# DEPARTMENT OF EQUITY.

EDITOR-IN-CHIEF,
RICHARD C. McMURTRIE, LL.D.
Assisted by
SYDNEY G. FISHER, JOHN DOUGLASS BROWN, Jr.,
ROBERT P. BRADFORD.

## CORLISS *v.* E. W. WALKER CO.[1] UNITED STATES CIRCUIT COURT, DISTRICT OF MASSACHUSETTS.

A court of equity has no jurisdiction of a suit to restrain respondents from publishing a biography of complainant or a member of complainants' family, where such person is a public character, *e. g.*, one who holds himself out as an inventor, and whose reputation as such becomes world-wide.

This was a suit by the widow and children of G. H. Corliss, to enjoin the publication and sale of a biographical sketch of the deceased. Judge Colt placed his opinion upon two grounds. He maintained that the foundation of the jurisdiction of a court of equity is civil property, and that, therefore, such court has no jurisdiction to restrain even defamatory publications, and still less, such publications as that in the present case, which was not even suggested to be libelous, or even untrue.

To quote from the opinion:

"The bill does not allege that the publication contains anything scandalous, libelous or false, or that it affects any right of property, but the relief prayed for is put upon the novel ground that such publication is an injury to the feelings of the plaintiffs and against their express prohibition. The counsel for plaintiffs put their case upon the ground that Mr. Corliss was a private character, and that the publication of his life is

[1] Reported in 57 Fed. Rep. 434.

an invasion of the right of privacy, which a court of equity should protect. . . . I cannot assent that Mr. Corliss was a private character. He held himself out to the public as an inventor, and his reputation became world-wide. He was a public man, in the same sense as authors or artists are public men. It would be a remarkable exception to the liberty of the press if the lives of great inventors could not be given to the public without their consent while living, or the approval of their family when dead. But whether Mr. Corliss is to be regarded as a private or public character (a distinction often difficult to define) is not important in this case. Freedom of speech and of the press is secured by the Constitution of the United States and the constitutions of most of the States. This constitutional privilege implies a right to freely utter and publish whatever the citizen may please, and to be protected from any responsibility for so doing, except so far as such publication, by reason of its blasphemy, obscenity or scandalous character, may be a public offence, or by its falsehood and malice, may injuriously affect the standing, reputation or pecuniary interests of individuals: Cooley on Constit. Law (6 Ed.), 578. In other words, under our laws, one can speak or publish what he desires, provided he commits no offence against public morals or private reputation."

INJUNCTIONS AGAINST PUBLICATIONS INTRUDING UPON PRIVACY.

Four years ago, in an article entitled "The Right to Privacy," in 4 *Harvard Law Review*, 193, this entire subject was very admirably and exhaustively discussed.

The view there advanced, and ably maintained, was that the right to privacy is a legal right, distinct from the rights of property and of reputation; and that this right should be enforced by the courts, either in an action for damages, or, in a proper case, by an injunction to prevent the publication of anything which unjustifiably intrudes upon privacy.

This article leaves little to be said, and it is here proposed only to consider the cases which have been decided since it was written, presenting, as they do, a difficulty not discussed in the article, a new stumbling block in the way of the enforce-

ment of this right by injunction, namely, the constitutional provision for the "freedom of the press."

The reasoning of the above-mentioned article has received judicial approbation in two New York cases.

*Schuyler* v. *Curtis*, 30 Abb. N. C. 376; 24 N. Y. Supp. 512 (1893), was a case where an injunction was granted, at the suit of the near relatives of a deceased person, to restrain the erection and exhibition of a statue of the deceased, it being established that the exhibition would cause the complainants pain and distress. The injunction was granted because the injury was permanent or continuing in its nature, and, unlike a libel, it would be impossible to ascertain the damage which might be caused.

In other words, the court of equity intervened, because otherwise the complainants would have been left without any remedy.

