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NOTES

DOES EQUITY PROTECT PROPERTY RIGHTS IN DOMESTIC RELATIONS?

INTRODUCTION

In many cases, we find the broad general statement that "Equity protects only property rights."

This rule that the office and jurisdiction of a court of equity, unless enlarged by an express statute, are limited to the protection of property rights,¹ is a rule of very general application.

In *People vs. Prouty*² the court said: "Injury to property whether actual or prospective is the foundation upon which the jurisdiction of courts of equity rests."

And in *In Re Sawyer*,³ we find the following statement: "The office and jurisdiction of equity, unless enlarged by statute, are limited to property rights."

In some decisions, expressions are found to the effect that a court of equity would seem to be as responsive to a call for protection of personal rights, as to one for the protection of rights relating to property.⁴ However, where the sole damage suffered consists of injury to personality, there is very little authority for giving injunctive relief.

The writer has been unable to find a single case in which the court protected personal rights as such. Dicta will be found in several cases to the effect that equity would protect personal rights as such, but there is no decision directly in point. In *Vanderbilt vs. Mitchell*,⁵ the court said: "An individual has rights other than property rights which he can enforce in equity." This case was an action by the husband to cancel the birth certificate of the bastard child of his adulterous wife. However, the court after all the brave talk about equity protecting personal rights as such, shied off when they had to decide the

¹ *Taylor v. Kercheval*, 82 Fed. 497; *Angelus v. Sullivan*, 246 Fed. 54; *White v. Pasfield*, 212 Ill. App. 73-75; *Gee v. Prichard*, 36 Eng. Rep. 670; *People v. Prouty*, 262 Ill. 218.

² 262 Ill. 218.

³ 124 U. S. 200 at 210.

⁴ *Vanderbilt v. Mitchell*, 72 N. J. Eq. 910 at 915.

⁵ Cited supra No. 4.

point and refused to base the decision upon any such ground. They searched until they finally found a technical property right upon which to base the decision, i e., the right of the child to inherit from plaintiff. This seems to the writer to be a very remote property right upon which to base the decision. It is suggested that if the court was really in earnest about protecting personal rights as such, this was a good opportunity to do so. It can be argued that the right to inherit was a valuable property right since plaintiff was wealthy. Following up this line of argument, it would be interesting to note how the court would decide the case if plaintiff was a bankrupt with no chance of ever having any property. They would probably close their eyes to this fact and complacently say: "This is a valuable property right and we will base our decision upon this right, but if this property right was not present, we would protect plaintiff's personal rights."

*Gee vs. Prichard*⁶ is a leading case in the proposition that equity protects only property rights. The writer of a letter brought action to enjoin the recipient from publishing a copy of the letter. The court held that the writer had a joint property interest in the letter with the recipient and this property right was sufficient to ground an injunction restraining recipient from publishing the letter. Lord Eldon in this case seems to have trouble in finding a property right on which to base his decision. He expressly denies the right of equity to protect personality as such. However, it would seem that he protected it after all. He states that he is unable to find any property right in the writer of a letter but that he is bound by precedent which recognizes such a right and therefore he protects the writer because of his property interests. It is suggested that the real reason for his decision was the desire to protect personality.

Another case which expressly bases its decision upon the proposition that equity protects only property rights is *Murray vs. Gast Lithographic and Engraving Co.*,⁷ This was an action by a father to enjoin the publication of a portrait of his infant daughter. The court said that it is fundamental to the jurisdiction of equity that some property right is involved. They hold

⁶ 36 Eng. Rep. 670.

⁷ 28 N. Y. S. 271.

that there can be no recovery for humiliation and mental suffering as such.

While in most cases, the courts have striven to uphold equitable jurisdiction on the ground of some property right, there is distinctly discernible a tendency on part of the courts to afford more adequate protection to personal rights, and to that end, they often lay hold of slight circumstances tending to show a technical property right, no matter how slender and shadowy it may be.⁸ The courts are inclined to talk about protecting personal rights as such when they do not have to decide whether to protect them or not. But, when a case of personal rights is brought before them, they either expressly refuse to protect them, or else search until they find something which might by a straining of the imagination, be made to resemble a property right and then base their decision upon this right. They do not seem to care how slender and remote such a so-called property right is; they have a horror of protecting personal rights as such. Therefore, they are perfectly satisfied when they can lay hands on something which they can call a property right.

