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precarious business of reporting on the reputation of another.

It is submitted that no present day court would, or should, attempt to discredit the function of the mercantile agency or its important role in our mercantile structure. Perhaps future decisions will formulate a somewhat modified rule in determining whether the defense of conditional privilege should be afforded mercantile agencies—a rule that would exact from the trained credit reporter a special standard of care, that would determine liability by judging the reasonableness of the report in light of the facts as they ought to have appeared to the trained credit reporter; a rule, that is, which would set apart the mercantile agency from the ordinary individual.

PROTECTION OF MARITAL RELATIONS BY INJUNCTION

A field in which there has been great differences in result is that of equitable intervention in the realm of marital relations to protect personal rights. The cases to be considered are to be distinguished from those cases which involve property rights.¹

The group of cases to be discussed presents a situation wherein a spouse is seeking to invoke the aid of equity to enjoin a third party or parties from alienating the affections of his or her spouse. A much noted decision relative to this issue is that of *Snedaker v. King*,² wherein a wife sought to enjoin a female defendant from alienating the affections of the former's husband. The majority per curiam opinion refused to issue the injunction, stating that such an extension of the jurisdiction of equity to the protection of personal rights is not supported by authority,³ warranted by sound reason, or in the interest of good morals or public policy. The court also stated that the opening of such a wide field for injunctive process, enforceable only by contempt proceedings, the difficulty if not impossibility of such enforcement, and the very doubtful beneficial results to be obtained warranted the denial of such a decree. Subsequent decisions denying equitable relief in similar factual situations have done so on the basis of the above reasoning.⁴

However, two very strong dissenting opinions appear in the *Snedaker*

¹ See *Bank v. Bank*, 180 Md. 254, 23 A. 2d 700 (1942), where the court stated that equity will not, by way of injunction, grant relief for personal wrongs.

² 111 Ohio St. 225, 145 N.E. 15 (1924).

³ No reference was made to two prior decisions in which courts of equity did take jurisdiction to enjoin a person from alienating the affections of the complainant's spouse: *Witte v. Bauderer*, 255 S.W. 1016 (Tex. Civ. App., 1923); *Ex parte Warfield*, 40 Tex. Crim. 413, 50 S.W. 933 (1899).

⁴ *Pearce v. Pearce*, 37 Wash. 2d 918, 226 P. 2d 895 (1951); *Knighon v. Knighon*, 252 Ala. 520, 41 So. 2d 172 (1949); *White v. Thomson*, 324 Mass. 140, 85 N.E. 2d 246 (1949); *Hadley v. Hadley*, 323 Mich. 555, 36 N.W. 2d 144 (1949); *Bank v. Bank*, 180 Md. 254, 23 A. 2d 700 (1942).

case. The theory of the dissent was to the effect that the marriage relation is contractual in nature, and that an injunction will lie to restrain persons from inducing the breach of a lawful contract, even though it may be based solely upon personal rights. As to the doubt of the ability of the court to adequately enforce its order by contempt proceedings, the dissent reasoned that contempt proceedings are the only method of enforcing injunctive process, and that such objection is not in any way more applicable to this factual situation than it is to any other case where injunction is recognized as a proper extraordinary remedy.

The dissent seems to have taken a more realistic approach to the problem.⁵ The plaintiff wife was seeking to preserve her marriage and to protect her status in the community as a mother and a wife. The defendant had openly and defiantly informed the plaintiff that she would not desist from associating with the latter's husband. To deny the issuance of an injunction in such a factual situation clearly amounts to a failure of the court to perform its duty of defending and protecting the marital status and obligations.

In a recent Ohio decision, the court issued a temporary restraining order, during the pendency of an action for divorce, restraining a defendant woman and plaintiff's husband from associating or in any way communicating with each other.⁶ The *Snedaker* case can be distinguished factually on the ground that it was an original action in a court of equity in which the plaintiff sought a permanent injunction. However, the basic reasoning and underlying philosophy of the court must be considered as directly contrary to that in the *Snedaker* case. The court stated that the status of marriage is a civil contract between husband and wife to which the state is a party. The state is represented by the court, which has a duty to exercise watchful vigilance to safeguard the sanctity of marriage and prevent its disruption. The court also stated that the issuance of such an injunction would aid greatly in effecting a reconciliation between the parties, and thus would operate to attain the ultimate end of maintaining the family relation. It seems clear that any such decision which places the value of personal rights on as substantial a foundation as property rights is the more desirable one. As stated by a California court, the issue should not, in logic, turn upon the proposition that a personal right rather than a property right is involved.⁷ The primary consideration

⁵ Marshall, C.J., in his dissenting opinion, accuses the majority opinion of seeking to treat the matter from a facetious standpoint and of failing to look at it in the seriousness it deserves.

