expressly declared that there are exceptions and indicated that where private rights are concerned equity might possess some power to place a previous restraint upon a publication.

In addition to refusing to enjoin in the fear that a censorship might be established thereby, the courts have advanced the following arguments as the basis for withholding equitable relief:

(1) That the plaintiff has an adequate remedy at law in the form of damages, and as a consequence thereof, the defendant does not require the extraordinary relief rendered in equity.[10]

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[6] Pound, *Equitable Relief Against Defamation and Injuries to Personalities*, 29 HARV. L. REV. 640, 651 (1916).

[7] Routh v. Webster, 10 Beav. 561, 50 Eng. Rep. 698 (Ch. 1847); Gee v. Pritchard, 2 Swanst. 402, 36 Eng. Rep. 670 (Ch. 1818); Grigsby v. Breckinridge, 2 Bush 480 (Ky. 1867); King v. King, 25 Wyo. 275, 168 Pac. 730 (1917).

[8] 283 U. S. 697 (1931).

[9] *Id.* at 715, 716. (Italics ours.)

[10] Singer Mfg. Co. v. Domestic Sewing Machine Co., 49 Ga. 69 (1873); Baltimore Life Ins. Co. v. Gleisner, 202 Pa. 386, 51 Atl. 1024 (1902).

It has been held in one case that the fact that the plaintiff has no adequate remedy at law because of inability to prove special damages is immaterial.[11]

(2) That libel actions involve the question of the truth or falsity of statements made by the defendant, and on such an issue of fact the defendant is entitled to a jury trial.[12]

(3) That libel is a crime and equity lacks the power to prevent crime.[13]

A careful consideration of these propositions indicates that each of them possesses an inherent weakness:

(1) A plaintiff whose business has been attacked by libelous statements has, at most, an inadequate remedy at law. This is so because such a plaintiff must allege and prove special damages.[14] Proof of such damages is a practical impossibility.

(2) When an action is properly one for equitable intervention, a defendant is not entitled to a jury trial, and accordingly he is not deprived of any constitutional right.

(3) Although libel is a crime and equity lacks the power to prevent crime the chancery is not precluded from acting to prevent injury through a civil wrong merely because the act in another aspect may be the subject of a criminal prosecution.[15]

It is deemed advisable at this point to call attention to the distinction between attacks on a person's business reputation or professional reputation which result in the most direct way in injuries to the right to carry on a business and attacks which are directed

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[11] Marlin Fire Arms Co. v. Shields, 171 N. Y. 384, 64 N. E. 163 (1902).

[12] Citizens' Light, Heat & Power Co. v. Montgomery Light & Water Power Co., 171 Fed. 553 (N. D. Ala. 1909). The plaintiff, a public utility company, sought to restrain a competing company from circulating, among the customers of the plaintiff, false and malicious statements to the effect that the plaintiff was insolvent and that there were dissensions in its management and that it would shortly go into the hands of a receiver. The court refused an injunction declaring that the defendant had the right to a jury trial on the issue of the truth of the statements and that the court could place no previous restraint on the defendant's right of publication. In Kidd v. Horry, 28 Fed. 773 (E. D. Pa. 1886), the court refused to grant an injunction to restrain a defendant from publishing certain circular letters which were alleged to be libelous and injurious to the patent rights and business of the plaintiff. The court stated that the law was well established that equity will not grant injunctive relief to prevent the publication of a libel even though the libel was calculated to injure property.

[13] Gee v. Pritchard, 2 Swanst. 402, 36 Eng. Rep. 670 (Ch. 1818) (dictum).

[14] Marlin Fire Arms Co. v. Shields, 171 N. Y. 384, 64 N. E. 163 (1902); Tobias v. Harland, 4 Wend. 537 (N. Y. 1830); Le Massena v. Storm, 62 App. Div. 150, 70 N. Y. Supp. 882 (1st Dep't 1901).

[15] *In re* Debs, 158 U. S. 564 (1895).

against the business itself. Defamation of business may consist either of words disparaging the quality of the plaintiff's property or of words which attack the plaintiff's title to property. Defamation of a plaintiff's reputation consists of words imputing incompetency, corruption, or dishonesty to the plaintiff with reference to the business, trade or profession in which he is engaged. Concerning the latter, Professor Walsh has this to say, ". . . injury to business arising from personal injury to reputation will not be restrained in equity for much the same reason that a threatened physical injury to a man will not be restrained as an injury to property, although it will incapacitate him from engaging in his trade, profession or business." [16]