Many courts which refuse to protect personal rights, base their decisions on the ground that there is an adequate remedy at law.⁹

In the case of *White vs. Pasfield*,¹⁰ the court said: "Courts of equity have no jurisdiction and will not interfere in a matter concerning merely personal rights where no property rights or interests are involved. A party complaining of the violation of such rights must pursue his remedy at law."

In *Angellus vs. Sullivan*,¹¹ the court held that equity would not enforce mere personal rights, as distinguished from property rights, for the reason that there was a full and complete remedy at law for the adequate redress of wrongs to the person.

This excuse that the remedy at law is adequate seems to be very weak. The statements in *White vs. Pasfield* and *Angellus vs. Sullivan* to the effect that there is an adequate remedy at law for wrongs to the person seem to be entirely too broad. There

⁸ *Chappell v. Stewart*, Note 37 L. R. A. 783 (Maryland); *Vanderbilt v. Mitchell*, 72 N. J. Eq. 910.

⁹ *White v. Pasfield*, 212 Ill. App. 73; *Angellus v. Sullivan*, 264 Fed. 54.

¹⁰ 212 Ill. App. 73 at 75.

¹¹ Cited *supra* No. 9.

are many examples of personal rights which are either not protected at law or the remedy at law is inadequate.

Upon a consideration of the cases, we can, therefore state the broad general proposition that equity protects only property rights. With this general proposition as a background, we shall discuss the question whether or not equity protects personal rights in the case of domestic relations. We shall treat this subject under two heads (A) as to husband and wife, and (B) as to infants.

HUSBAND AND WIFE

From the beginning the law has recognized the right of the husband to sue for the alienation of the affections of his wife. This right was based on loss of consortium and loss of services. In *Foot vs. Card*,¹² Parde, J. said: "From time immemorial, the law has regarded the husband's right to the conjugal affection and society of his wife as a valuable property right, and has compelled the man who has injured it to make compensation."

However, courts of common Law looked upon the wife in a different manner. The majority of the cases held that a wife had no right of action for the enticement of her husband or for the alienation of his affections,¹³ or at most if she had such a right of action, it existed merely in the abstract and remained in abeyance during coverture.¹⁴

Probably the reason for this peculiar rule is that in its early stages, the common law enveloped the identity of the wife and all her possessions in the personality of the husband. The husband and wife were considered as one person and the wife's legal existence was merged and suspended during the union. She had no will and without her husband's authority could do no act. She was unable to bring an action at law for redress of an injury sustained in respect to person or property. However, with the aid and joinder of her husband, a remedy was afforded her generally for torts committed against her. Yet it was denied her when the tort consisted of the alienation of her hus-

¹² 18 Atl. 1027 at 1028. (Conn.)

¹³ *Eliason v. Draper*, 77 Atl. 572 (Del.); *Lynch v. Knight*, 11 Eng. Rep. 854.

¹⁴ *Dietzman v. Millin*, 108 Ky. 610.

band's affections, upon the theory that in such a wrong the husband must have assisted or assented and therefore he should not be allowed to profit by his own wrong by becoming a party with his wife in an action to the fruits of which, if successful, he would be entitled. As in an action upon a tort of this character her husband was not permitted to sue with her, and as in an action upon a tort of any character, she was not permitted to sue without him, the common law placed a married woman with such an injury in a technical predicament that left her wholly without a remedy at law.

Another reason given for this position is that the wife does not have any property right in the affections and companionship of her husband.¹⁵ It is difficult to support such a statement because the wife certainly has as much property in the husband's affections as he has in the wife's. However, with the passing of the Married Women Acts, giving the wife the right to sue and be sued, the husband and wife are placed on an equal footing, and it is the general rule now that husband and wife are equal as to right of each in the conjugal affection, society and chastity of the other; and, that the wife has the same right of action against another woman who commits adultery with her husband, or against anyone who wrongfully alienates his affections, and induces him to leave her, that the husband has in a like case.¹⁶ Therefore, what we shall say in regard to the right of action of the husband for alienation of affection, will apply with equal force to the right of action of the wife in like cases.

The principle upon which the majority of the cases base their decisions is the loss of consortium;¹⁷ that is, the conjugal society, affection and assistance of the wife.

The courts consider this right to consortium of the wife as a valuable property right and compel the person who has injured it to make compensation to the husband.¹⁸ The principle upon which the majority of courts go is very well stated in *Valentine*

¹⁵ *Foot v. Card*, (Conn.) 18 Atl. 1027.

