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EQUITABLE JURISDICTION TO PROTECT PERSONAL RIGHTS

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It is a curious fact in the history of the court of equity that certain limitations upon its jurisdiction have been insistently declared by text-writers and judges which are not only contrary to the fundamental theory of equitable jurisdiction, but also have no substantial foundation in the actual decisions and practice of the courts. Among these anomalous limitations may be mentioned the doctrines that a court of equity will not grant relief against a pure mistake of law; that it will never enforce a forfeiture; and that it has no jurisdiction to protect personal rights where no property rights are involved. After a long struggle the courts of equity have now about broken away from the unsound doctrines that they cannot grant relief against mistakes of law nor enforce forfeitures, and there are clear signs that the equally unsound doctrine that they have no jurisdiction to protect personal rights will soon be abandoned. The unreasonableness of so arbitrary and unjust a doctrine that a court of equity will protect one in his rights of contract and property, but deny protection to his far more sacred and vital rights of person, has often been commented upon, but the unsubstantial character of the foundation upon which this doctrine rests has not been so generally recognized.

Until recently it was inevitable that the jurisdiction of the court of equity should, in practice, have been almost entirely confined to the protection of property rights. Most of the rights recognized in municipal law are rights of property, and from the beginning it has been settled that a court of equity will protect property rights wherever there is not a full, adequate, and complete remedy at law. The recognized personal rights have been few, and these in the main have always been as well protected by the courts of law as they could be by courts of equity. Such wrongs to the person as assault and battery, mayhem, or homicide fall within the jurisdiction of the criminal courts, by which they can be much better dealt with than by the chancellor. In specific cases the common law courts may enjoin the commission of wrongs to the person by binding the prospective offender to keep the peace, and

the law prohibiting the wrong is itself a standing injunction binding on all, the violation of which may be punished by the criminal courts more effectively than a court of equity can punish for contempt. There is also, in most cases, the right to sue for damages for the civil injury, so that, taking the criminal and civil remedies together, there is found for most cases of injury to the person that full, adequate, and complete remedy at law which excludes these cases from the jurisdiction of courts of equity. It is not surprising, therefore, that the chancery reports have been lacking in cases of equitable protection of personal rights.

From this fact, and also from the fact that a court of equity will take cognizance of cases not ordinarily falling within its jurisdiction, for example, criminal cases, when necessary to protect rights of property, the conclusion has naturally been reached that the existence of a property right needing protection is the test of equity jurisdiction. In most cases this test is sufficiently accurate, and this doubtless explains why the test has not been more critically scrutinized by the courts. But the jurisdiction of equity does not properly depend upon the nature of the right involved, whether a right of person or of property; the true test of equity jurisdiction is the existence of a justiciable right for which there is not a full, adequate, and complete remedy at law.

The doctrine that a court of equity has no jurisdiction of personal rights is of comparatively recent origin. The suggestion of a learned writer¹ that it may have no more legitimate basis than an "unintelligent adherence to the *dicta* of a great judge in the pioneer case," is probably not far from the truth. The case referred to is *Gee v. Pritchard*,² decided by Lord Eldon in 1818. The doctrine finds support in most of the text books on equity and in innumerable *dicta* of judges. Spence says:³ "The only subject of the jurisdiction of the court of chancery is property." The statement of Kerr is often quoted that,⁴ "The subject-matter of the jurisdiction of the court of chancery is civil property. The court is conversant only with questions of property and the maintenance of civil rights. Injury to property, whether actual or prospective, is the foundation on which its jurisdiction rests. The court has no jurisdiction in matters merely criminal or merely immoral, which do not affect any right to property." Neither of these writers seem to have had in mind the question of equitable jurisdiction over personal rights; they simply emphasize the fact that a court of equity has no jurisdiction "in matters merely criminal or merely immoral." Kerr's statement that the court is concerned "only with questions of property and the maintenance of civil rights," is correct and is broad enough to include injuries to the person. The accompanying statements limiting

¹ See article by Dean Roscoe Pound, *Equitable Relief Against Defamation and Injuries to Personality* (1916) 29 HARV. L. REV. 640, 641. On this subject see also a recent article by Z. Chafee, Jr., *The Progress of the Law, 1919-1920* (1921) 34 HARV. L. REV. 388, 407-415.

² (1818) 2 Swanst. 402.

³ 2 Spence, *Equitable Jurisdiction* (1849) 868.

⁴ Kerr, *Injunctions* (1st ed. 1871) 1.

the jurisdiction to property rights are also correct, if we assume that the only other matters he had in mind were matters merely criminal or immoral.

Neither of these authorities says that equity has no jurisdiction of personal rights, but Mr. Bispham expressly lays down this doctrine. He says:⁵ "Equity is concerned only with questions which affect property, and it exercises no jurisdiction in matters of wrongs to the person or to political rights, or because the act complained of is merely criminal or illegal."

It is only within the past few years that the doctrine that the court of equity has no jurisdiction of personal rights has become prominent. Its prominence is no doubt due to the more extensive recognition of personal rights under modern conditions of society. The right of privacy, for example, owes its importance mainly to the introduction of photography and cheap printing processes. The great extension also of public control over the details of private life may have led to a counter insistence upon the sacredness of personal rights. At any rate cases involving personal rights are becoming common in courts of equity, and the doctrine that these courts have no jurisdiction to protect such rights is being discarded before it had become really established by judicial action. The influence of the doctrine is still strong and in some cases the courts have felt constrained to support their decisions protecting personal rights by discovering in the right before them a nominal or fictitious property right. Such an evasion is foreign to the spirit of equity, which looks at the substance rather than the form, and more recently the courts have been disposed to protect personal rights frankly recognized as such.

It is proposed in this paper to examine the principal cases on this subject. The writer has found no case in which equitable relief has been denied definitely and solely because the right claimed was a personal right, and therefore not within equitable jurisdiction. In every case the denial of relief has been solely or chiefly because there was an adequate remedy at law, or because there was no recognized personal right to protect. On the other hand there are a number of cases in which personal rights have been protected in equity. For convenience the cases will be considered topically.