In *Marks* v. *Jaffa*, 26 N. Y. S. 908, (1893), the principle was extended to the granting of an injunction against the publication of a picture of the plaintiff in a newspaper, with an invitation to readers of the paper to vote upon the question of the popularity of plaintiff as compared with another person, whose picture was also published.

The court there referred expressly to the article in the *Harvard Law Review*, and said: "The action may seem novel, but there can be no question about the plaintiff's right to relief, irrespective of the amount of damages he might recover at law (citing *Schuyler* v. *Curtis*, *supra*). If a person can be compelled to submit to have his name and profile put up in this manner for public criticism, to test his popularity with certain people, he could be required to submit to the same test as to his honesty, or morality, or any other virtue or vice he was supposed to possess. Such a wrong is not without its remedy. No newspaper or institution, no matter how worthy, has the right to use the name or picture of any one for such a purpose without his consent. . . . Private rights must be respected, as well as the wishes and sensibilities of people. When they transgress the law, invoke its aid, or put themselves up as candidates for public favor, they warrant criticism,

and ought not to complain of it; but where they are content with the privacy of their homes, they are entitled to peace of mind and cannot be suspended over the press-heated gridiron of excited rivalry and voted for against their will and protest."

The case of *Schuyler* v. *Curtis* was urged in argument in the principal case, but was dismissed by the court with the remark that it was not in point—that the right of publication was not there in question.

Indeed, this view seems to be borne out by the words of Ingraham, J., (30 Abb. N. C. 376): "Nor does the act of these defendants come within the provision of the State Constitution which secures to each citizen the right to freely speak, write and publish his sentiments on all subjects. The defendants can freely speak, write and publish their sentiments as to Mrs. Schuyler without exhibiting her statue to the public."

It would seem a trifle difficult to distinguish, in principle, between the erection of this statue, and the printing of a portrait in a newspaper. Should this last be regarded as within the privileges secured by the "freedom of the press?"

In *Marks* v. *Jaffa* (*supra*), apparently, the point was not raised.

If the publication of a portrait can be restrained, why not, also, a printed description of a person or of his life?

But this further step, the court, in the principal case, refused to take.

It remains to consider the two grounds for this refusal.

First, equity will only intervene in cases where property rights are concerned. An injunction will not be issued to restrain even a libelous publication.

This proposition is supported by a long list of authorities: *Kidd* v. *Horry*, 28 Fed. Rep. 773; *Boston D. Co.* v. *Florence*, 114 Mass. 69; *Whitehead Co.* v. *Kitson*, 119 Mass. 484; *N. Y. Juvenile, etc., Co.* v. *Roosevelt*, 7 Daly, 188; *Maugher* v. *Dick*, 55 H. Pr. 132; *Life Assn.* v. *Boogher*, 3 Mo. Ap. 173; *Southey* v. *Sherwood*, 2 Mer. 435; *Gee* v. *Pritchard*, 2 Swanst. 402; *Mulkern* v. *Ward*, L. R. 13 Eq. 619; *Lawrence* v. *Smith*, Jacob. 471; *Wetmore* v. *Scovell*, 3 Ed. Ch. (N. Y.) 515; *Fisher* v. *Apollinaris Co.*, L. R. 10 Ch. 297;

*Prudential Ins. Co.* v *Knott*, 10 Ch. Ap. 142; *Mayer et al.* v. *Journeymen Stone Cutters' Assn.*, 20 Atl. 492 (N. J., 1890); *Townshend on Slander and Libel*, 4th Ed. 417 a., *et. seq.*, and notes, with cases there cited; *High on Injunctions*, 3d Ed., § 1015; *Kerr on Injunctions*, *502.

