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Note and Comment

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NOTE AND COMMENT.

THE LAW SCHOOL.—The Law School reopens this fall with an attendance slightly larger than that of last fall. There are but few changes in the faculty: Professor Bradley M. Thompson, who was a member of the first graduating class of the Law School, and who since 1887 has been Jay Professor of Law, resigned at the end of the last college year, and the resulting vacancy in the faculty has been filled by the appointment of Mr. Edgar N. Durfee as Assistant Professor. Mr. Durfee is a graduate of Harvard College, was for one year a student in this Law School, and later graduated from the University of Chicago Law School; after engaging for two and a half years in the practice of law in Detroit, he went to the Law School of the University of Idaho as Associate Professor, where he spent one year before coming to Ann Arbor this fall. Professor Brewster is absent on leave for another year, but will return next fall to resume his work.

PLEADING ESTOPPEL.—The conflict of opinion on the question as to whether it is necessary to plead facts constituting an estoppel *in pais* still continues, if we are to judge from two cases, *John V. Schaefer, Jr. & Co. v. Ely et al.*

(Conn. 1911) 80 Atl. 775, and *Krieg et al. v. Palmer National Bank* (Ind. App. 1911) 95 N. E. 613, decided during the summer just past. In the *Schaefer* case, which involved a suit by a contractor to recover the balance due on a contract for erecting a school building, the Supreme Court of Connecticut, on an appeal by the defendants from a judgment for plaintiff on the ground that the lower court had incorrectly sustained a demurrer to that portion of the defendants' answer which attempted to set up an estoppel *in pais* against the plaintiff, decided that the error was harmless, as an estoppel *in pais*, to be proven as a defense, did not need to be pleaded.

This decision is in accord with several other more or less recent cases decided by the Connecticut court on this point. *Buffalo Forge Company v. Mutual Security Co.* (1910), 83 Conn. 393, 76 Atl. 995; *Bernhard v. Rochester Insurance Company* (1906), 79 Conn. 388, 65 Atl. 134; *Fish, Receiver, v. Smith* (1900), 73 Conn. 377, 387, 47 Atl. 711; *Phumb v. Curtis* (1895), 66 Conn. 154, 173, 33 Atl. 998; *Hawley v. Middlebrook* (1850), 28 Conn. 527. These cases are based largely on the authority of the *Hawley* case, which was decided before the adoption of the code and while Connecticut was still a common law state, and at least one recent Connecticut case has taken a contrary view of the question and required matters of estoppel to be pleaded if they are to be availed of as a defense. *Wilnot v. McPadden* (1905), 78 Conn. 276, 61 Atl. 1069. The writer believes the court makes a mistake in following, as an authority in a matter of pleading, the decisions of the court rendered before the adoption of the code and while the procedure was that generally known as "common law." The pleader in courts of law under the old system made considerable use of fictions and many defenses were allowed to be introduced under the general issue of which the plea itself gave no real notice. The intent of the framers of the code was to abolish fictions and to require the facts constituting the cause of action or defense to be pleaded in such a way as clearly to define the issue and give notice to the respective parties of the matters they would be required to meet. This purpose does not seem to be accomplished by allowing a matter of estoppel to be proven without first having been pleaded. The pleadings under the code system more nearly resemble the pleadings in a court of equity than those of a court of law under the old system. And in those states still making use of the common law system of pleading it is quite generally held that it is necessary to plead estoppel *in pais* in a court of equity in order to prove the same. See 9 MICH. L. REV. 497, 498. If the courts in code states go to cases decided under common law procedure for authority on the necessity of pleading estoppel, they should refer to equity, rather than law, cases, and this is especially so since the rule in equity pleading, that every fact essential to the plaintiff's title to maintain the bill and obtain the relief asked must be stated therein and that all matters relied on as a defense must be stated in the answer in order to be availed of for that purpose, is very similar to those provisions of the code which require the complaint to contain "a plain and concise statement of the facts, constituting each cause of action" and the answer to contain "a statement of any new matter constituting a defense."