⁶ *Pashko v. Pashko*, 45 Ohio Op. 498, 101 N.E. 2d 804 (1951).

⁷ *Orloff v. Los Angeles Turf Club*, 30 Cal. 2d 110, 180 P. 2d 321 (1947): "On principle it is difficult to find any sound reason for the enunciation of a broad principle that equity will not protect personal rights. . . . The issue should not in logic turn

should be the preservation of the marital status and the family relation.

In 1942, the Supreme Court of Alabama, in *Henley v. Rockett*,⁸ issued an injunction restraining a female defendant from associating with the plaintiff's husband. The court cited with approval the dissenting opinion of *Snedaker v. King*,⁹ and stated that the weight of authority will allow one spouse to enjoin a third party from alienating the affections of the other spouse.¹⁰ The court reasoned that marriage is a covenant relation in which each spouse has the unquestioned right to all the fealties on the part of the other.¹¹ Mistreatment of the wife, reflection on the children, and the social hurt were reasons given for issuing the injunction. The rights of the wife were described as being of a "sacred sort," which, on grounds of policy, must be protected.¹²

In a subsequent decision, however, this same court, in a separate maintenance action, refused to enjoin both the husband and his alleged paramour from further carrying on their alleged improper relations with each other.¹³ The *Henley* case was distinguished on the ground that the wife was still trying to preserve the marriage and that the parties were still living together, while in the present case the husband had no love for his wife and the parties had agreed to live separate and apart. It is difficult to agree with the court's reasoning that it would be vain and useless to attempt the restoration of the love and affection of the parties by means of injunction. It is true that people cannot be made moral by coercion; nor can any legal process compel right feelings, affection, and a due sense of the sacredness of the family relation.¹⁴ Nevertheless, in this case there appeared to be a possibility of eventual reconciliation between the parties. The court admitted that the wife's reason for seeking separate maintenance was the reprehensible conduct of the husband. If this conduct were to cease, the possibility of reconciliation

upon the proposition that a personal right rather than a property right is involved. To do so is to place property rights in a more favorable position than personal rights, a doctrine wholly at odds with the fundamental principle of democracy."

⁸ 243 Ala. 172, 8 So. 2d 852 (1942).

⁹ 111 Ohio St. 225, 145 N.E. 15 (1924).

¹⁰ The court cited 27 Am. Jur., Husband and Wife § 520 (1940), in support of this proposition.

¹¹ It is interesting to note that in Alabama, no action at law for damages will lie for alienation of affections or criminal conversation. *Young v. Young*, 236 Ala. 627, 184 So. 187 (1938).

¹² This is one of the few cases in which the court discussed at length the character of the personalities involved. The husband was a well-respected retired business man of sixty-four. His paramour was thirty-six. The court expressed the opinion that the injunction would also aid greatly in the moral rehabilitation of the husband.

¹³ *Knighton v. Knighton*, 252 Ala. 520, 41 So. 2d 172 (1949).

¹⁴ *White v. Thomson*, 324 Mass. 140, 85 N.E. 2d 246 (1949).

would be increased, and there was every indication that a final decree of divorce could be avoided.

In a recent Michigan decision, a husband filed a cross bill of complaint in a divorce action by which he sought to enjoin his wife from associating with other men.¹⁵ Both the divorce action of the wife and the cross bill of the husband seeking the injunctive relief were dismissed. The court stated that if the conduct of the wife was of such a nature that the husband feels aggrieved, he has an adequate remedy in the dissolution of the marital relationship. It seems strange that a court should advise a spouse who is seeking to preserve his marital relation that he has an adequate remedy in the dissolution of the marriage status. This is especially strange since it is a known fact that contracts against marriage, or to marry when one spouse becomes divorced, are against public policy and, therefore, void. The situation today is such that divorces are at a scandalously high level. It would seem more desirable that the courts should use whatever powers they have to stem the tide of divorce, rather than advise a spouse to dissolve the marriage status which he is seeking to preserve.¹⁶

In another recent decision,¹⁷ a husband received a divorce from his wife. As part of the interlocutory decree, the lower court restrained both the wife and her lover from associating with each other. The Supreme Court of Washington, although stating that it approved of the modern tendency of the courts to protect personal rights by injunctive relief, held that the trial court was without authority to issue the restraining order. The distinguishing factor of this case is that it does not appear that the husband asked for the restraining order. The husband merely sought a divorce and not the protection of the society and affection of his wife. In a case where it is clear that neither party is seeking a reconciliation and a divorce decree has been issued, the reviewing court appears to be correct in its conclusion that the restraining order would amount to an unwarranted and unjustified interference with the personal rights of the parties.¹⁸

In a case of first impression in the state of Maryland,¹⁹ the court refused to enjoin a parent from counselling and supporting a daughter

¹⁵ *Hadley v. Hadley*, 323 Mich. 555, 36 N.W. 2d 144 (1949).