¹⁶ *Eliason v. Draper*, 77 Atl. 572 (Del.).

¹⁷ *Deitzman v. Millin*, 108 Ky. 610. *Gregg v. Gregg*, 37 Ind. App. 210; *Pudd v. Rounds*, 64 Vt. 432; *Ireland v. Ward*, 51 Oreg. 102; *Prettyman v. Williamson*, 1 Penn. (Del.) 234; *Hart Pence v. Rogers*, 143 Mo. 635; *Ammarina v. Boland*, 111 A. 84 (Maryland); *Medica v. Brown*, 230 P. 853 (Okla.); *Buchanan v. Foster*, 48 N. Y. S. 732; *Nolin v. Pearson*, 191 Mass. 283.

¹⁸ *Lane v. Dunning*, 186 Ky. 797.

vs. *Pollock*.¹⁹ In that case the court said: "The gist of the actions both for the alienations of affections and criminal conversation with plaintiff's husband is the loss of 'consortium' which is a property right growing out of the marriage relation and includes the exclusive right to services of the spouse and to the society and companionship and conjugal affection of each other."

The doctrine that the right of action is based on injury to property rights is also set forth in *Nelson vs. Nelson*²⁰ where the court says: "The gist of the action by wife for alienation of husband's affections is the deprivation of marital rights, including society, affections and companionship of husband, and financial support during the husband's life, in accordance with his rank and station."

When the act of defendant has consisted of interfering with domestic relations, equitable relief has rarely been given unless a property right was involved. The case of *Hodecker vs. Stricker*²¹ is a typical example of cases in which equity has refused to act because no property right was involved. In that case plaintiff sued to enjoin defendant from pretending to be wife of plaintiff's husband. The court refused to grant the injunction on the ground that the only right violated was one of personality and therefore equity had no jurisdiction. There was a property right in this case, i. e., the right to consortium, but it was not before the court because of defective pleadings.

Probably the case which comes nearer to the protection of personal rights as such in domestic relations is *Ex Parte Warfield*.²² This case has been discussed pro and con by a great many writers but they have not yet reached an agreement as to whether the case can be cited as authority for the proposition that equity will protect personal rights as such in domestic relations cases. In this case the court held that they had jurisdiction to enjoin defendant from conduct which would probably result in the complete alienation of affections of plaintiff's wife. The writer is inclined to agree with Dean Pound²³ that the authority of this case is weakened by the fact that there is a stat-

¹⁹ 111 Atl. 869 at 872 (Conn.)

²⁰ 296 F. 367.

²¹ 39 N. Y. Supp. 515.

²² 40 Tex. Crim. App. 413.

²³ 29 Harvard Law Review 675.

ute in Texas²⁴ which has been construed as giving a wider power of granting injunctions than that generally possessed by courts of equity. It is true that there are certain dicta in the case to the effect that equity had jurisdiction to protect personal rights as such, yet the real basis of the decision was the statute. In the absence of the statute, the court probably would have seized upon the husband's property right in his wife's services and rested their decision upon that basis.

*Hawks vs. Yancy*²⁵ is another leading case on the subject. There the court granted an injunction restraining defendant from annoying or communicating with her in any way and from discussing her relations with him or any other person. This case was also based on a statute and even in the absence of the statute, the courts could very easily have found a property right upon which to base their decision. However, there is a dictum in the case which apparently says that the court would protect personal rights as such in the absence of any property rights.

There are many other cases which hold that courts of equity have power to grant injunctions in cases of enticement and alienation of the husband. The case of *Hall vs. Smith*²⁶ is one of the leading ones. In this case, the court said: "The right to grant such an injunction resides in a court of equity, and it is not unduly extending the jurisdiction of the court in restraining commission of acts violative of plaintiff's rights in suits of this character." The case cites *Ex Parte Warfield* supra as an authority. It is suggested that the court erred in citing *Ex Parte Warfield* since that case was based on a statute.

The cases are not in entire harmony as to the elements necessary to make up this cause of action. In the great majority of cases, the mere destruction or impairment of the wife's affections is held to give a cause of action without either the fact of adultery or that the wife has left the husband.²⁷ In the case of *Rinehart vs. Bills*²⁸ the court says: "The alienation of the wife's affections for which the law gives redress, may be accom-

²⁴ Rev. Statutes, Section 2989.

