PROTECTION OF PROPERTY INTERESTS IN EQUITY.*

The use of maxims or proverbs to describe the operation of legal rules in English law has been ascribed to an exaggerated respect for Roman legal science,[1] but an examination of their utility leads one to the conviction that they are frequently used as pedantic cloaks for careless thinking or lack of application to detail. To explain the ramifications of the doctrine of equitable conversion, by which land for certain purposes is regarded as personal property, on the ground that equity considers as done that which ought to be done is as inaccurate and dangerous as the adoption of the proverb "do not cross your bridges until you reach them," as a guiding philosophy of life. In many situations equity does not consider as done that which ought to be done and, you know that you should cross some of your bridges before you reach them. One could forgive the use of maxims if they were merely inaccurate; but they are dangerous, since in new situations courts are apt to seize upon a stereotyped maxim and extend its application unduly without appreciating the real interests involved which are calling for adjustment. The free development of Equity suffered because of the predominance of neat sounding maxims in that field. The maxim "Equity never aids a volunteer" hindered the clear development of trusts for over a century and to-day there is no maxim in Equity which could possibly give to a student a more inaccurate conception of equitable principles.

There is also another maxim which has retarded and is tending to retard the development of Equity as a liberal, justice-doing body of law—Equity follows the Law—, meaning that equity is merely a gloss on the common law and not a body of appellate rules. In its proper setting as explanatory of the operation of uses and trusts the maxim is intelligible; in those situations Courts of Chancery recognize the common law title but direct that the common law title must be held for the benefit of some one else who has the equitable title. Equity follows the common law to the extent of permitting the creation of similar types of estates in land, e.g. equitable fee simples, fee tails, life estates, and tenancy by the curtesy. But even as to real property the maxim is but a half truth, because, apart from statute, there is no dower in equitable estates and equity does not follow the common law as to the technical rules relating to abey-

* An address delivered before the Law Club of the University of Toronto.
[1] Pound—Maxims of Equity (1921), 34 Harvard L.R. 809.

ance of seisin. Hence, should such a half truth as to the law of real property, with its emphasis on the interests of security and certainty be applied as a whole truth to the law of torts? Does it necessarily follow, in every case, that because a common law court refuses to give damages for some injury that a Court of Chancery should refuse to use its preventive device of injunction for the purpose of doing justice? The devices by which a court of Chancery acts are in many cases more advantageous, more efficient, than the devices of the common law. The common law remedy of damages is imperfect—the calculation of damages for tortious injuries is in the last analysis a mere guess, and although you will find common law judges boasting of the complete adequacy of the common law remedy, nevertheless sometimes common law courts withhold their remedy because of the realization that an award of damages can not achieve justice. Consider, for example, a debated field of the law of torts—whether a right to privacy exists. Some common law jurisdictions recognize a right to privacy; others do not, feeling no doubt that a sum of money ought not to be awarded an opera singer whose name and face is used to advertise a particularly fragrant cigar. The injury which she has suffered is, after all, hardly capable of estimation in damages; in damages lies a danger of extortion, fictitious actions, "shakedowns." But does it follow that because damages are refused a Court of Chancery should refuse an injunction merely because of the inadequacy of the common law remedy? In other words, may not an act be a tort in Equity without being considered a tort at law? A blind application of the maxim that Equity follows the Law would lead to the result that in such cases an injunction must be refused. The House of Lords indicated in *White* v. *Mellin*[2] that an injunction would be given only in a case where damages could be given. Lord Watson said, "Damages and injunction are merely two different forms of remedy against the same wrong; and the facts which must be proved in order to entitle a plaintiff to the first of these remedies are equally necessary in the case of the second." In other words, in Lord Watson's opinion, there is no separate equitable law of torts.

Nevertheless, unfair competition cases such as *White* v. *Mellin* lend themselves peculiarly to injunctive treatment. The essence of the injunctive relief is that the validity of the unfair competition is determined in the action for an injunction; the defendant henceforth knows his position, he knows exactly to what extent he can criticize a competitor's goods without incurring liability. On the other hand, damages are essentially punishment for past conduct, for conduct

[2] [1895] A.C. 154.

of which a defendant has no precise means of judging the validity, and courts, in business cases, may feel a certain reluctance in awarding damages under such circumstances. Courts in business competition cases are inclined towards an attitude of *laissez faire*. Provided the statements are not fraudulent, puffing of goods by a merchant is regarded as fair competition. A court might well hesitate to award damages for statements by a merchant which lie midway between the extremes of fair and unfair competition yet would not hesitate to lay down a standard for future conduct by the injunctive method.

Despite the observations of the Law Lords in *White* v. *Melin* (*supra*), the conception of separate equitable torts is recognized by English law. For example, the commission of waste by a life tenant is a tort. Where property is settled on a tenant for life without impeachment of waste the common law courts held that under such protecting phrase the life tenant could perpetrate any kind of waste: yet the Court of Chancery held that even under such a phrase it would enjoin the commission of purely malicious or spiteful waste. In other fields, equity uses its own distinctive methods such as specific performance, subrogation, constructive trusts for the purpose of correcting the inadequacies of the common law.

