YALE LAW JOURNAL

SUBSCRIPTION PRICE, $2.50 A YEAR. SINGLE COPIES, 35 CENTS.

Published monthly during the Academic year, by students of the Yale Law School. P. O. Address, Box 893, Yale Station, New Haven, Conn.

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THE LIABILITY OF PARTNERS FOR SLANDER.

That the words of one are not the words of another, and that each individual should only be responsible for the injury inflicted by his own independent act is a recognized principle of law. For that reason the treatise writers nearly all lay it down as a rule that ordinarily there can be no joint action for slander.

Concerning the question as to whether a partner can be joined in an action with a co-partner there is no very great weight of authority. In the recent case of *Duquesne Distributing Co. v. Greenbaum,* reported in the 121 S. W. Rep. 1026, it was held that partners are not jointly liable for slanderous words spoken by one of them, unless authorized by the other, but that they are liable as a firm for slander committed by an employee whom they have authorized to speak, or whose words they have ratified. There was an editorial comment on this case in the *New York Law Journal* in its issue of December 1, 1909.

In this case the plaintiff was a corporation making a mineral water sold principally to liquor dealers. They alleged that defendant, wishing to injure plaintiff's business, made slanderous

statements through its traveling salesman, who was acting within the scope of his authority, that the plaintiff had contributed money to advance the prohibition cause and such assertion caused the damage complained of.

Slander is defined to be "the malicious defamation of a man with respect to his character, or his trade, profession or occupation, by word of mouth." 13 *Am. & Eng. Ency. of Law,* 296.

It is laid down in *Cooley on Torts,* p. 124, that slander is one of the several wrongs which in its very nature is essentially individual. He says: "This (meaning slander) is an individual action because there can be no joint utterance. He alone can be liable who spoke the words; and if two or more utter the slander at the same time, still the utterance of each is individual, and must be the subject of a separate proceeding for redress."

This may be further illustrated by the following section (113) from *Townsend on Slander and Libel*: "Speech is but sound, a mere vibration of the atmosphere cognizable only by the auditory sense. From its nature it necessarily follows that the *same* sound cannot be repeated; a *similar* or *like* sound may be produced, undistinguishable in every respect from the first, and of the like character and signification, but that will not be the same sound. One who repeats a word previously spoken does not utter the identical word, but a similar or like word; he repeats a *like* sound of the *same signification* as the first. The two sounds are separate and distinct, although each has the same meaning. Hence each publication of oral language is a new and distinct and separate publication."

In *Gilbert v. Crystal Mountain Lodge,* 80 Ga. 284, the court said by *obiter dicta*: "Whether a partnership can slander anybody might formerly have admitted of some question; for it is an old rule going back to *Croke's Reports*—perhaps farther still, that there can be no joint action against several persons for oral words. The courts considered that if two uttered the same words simultaneously, the vocal act of each would have a separate identity and be an individual act; and so actions for such torts ought to be several and not joint."

There is this exception to this strict rule in the older cases: Where a slanderous song was chanted in concert by several voices, the court held that a joint action would lie against all

the slanderers because each man's voice was only a part of the whole sound that reached him; that the song was a melody—a succession of single musical sounds. *2 Burr,* 980. And in the case of *State v. Marlier,* 46 Mo. App. 233, this particular doctrine was extended, the court saying: 'If several parties give voice to the same utterance at the same time they may be proceeded against jointly as it is an entire offence—one joint act done by all—and the more there are joined in it, the greater is the offence."

However, the older English courts held rigidly to the rule that in slander the words of one were not the words of another and that the plaintiff must bring several and not joint actions. In an old case in *Gouldsborough's Reports,* p. 76, judgment was given against the defendant for having accused plaintiff and his family of robbing him. The rest of the family did not join in the action and it was moved in arrest of judgment by the defendant because the plaintiff alone had brought this action. But the court held that the action had been well brought because the slander was several and every one slandered had a several action. *Barrat & Hodsoll v. Collin,* 10 Moore 451; *Bishop's Criminal Procedure* (2nd Ed.), Sect. 811; *Harding v. Greening,* 8 Taunt. 42; *Rice v. McAdams,* 149 N. C. 29; *Thomas v. Rumsey,* 6 Johns. 26; *Hinckle v. Davenport,* 38 Ia. 355.