²⁵ 265 S. W. 233 Texas.

²⁶ 140 N. Y. S. 796 at 798.

²⁷ *Rinehart v. Bills*, 52 Am. Rep. 385 (Mo.); *Gregg v. Gregg*, 37 Ind. App. 210.

²⁸ 52 Am. Rep. 385 at 387 Mo.

plished notwithstanding her continued residence under the husband's roof. Indeed it has been not infrequently remarked by the authors and jurists that such continued residence after the alienation has been effected, so far from leaving the husband without a good cause of action, constituted an aggravation to his injury from which an elopement might well be accepted in the nature of an alleviation." This is the general rule, that mere alienation of affections is sufficient to ground the action.

The Mass. rule is directly contra to the majority rule. In the case of *Sperry vs. Moore*²⁹ the court held that no action lies merely for depriving one spouse of the affection of the other in the absence of keeping apart or debauching the body.

This case is in complete accord with the other Mass. decisions³⁰ which hold that there must be some keeping apart or debauching of the body. There can be no recovery merely for depriving one spouse of affection of the other regardless of the fact that the alienating of affection may have been done maliciously.

In cases resting on officious interference of defendant with marital relations, rather than on a claim of seduction, attempted or accomplished, the motive of defendant is important. Thus for parents to consult with their married daughter in good faith, to protect her from her husband's abuse, even to advise her to leave him and come home to them, is not actionable, if such interference was in good faith and was reasonably justified by circumstances as they appeared to the parents.³¹

Probably the best statement of the rule is found in *Oakman vs. Bedding*³² where the court says: "A husband may be false to his marital obligations, he may be immoral and indecent, he may be grossly cruel and abusive, he may become a confirmed drunkard, his conduct toward her may be such as to endanger her health, and entirely destroy her peace and comfort, so that she may properly leave him. In such cases, to whom shall she apply if not to her parents, and from whom shall she seek advice if not from her parents? A parent may not with hostile, wicked,

²⁹ 155 N. E. 441 (Mass.)

³⁰ *Longe v. Saunders*, 246 Mass. 159; *Gahagan v. Church*, 132 N. E. 357 (Mass.); *Broadstreet v. Wallace*, 254 Mass. 509; *Nolin v. Pearson*, 191 Mass 293.

³¹ *Multer v. Knibbs*, 193 Mass. 556; *Hutchinson v. Peck*, 5 N. Y. 196.

³² 80 Am. St. Rep. 396 at 397 (Maine).

and malicious intent break up the relation between his daughter and her husband. He may not do this simply because he is displeased with her marriage, or because it was against his will, or because he wishes the marriage relation to continue no longer. But, a parent may advise his daughter in good faith and for her good, to leave her husband, if he, on reasonable grounds, believes that the further continuance of the marriage relations tends to injure her health, or to destroy her peace of mind, so that she would be justified in leaving him. Whether the motive was proper or improper is always to be considered, whether the persuasion or argument is proper and reasonable under the conditions presented to the parent's mind is always to be considered. It may turn out that the parent acted upon mistaken premises, or upon false information, or his advice and interference may have been unfortunate, still, we repeat, if he acts in good faith, for the daughter's good upon reasonable grounds or belief, he is not liable to the husband."

In summing up the decisions in the husband and wife cases, we fail to find a single case which directly bases its decision upon the personal rights of husband and wife in the absence of statute. The cases state without exception that the decision is based on property rights. It is very easy to find a property right in these alienation and enticement cases, and the courts base their decisions upon these rights. Although some cases contain very strong dicta to the effect that they would protect personal rights as such, there are no decisions in point. The majority of the decisions fall back on the old saying, "Equity protects only property rights."

INFANTS

To this general rule that equity protects only property rights there is one well-recognized exception. This exception is in cases where rights of infants are concerned. Equity has an inherent jurisdiction over the persons and property of infants.³³ The source of this wide jurisdiction is somewhat uncertain and has been much discussed. However, the doctrine now most commonly maintained is that it represents a delegation to the chancery courts by the crown of its right as "Parens Patriae" to in-

³³ *Cullins v. Williams*, 156 Ky. 57; *Ex Parte Badger*, 226 S. W. 936 (Mo.)

terfere in particular cases for benefit of such as were incapable of protecting themselves: that it belonged to the court of Chancery, and was exercised by it from its first establishment, and that the jurisdiction exists in the U. S. by inheritance from English courts of Chancery.³⁴ Equity jurisdiction to appoint guardians for infants was said in *Thomas vs. Thomas*³⁵ to exist by inheritance from English courts of Chancery, and not because equitable rights or titles were involved.