The position of the Connecticut court and of the New York courts, which

also have generally held that the defense of estoppel *in pais* need not be pleaded to be proved, is illogical and opposed to the spirit of the code. In the *Krieg* case (the recent Indiana case cited above) the court took the more logical position, and, following the uniform holdings of the Indiana courts, decided that the defendant in order to prove an estoppel *in pais* must have pleaded it in his answer. This rule is supported by the great weight of authority and, it is believed, is of universal application in the code states excepting New York and Connecticut. *Dollar v. International Banking Co.* (1910), 13 Cal. App. 331, 109 Pac. 499; *Moots v. Cope* (1910), 147 Mo. App. 76, 126 S. W. 184; *Fletcher v. Painter* (1909), 81 Kan. 195, 105 Pac. 500; *Union Biscuit Co. v. Springfield Grocer Co.* (1910), 143 Mo. App. 300, 126 S. W. 996; *Smith v. Cleaver* (S. Dak. 1910) 126 N. W. 589; also cases cited in article on "*Pleading Estoppel*" in 9 MICH. L. REV., on pages 577 and 578. G. S.

LIBELS ON PERSON AND ON PROPERTY.—The recent decision in *Cleveland Leader Printing Co. v. Nethersole* (Ohio 1911) 95 N. E. 735, promises to invoke discussion among lawyers as well as condemnation from the ranks of the dramatic profession. Suit was brought by an actress of prominence for a libel written by the dramatic editor of the defendant newspaper. After reviewing the ideas of Dr. Torrey, the evangelist, who had recently expressed his opinion of the evils of the stage, the writer said, "We can pass over without much comment his remarks on the unwholesome atmosphere of the stage and its pernicious effects on the youthful mind. All it needs is the qualification 'sometimes.' One of these times was last week, when the whole Nethersolian repertory failed to provide a helpful situation or one that was not tarred with suggestiveness. All the plays left nasty tastes in the memory. As I recall them, 'The Labyrinth' was the worst of the lot. Cleveland received it frigidly, as is the American way when displeased or disgusted, but when it was produced in London it was hissed so soundly that Miss Nethersole had hysterics."

Both of these last statements were false. Without proof of special damage, the plaintiff recovered a judgment of \$2,500 in the trial court, affirmed on error in the circuit court. Judgment was reversed by the Supreme Court, which held, as a matter of law, that neither statement was libelous *per se*, even though untrue; for "to say that a woman had hysterics does not bring her into ridicule, hatred, or contempt, nor affect her in her trade and profession," and a statement in a newspaper that "a play owned by such woman had been hissed, is prejudicial to property and not to the person." Furthermore the court declares that in commenting upon matters of public interest, the editor of a newspaper acts under a certain privilege.

For the good of the public, the courts have always given great freedom of expression to critics of authors. *Carr v. Hood*, 1 Camp. 355; of artists, *Thompson v. Shackell*, 1 Moody & Malkin 187, 31 R. R. 728, which held it not actionable *per se* to call a painting a "daub"; and of actors, *McQuire v. Western Morning News Co.* [1903] 2 K. B. 100. But even critics must be fair. When comment becomes malevolent, or exceeds the bounds of fair opinion it has been considered libel since the day of *Dibden v. Swan* (1793), 1 Esp.

28, the opinion in which often since has been reiterated and enforced by the courts.

But in fact no issue of privilege, as understood in the law of libel, is ever present in these cases. *Merivale v. Carson*, 58 L. T. (N. S.) 331, 36 Week. Rep. 231. Whether the criticism is "fair" is the question, for when the critic goes too far all privilege vanishes. The Ohio court in the leading case quotes from the famous opinion in *Gott v. Pulsifer*, 122 Mass. 235, 23 Am. Rep. 322 (which involved a libel on the curio known as the "Cardiff Giant") the rule laid down by Judge GRAY: "The editor of a newspaper has the right if not the duty of publishing for the information of the public fair and reasonable comments, however severe in terms, upon anything which is made by its owner a subject of public exhibition, as upon any other matter of public interest." But inadvertently the Ohio court omits what Judge GRAY adds,—“But such latitude does not include false, reckless, and unjustifiable statements.” *Gott v. Pulsifer*, *supra*.