ASSAULT AND BATTERY

It is well settled that a court of equity will not take jurisdiction to restrain an ordinary threatened assault and battery. This is not, however, because an assault is an injury to the person and not to property, but because there is an adequate remedy at law. Thus in the Alabama case of *M. & W. R. R. Co. v. Walton*,⁶ decided in 1848, suit was brought to enjoin obstructing by personal violence the construction of a railroad

⁵ Bispham, *Principles of Equity* (10th ed. 1922) sec. 37.

⁶ 14 Ala. 207. See also, *United States v. Marine Engineers' Beneficial Asso.* (1921, W. D. Wash.) 277 Fed. 830.

through defendant's property. The plaintiffs had obtained a right of way by condemnation proceedings, but the defendant refused to accept the money awarded and threatened personal violence if the plaintiffs undertook to construct the road over his land. The bill was dismissed on the ground that the remedy at law was sufficient. The court, by Dargan, J., said:

"The rule is too well established to admit of controversy, that equity cannot interpose by way of injunction to restrain the commission of a personal trespass, although it may be threatened. See 3 Daniel's Ch. Pr. 1834. Nor can an injunction be granted to restrain the publication of a libel. See [*Brandreth v. Lance* (1839, N. Y. Ch.)] 8 Paige's Rep. 24. Nor can a case be found where the chancellor has interposed by injunction, to restrain a crime threatened by one to be perpetrated upon another. The courts of law have complete jurisdiction to punish the commission of crimes, and can interpose to prevent their commission by imprisoning the offender, or binding him to keep the peace. But equity has no jurisdiction over such matters, at least a court of equity cannot entertain a bill on this ground alone."

In the Pennsylvania case of *Ashinsky v. Levenson*⁷ suit was brought by a Jewish rabbi and his congregation to enjoin the defendant from entering into the synagogue or premises of the congregation, and also from insulting, molesting, approaching, accosting, or speaking to the rabbi. The injunction was granted restraining the defendant from entering the synagogue, to protect the congregation in the use of their property, but the injunction for the protection of the rabbi personally was denied on the ground that there was an adequate remedy at law.

DEFAMATION

The right to reputation is one of the highest of the personal rights. Libel and slander are primarily injuries to the feelings, sensibilities, and honor of the person defamed. The fact that charges affecting a person's character or capacity may injure him in the pursuit of his calling by turning away patronage does not alter the real nature of the wrong nor justify the classification of defamation as an injury to property rights. An assault may also injure one's business by incapacitating him from working at it, but the injury does not for this reason become an injury to property. It is well settled in this country, that a court of equity will not restrain the threatened publication of a libel, as such, and this was formerly the rule in England also, but since the Judicature Act the English chancery court has exercised jurisdiction to restrain the publication of false statements calculated to injure one's trade.⁸

While actions at law for defamation are common, suits in equity for simple personal defamation, unconnected with the property rights or

⁷ (1917) 256 Pa. 14, 100 Atl. 491.

⁸ 1 and 2 Pomeroy, *Equitable Remedies* (1905) secs. 481, 629-631. See Dean Pound, *op. cit. supra* note 1. See also *Willis v. O'Connell* (1916, S. D. Ala.) 231 Fed. 1004; *Wolf v. Harris* (1916) 267 Mo. 405, 184 S. W. 1139; *Mayer v. Journeymen Stone-Cutters' Asso.* (1890) 47 N. J. Eq. 519, 20 Atl. 492; *Ex parte Tucker* (1920) 110 Tex. 335, 220 S. W. 75 (slander).

business or professional occupation of the person defamed, are almost unknown. This indicates that the remedy by action at law or by criminal prosecution has been found adequate. In the few cases in which the question of equity jurisdiction in slander and libel cases has been directly involved or incidentally discussed, the denial of equity jurisdiction has never, so far as the writer knows, been placed upon the ground that the right invaded was a personal right rather than a property right. Relief has been denied either because equitable interference was deemed an abridgment of the freedom of speech or of the press, or because the remedy at law was adequate, or because of the importance attached to trial by jury in defamation cases.

The leading American case on the subject of equity jurisdiction in libel cases is the New York case of *Brandreth v. Lance*,⁹ decided in 1839. This was a suit to enjoin the publication of a libelous pretended autobiography of the plaintiff, who was a manufacturer of a proprietary medicine. The bill was dismissed, chiefly on the ground that to grant the injunction would be an abridgement of the liberty of the press. In the course of the opinion Chancellor Walworth said:

"The utmost extent to which the court of chancery has ever gone in restraining any publication by injunction, has been upon the principle of protecting the rights of property. Upon this principle alone Lord Eldon placed his decision, in the case of *Gee v. Pritchard* (2 Swanst. Rep. 403) continuing the injunction which restrained the defendant from publishing copies of certain letters written to him by the complainant. But it may, perhaps, be doubted whether his lordship in that case did not, to some extent, endanger the freedom of the press by assuming jurisdiction of the case as a matter of property merely, when in fact the object of the complainant's bill was not to prevent the publication of the letters on account of any supposed interest she had in them as literary property, but to restrain the publication of a private correspondence, as a matter of feeling only. . . . In this case the complainant does not claim the exercise of the extraordinary jurisdiction of this court on the ground of any violation of the rights of literary property, or because a work is improperly attributed to him which will be likely to injure his reputation as an author, or even as against a manufacturer of pills. . . . As the publication of the work, therefore, which is sought to be restrained, cannot be considered as an invasion either of literary or medical property, although it is unquestionably intended as a gross libel upon the complainant personally, this court has no jurisdiction or authority to interfere for his protection. And if the defendants persist in their intention of giving this libelous publication to the public, he must seek his remedy by a civil suit in a court of law, or by instituting a criminal prosecution."