¹⁶ *Pashko v. Pashko*, 45 Ohio Op. 498, 101 N.E. 2d 804 (1951).

¹⁷ *Pearce v. Pearce*, 37 Wash. 2d 918, 226 P. 2d 895 (1951).

¹⁸ It is interesting to note, however, that the court stated that it felt the restraining order was for the wife's benefit and that she would have been better off had she obeyed it. Nevertheless, the court stated that it would not stand in loco parentis to adults such as the wife, and under the pains and penalties of contempt restrain them from doing the things they ought not to do.

¹⁹ *Bank v. Bank*, 180 Md. 354, 23 A. 2d 700 (1942).

living apart from her former husband. Prior to the divorce of the parties, the husband had recovered a judgment against the parents for alienation of affections. His present bill did not allege a reconciliation or that a reconciliation was possible which was being prevented by the parents. Under such circumstances, the parties being already divorced, it would seem that the court was justified in denying injunctive relief.

It should also be noted that the law distinguishes between the right of a parent to interest himself in the marital affairs of his child, and the absence of the right in a stranger to meddle in such affairs.²⁰ A parent is not liable when he acts and advises his child in good faith with respect to the child's marital relationship, even where his conduct and advice result in the separation of the spouses or the obtaining of a divorce.²¹

Another related situation is presented where the person seeking the injunctive relief is not the spouse, but is the child of the erring spouse. The Supreme Judicial Court of Massachusetts,²² in a recent decision, held that minor children, who have been deprived of the care and society of their father by a woman who has enticed the father away, were not entitled to an injunction to compel the father to support them;²³ they were also not entitled to have the father placed under guardianship as a spendthrift even though he was squandering his funds on the woman so as to deplete his estate.²⁴ It seems that the court was correct in denying such equitable relief to the children in that they had an adequate remedy for support under the Massachusetts statutes.²⁵ However, the wife also sought an injunction in this case, and the court arbitrarily stated that equitable relief by injunction in cases of deprivation of exclusive right to marital intercourse or deprivation of consortium will not be granted in Massachusetts.²⁶ There seems to be no justification for such an arbi-

²⁰ *Kurdle v. Brookmeyer*, 172 Md. 246, 191 Atl. 416 (1937); *Miller v. Miller*, 165 Md. 425, 169 Atl. 426 (1933).

²¹ 27 Am. Jur., Husband and Wife § 529 (1940), and authorities cited.

²² *White v. Thomson*, 324 Mass. 140, 85 N.E. 2d 246 (1949).

²³ Compare *Knighton v. Knighton*, 252 Ala. 520, 41 So. 2d 172 (1949), wherein the court stated that it knew of no case in which an attempt had been made to require a husband, by the process of mandatory injunction, to discharge the duties of companionship, love, affection, and other obligations assumed by him when he entered the conjugal relation.

²⁴ The court did take note of the recent decisions recognizing the right of minor children to sue and recover damages against one who has deprived them of care and society in their parent: *Daily v. Parker*, 152 F. 2d 174 (C.A. 7th, 1945); *Johnson v. Luhman*, 330 Ill. App. 598, 71 N.E. 2d 810 (1947). It also noted other recent cases denying the existence of that right: *Taylor v. Keefe*, 134 Conn. 156, 56 A. 2d 768 (1947); *Rudley v. Tobias*, 84 Cal. App. 2d 454, 190 P. 2d 984 (1948).

²⁵ Mass. G. L. (1932) c. 209, § 37.

²⁶ The court cited the Restatement of the Law of Torts, Vol. 4, § 943 (1939), as stating that an injunction against alienation of affections would only serve to add fuel to the flame.

rary rule made without reference to the specific factual situations in which the need for injunctive relief may arise.²⁷

It does not appear that the Illinois reviewing courts have been called on to decide whether a spouse may enjoin a third party or parties from alienating the affections of his or her spouse. However, Section Twelve of the Illinois Divorce Act is to the effect that the court may, during the pendency of a suit, restrain another from doing any act threatening to prevent or interfere with a reconciliation of the husband and wife or other amicable adjustment.²⁸ At least two instances are known of where the lower courts of Illinois have issued such an injunction. In both instances the injunction attained the desired results, the third party obeying the injunction by leaving the vicinity and the husband and wife being reconciled and thus avoiding divorce.²⁹