And whatever privilege or liberty may exist, never has been extended to the gratuitous assertion of matters of fact for which there is no foundation. *Morrison v. Belcher*, 3 F. & F. 614, 1 COOLEY, TORTS, Ed. 3, p. 451. Misstatements of facts, such as were made of Miss Nethersole and her play, cannot be deemed logically either comment or criticism. If "The Labyrinth" is an immoral play, no court could censure a fearless dramatic critic for publishing the fact. In an old case, (1808), see note on *Tabart v. Tipper*, 1 Camp. 350, Lord ELLENBOROUGH forcibly said, "That publication I shall never consider libelous which has for its object, not to injure the reputation of any individual, but to correct misrepresentations of fact, to expose a vicious taste in literature, or to censure what is hostile to morality." Yet in *Tabart v. Tipper*, *supra*, he held it actionable falsely to impute to a book-seller the publication of a ridiculous poem. There seems but little distinction between the unfounded statement that a man has published a vicious or foolish book and the false assertion that an actress has appeared in a play so immoral that it was hissed off the boards.

The question of privilege or fairness of criticism, however, is not vital in this case. For the court concedes that part of the words are libelous, but not so *per se*, because they affect only the play and therefore require proof of special damage. *Dooling v. Budget Pub. Co.*, 144 Mass. 258, 10 N. E. 809, 59 Am. Rep. 83; *Kennedy v. Press Pub. Co.*, 41 Hun 422. "As a thing has no rights and as no one owes any duty to a thing, and as no wrong can be done to a thing, language which merely concerns and affects a thing cannot be actionable *per se*." TOWNSEND, SLANDER & LIBEL, Ed. 3, § 204.

Therefore, logically, the fundamental issue seems to narrow down to this—Was the false statement that the play "was hissed so soundly that Miss Nethersole had hysterics," a libel on the play alone, casting no reflections on the leading actress, and causing no injury to her in her profession?

As SPEAR, C. J., well remarks in the leading case, "the distinction between a libel on a person and a libel upon that which is the property of the person is somewhat nice and the decisions illustrating the subject are not consistent one with another." The authorities do not in fact lay down a good working

rule. Most of the cases in the books and all of those cited by the Ohio court illustrating libels on property, as distinct from libels on the person, are of a special class dealing only with a merchant or a manufacturer and the article sold or made. Even there the courts seem not in accord. In *Victor Safe & Lock Co. v. Deright*, 77 C. C. A. 437, a statement that plaintiff's products were cheap safes, etc., was held a libel on property and not on the plaintiff. In *Dooling v. Budget Pub. Co.*, *supra*, it was held that an article stating that a dinner furnished by a caterer on a public occasion was "wretched and was served in such a way that even hungry barbarians might justly object" was not actionable without proof of special damage. But in *Henkel v. Schaub*, 94 Mich. 542, 54 N. W. 293, where plaintiffs owned a blooded stallion for breeding purposes and defendants told various persons that it was nothing but a grade horse, the court held that this was not a libel on the property but a libel on the plaintiffs in their business, and that it was actionable without proof of special damage. Again, the Ohio court, in the principal case, uses as an illustration of libel on property, the comments of various papers on the proofs which Doctor Frederick Cook, the explorer who lately claimed to have discovered the North Pole, offered to substantiate his claim when he was on a lecture tour, in which the writers attempt to show the proofs were bogus. Yet in *Burtch v. Nickerson*, 17 Johns. 217, 8 Am. Dec. 390, it was held a libel on the person to say of a blacksmith, "He keeps false books."

Despite the apparently irreconcilable conflict in the above cases, there seems possible a basis of distinction. In *South Hetton Coal Co. v. The Northeastern News Assn.* [1894] 1 Q. B. 133, where the court held a statement as to the unsanitary condition of cottages let by the plaintiff to its workmen a libel on the plaintiff calculated to injure its business, without averment or proof of special damages, Lord ESNER, attempting to demonstrate the line of distinction, said, "Suppose plaintiff was a merchant who dealt in wine, and it was stated that wine which he had for sale of a particular vintage was not good wine; that might be stated as only to import that the wine of the particular year was not good in whosoever hands it was, but not to imply any reflection on his conduct of his business. In that case the statement would be in regard to his goods only and there would be no libel. But if the statement were so made as to import that his judgment in the selection of wine was bad, it might import a reflection on his conduct of his business and show he was an inefficient man of business. If so, it would be a libel."