There is in this opinion not a hint that the fact that the complainant was seeking protection for a personal right, rather than a property right, had any influence in the decision of the question whether or not equitable relief should be granted. The implication that the injunction might have been granted if a property right had been involved, is simply a recognition of the well settled doctrine that a court of equity will protect rights of property, even in cases not otherwise coming within

⁹ (1839, N. Y.) 8 Paige Ch. 24.

equity jurisdiction, and affords no support to the doctrine that only property rights will be protected. The relief was denied on the double ground that it would be an interference with the liberty of the press and also because there was an adequate remedy at law, either by an action for damages or by a criminal proceeding.

The importance of a jury trial in slander and libel cases is another controlling reason why a court of equity will not restrain a threatened slander or libel. This is well brought out in the Missouri case of *Flint v. Hutchinson Smoke-Burner Co.*¹⁰ This was a suit to restrain the slander of title of letters patent. The plaintiffs, the owners of a smoke-preventing device, sued to restrain the defendants from representing to plaintiffs' customers that plaintiffs' device was an infringement of defendants' patents. It was held that the court of equity had no jurisdiction, the remedy being at law. The court, by Black, J., said:

"We live under a written constitution which declares that the right of trial by jury shall remain inviolate; and the question of libel or no libel, slander or no slander, is for the jury to determine. Such was certainly the settled law when the various constitutions of this state were adopted, and it is all-important that the right thus guarded should not be disturbed. It goes hand in hand with the liberty of the press and free speech. For unbridled use of the tongue or pen, the law furnishes a remedy. In view of these considerations, a court of equity has no power to restrain a slander or libel, and it can make no difference whether the words are spoken of a person, or his title to property. In either case it is for the jury to first determine the question of libel or slander in an action at law. This, we conclude, is the result of the better cases in this country and in England. . . . We see nothing in this case save slander of title, and the remedy is at law. After verdict in favor of the plaintiffs, they can have an injunction to restrain any further publication of that which the jury has found to be an actionable libel or slander."

As illustrated in the case just considered, the refusal of courts of equity to restrain the publication of libelous or other false statements is not confined to those affecting the person. Most of the cases have been those affecting property rights. It is settled law in this country that a court of equity has no jurisdiction to enjoin the publication of false or libelous statements injurious to the plaintiff's business, trade, or profession, or which operate as a slander of title to property, where such statements are not accompanied with threats, intimidation, or coercion, or any direct attack upon the property of business of the plaintiff. In such cases the remedy is at law.¹¹ There could be no

¹⁰ *Flint v. Hutchinson Smoke-Burner Co.* (1892) 110 Mo. 492, 19 S. W. 804, 16 L. R. A. 243. Note the suggestion that after verdict in favor of the plaintiff in an action at law a court of equity may restrain any further publication of the libel. This seems to afford the solution of such cases. After verdict in an action at law, the several objections to equitable relief no longer hold. This suggestion was approved in *Wolf v. Harris*, *supra* note 8.

¹¹ *Francis v. Flynn* (1886) 118 U. S. 388, 6 Sup. Ct. 1148; *Kidd v. Horry* (1886, C. C. E. D. Pa.) 28 Fed. 773; *Baltimore Car-Wheel Co. v. Bemis* (1886, C. C. D. Mass.) 29 Fed. 95; *Edison v. Edison, Jr., Co.* (1904, C. C. D. Del.) 128

clearer demonstration of the proposition that the refusal of courts of equity to protect one from personal defamation is not on account of the personal nature of the injury, than the fact that the court equally refuses its protection against defamation of property. Cases of defamation, therefore, afford no support whatever to the general doctrine that a court of equity will not protect rights of the person.

Several other cases somewhat akin to defamation cases may be noted. In the Nebraska case of *Howell v. Bee Publishing Co.*¹² the court refused to enjoin the publication of an untrue but not libelous statement that the plaintiff would not be a candidate for the office of governor of the state, the suit being dismissed on the ground that to grant the injunction would be to abridge the freedom of the press. In the California case of *Dailey v. Superior Court*¹³ the defendant in a notorious murder case sued to restrain the presentation of a dramatic performance based upon the facts of his case as established in the preliminary examination, on the ground that the production of the play during the trial would interfere with the administration of justice and deprive the defendant of a fair and impartial trial. The lower court granted a restraining order, but this was annulled by the appellate court on the ground that it was an attempted interference with the right of free speech. Another case, which might be considered just as appropriately in the discussion of the right of privacy, is the Louisiana case of *Itzkovitch v. Whitaker*,¹⁴ in which an injunction was granted to restrain the police authorities from

Fed. 957; *Willis v. O'Connell*, *supra* note 8; *Reyes v. Middleton* (1895) 36 Fla. 99, 17 So. 937, 29 L. R. A. 66 (slander of title to real property); *Singer Mfg. Co. v. Domestic Sewing Machine Co.* (1873) 49 Ga. 70; *Boston Diatite Co. v. Florence Mfg. Co.* (1873) 114 Mass. 69; *Raymond v. Russell* (1887) 143 Mass. 295, 9 N. E. 544; *Finnish Temperance Society v. Rairvaaja Pub. Co.* (1914) 219 Mass. 28, 106 N. E. 561, Ann. Cas. 1916 D 1087; *Marlin Firearms Co. v. Shields* (1902) 171 N. Y. 384, 64 N. E. 163.

But the publication of false or libelous statements may be enjoined when accompanied with threats, intimidation, or acts destructive of property. *Emack v. Kane* (1888, C. C. N. D. Ill.) 34 Fed. 46; *Casey v. Cincinnati Typographical Union* (1891, C. C. S. D. Ohio) 45 Fed. 135, 12 L. R. A. 193; *Beck v. Railway Teamsters' Union* (1898) 118 Mich. 497, 77 N. W. 13, 42 L. R. A. 407; 2 Pomeroy, *op. cit. supra* note 8.

The former English rule was that the publication of false statements injurious to the plaintiff's business interests would not be enjoined. *Prudential Assurance Co. v. Knott* (1875) L. R. 10 Ch. App. 142 (overruling *Dixon v. Holden* [1869] L. R. 7 Eq. 488). But the rule is otherwise under the Judicature Acts. *Collard v. Marshall* [1892] 1 Ch. 571. See also *Monson v. Tussauds* [1894] 1 Q. B. 672 (exhibition of wax figure of plaintiff).