That the court may acquire jurisdiction in any particular case, the infant must first be made a "ward of the court." He becomes a ward of the court whenever he is brought before it for any purpose.

In *Shallcross vs. Shallcross*³⁶ the court said: "Courts of equity are given practically exclusive jurisdiction over persons and property of infants and this jurisdiction attaches from the very fact of the institution of an action or proceeding affecting the person or property of an infant, and at once makes him a ward of the court." Property is not essential to the existence of the jurisdiction although as the court said in *Wellesley vs. Beaufort*,³⁷ the court could not exercise its jurisdiction usefully and practically unless there was property because the means of doing so would be lacking.

The basis of this jurisdiction of equity over infants is the welfare of the child. The court will not hesitate to remove a child from the custody of its own parents where the present or future well-being of the child demands such removal. In *Cowls vs. Cowls*,³⁸ the court said: "Courts of equity have power to control custody of infants as well as their estates within its jurisdiction and will remove them from parental control and place them in care of other guardians, where by reason of parent's neglect or abuse, it becomes necessary for the infant's well-being."

Although in awarding the custody of minors, courts have often said that the welfare of the child is paramount, this consideration will not suffice to take children from parents who are

³⁴ *Dodge v. Cole*, 37 Am. Rep. 111 (Ill.); *Thomas v. Thomas*, 35 L. R. A. (N. S.) 1158 (Ill.)

³⁵ 35 L. R. A. (N. S.) 1158 (Ill.)

³⁶ 135 Ky. 418.

³⁷ 38 Eng. Rep. 236.

³⁸ 44 Amer. Dec. 708 at 709 (Ill.)

decent and responsible if they are able to furnish the necessities for the children, although the child's welfare and prospects in life might be bettered by such removal.

It is not only the right of a court of equity to protect the rights of infants but also their duty. In *Jones vs. Hudson*³⁹ the court said: "The court of equity, if cognizant of the necessity should on its own motion protect rights of minors when involved in litigation to which they are not parties." This case seems to say that if an infant's rights are at all likely to be affected by the litigation, it is the absolute duty of the court to protect those rights. The chancellor himself is in legal contemplation the infant's guardian and he must do all that he can to protect his ward's interests.

The foregoing discussion shows that courts of equity have a very wide and complete jurisdiction in all classes of cases where the rights of infants are concerned. All that is necessary to give the chancery courts jurisdiction is that rights of infants be involved, no matter how slight these rights may be.

CONCLUSION

In conclusion we can say generally, (A) that equity protects only property rights, (B) that in cases involving husband and wife, equity will not take jurisdiction where no property right is involved, (C) that in cases involving infants, equity takes jurisdiction regardless of property rights.

It is difficult to understand the courts' reluctance to protect personal rights as such. In many cases they protect them but they do it under the guise of protecting property rights even though in many cases a property right does not exist. Even tho in the past equity has found it expedient to limit its protection to property rights, it was merely a matter of expediency and there is no substantial reason today for any such limitation upon equity jurisdiction. It would seem that in these modern times, when there are so many new interests which come under the scope of equity jurisdiction, equity would enlarge its jurisdiction and protect personal rights as such. But they have steadfastly refused to protect any except property rights. They do not give any logical reason for their refusal to protect personal

³⁹ 44 L. R. A. (N. S.) 1182 at 1185 (Nebraska).

rights. They fall back on the old worn-out doctrine that equity only protects property rights, and let it go at that. The reason given most frequently for the refusal to protect personal rights by injunction is that courts have never in fact issued such injunctions.

This ground does not seem to be very strong. It is the boast of equity, that there is a remedy in equity for every wrong where the remedy at law is inadequate. This boast is certainly not being carried out when equity holds to the rule that only property rights will be protected. There are certainly many personal rights where the law does not provide an adequate remedy for their violation. In many cases, mere pecuniary compensation will not be sufficient for the injury received. Yet equity refuses to step in and protect such rights merely because they are personal rights and have never been protected as such. When one takes into consideration the reasons why equity courts were first established, it is hard to understand why they balk at protecting personal rights merely because there is no precedent. It seems that since chancery courts were established with the idea that they would give relief upon principles of reason and justice they should grow with the times.

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