The English cases to the contrary, have either been disapproved by later decisions, or else seem to be based upon special statutory provisions, extending the jurisdiction of the court of chancery. See *Dixon* v. *Holden*, L. R. 7 Eq. 488; *Springhead Spinning Co.* v. *Riley*, L. R. 6 Eq. 551; *Prudential Ins. Co.* v. *Knott* (*supra*); *Thorley's Cattle Food Co.* v. *Massam*, 14 Ch. Div. 763; *Thomas* v. *Williams*, Id. 864; *Loog* v. *Bean*, 26 Ch. Div. 316; Bradley, J., in *Kidd* v. *Horry* (*supra*).

The case of *Croft* v. *Richardson*, 59 H. Pr. 356, where an injunction was issued against the publication of a trade-libel, seems to stand alone, and is based upon insufficient authority.

In *Brandreth* v. *Lance*, 8 Paige, 24, the court said: "The utmost extent the court of chancery has ever gone in restraining any publication, has been upon the principle of protecting the right of property." Since *Schuyler* v. *Curtis* and *Marks* v. *Jaffa*, this is no longer true; those cases have furnished precedents, if no more.

The court in *Singer Co.* v. *Domestic Co.*, 49 Ga. 70, stated the law in clear and unmistakable terms:

"The general rule is that to get an injunction you must show the infringement of a property right. It is well settled that an injuncion will not be granted to restrain slander or libel of title or reputation: 6 Simm. 297; 11 Beav. 112; 11 Simm. 582. Not that it is not wrong, not that the wrong might not be irreparable, but simply because courts of chancery, in the exercise of the extraordinary powers lodged in them, have uniformly refused to act in such a case, leaving parties to their remedy at law. Equity, it must be remembered, will not enjoin every wrong. There are injuries done by one man to another which no law will remedy. Telling lies, unless those lies be of a peculiar character, is one of such injuries. But there are very many wrongs, wrongs recogniza-

ble and capable of redress at law, that yet are not such wrongs as a court of equity will enjoin. Libel and slander, however illegal and outrageous, will not be enjoined. This is the settled rule. It is true that courts of equity constantly refuse to lay down any absolute limitation to their power to issue this writ. But this only means that cases coming within the principles on which the court has long acted, are not beyond its power simply because the facts are novel or the injury peculiar. The principle is, that to authorize the writ there must be an irreparable, expected injury to property right."

Such language prompts a fear that the doctrine of the principal case is the true one, that the mere absence of any other remedy is not enough to warrant the intervention of equity, and that the New York courts, in their desire to accomplish a salutary purpose, have overstepped the legitimate bounds of their jurisdiction, and entered the political field.

Turning to the other ground of Judge Colt's opinion, the question is whether the constitutional protection of the "freedom of the press" presents an insuperable obstacle to the use of the injunction to restrain publications.

A collection of the provisions of the various State Constitutions will be found in Cooley's *Constitutional Limitations*, 510, n. 1. That of New York, Art. I, § 8, is typical: "Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press."

There can be no question that the real motive for the insertion of such provisions in the various constitutions, as in that of the United States, was to prevent a political censorship of the press, to leave all matters of public interest and importance open for free discussion, and not to force upon private individuals a distasteful publicity at the hands of gossiping newspapers, leaving them to the very cold comfort of an action at law for damages.

See *Comm.* v. *Blanding*, 3 Pick. 304; *Respublica* v. *Dennie*, 4 Yates, 267; *Jones* v. *Townsend*, 21 Fla. 431.

If the existence of the legal right to privacy be granted, then

this constitutional provision, literally construed, must make justice a mockery in many instances; for it is obvious that the only possible safeguard against unwarrantable publications is by way of prevention, and that for most of them, damages would be no recompense at all, even if a court of law had power to award such damages.

Yet, there stands the provision, and, thus far, it has not been explained away.

In *Marks* v. *Jaffa* (*supra*), the constitutional question seems to have been ignored; in *Schuyler* v. *Curtis* (*supra*), it was avoided by a strict interpretation of the word "publication;" while in the principal case it furnished a conclusive argument against the granting of the relief sought for.

A decision from the court of some other State will be awaited with great interest. S. D. M.