It is to be noted that attacks directed against a person's business reputation are slanderous *per se*.[17] This simply means that damage is inferred and need not be proved.[18] It also means that such a plaintiff has an adequate remedy at law and is not required to appeal to equity for aid. The fact remains, however, that the merchant whose business, as distinguished from reputation, has been libelled has no adequate remedy at law and must appeal to equity. That the courts are dissatisfied with the rule declaring that equity may not enjoin the disparagement of a business is evident, for when a court has been moved by the prayer of the plaintiff relief has been granted on the ground that equity can restrain a libel if it is incidental to another wrong over which the chancery has jurisdiction,[19] and there is a trend toward recognition of defamation and disparagement of a competitor's goods as unfair competition in and of itself for which the only effective relief is injunction. Thus in *Allen Mfg. Co. v. Smith* [20] the defendant had instructed his salesmen to make false statements as to the efficacy of the plaintiff's product, to tell prospective purchasers that they could be fined for selling the product, and that United States Government inspectors had the right to seize such goods. Spurious documents were published by the defendant which purported to be official documents of the United States Department of Agriculture dealing with the plaintiff's product. These documents were given to the defendant's salesmen to be shown to prospective purchasers in order to destroy the plaintiff's business. The Appellate Division said, "The judgment which is here under review restrains the continuance both of the practice of false and fraudulent disparagement and of the

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[16] WALSH, A TREATISE ON EQUITY 262 (1930).

[17] Nunan v. Bullman, 256 App. Div. 741, 12 N. Y. S. 2d 51 (3d Dep't 1939).

[18] Secor v. Harris, 18 Barb. 425 (N. Y. 1854).

[19] Bourjois v. Park Drug Co., 82 F. 2d 468 (1936) (unfair competition); American Malting Co. v. Keitel, 209 Fed. 351 (2d Cir. 1913) (inducing breach of contract); Sherry v. Perkins, 147 Mass. 212, 17 N. E. 307 (1888) (illegal boycott); Nann v. Raimist, 255 N. Y. 307, 174 N. E. 690 (1931) (illegal conspiracy); Shevers Ice Cream Co. v. Polar Products Co., 194 N. Y. Supp. 44 (Sup. Ct. 1921) (unfair competition).

[20] 224 App. Div. 187, 229 N. Y. Supp. 692 (4th Dep't 1928).

practice of the dishonest business methods. The jurisdiction of the courts to restrain libels has been vigorously denied and asserted. In England the equity courts formerly refused such jurisdiction. . . . Now, however, the jurisdiction is fully recognized. . . . Conflict of view exists in the federal courts. . . . In our own state the general tendency has been against such jurisdiction. . . . Actions for unfair competition are not now confined to 'passing off' cases. . . . The courts have been increasingly inclined to protect business interests even when such interests do not come within strict definitions of property. The judgment here in enjoining false and fraudulent disparagement, protects the intangible, but real relationship existing between a merchant and his usual customers—his 'good will.' . . . We, therefore, do not hold that the judgment was erroneous in enjoining the practice of false disparagement of plaintiff's product." [21] In *Old Investors and Traders Corporation v. Jenkins* [22] the New York Appellate Division upheld the lower court in its refusal to dismiss a complaint which charged the defendants with having published circulars containing false statements intended to injure the plaintiff and its business and which prayed for an injunction to enjoin the publication of another such circular. The defendants, one the publisher and the other the distributor of the circular, were both enjoined on the theory that much more was involved than the publication of a libel. The conduct of the defendants was characterized as unfair competition.

These cases indicate that the New York courts are becoming more appreciative of the need for injunctive relief in cases of trade libel and are moving away from the doctrine which demands that they find an underlying tort in order to grant relief when a business is being libelled. The barrier, in New York, which stands in the way of the courts and requires them to adhere to this doctrine or to seek for minute distinctions, is the case of *Marlin Fire Arms Co. v. Shields*,[23] which held that equity would not enjoin a libel. The

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[21] *Id.* at 191, 192, 229 N. Y. Supp. at 697, 698.

[22] 225 App. Div. 860, 233 N. Y. Supp. 845 (1st Dep't 1929).

[23] 171 N. Y. 384, 64 N. E. 163 (1902). Here the plaintiff, a manufacturer of firearms, had been advertising with the defendant, the publisher of a well-known and widely bought magazine for sportsmen, but had terminated his contract of advertising with the defendant. In order to coerce the plaintiff into renewing the contract of advertising, the defendant wrote sham letters purporting to be written by correspondents and published as coming from correspondents, in which the pretended correspondents criticized the plaintiff's rifles alleging that they were defective. A demurrer was sustained. The court stated that the words would not be actionable at law unless special damages were proved and that the complaint negatived such claim. Thus the court admitted that no action at law was available to the plaintiff. The court then considered the question, whether the malicious defamation of a manufactured article for which the manufacturer has no adequate remedy at law because of his inability to prove special damages, is the subject of equitable cognizance and concluded that it was not.