Viewed in the light of Lord ESNER's distinction, the decision in the *Nethersole* case is worthy of careful consideration. The statement made no attack on the faulty construction of the play, or upon its lack of literary merit; the words were a libel on the performance, *i. e.*, the drama as presented by Miss Nethersole in London. Can the average play-goer hear the remark that "the play was hissed so soundly that Miss Nethersole had hysterics," without feeling that some reflection has been cast on the actress' judgment, her reputation, and her conduct as a member of her profession?

Moreover, upon close investigation of the authorities, some readers would be likely to come to the conclusion that the difference between a libel on property and a libel on the person, as illustrated by the cases involving man-

ufacturer and article manufactured, does not apply here. The analogy appears hardly close enough, and not quite fair. The issue presents itself—Is a libel as to the performance of a play like "The Labyrinth," an attack on the play as totally distinct from the artist?

The critic attacked the production for baseness, suggestiveness and immorality. If we take into account, as we must, the unity of artist and play in any serious performance, the merging of the personality of the performer into her "part," and the fact that the selection is her own, can we condemn the play, as she plays it, without also casting some reflection upon her? Especially in dramas of such type, often the interpretation by the actor is a factor as vital as the inanimate product of the author. "Carmen," in the hands of a lover of the beautiful, is the highest art; yet it can be, and has been, made a vulgar show. Whether we can hiss the immoral "thing" so that the person goes into hysterics, and cast no stigma on her, is a question open to nice distinction. At all events, the case under discussion will not settle for most legal thinkers the exact difference between a libel on property and a libel on its owner.

S. W. D.

THE CONFLICT BETWEEN A PATENTEE'S RIGHT TO MONOPOLY AND A STATE ANTI-MONOPOLY STATUTE.—A corporation doing intrastate business is subject to the anti-trust laws of a State wherein it does business even though its principal violation of such laws is a combination of firms dealing chiefly in articles covered by United States patents. The State under its laws may withdraw the right of such a corporation to do business within its borders. This view was upheld in *State v. Creamery Package Mfg. Co.*, 132 N. W. 268, wherein the court affirmed its earlier decision, reported in 110 Minn. 415, 126 N. W. 126, 623, 136 Am. St. Rep. 514.

There is a sharp conflict of authority in regard to a restraint on articles all of which are patented. The same division is carried into the conflict when the presence of patented articles is claimed to leaven the entire transaction so as to legalize it in its entirety.

The view of the authorities holding that the virtue of a patent grant prevents the State from interfering with the patentee is well expressed in the words of a federal court:

"In consideration that a patentee will give his invention to the public with full drawings and specifications, so as to enable the public to freely use it at the expiration of seventeen years, a grant is made to him of the exclusive right to the monopoly of the patented article during that time. The rights so acquired by the patentee under a grant from the United States are entirely inconsistent with the patentee being made subject to the provisions of the anti-trust laws of the several states." *Columbia Wire Co. v. Freeman Wire Co.*, 71 Fed. 302; *Edison Electric Light Co. v. S. M. Electric Light Co.*, 53 Fed. 592; *Strait v. Nat. Harrow Co.*, 51 Fed. 819; *American Soda Fountain Co. v. Green*, 69 Fed. 333.

Or to view the question from the other side, as expressed in *Grover & Baker Sewing Machine Co. v. Butler*, 53 Ind. 454, 21 Am. Rep. 200 (at page 204) if the State were not barred from interfering, "it is easy to see that a

State could impose terms which would result in a prohibition of the sale of this species of property within its borders, and in this way nullify the laws of Congress which regulate its transfer, and destroy the power conferred on Congress by the Constitution." *Accord: Walter A. Wood Mowing Machine Co. v. Caldwell*, 54 Ind. 270, 23 Am. Rep. 641; *Taylor v. Blanchard*, 13 Allen 370, 90 Am. Dec. 203; *U. S. Seeded Raisin Co. v. Griffin & Kellogg Co.*, 126 Fed. 364.