Although the maxim that Equity follows the Law has some substance when applied to the working out of the details of equitable interests in land, it is unintelligible and dangerous when applied in full strength to the law of torts. In fact, as we have seen, it has not been so applied, yet in some cases Courts have seized upon the maxim and have acted inequitably by blindly following the maxim. Whether Equity should follow the law of torts is a problem that depends on the nature of the tort under consideration. Some situations lend themselves peculiarly to the injunctive treatment—as to those situations the mere refusal of a common law court to do justice because of the clumsiness of its weapon ought not to afford a Court of Chancery a reason for withholding its devices, which can neatly and fairly adjust the competing interests involved.

In three Ontario cases equitable relief by way of injunction was refused on the ground that equity only interferes for the protection of property interests and that no property interests were involved in these cases. In *Rowe* v. *Hewitt*,[3] a member of a team playing in the Ontario Hockey Association asked for an injunction restraining the officers of the association from refusing to give him a playing certificate. A Divisional Court held that he could not obtain an injunction because the interest one has in playing a game of hockey

[3] (1906), 12 O.L.R. 13.

is not a property interest. In *Warren* v. *Karn*,[4] a purchaser of an organ wrote a letter to the defendant praising the workmanship of the plaintiff, who had supervised the construction of the organ while in the defendant's employ. Subsequently, the plaintiff left the defendant and started an organ business of his own; the defendant used the letter of praise in his advertisements, deleting the name of the plaintiff so as to make it read as if the praise had been directed solely to the defendant. The plaintiff asked for an injunction restraining the defendant from using the letter in a garbled manner, but the court refused relief because the plaintiff had no property interest in the words of praise used in the letter. In another case, *McCharles* v. *Wylie*,[5] the Court refused to intervene in a church dispute because no property interest was involved. But what is a property interest? Is the conception properly confined to such orthodox interests as land, choses in action or personal chattels? Is the right of John Smith to call himself John Smith property? Is the good reputation of a citizen property? Is the right of a married man to the association of his wife a property right? Are not all rights property? To say that equity will interfere to protect only property interests is to say that equity will interfere only to protect rights. Thus, as a general guiding principle of equitable interference the property interest-conception is worthless. Without any analysis of the property interest theory some Courts of Chancery have enunciated it, as a guiding principle, limiting their jurisdiction.

It is submitted, however, that an examination of the cases dealing with the property interest theory leads one to the following conclusions:

(1) that, in the early cases dealing with this supposed limitation, the refusal of a Court of Chancery to interfere on the ostensible or professed ground of a want of property interest can be definitely traced to other more powerful causes;

(2) that many enlightened courts which profess to protect only orthodox property interests are very prone to find such a property interest in a given case;

(3) that the danger in the application of the limitation lies in the circumstance that unenlightened Courts are apt to apply it as a limitation of their jurisdiction, except in orthodox property interest cases, even though the situation is one to which the injunctive method is peculiarly appropriate.

Before the Judicature Act the English Courts refused, and many American courts even to-day refuse, to enjoin a libel. In 1875, in

[4] (1907), 15 O.L.R. 115.
[5] (1927), 32 O.W.N. 202.

Prudential Assurance Co. v. *Knott*,[6] the Court of Appeal in Chancery refused to issue an injunction against a libel because no property interest was involved. This was expressive of the orthodox English view as to injunctions against libels; there was one glorious dissent as to this, that of Malins, V.C., who saw the foggy nature of the property conception. In *Dixon* v. *Holden*,[7] he said:

> I am told that a court of equity has no jurisdiction in such a case as this, though it is admitted it has jurisdiction where property is likely to be affected. What is property? One man has property in lands, another in goods, another in a business, another in skill, another in reputation; and whatever may have the effect of destroying property in any one of these things (even in a man's good name) is, in my opinion, destroying property of a most valuable description.

It is submitted that there were other viewpoints and prejudices which operated on the minds of the majority of the Chancery judges compelling them to the opinion that they should not intervene in cases of libel and slander. The struggle for freedom of speech in England was a struggle against prior restraint, license, and censorship. Coupled with the conception of freedom of speech there arose the legal attitude that a man should be permitted to publish whatever he desires and have to pay damages if it turned out to be libellous. The natural prejudice against administrative injunctive interference with publications wrongly influenced the Chancery judges against the advisability of judicial injunctive interference. Viewed in its true light the conception of freedom of speech does not prohibit the granting of an injunction against libel after due process. This misconceived attitude, although it has spent its force in England, still has its influence on constitutional decisions in the United States. The Supreme Court of the United States[8] a few weeks ago declared that a Minnesota statute which conferred on the courts of that state the power to grant injunctions in libel actions was unconstitutional as offending against the free speech provisions of the constitution. Moreover, Courts of Chancery were influenced against interference in libel cases by the spirit of Fox's Libel Act, which provided that in criminal libels the question of libel or no libel was one solely for a jury. This attitude that all questions of libel are questions for a jury exercised a restraining influence on the minds of Chancery judges. Fortunately since the Judicature Act in England and in Ontario these influences have lost their power and to-day the courts see no difficulties in restraining by injunction the publication of libels.