¹² (1916) 100 Neb. 39, 158 N. W. 358, L. R. A. 1917 A 160, Ann. Cas. 1917 D 655.

¹³ (1896) 112 Cal. 94, 44 Pac. 458 (two judges *dissenting*).

¹⁴ (1906) 117 La. 705, 42 So. 228, 116 Am. St. 215. For earlier report of this case, see (1905) 115 La. 479, 39 So. 499, 1 L. R. A. (N. S.) 1147. See also, *Schulman v. Whitaker* (1906) 117 La. 704, 42 So. 227, 7 L. R. A. (N. S.) 274, 8 Ann. Cas. 1174. But an injunction will not be granted to compel the destruction or prevent the proper circulation of pictures of a convicted criminal, for no such right of privacy exists in such case. *Hodgeman v. Olsen* (1915) 86 Wash. 615, 150 Pac. 1122.

putting the plaintiff's photograph in the rogue's gallery. The court said: "We think the publication of an innocent man's photograph in the rogue's gallery gives rise to sufficient grounds to sustain an injunction. There is a right in equity to protect a person from such an invasion of private rights." This is a clear-cut decision that the court will protect a personal right. The court, however, did not refer to the authorities to the contrary.

THE RIGHT OF PRIVACY

The so-called "right of privacy,"¹⁵ so far as any such legal right exists, is, of course, a personal right, and the cases in which equitable relief for the protection of this right has been denied, afford some color of support for the doctrine that equity will not protect personal rights. The denial of relief in these cases, however, has always been on the ground either that there was no such legal right as that claimed or that there was an adequate remedy at law. It is in connection with this right that the doctrine that the jurisdiction of equity is confined to the protection of rights of property seems to have originated. It happens, however, that in the leading case protection was in fact granted to what to all intents and purposes was a personal right transformed by a legal fiction to a property right.

This case is the well-known English case of *Gee v. Pritchard*,¹⁶ decided in 1818. The case came before Lord Eldon on a motion to dissolve an interlocutory injunction to restrain the publication of copies of private letters written by the plaintiff to the defendant, the originals of which the defendant had returned to the plaintiff. There was no claim that the contents of the letters were of any literary value. In the course of the argument the chancellor excused counsel from discussing a claim that the injunction should be sustained on the ground that the publication of the letters would be painful to the feelings of the plaintiff, and said: "The question will be, whether the bill has stated facts of which the court can take notice, as a case of civil property, which it is bound to protect." It is clear that Lord Eldon was not satisfied that any property right was involved, but he felt bound by two earlier decisions in which the publication of private letters had been enjoined.¹⁷ He said:

"My predecessors did not inquire whether the intention of the writer was or was not directed to publication. The difficulty which I have felt

¹⁵ See generally as to the right of privacy, 2 Pomeroy, *op. cit. supra* note 8, sec. 632. The author cites various articles in law reviews on this subject, beginning with the article by Warren and Brandeis, *The Right to Privacy* (1890) 4 HARV. L. REV. 193.

¹⁶ *Supra* note 2.

¹⁷ *Pope v. Curl* (1741, Ch.) 2 Atk. 342 (Alexander Pope's letters); *Thompson v. Stanhope* (1774, Ch.) Ambler, 737 (Lord Chesterfield's letters). The reports in these cases do not indicate that the court was influenced by the fact that the letters were written by distinguished literary persons.

in all these cases is this: If I had written a letter on the subject of an individual, for whom both the person to whom I wrote and myself had a common regard, and the question arose for the first time, I should have found it difficult to satisfy my mind that there was a property in the letter; but it is my duty to submit my judgment to the authority of those who have gone before me; and it will not be easy to remove the weight of the decisions of Lord Hardwicke and Lord Apsley. The doctrines of this court ought to be as well settled and made as uniform almost as those of the common law, laying down fixed principles, but taking care that they are to be applied according to the circumstances of each case. I cannot agree that the doctrines of this court are to be changed with every succeeding judge. Nothing would inflict on me greater pain, in quitting this place, than the recollection that I had done anything to justify the reproach that the equity of this court varies like the chancellor's foot."

In view of these observations about the jurisdiction of the court of equity and his personal attitude toward it, we may suppose that his lordship would have taken more pains with his language in this case had he foreseen that an "unintelligent adherence" thereto would become responsible for the introduction into equity jurisprudence of a new and unsound doctrine of equity.

In continuing the injunction, Lord Eldon said: "I am of opinion that the plaintiff has a sufficient property in the original letters to authorize an injunction, unless she has by some act deprived herself of it. . . . I do not say that I am to interfere because the letters are written in confidence, or because the publication of them may wound the feelings of the plaintiff; but if mischievous effects of that kind can be apprehended, in cases in which this court has been accustomed, on the ground of property, to forbid publication, it would not become me to abandon the jurisdiction which my predecessors have exercised, and refuse to forbid it. . . . On these grounds the injunction must be continued."

In basing his decision upon the jurisdiction of equity to protect property rights, Lord Eldon made use of the only ground available at that time, for a century ago the right of privacy was unknown to any court, whether of law or of equity. His dispensing with argument on the question of protecting the plaintiff's feelings is not to be understood as authority for the proposition that a court of equity will not protect personal rights, but was merely a recognition of the fact that personal feelings had not yet been brought within the protection of municipal law. But in this case the real injury was the invasion of the plaintiff's right of privacy, since it did not appear that the letters had any literary value, and Lord Eldon simply employed the strained theory of literary property in order to protect a previously unrecognized personal right.

In a number of later cases in this country the same doctrine has been applied and the publication of private letters has been enjoined on the

theory of literary property, which has usually been fanciful to say the least.¹⁸ In a few cases equitable relief has been denied where the letters were deemed to have no literary value, but this was not because the right invaded was personal, but because there was no legal right at all. Thus in denying relief in a New York case,¹⁹ decided in 1848, Chancellor Walworth, without making any reference to "personal rights," said: "This court has no jurisdiction to restrain and punish crime, or to enforce the performance of moral duties, except so far as they are connected with the rights of property."