A study of the Illinois decisions discloses that the public policy of this state is for the maintenance of the home and the sustaining of the marriage relation.³⁰ It is also held that it is the duty of the state, in the conservation of the public morals, to guard the marriage relation.³¹ It appears then that if the right factual situation presents itself, the Illinois courts would not hesitate to issue the injunction for the purpose of guarding the marriage relation. It seems certain that the Illinois courts would not adopt the arbitrary rule of some courts that in no case would an injunction lie to enjoin an alienation of affections of one's spouse.³²

It must be concluded that the majority rule today remains that equity will not restrain a third party or parties from alienating the affections of the spouse of another. It is unfortunate that this rule has prevailed, for actual practice has shown the effectiveness and desirability of such an injunction. Also, good morals and public policy would seem to dictate that the courts permit a spouse to employ the extraordinary remedy of injunction to preserve and protect the marital relation and thus reduce

²⁷ It is clear that the court did not base its opinion on the fact that only personal rights were involved in the suit, for it cited *Kenyon v. City of Chicopee*, 320 Mass. 528, 70 N.E. 2d 241 (1946), as holding that equitable relief may be obtained where a purely personal right is involved.

²⁸ Ill. Rev. Stat. (1951) c. 40, § 13. No cases could be found interpreting or construing this statute.

²⁹ This information was acquired by personal interview with the Hon. Cornelius J. Harrington, Judge of the Circuit Court, Cook County, Illinois.

³⁰ *Winning v. Winning*, 366 Ill. 57, 7 N.E. 2d 750 (1937); *Leland v. Leland*, 319 Ill. 426, 150 N.E. 270 (1925); *Berlingieri v. Berlingieri*, 297 Ill. App. 119, 17 N.E. 2d 354 (1938); *Garvy v. Garvy*, 282 Ill. App. 485 (1935).

³¹ *Johnson v. Johnson*, 381 Ill. 362, 45 N.E. 2d 625 (1942); *Pratt v. Pratt*, 342 Ill. App. 513, 97 N.E. 2d 132 (1951); *Wells v. Wells*, 323 Ill. App. 190, 55 N.E. 2d 390 (1944).

³² *White v. Thomson*, 324 Mass. 140, 85 N.E. 2d 246 (1949); *Bank v. Bank*, 180 Md. 254, 23A. 2d 700 (1942); *Snedaker v. King*, 111 Ohio St. 225, 145 N.E. 15 (1924).

the appalling number of divorces which threaten so seriously to disrupt our American society.

IMPAIRMENT OF SECURITY BY CREDITOR'S INACTION: EFFECT ON THE SURETY'S LIABILITY

"The surety," says Chancellor Kent, "by his . . . very relation of surety, has an interest that the mortgage [security] taken from the principal debtor, should be dealt with in good faith, and held in trust, . . . as well for the secondary interest of the surety, as for the more direct and immediate benefit of the creditor. . . ."¹

Since, according to Story, a creditor's laches in regard to hypothecated property will not discharge the surety,² a problem arises in the application of the "trust theory" to those circumstances where the creditor receives collateral security and, by his passive negligence, the security is lost or its value impaired.

The early American decision of *Schroepell v. Shaw*,³ established the prevailing view that inaction or laches by a creditor in realizing on security held by him does not discharge the surety. Plaintiff, who was the surety, filed suit in a court of chancery to be relieved of a judgment entered at law in favor of defendant, the creditor. Plaintiff claimed that defendant held securities in the form of bonds and mortgages, but failed to seek foreclosure on the securities for a period of two and one-half years after the obligation matured; that when defendant did seek foreclosure, he failed to docket the decree, permitting other lienors to attach the principal obligor's property; that as a result of defendant's negligence, the securities greatly depreciated in value.

After holding that the court lacked jurisdiction because the plaintiff's claims could have been pleaded as a defense at law, the court said:

No rule is more uniformly recognized than that mere indulgence, at the will of the creditor, however long, or whatever may be the consequences, will not operate to discharge the surety.⁴

Therefore, in reality, dictum became a basis for ruling law.

In the case of *Clopton v. Spratt*,⁵ the creditor's failure to enforce collateral security resulted in such security becoming worthless. The court held that a creditor discharges his duty to the surety so long as he does not perform any affirmative act which would diminish the value of the security; an act of commission will discharge the surety, an omis-

¹ *Hayes v. Ward*, 4 Johns Ch. (N.Y.) 123, 130 (1819) (brackets added).

² 1 Story's Equity Jurisprudence § 501 (11th ed., 1873).

³ 3 N.Y. 446 (1850).

⁴ *Ibid.*, at 461.

⁵ 52 Miss. 251 (1876).