Probably the strongest case which seems to indicate that the States cannot interfere is *Bement v. National Harrow Co.*, 186 U. S. 70. In this case the United States Supreme Court intimates that the rule of such cases as *Patterson v. Kentucky*, 97 U. S. 501, does not apply except to special cases. The court holds the acquisition of patents to be legal. Yet as suggested in *Hartman v. J. D. Parks & Sons Co.*, 145 Fed. 358, there is a distinction between the case of a restraint by the patentee, resulting through the exercise of patent rights, and the case of a combination of firms, resulting in a restraint of a *business* involving patent rights, as in the principal case. Most of the cases which hold with the *Bement* case, are distinguishable on this ground. They follow the early case of *Heaton-Peninsular Co. v. Eureka Specialty Co.*, 47 U. S. App. 146, which is a case wherein a single patentee was allowed to continue an exclusive control of his invention by restrictions on the user thereof.

It is, moreover, noticeable that the cases which seemingly go contrary to the principal case, are cases concerning *patent rights*. The Minnesota case concerns articles of commerce, both patented and otherwise. And as was said in *Patterson v. Kentucky*, *supra*, in the case of an oil patent in regard to which the State regulation was held valid, the State cannot regulate a patent right, "but when the fruits of the invention, or the article made by reason of the application of the principle discovered, is attempted to be used or sold within the jurisdiction of a State, it is subject to its laws like other property." Or, as stated in *State v. Telephone Co.*, 36 Ohio St. 296, 38 Am. Rep. 583, "the right to enjoy a new and useful invention may be secured to the inventor and protected by national authority against all interference; but the use of tangible property which comes into existence by the application of the discovery is not beyond the control of the State legislation simply because the patentee acquires a monopoly in his discovery."

The Constitution says, Art. I, § 4, that Congress shall have the power "To promote the Progress of Science and useful Arts, by securing for limited times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." The clause is a general welfare clause. Clearly, it is not within the spirit of this clause any more than of any other part of the Constitution, to hamper the development of inventions which are advantageous to the public. It gives Congress the right to "promote the progress of science and the useful arts" by granting patents. As said in *Warner v. Smith*, 13 App. D. C. 111, at page 114, "the provision, it will be noticed, is not to benefit the inventor primarily, but the public. * * * The interests of the public are therefore, the primary consideration and to these the privileges granted to inventors are secondary and subordinate." Or as said in *Hoe et al. v.*

Knab et al, 27 Fed. 204, where a patentee failed to use his invention for a long period, whereupon someone else did use it, that "under a patent which gives a patentee a monopoly, he is bound either to use the patent himself or to allow others to use it on reasonable or equitable terms." Clearly, then the Constitution means that patent rights shall be used for the benefit of the public. And the laws of Congress have always been pointed that way.

A grant under the patent clause does not mean an unlimited right to go ahead absolutely untrammelled by any restraint. If this were the case, the patent laws would contain more rules and regulations for the use of patents. They would be more than mere directory laws. *People v. Russell*, 49 Mich. 517, 14 N. W. 568, 43 Am. Rep. 478; *State v. Cook*, 107 Tenn. 499, 62 L. R. A. 174. *Contra*: *State v. Butler*, 71 Tenn. (3 Lea) 222. As it is today, letters patent are issued as a matter of course to any person who applies by sending in the papers and the fee, and swearing that he is the inventor of the article. Congress makes no attempt to regulate, yet it is perfectly obvious that some patented articles necessarily require regulation and legislation, as for example, a patented inflammable oil. *Patterson v. Kentucky*, 97 U. S. 501; *Jordan v. Overseers of Dayton*, 4 Ohio 295.

If the patent from the government excluded the State, the State could not require the patentee to obtain a license before selling the right to make or sell the patented article, as in *Burns v. Sparks*, 26 Ky. Law Rep. 688; *Nunn v. Citizens Bank*, 107 Ky. 262. Nor could a State limit the price which a telephone company might charge for its patented article or facilities. *Hockett v. State*, 105 Ind. 250; *State v. Telephone Co.*, 36 Ohio St. 296, 38 Am. Rep. 583. *Contra*: *A. R. Telephone Co. v. Conn. Telephone Co.*, 49 Conn. 352. Nor could a State tax any patented property, or subject the incomes of patents to a general income tax, if the patent clause of the Constitution took the patented article entirely outside of any control by State laws or regulations.