The right of privacy has been denied in several other equity cases. Thus in *Schuyler v. Curtis*²⁰ the object of the suit was to restrain the defendant from making and exhibiting a bust of the plaintiff's deceased aunt as a typical philanthropist. The court said: "This action is founded upon an alleged violation of the right of privacy." The injunction was denied on the ground that no such right of privacy as that claimed existed. In the similar case of *Atkinson v. Doherty*²¹ the Michigan court refused to enjoin a cigar maker from marketing a cigar with the name and likeness of one Colonel John Atkinson, the plaintiff's deceased husband. The injunction was denied on the ground that the acts complained of did not constitute an "actionable wrong." The court said: "So long as such use does not amount to a libel, we are of opinion that Colonel John Atkinson himself would be remediless, were he alive, and the same is true of his friends who survive."

Of the same sort is the well-known case of *Roberson v. Rochester Folding Box Co.*,²² which is sometimes cited to the proposition that equity has no jurisdiction of matters affecting the person. In this case a young lady sued to enjoin the unauthorized use of her portrait for advertising purposes and for damages. The court held that the complaint did not show any right to relief *either in law or in equity*. Damages were denied as well as an injunction. The fact that the right

¹⁸ 2 Pomeroy, *op. cit. supra* note 8, sec. 576. *Grigsby v. Breckinridge* (1867, Ky.) 2 Bush, 480; *Baker v. Libbie* (1912) 210 Mass. 599, 97 N. E. 109, 37 L. R. A. (N. S.) 944, Ann. Cas. 1912 D 551 (cases reviewed).

¹⁹ *Hoyt v. Mackenzie*, 3 Barb. Ch. 320.

²⁰ (1895) 147 N. Y. 434, 42 N. E. 22, 31 L. R. A. 286.

²¹ (1899) 121 Mich. 372, 80 N. W. 285, 42 L. R. A. 219.

²² *Roberson v. Rochester Folding Box Co.* (1902) 171 N. Y. 538, 64 N. E. 442, 59 L. R. A. 478. This decision denying the right of privacy in such case was by a divided court, three of seven judges dissenting. It was generally adversely criticised and was followed in New York and other states by legislation expressly authorizing injunctions to restrain the unauthorized use of personal portraits. In *Corliss v. Walker* (1893, C. C. D. Mass.) 57 Fed. 434, (1894, C. C. D. Mass.) 64 Fed. 280, an injunction to restrain the publication of a portrait was denied on the ground that there was no right of privacy where the subject, as in that case, was a public character. In *Pollard v. Photographic Co.* (1888) L. R. 40 Ch. Div. 345, a photographer was enjoined from selling and exhibiting photographs of a customer on the ground there was an implied contract not to use the negative for this purpose, and also on the ground that such sale and exhibition would be a breach of confidence.

claimed was of a personal nature was not mentioned by the court, the judgment of which was based solely upon its conclusion "that the so-called 'right of privacy' has not as yet found an abiding place in our jurisprudence." It is obvious that these cases are no authority for the doctrine that a court of equity will not protect a recognized personal right when the remedy at law is not adequate.

In a recent New Jersey case the court restrained the unauthorized use of the name and picture of Thomas A. Edison to advertise a medical remedy upon the theory that the right involved was a property right.²³ In so holding, the court said: "If a man's name be his own property, as no less an authority than the United States Supreme Court says it is, it is difficult to understand why the peculiar cast of one's features is not also one's property, and why its pecuniary value, if it has one, does not belong to its owner, rather than to the person seeking to make an unauthorized use of it."

Another phase of the right of privacy is presented in a Louisiana case in which it was held that an injunction was properly granted to restrain the continued publication of a petition for the incorporation of a village, which petitioners had signed under a misapprehension and which they had since disowned and repudiated. Thus the continued misrepresentation of the petitioners' sentiments was prevented.²⁴

One of the best known cases in this connection is the Maryland case of *Chappell v. Stewart*,²⁵ which was a suit for an injunction to restrain the defendant from employing detectives to follow and watch the plaintiff. The plaintiff alleged that this conduct caused him great inconvenience and annoyance, interfered with his social intercourse and his business, and caused suspicions to be entertained about him to the injury of his financial credit. It was held that the bill did not contain "any matter cognizable in equity." It may be doubted whether the plaintiff in this case suffered any actionable wrong. Public policy would seem to be against recognizing the right of an individual to be immune from properly conducted observation by detectives. The enforcement of the criminal laws would be difficult, if not impossible, if such an impediment should be put in the way of bringing offenders to justice. The court, however, based its decision upon the adequacy of the remedy at law. Bryan, J., said:

"Courts of equity exercise a very extensive jurisdiction in cases involving property rights. The occasion does not require us to state

²³ *Edison v. Edison Polyform Mfg. Co.* (1907) 73 N. J. Eq. 136, 67 Atl. 392. See also, that the right is a property right, *Munden v. Harris* (1911) 153 Mo. App. 652, 134 S. W. 1076 (action at law).

²⁴ *Schwartz v. Edrington* (1913) 133 La. 235, 62 So. 660, 47 L. R. A. (N. S.) 921, Ann. Cas. 1915 B 1180.

²⁵ (1896) 82 Md. 323, 33 Atl. 542, 37 L. R. A. 783. The note to this case in 37 L. R. A. contains one of the earliest and most forceful protests against the doctrine that a court of equity has no jurisdiction to protect personal rights that has appeared.

its precise limits. It is usually said, in general terms, that it does not exist where a plain, adequate, and complete remedy can be obtained at law. In this case, it is alleged that rights affecting the complainant's person have been violated, and that there is a purpose to persist in violating them. The ordinary processes of law are fully competent to redress all injuries of this character. They have always been considered beyond the scope of the powers of a court of equity. . . . We, of course, do not intend to express any opinion on the merits of any action at law which the complainant may see fit to bring."