Perhaps the most outspoken opinion on this matter in the United States is *Webb v. Cecil & Vaughan,* 9 B. Mun. (Tenn.) 198, where it was held in a joint action against the defendants for slander of title that a joint action could not be maintained against two individuals for slander of title by words—no conspiracy being alleged. The court said: "The words of one are not the words of the other. The act of each constitutes an entire and distinct offence. *The same words spoken by one may occasion much greater injury than if spoken by another.* Each should only be responsible for the injury inflicted by his own independent act." 13 *Ency. Pl. & Pr.,* 30; *Starkie on Slander & Libel* (Wood's Ed.), Sect. 410; *Newell on Slander & Libel,* p. 243; 18 *Am. & Eng. Ency. of Law,* 1057.

We must not confuse the action of slander with that of libel. The authorities are all agreed that the doctrine in question does not apply to *written* defamation. The court in *Thomas v. Rumsey, supra,* in distinguishing libel from slander said: "This is

not like an action against several persons for speaking the same words. Such an action cannot be maintained because the words of one are not the words of another. But with respect to libel, if one repeat and another write and a third approve what is written, they are all makers of the libel for all persons who concur and show their assent or approbation of the doing of an unlawful act are guilty."

It was even held at common law that if a husband and wife uttered similar words simultaneously there were two separate publications, and that an action must be brought against the husband alone for what he said, and against the wife and husband for what she said. *Penters v. England,* 1 McCord 14. It was held also that two offenders could not be joined in a single count charging the offence of uttering obscene language, because the words of one were not the words of the other. *State v. Roulstone et al.,* 3 Sneed (S. C.) 107.

Without attempting to discuss the liability of a corporation for slanderous statements of its agents it might be well to say a word on it because of its somewhat analogous relation to a partnership.

Odgers on Slander & Libel (star, p. 368), contends that a corporation will not be liable for slander by its agent even when the agent be acting within the scope of his authority, unless it appears that the corporation has expressly directed him to speak the words; that slander is the voluntary and tortious act of the speaker. *Kane v. Mutual Life Ins. Co.,* 200 Mass. 265; *Pa. Iron Works Co. v. Henry Voght Mach. Co.,* 96 S. W. 551. And in *Singer Mfg. Co. v. Taylor,* 150 Ala. 574, the court said: "By reason of the fact that slander is the voluntary and tortious act of the speaker and is more likely to be the expression of momentary passion or excitement of the agent, it is, we think, rightly held that the utterance of slanderous words must be ascribed 'to the personal malice of the agent rather than to an act performed in the course of his employment and in aid of the interest of his employer, and exonerating the company unless it authorized or ratified the act of the agent uttering the particular slander.'"

However, *Marshall on Corporations,* p. 311, says, that a corporation will be liable for the slanderous statements of its employees if committed within the course of a transaction which is

within the scope of their authority. *Rivers v. Y. & M. V. Ry. Co.*, 90 Miss. 196; *Jordan v. A. G. S. Ry. Co.*, 74 Ala. 85; *Phila. W. & B. R. R. v. Quigley*, 21 How. 202.

The courts of Michigan apparently make no distinction between slander and other tortious acts and hold that partners are jointly liable for statements made by one in derogation of a competitor and in aid of the firm's business. *Haney Mfg. Co. v. Perkins*, 78 Mich. 1; *Chesbro v. Powers*, 78 Mich. 472.

It seems to be perfectly reasonable that greater liberty should be allowed in the case of words spoken than of writing. The master cannot be in a position at all times to control the tongues of his servants. So while it is generally sufficient, in seeking to hold the master liable for the acts of his servant's, to allege that the act was within scope of the servants authority, the better authority would seem to be that a more lenient application of the rule should be applied in a case of oral defamation by the servant. How easy it is for one to slander while under the influence of passion or excitement! It is true that the principal ordinarily is responsible for the character of the agents he employs. But no matter how great the amount of care he may exercise, it will not be sufficient to guard against an occasional loss of temper which may lead to the making of slanderous statements.

Quoting from the court, in the case being commented upon: "A speech by the agent or servant when absent from the principal or master is absolutely within his power alone to control. He may be prudent and discreet, or reckless or careless in his conversation. He may have his tongue under perfect control; or under no control whatever, may speak freely about persons and things, or talk little."

It would appear from a review of all the authorities that where it is sought to hold a partner liable for defamatory utterances by his agent or servant (he would be in the position of principal for the acts of his co-partner), the better opinion is that he cannot be held if it is merely alleged that the agent or servant was acting within the scope of his authority, as that expression is commonly used. It must be further shown that the principal or master directed or authorized the agent or servant to speak the actionable words or afterwards ratified them.