By the grant of letters patent, a person is given no more right to make, use or vend an article than he possessed before. "The sole operation of the statute is to enable him to prevent others from using the product of his labors without his consent; but his own right of using is not enlarged or affected." *State v. Telephone Co.*, *supra*; *Bloomer v. McQuewan*, 14 How. 539, 14 L. Ed. 532; *Continental Paper Bag Patent Case*, 210 U. S. 405, 424, 52 L. Ed. 1122. Existing rights are enlarged only in so far as they affect third parties. "By the terms of the patent, he has the exclusive right to make, use and vend. The right to make, use and vend, he has without the grant of letters patent. When we say that a patent grants an 'exclusive right,' we do not mean that the right to make, use and vend is granted, but only that the patentee's existing right is made exclusive by the grant." *Blount Mfg. Co. v. Yale & Towne Mfg. Co.*, 166 Fed. 555, 558.

But while the patent has this effect in respect of third parties, it does not necessarily follow that the public is deprived of control over the patentee or over patented articles. Consequently the grant of a patent does not give the patentee a right to violate the laws of any State. "While it is true that letters patent secure a monopoly in the thing patented, so that the right to make, vend, or use the same is vested exclusively in the patentee,—for a lim-

ited time—it is not true that a right to make, vend or use the same in a manner which would be unlawful except for the letters patent thereby becomes lawful under the act of Congress and beyond the power of the States to regulate and control." *State v. Telephone Co. supra*. "Congress never intended that the patent laws should displace the police powers of the States, * * * Whatever rights are secured to inventors must be enjoyed in subordination to this general authority of the State over all the property within its borders." *Webber v. Virginia*, 103 U. S. 344. And the same court in *Patterson v. Kentucky, supra*, said, page 503, in speaking of patent rights: "Obviously this right is not granted or secured without reference to the general powers which the several States of the union unquestionably possess over their purely domestic affairs, whether of internal commerce or of police." In the same case the court quoted with approval the opinion of *Jordan v. Overseers of Dayton*, 4 Ohio 295, where the court said, "an attempt by the legislature in good faith, to regulate the conduct of a portion of its citizens in a matter strictly pertaining to its internal economy, we cannot but regard as a legitimate exercise of power, although such law may sometimes indirectly affect the enjoyment of rights flowing from the federal government."

The principal case follows what seems to be the view sustained by the greater weight both in authority and logic. That a combination of business interests may be a restraint of trade even where patent rights are concerned, is clearly shown in *National Harrow Co. v. Hench et al*, 83 Fed. 36, 27 C.C.A. 349, 39 L. R. A. 299; *National Harrow Co. v. Quick et al*, 67 Fed. 130. In those cases the company bought up patents on a certain kind of patented harrow, and thus controlled the market. And in *Mines v. Scribner et al*, 147 Fed. 927, and a number of similar cases, it was held that a combination affecting the sale of books by publishers to middlemen was a restraint as meant by the federal anti-trust law, even though most of the books so sold were copyrighted. And such a restraint, when interfering with local trade, would be a subject for local laws. For generally speaking, the "express grant of power to regulate commerce among the States has always been understood as limited to its terms; and as a virtual denial of any power to interfere with the internal trade and business of separate States." *United States v. Dewitt*, 9 Wall. 41. "The power of Congress is only to define the right of property; it does not extend to regulating the use of it; that must be exclusively of local cognizance." KENT in *Livingston v. Van Ingen*, 9 Johns. 507, 581.

Probably no better summary of the matter could be made than that expressed in *Webber v. Virginia*, 103 U. S. 344-347, where the court says "The legislation respecting the articles which the State may adopt after the patents have expired, it may equally adopt during their continuance. It is only the right to the invention or discovery—the incorporeal right—which the State cannot interfere with. Congress never intended that the patent laws should displace the police powers of the State, meaning by that term those powers by which the health, good order, peace and general welfare of the community are promoted. Whatever rights are secured to inventors must be enjoyed in subordination to this general authority of the State over all property within its limits."

V. R. J.