PROTECTION OF FAMILY RELATIONS

The jurisdiction of a court of equity to protect rights growing out of family relations has been recognized from an early date. The most familiar example is found in the cases involving the custody of infants. Such suits have long been common. The right to the custody of a child, especially when asserted by a parent, would seem to be peculiarly a personal right. It is possible, of course, to tack on an allegation of a property right to the child's services, but, aside from the fact that the courts have paid little or no attention to this right in determining the right of custody, and, so far as the writer knows, have never made the right to services the basis of equity jurisdiction, the right, even of a parent, to a child's services has scarcely been recognized at all by the English courts, and in most cases the child's services are of little or no real value. The right of custody is essentially a personal right.²⁶

Even more distinctly a personal right, it would seem, is the right of a husband to the affections of his wife, which was protected by injunction in the case of *Ex parte Warfield*.²⁷ In this case the Texas court held that a defendant, who had partially alienated the affections of the plaintiff's wife, was rightly enjoined from further association or communication with her so as to prevent him from alienating them completely. It was held that the court had jurisdiction to grant the injunction both under the inherent power of the court of equity and also under the Texas statute relating to injunctions. The fact that a husband is entitled to the services of his wife was mentioned in the opinion, but seems not to have influenced the decision. In the recent Georgia case of *Stark v. Hamilton*²⁸ the plaintiff obtained an injunction to restrain the defendant from associating or communicating with the plaintiff's minor daughter whom defendant had debauched and induced to abandon her home and live with him in illicit cohabitation. The

²⁶ See Bispham, *op. cit. supra* note 5, secs. 541-550. *Ex parte Badger* (1920) 286 Mo. 139, 226 S. W. 936, 14 A. L. R. 286.

In 1817 Chancellor Kent restrained a young man from having anything to do with a girl under twelve years of age whom he had induced to marry him, but was ignorant of the duties of marriage, and, upon being informed, dissented from the marriage. *Aymer v. Roff* (1817, N. Y.) 3 Johns. Ch. 49.

²⁷ (1899) 40 Tex. Crim. App. 413, 50 S. W. 933.

²⁸ (1919) 149 Ga. 227, 99 S. E. 861, 5 A. L. R. 1041.

court said that the case, "in a sense involves both personal and property rights."

The New Jersey case of *Vanderbilt v. Mitchell*²⁰ has attracted some attention. The plaintiff, John Vanderbilt, brought suit against his wife, her child, and one Mitchell, medical superintendent of the state bureau of vital statistics. He charged that the child was the fruit of his wife's adultery and that she, by false statements as to its paternity, had had its birth certificate made out and recorded to the effect that the plaintiff was the father of the child. The object of the suit was to have the fraudulent record cancelled, and to enjoin mother and child from claiming under it for the child the status and rights of a legitimate child of plaintiff. The court below sustained a demurrer to the bill on the ground that the case did not fall within any recognized head of equity jurisdiction, that no property right was involved, and that a court of equity could not take cognizance of personal rights or redress personal wrongs not affecting property rights. The appellate court reversed this decree and granted the relief sought. In delivering the opinion, Dill, J., said:

"If it appeared in this case that only the complainant's status and personal rights were thus threatened and thus invaded by the action of the defendants and by the filing of the false certificate, we should hold, and without hesitation, that an individual has rights other than property rights, which he can enforce in a court of equity, and which a court of equity will enforce against invasion; and we should declare that the complainant was entitled to relief, and to a decree establishing the truth as to the paternity of the child, relieving the complainant of the intolerable burden *prima facie* put upon him by the false record and preventing the wife from perpetuating a fraud upon the husband. . . . But it is not necessary to place the decision upon this ground, because there are sufficient facts presented to enable us to put this case upon the technical basis that the jurisdiction we are exercising is the protection of property rights, and to declare that the complainant is entitled to restrain the unwarranted use of his name as the father of the child upon the ground that such action is calculated to injure his property, and the probable effect of it will be to expose him to risk or liability."

PROTECTION OF RIGHTS OF MEMBERS OF VOLUNTARY ASSOCIATIONS

Suits have occasionally been brought to restrain the managing authorities of clubs and other voluntary associations from expelling members

²⁰ (1907) 72 N. J. Eq. 910, 67 Atl. 97, 14 L. R. A. (N. S.) 304.

The court states with approval the case of *Randazzo v. Roppolo* (1906, Sup. Ct.) 105 N. Y. Supp. 481, in which an injunction was granted to restrain the defendant from falsely claiming and representing herself to be the wife of the plaintiff and to cancel a marriage certificate falsely reciting their marriage. See the earlier case of *Hodecker v. Strickler* (1896, Sup. Ct.) 39 N. Y. Supp. 515, in which an injunction to restrain the defendant from falsely claiming to be the wife of the plaintiff's husband was denied.

or depriving them of the rights of membership. It is well settled that, as a rule, the courts, whether of law or equity, have no jurisdiction to interfere with or control the internal affairs of voluntary associations, unless called upon to do so for the protection of rights of property or some other civil right. Generally the government of social, religious, fraternal, and other voluntary associations is left with the officers of the society, to be administered in accordance with its own rules and regulations.³⁰

This general immunity of such associations from judicial control will ordinarily be sufficient to prevent a court of equity from taking jurisdiction to restrain the society from expelling a member where no property rights are involved.³¹ Thus in a leading English case,³² in which the plaintiff sued to enjoin the authorities of a trade union from expelling him from membership, relief was denied. In the opinion Jessel, M. R., said: "The first question I will consider is, what is the jurisdiction of a court of equity as regards interfering at the instance of a member of a society to prevent his being expelled therefrom? I have no doubt whatever that the foundation of the jurisdiction is the right of property vested in the member of the society, and of which he is unjustly deprived by such unlawful expulsion. There is no jurisdiction that I am aware of reposed, in this country at least, in any of the Queen's courts to decide upon the rights of persons to associate together when the association possesses no property."