MANDATORY CONSTRUCTION OF PERMISSIVE STATUTES.

The Supreme Court of the State of New York in the recent case of *People ex rel, Hilliker v. Pierce et al.,* 119 N. Y. Supp. 21, in a broad and thorough opinion reviews and strengthens the old and almost undisputed doctrine, that an authority to a municipal corporation, prescribed by the legislature as a permissive act, if it contained no discretionary powers, would be construed and enforced as a mandatory duty, this applying whether it be a so-called governmental function or not. This underlying principle, depending on and carrying with it important subsiduary doctrines, was well suggested and brought out in the case at hand. Here, the waterworks system of a village of the fourth class had been extended to supply all but four of the inhabitants of the village. The plainiff, as one of those who had applied for but been refused this extension, asked for a *mandamus* against the defendants, as the waterworks board, to force them to extend the system to his premises. He alleged that the statute, under which the construction had been made, declared: "The board shall keep it in repair *and may, from time to time, extend the mains or distributing pipes within the village,*" etc., and that this placed a mandatory duty upon the board to make the extension asked for. The defendants, in their justification, argued that the village, in availing itself of the permissive authority to construct and maintain a system of waterworks, conferred by the general act, is exercising only a governmental authority and all governmental functions are purely discretionary and cannot be enforced by a citizen through *mandamus.*

Undoubtedly a municipal corporation can, in the scope of its business, use powers derived from two separate and distinct sources; it may do so as a duty enjoined upon it by legislative authority or it may do so as a choice of its discretionary governmental powers given to it permissively. The case of *Springfield Fire & Marine Ins. Co. v. Keeseville,* 148 N. Y. 46, says: "The investiture of municipal corporations by the legislature may be of two kinds. It may confer powers and enjoin their performance upon the corporation as a duty; or it may create new powers, to be exercised as governmental adjuncts and make their assumption optional with the corporation." The case of *Lloyd v. Mayor of New York,* 5 N. Y. 369, also says: "Municipal corporations possess two kinds of powers; one governmental and public and

clothed with soverignty—the other private and held as a legal individual." See also *Maximillian v. Mayor,* 62 N. Y. 160; *Wheeler v. Cincinnati,* 19 Oh. St. 19. Admittedly then, the test of construction for statutory requirement and the powers of the courts to enforce them *is whether the power is given as a duty or a discretion.*

Dillon in his work on *Municipal Corporations,* Sect. 669, says: "Discretionary powers are not, unless in extraordinary and exceptional instances to restrain gross abuse, subject to judicial control, but duties imperatively enjoined may be enforced by *mandamus.*" But to compel a public officer to perform a duty concerning which he is vested with no discretionary power and which is either imposed upon him by some express enactment or necessarily results from the office which he holds, *mandamus* is proper and appropriate. *Pond v. Parrott,* 42 Conn. 13; *Commonwealth v. Allegheny County Commissioners,* 37 Pa. 278; *Mitchell v. Boardman,* 79 Me. 469. However, the courts cannot control discretion but will only force the exercise of that discretion. *People v. Supervisors of City of New York,* 1 Hill 362; *People v. Steele,* 1 Edm. Sel. Cases (N. Y.) 505; *Commonwealth v. Doylertown Supervisors,* 16 Pa. Co. Ct. Reports 161.

What then is the distinction in determining when there is a vested duty and when a discretionary power where the words of the statute are permissive? Dwarris in his treatise on the *Construction of Statutes,* says: "Words of permission shall in certain cases be obligatory. Where a *statute directs the doing of a thing for the sake of justice the word 'may' shall be the same as he word 'shall'.*" (*Potter's Dwarris on Statutes and Constitutions,* p. 220.)