Marlin case, it will be observed, is distinguishable on the facts from the *Allen* case and the *Old Investors* case. The acts of libel in the latter cases had also satisfied the requirements of the tort of unfair competition whereas in the *Marlin* case they did not. That the *Marlin* case is now a weak barrier is evidenced not only by the fact that the courts have tended to confine it to its own facts but by the granting of an injunction by a lower court on a set of facts not unlike those in the *Marlin* case.[24] In 1946 the New York Court of Appeals decided *Advance Music Corporation v. American Tobacco Co.*[25] which indicates a possible future repudiation of the rule in the *Marlin* case. The plaintiff in that case was a music publisher and the defendant a sponsor of a radio program. The defendant's program advertised that the nine or ten songs performed on their weekly program constituted the nine or ten most popular songs of the week and that the selection was the result of an extensive and accurate survey. The complaint alleged that the program rating was not the result of an accurate survey and that by omitting the plaintiff's songs, the defendant had injured plaintiff's business. Injunctive relief was sought and the Appellate Division, on motion, dismissed the complaint, stating that ". . . the law is well settled in this state that equity will not intervene to enjoin the disparagement of property." [26] The Court of Appeals reversed the ruling of the Appellate Division declaring that a complaint which alleges an intentional infliction of temporal damages for which there is no legal justification, and asks for an injunction against publication, is sufficient against a motion to dismiss. The court expressly declared that it was not determining the nature of the relief to which the plaintiff was entitled, but that the complaint stated a cause of action in law or equity. In view of the fact that the court could not fail to realize that the plaintiff would be unable to prove special damages and consequently would have no remedy at law, the court's declaration is significant.

The federal courts also appear to be moving away from the rule that equity will not enjoin a trade libel. In *Black Yates, Inc. v. Mahogany Ass'n*,[27] the plaintiff sought to enjoin the defendant from publishing disparaging statements to the effect that lumber sold by the plaintiff under the name "Philippine Mahogany" was not ma-

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[24] Saxon Motor Sales, Inc. v. Torino, 166 Misc. 863, 2 N. Y. S. 2d 885 (Sup. Ct. 1938). Here the defendants put an automobile, which they had bought from the plaintiff, in front of his store decorating the car with signs deriding its qualities. The court granted a temporary injunction. Realizing that the case of *Marlin Fire Arms Co. v. Shields* was an obstacle, the court attempted to distinguish it from the case at bar by saying that the acts herein complained of were more serious and were different in character from those in the *Marlin* case.

[25] 296 N. Y. 79, 70 N. E. 2d 401 (1946), *reversing* 268 App. Div. 707, 53 N. Y. S. 2d 337 (1st Dep't 1945).

[26] 268 App. Div. 707, 711, 53 N. Y. S. 2d 337, 341 (1st Dep't 1945).

[27] 129 F. 2d 227 (3d Cir. 1942).

hogany but an inferior wood, a substitute. In writing the opinion, Circuit Judge Clark laid much stress upon Dean Pound's often quoted, "Most of the cases that grant relief speak strongly of the injustice that must result from denial of jurisdiction in these cases. In substance the traditional doctrine puts anyone's business at the mercy of any insolvent malicious defamer who has sufficient imagination to lay out a skillful campaign of extortion. So long as denial of relief rests on no stronger basis than authority our courts are sure to find a way out." [28] Clark then stated, "We are quite willing to repudiate the 'waning doctrine that equity will not restrain the trade libel.' We are further willing to do so directly and without hiding behind the other equitable principles put forward in some of the cases." [29] The court had some doubt as to the correctness of its decision on this point, consequently a rehearing was ordered. On rehearing the court stated as a final conclusion that it was not required to depart from precedent since the allegations of the complaint were sufficient to support a charge of unfair competition which afforded a basis for the granting of an injunction. Nevertheless, the fact that the court stated that there was an urgent need for equitable relief in cases like the instant one where genuine proprietary interests of great social and commercial significance to the parties are affected, would indicate that the court would have adhered to its original conclusion even if it had been unable to find these additional grounds for relief.

It is submitted that the present disposition by equity of cases involving the disparagement of business is inadequate. It is to be hoped that the courts will recognize that by refusing injunctive relief in the class of cases under discussion, they are merely swelling the ranks of those cases designated *damnum absque injuria;* and that they will discard the rule which requires them to find some underlying tort in order to issue an injunction against the publication inasmuch as such a disposition of these cases falls short of accomplishing practical justice, which is the ultimate goal of our judicial system.

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[28] *Equitable Relief Against Defamation and Injuries to Personalities,* 29 HARV. L. REV. 651 (1916).

[29] 129 F. 2d 227 (3d Cir. 1942).