In the exercise of its ordinary jurisdiction to protect property rights where the remedy at law is inadequate, a court of equity may compel the reinstatement of a member of a voluntary society when necessary to protect his property rights, as in the case of a member of a fraternal order who has been wrongfully expelled and thus deprived of pecuniary benefits to which he is entitled.³³ Where a member is entitled to such benefits, or the society owns property to which the individual members as such are entitled, the right of membership is distinctly a property right, and as such comes within judicial cognizance. Membership in a trade union or similar organization may also in a sense be regarded as a property right since it may affect the power of the member to earn a living at his calling, and by some courts membership in voluntary organizations generally is regarded as a matter of contract between the members and comes within judicial cognizance on this basis.³⁴

³⁰ *Forbes v. Eden* (1867, H. L.) L. R. 1 Sc. & Div. App. 568; *Baird v. Wells* (1890) L. R. 44 Ch. Div. 661; *Lawson v. Hewell* (1897) 118 Calif. 613, 50 Pac. 763; *Mead v. Stirling* (1892) 62 Conn. 586, 27 Atl. 591, 23 L. R. A. 227; *Wellenvoss v. Grand Lodge* (1898) 103 Ky. 415, 45 S. W. 360; *Mayer v. Journeymen Stone-Cutters' Asso.*, *supra* note 8; *Gaines v. Farmer* (1909) 55 Tex. Civ. App. 601, 119 S. W. 874.

³¹ *Robertson v. Walker* (1874) 62 Tenn. 316.

³² *Rigby v. Connol* (1880) L. R. 14 Ch. Div. 482.

³³ *Mesisco v. Giuliano* (1906) 190 Mass. 352, 76 N. E. 907.

³⁴ See Pound, *op. cit. supra* note 1, at pp. 677-681. That the right is one of contract, see *Baird v. Wells*, *supra* note 30; *Lawson v. Hewell*, *supra* note 30.

It is only in the case of purely social clubs and similar organizations in which membership confers no individual property rights, that expulsion is a pure injury to the person. Wrongful expulsion from such an organization is an injury analogous to defamation. The humiliation, social stigma, and blasting of character resulting therefrom constitute a personal injury of which the courts may take cognizance, even though the right of persons to associate together in personal and social intercourse is beyond judicial control. It is possible for the court to enjoin the society from formally expelling a member without undertaking to compel the other members to associate with him. Several cases involving this question have come up in England.

The general doctrine to be gathered from the decisions seems to be that the court of equity will not interfere with the action of the society expelling a member where the authorities profess to act under their rules, unless it can be shown either that the rules are contrary to natural justice, or that they were not observed, or that there has been *mala fides* or malice; but where these conditions are not satisfied, the court may interfere.³⁵ Thus in a comparatively early case,³⁶ where the plaintiff, an army officer, was expelled from an Army and Navy Club for alleged misconduct, the court ordered his restoration and enjoined the authorities of the club from interfering with his rights of membership, it being found that he was expelled irregularly and without notice and without giving him an opportunity to explain or palliate his conduct. The personal nature of the right was recognized by Jessel, M. R., in his remark that by the course pursued in this instance, "the character and prospects in life of any member of this club may be irremediably blasted."

MISCELLANEOUS CASES

In cases arising in the Federal courts under the Selective Draft Act of 1917 it was held that a court of equity had no jurisdiction to restrain the authorities charged with the enforcement of the act from inducting draftees into the military service. Equitable relief was denied either because there was an adequate remedy by *habeas corpus* or otherwise, or on the ground that the court had not been given jurisdiction to interfere with the exercise by the authorities of their functions in enforcing the act.³⁷ In a case in the Circuit Court of Appeals,³⁸ the court said:

³⁵ *Dawkins v. Antrobus* (1881, C. A.) L. R. 17 Ch. Div. 615; *Baird v. Wells*, *supra* note 30; *Young v. Ladies' Imperial Club, Ltd.* [1920] 1 K. B. 81; *Burn v. National Amalgamated Labourers' Union* [1920] 2 Ch. 364.

³⁶ *Fisher v. Keane* (1879) L. R. 11 Ch. Div. 353.

³⁷ *Angelus v. Sullivan* (1917, C. C. A. 2d) 246 Fed. 54; *Bonifaci v. Thompson* (1917, W. D. Wash.) 252 Fed. 878.

In *Kneedler v. Lane* (1863) 45 Pa. St. 238, an injunction to restrain the enforcement of the Civil War draft act was refused by a divided court, the decision turning mainly on the constitutionality of the act. The writ of *habeas corpus* was suspended, so the usual legal remedy was unavailable. On the question of equity jurisdiction, Strong, J., writing for the majority of the court, said: "But

"But whatever remedy the complainant may have or not have, there can be no doubt that he is not entitled to the relief he asks in his bill of complaint. It has heretofore been laid down by the text-writers and the courts as beyond the scope of the powers of a court of equity to enforce mere personal rights as distinguished from property rights. This, it need not be said, has not been due to the fact that equity regarded rights of property as more sacred than rights of the person. But the reason for it lies in the fact that equity affords no remedy where there is a full and adequate remedy at law, and that the ordinary process of the law courts are fully adequate for the redress of wrongs to the person."

One of the clearest cases of equitable protection of personal rights is the South Carolina case of *Kirk v. Wyman*.³⁹ The plaintiff, Miss Kirk, an elderly lady of refinement, was affected with a mild form of leprosy, which was supposed to be only slightly contagious, and it appeared that quarantine in her own home would afford complete protection to the public until a comfortable place could be prepared for her elsewhere. Nevertheless the health authorities of Aiken were about to take her to the pest house, which was an utterly unfit and unsafe place in which to place her. She sued for an injunction to restrain them from doing so. A temporary injunction was granted and the Board of Health appealed from this order, which was affirmed by the supreme court. The question of equity jurisdiction to protect personal rights is not referred to in the opinion and does not appear to have been

when, before these cases, was an injunction ever granted to restrain the commission of a purely personal tort? What chancellor ever asserted that he had such power?" To this Woodward, C. J., replied: "Courts of equity are accustomed to enjoin to prevent frauds, waste, nuisances, trespasses, obstructions, and diversion of watercourses, and in numerous other torts. The principle of injunctive relief against a tort is, that the inadequacy of the remedy at law is a sufficient equity and will warrant an injunction against the commission or continuance of the wrong. The inadequacy of all remedies at law for infringement of personal liberty, when habeas corpus is suspended, is too plain to be doubted or discussed, and the necessary consequence is that courts of equity would have jurisdiction. . . . If courts of chancery have not jurisdiction of torts which touch personal liberty, what are we to say,—that the property is better guarded with us than liberty? Who is willing to stand on that ground? For one, I am not. I would not say that man has more rights in his horse or his house than he has in himself. If equity will restrain torts in respect to lands and goods, much more will it restrain torts in respect to his immensely higher interest—his liberty—when all legal remedies have been taken away." As Dean Pound remarks, "these statements are important in that they put each side of the question as well as it has ever been put in the cases."