In the case of *King v. Barlow,* 2 Salkberg 609, decided during the reign of Anne and cited as the leading English authority, the court says: *"The words 'shall' and 'may' are construed mandatory where the statute directs the doing of a thing for the sake of justice and the public good."* In almost the same words the American authorities have accepted and adopted this theory. In *Supervisors v. United States,* 4 Wall. 435, the United States Supreme Court, by Mr. Justice Swayne, laid down the American doctrine in these words: "The conclusion to be deduced from the authorities is that where power is given to public officers in the language of the act before us, or in equivalent

language, whenever the public interest or individual rights call for its exercise, the language used, though permissive in form, is in fact peremptory—*what they are empowered to do as for a third person, the law requires shall be done.* The power is given not for their benefit but for his. It is given as a remedy to those entitled to invoke its aid and who would otherwise be remediless." See also *Lucas v. Ensign,* 4 N. Y. Leg. Ob. 142 (N. Y. Com. Pl.); *Newberg Turnpike Co. v. Miller,* 5 John. Chan. 113; *Hagadorn v. Roux,* 72 N. Y. 583. Chief Justice Nelson, in an able opinion, gathered together the American authorities in *Mayor of City of N. Y. v. Furze,* 3 Hill 612, saying: "When a public body or officer has been clothed by statute with power to do an act which *concerns public interest or rights of third persons,* the execution of the power may be insisted on as a duty, though the phraseology of the statute be permissive merely and not peremptory."

From this unbroken line of decisions it may be gathered that in the construction of such statutes of permissive or mandatory powers of a municipal corporation, the test is in the interest the corporation owes to the public or third persons. If it is an interest that the public acquires in the act; if it becomes a right and may be a protection; or if it presents a just claim, then it vests in the public a claim *de jure* which the courts will recognize and enforce by *mandamus* against the official whose duty it is to apply that right.

CHANCERY—POWER TO AFFECT FOREIGN PROPERTY.

The *Chicago Legal News* in a recent editorial, Dec. 4, 1909, made the following comment upon the case of *Fall v. Eastin,* decided Nov. 1, 1909, by the United States Supreme Court: "We commend this case as a good illustration of the class of cases in which it is extremely desirable to have an authorative decision from the highest judicial tribunal in the land, as without such an adjudication the probability is that the opinions of the best lawyers of the country would be thoroughly diverse upon the proposition involved."

This case was decided by the Nebraska Supreme Court in 75 Neb. 104, but was reversed on rehearing in 75 Neb. 120, the court finally holding that, "the court of one state cannot, by its decree, directly affect the legal title to land situated in another state."

The facts were briefly these: The plaintiff and her husband lived for a time in Nebraska, and by their efforts procured some land in that state. They subsequently removed to Washington where, differences arising, divorce proceedings were instituted by the wife. Divorce was decreed and the court having jurisdiction of both parties decreed that the husband transfer title to the land in Nebraska to the plaintiff in this suit. The husband did not execute the conveyance to the wife but, instead, conveyed the land in question to the defendant, Elizabeth Eastin. This is an action to quiet title to the land and to cancel a mortgage thereon. The lower court decided first in favor of the plaintiff, but on rehearing, they were against her. She appealed, and the cause came up to the United States Supreme Court, which, in an opinion by Justice McKenna, held: "A deed to land, situated in Nebraska, made by a commissioner, under a decree of a court of another state, in an action of divorce, in which in determining the equities of the parties conformable to the practice of that state, the land was set apart to the wife as her own separate property, need not be recognized in Nebraska, under the full faith and credit clause of the Federal Constitution." Justices Harlan and Brewer dissented, and Justice Holmes concurred specially, basing his opinion on other grounds than the majority of the court, and holding that the decree of the Washington court was entitled to full faith and credit.

Lord Hardwicke established the jurisdiction of the Court of Chancery to decree specific performance of land situated in another country where it had jurisdiction over the parties, in the case of *William Penn v. Lord Baltimore,* 1 Ves. Sr. 444, which concerned the boundaries of their possessions in America.

This case was given as a basis for the decision of Chief Justice Marshall in the case of *Massie v. Watts,* 6 Cranch. 143, in which he announced the following rule: "Upon the authority of these cases, this court is of the opinion that in a case of fraud, trust, or contract, the jurisdiction of the Court of Chancery is sustainable wherever the person be found, although land not within the jurisdiction of that court be affected by the decree." These authorities firmly establish the rule and have been followed steadfastly in both countries, so that there is no question whatever of that proposition. Then, the question arises, what effect has the de-

cree of a court which has only jurisdiction of the parties upon the title to the land?