[6] 10 Ch. App. 142.
[7] (1869), L.R. 7 Eq. Cas. 488.
[8] *Near* v. *Minnesota* (1931), 283 U.S. 697, 51 Sup. Ct. 625.

An examination of some other situations in which Courts of Chancery gave relief by injunction will show that, in fact, their interference or non-interference depended on considerations and balancing of interests apart from any question as to the existence of an orthodox property interest. In *Gee* v. *Pritchard,*[9] Lord Eldon restrained a recipient of private letters from publishing them. The injunction was at the suit of the estate of the sender. Relief could not possibly have been given on the basis of an orthodox property interest. The estate had not possession of the paper on which words were written; they had nothing saleable, nothing assignable, nothing which yielded or could yield any profit. Any interest which they had in the non-publication of the letters had none of the characteristic incidents of tangible property. Relief was given solely on the ground that what the defendant intended to do by publishing the private letters was a breach of confidence. To reach a just result Lord Eldon did not permit himself to be thwarted by any mystic idea of property interest. Similarly courts of Chancery give injunctive relief against the publication of trade secrets by those to whom the secret has been confided. The real basis of the relief in such cases is and must be the breach of a fiduciary obligation. Courts of Chancery in order to protect uncopyrighted literary efforts from publication in breach of trust or confidence have found no difficulty in saying that there is a property interest involved.[10] To avoid the consequences of the conception, enlightened courts in order to do justice have been able to satisfy themselves that a property interest in fact exists. This is well illustrated by the cases dealing with trade marks and trade names. For a court of Chancery to refuse to enjoin the infringement of a trade mark would be to do injustice, since the common law remedy in such situations, involving guesses as to loss of profits, is hopelessly inadequate. The real basis for interference in such cases is unjust and unfair competition amounting to a fraud. Equity uses the injunction to correct a fraudulent situation in these cases just as it uses a constructive trust to correct fraudulent situations involving land. Yet Equity had to circumvent the bugaboo of the property interest. Thus Lord Cranworth said:[11]

> The true principle therefore would seem to be that the jurisdiction of the Court in protection given to trade marks rests on property.

But has a man an orthodox property interest in a trade mark? If so, he only has it as appurtenant to a business he is carrying on. The real basis of interference in trade mark cases is fraud; the finding of

[9] Swanston 402.
[10] See for example *Abernethy* v. *Hutchison,* 3 L.J. Ch. O.S. 209.
[11] In *Leather Cloth Co.* v. *American Leather Cloth Co.* (1863), 4 DeG. J. & S. 137.

a fictitious orthodox property interest was only to circumvent the application of an inaccurate and misleading concept which had found some footing in the language of the courts.

Courts of Chancery do protect interests other than orthodox property interests; but in some cases they profess not to do what in fact they are doing. The danger is that courts administering Equity as they come to deal with novel interests, with intangible interests of increasing importance under our mode of life, may be befogged in their attitude by a misconception that their power is limited to the protection of tangible recognized rights. Problems are being presented to courts as to whether the interest of a man in his own privacy ought to be protected. Should the law interfere to protect a man in the exercise of purely social functions, e.g., membership in a club, or in his religious activities? Should a Court of Chancery protect a man or a woman in the use of her name? Are marital privileges such as ought to be translated into marital rights? To refuse to enjoin an invasion of privacy on the ground that no property interest is involved,[12] is to lose sight of the real problem involved. In *Baumann* v. *Baumann*,[13] the New York Court of Appeals had to decide whether it should at the suit of the lawful wife of Mr. Baumann grant an injunction restraining her husband's mistress from calling herself Mrs. Baumann. The Court thrust aside the suggestion that it could interfere by injunction only to protect orthodox property interests and granted the injunction. I do not suggest, of course, that a Court of Chancery should interfere to protect all interests of personality. There are some fields of human endeavour that even the efficient devices of a Court of Chancery can not reach; Love is perhaps one of these. I am not suggesting that our courts should go quite as far as a Texas Court went when it made an order at the suit of a husband restraining another man from alienating his wife's affections.[14] I am merely suggesting that as these novel situations arise courts administering equitable principles should not be hampered in their intelligent consideration of the balancing of the competing interests involved by a misconception that their jurisdiction is limited to the protection of orthodox property interests.

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[12] *Chappel* v. *Stewart* (1896), 82 Maryland Rep. 323.
[13] (1929), 250 N.Y. Rep. 382.
[14] *Ex parte Warfield* (1899), 40 Texas Criminal Appeals 413.