³⁹ *Angelus v. Sullivan*, *supra* note 37.

⁴⁰ (1909) 83 S. C. 372, 65 S. E. 387, 23 L. R. A. (N. S.) 1188.

Another case involving personal liberty is *Stuart v. Board of Supervisors* (1876) 83 Ill. 341. In this case a bill was filed by prisoners in a county jail to enjoin the use of the jail on the ground that it was unfit for use and dangerous to the health of prisoners. The bill was dismissed on the grounds that a court of equity has no jurisdiction to stay or prevent the execution of a sentence in a criminal case, and, mainly, because there was an adequate remedy at law.

raised by counsel. By no possible pretense could it have been claimed that her property rights were involved,—that she was being prevented from engaging in her occupation, for she had no occupation, being a retired foreign missionary. The court based its decision upon the inadequacy of the remedy at law, saying: "The remedy by action for damages would not be adequate where the health or life of the citizen is by force unnecessarily imperiled. Protection from the loss of health or life is the only adequate relief in such case."

In *Wong Wai v. Williamson*,⁴⁰ in the United States Circuit Court for California, the plaintiff, a Chinaman, sued to restrain the health authorities of San Francisco from requiring him to submit to inoculation with a serum claimed to be a preventive of the bubonic plague and from preventing him from leaving the city unless he should be so inoculated. This requirement was being imposed upon the plaintiff and other Chinamen in the city. The injunction was granted on the ground that the inoculation of the plaintiff in the circumstances of the case would be a violation of his constitutional rights. On the question of jurisdiction, the court, by Morrow, Circuit Judge, said:

"The court suggested at the hearing the question whether, upon the facts stated in the bill of complaint, an injunction would lie. Thereupon a parol exception was taken to the bill. After further investigation, the court is of the opinion that it is the proper remedy. The cause of action is not merely that the plaintiff is deprived of his personal liberty. He and a number of others similarly situated are being deprived by the defendants of their right to travel from San Francisco to other parts of the state in pursuit of lawful business, and this right, it is alleged, has a pecuniary value to the complainant in excess of the amount required to give this court jurisdiction of the case."

In this opinion there is a suggestion of the influence of the notion that an injunction will not lie unless a property right is involved. However, to protect the plaintiff against the inoculation of his person on the ground that this would interfere with his property right to pursue his business would amount to a practical abolition of the distinction between personal and property rights.

Another striking case is *Mickle v. Henrichs*,⁴¹ in the United States District Court for Nevada. This was a suit to restrain the warden and physician of the Nevada State Prison from performing the operation of vasectomy upon the plaintiff, who had pleaded guilty of rape and had been sentenced to the penitentiary and also ordered to be operated on so as to deprive him of the power of procreation, as authorized by a statute of the state in such cases. The plaintiff claimed that the statute was unconstitutional in that it violated the prohibition in the state constitution of "cruel or unusual punishments." The court granted the injunction on this ground. At the outset Farrington, D. J., said: "All questions as to jurisdiction have been expressly waived."

⁴⁰ (1900, C. C. D. Calif.) 103 Fed. 1

⁴¹ (1918, D. Nev.) 262 Fed. 687.

This reduces the value of this decision as authority, though it may be doubted whether the question of jurisdiction can legally be waived. It would seem that the consent of the parties could not enlarge the jurisdiction of the court so as to include a subject-matter not falling within it. At any rate this case stands as a clear case of the use of the injunction to protect a personal right. Legal juggling could hardly transmute the right involved in this case into a property right.

Another line of cases in which the courts have often repeated the common *dictum* that the jurisdiction of equity is confined to property rights are those in which equitable relief has been sought in connection with elections or other political matters. Relief in such cases is almost uniformly denied, and properly so, but not because equity jurisdiction extends only to the protection of property rights, but on other grounds.⁴² These cases are of interest in connection with our present inquiry only because of the support they afford to the doctrine that the court of equity has jurisdiction only to protect rights of property.

From this review it must be clear that the doctrine that a court of equity has no jurisdiction to protect personal rights is unsound in principle and unsupported by controlling authority. Originating in what appears to be a mistake as to the real significance of the existence of a property right as a jurisdictional fact,—namely, that it justifies the court in taking cognizance of cases otherwise beyond its jurisdiction, it has not as yet had the support of a single case known to the writer in which the denial of equitable relief was based squarely and solely on the ground that the right involved was a personal right. On the other hand, there has already accumulated a respectable body of decisions in which courts of equity have protected personal rights, either frankly dealt with as such or thinly camouflaged as property rights. It would seem that the time has come for the courts to discard this unsound dogma, which while it has probably never caused a denial of justice in actual decisions, stands in the way of the logical and symmetrical development of the law by courts of equity. In the complexity of modern civilization when new questions of legal rights are continually arising, the courts have in the injunction an unequalled instrument with which to explore and mark the boundaries of conflicting rights and interests, and no other judicial agency has been more useful in the development of the law. This development has been especially noticeable of late in the domain of personal rights. Under such conditions it seems important that courts of equity should lay aside every artificial restriction upon their power and administer their peculiar relief upon the broad principle which constitutes the foundation of equitable jurisdiction, that for every legal right there is a remedy, and this remedy the court of equity will supply wherever there is not a full, adequate, and complete remedy at law.

⁴² For example, see *Hutchinson v. Goshorn* (1917) 256 Pa. 69, 100 Atl. 586.