By statute the decree of a court may have the effect of transferring title. *King v. Bill,* 28 Conn. 302. But these statutes apply only to land situated in the state, for it is not within the power of a court of one state to decree the mode by which real estate shall be conveyed in another state. *Watts v. Waddle,* 6 Pet. 389. And, again, in *McCormack v. Sullevant,* 10 Cranch. 192, it is said: "The title and disposition of real estate is exclusively subject to the laws of the country where situated, which can alone prescribe the mode by which title can pass from one person to another." And further: "The court has no inherent power outside of its jurisdiction by the mere force of its decree to annul a deed or establish a title." *Hart v. Sanson,* 110 U. S. 151.

It is an established principle that equity acts only *in personam.* "The principle upon which the jurisdiction rests is that chancery acting *in personam* and not *in rem* holds the conscience of the parties bound without regard to the *situs* of the property. The decree imposes a mere personal obligation upon the defendant, enforceable by injunction, attachment, or like process against the person, and cannot operate *ex proprio vigore* upon the lands in another jurisdiction." *Lindley v. O'Reilley,* 50 N. J. L. 636. "The decree of chancery has no direct operation on property and in no way affects the legal or equitable title thereto." *Carrington's Heirs v. Brents,* 1 McL. 167. "The extent of the power of a court in such cases is to decree that the person invested with the title make conveyance of it, which may be enforced by personal process against the owner, but the decree is not effectual unless the owner of the land, in person, executes a conveyance." *Morris v. Hand,* 70 Tex. 489. In a case precisely similar to the one at bar the Illinois court, in *Proctor v. Proctor,* 215 Ill. 275, 69 L. R. A. 673 and note, held: "No interest in real estate, located in another state, can be vested in a complainant in a divorce proceeding, by a decree which purports to deal directly with the title to the estate."

"A court of equity will decree the performance of contracts relating to land without their jurisdiction. But, in such cases, the decree cannot affect the land, but can only be enforced when the court has jurisdiction of the person of the defendant, and thus

compels him to execute a conveyance. It is the conveyance, not the decree, that has the effect." *Davis v. Headley,* 22 N. J. Eq. 115; *Watkins v. Holman,* 16 Pet. 25. *Cyc.,* Vol. xxiii, p. 1548, thus sums up: "Real property, being governed only by the laws of its *situs,* and being subject only to the jurisdiction of the courts wherein it is situated, cannot be directly affected by the judgments or decrees of a court of any other state; nor do the provisions of the Federal Constitution require that a judgment of a state court should be accorded any extra-territorial force or effect as regards real property. But, although incapable of acting directly on real estate without its jurisdiction, a court of equity in one state having acquired jurisdiction of the parties may make decrees affecting their dealings with such property in such manner as to bind them personally, and such orders or decrees may be pleaded as a cause of action, a bar, or a defence, in a state where the land lies."

The courts of New York have deviated slightly from the strict application of the above rule, and have held that "where the court of New York renders a decree of strict foreclosure on lands in Illinois and the parties are before the court, the decree is binding in Illinois under the United States Constitution and laws, which provide that states shall give full faith and credit to the judicial acts of another state." *House v. Lockwood,* 1 N. Y. Supp. 196. But that case is distinguishable from the case at bar, in that, in this case, the decision of the Washington court relied on, was given under a statute of that state, while the New York court did not rest its decision on any statute, and was not trying to enforce a New York law in Illinois.

In *Wimer v. Wimer,* 82 Va. 892, the court of Virginia said: "Courts of Virginia have no jurisdiction to partition lands situated in another state, because such right can only be exercised under the *lex loci rei sitae.*"

The United States Supreme Court has apparently stated a rule which carries out the plaintiff's contention, for in *Dull v. Blackman,* 169 U. S. 245, they say: "If all the parties interested in the land were brought personally before a court of another state, its decree would be conclusive upon them, and thus in effect determine the title to the land." But an examination of that case shows that the above quoted statement is a mere *dictum,* as the court was not required to decide that point.

Another case which comes nearer to upholding the plaintiff's contention is that of *Burnley v. Stephenson,* 24 Ohio St. 474, which holds that "a decree of a court of equity in one state, directing a conveyance of lands situated in another, may be pleaded as a cause of action or ground of defence in the courts of the state where the land lies, although no conveyance has been made, and unless impeached for fraud, is entitled to full force and effect of record evidence of the equities between the parties therein determined." The Supreme Court, in speaking of this decision, said: "It may be doubted if the cases cited by the court sustain its conclusion. There is much temptation to follow the rule." But they do not do so, but affirm the holding of the lower court.

Thus, it will be seen by a review of all the authorities upon this subject, that the recent decision makes no departure from the rules already laid down.