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# Disparagement of Property: A Right of Action

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# NOTE

## DISPARAGEMENT OF PROPERTY: A RIGHT OF ACTION

The action for disparagement of real property is relatively uncommon today. There are two principal reasons for this infrequence. First, the courts have surrounded the action with various limitations to protect freedom of speech.[1] Secondly, the action is seldom explored in the law schools, and as a result it is doubtful that the average practicing lawyer is aware of its existence. It is the purpose of this article to consider the elements of this cause of action and the problems arising from it.

The action of slander of title, from which the general law of disparagement of property grew, is ancient in origin. In a case in 1324, a guardian of a minor recovered damages when the sale of a hedge was prevented by remarks of the defendants disparaging the plaintiff's title to the hedge.[2] Through the years, the action has been broadened to cover disparagements to the quality of property as well as to its title.[3] Time has also brought about changes in nomenclature, as the action is presently spoken of in terms of trade libel, disparagement, and injurious falsehood.[4] For convenience, the term disparagement will be used throughout this article.

The plaintiff, in an action for disparagement of property must prove that the remark was false in fact, that it was published, and that he suffered actual damages thereby.[5] It is generally said that the plaintiff must also prove malice on the part of the defendant, but this is not always true as will be shown later.[6] Before considering these elements separately, it is necessary to understand what interests are protected by the action.

The interest protected is not actually the title or the quality of the property, but rather the salability of the plaintiff's interest in the property.[7] This conclusion is buttressed by the fact that recovery is usually denied where a contract of sale has been concluded. In such a case, the plaintiff has an adequate remedy against the purchaser for either specific performance or for damages caused by the breach of the contract.[8] This was pointed out in

1. PROSSER, TORTS 760 (2d ed. 1955).
2. 4 SELDON SOCIETY PUBLICATIONS 136 (1891); Prosser concludes that the action originated at the end of the sixteenth century: PROSSER, TORTS 760 (2d ed. 1955).
3. PROSSER, TORTS 761 (2d ed. 1955).
4. Goodhart, *Restatement of the Law of Torts III—A Comparison of American and English Law*, 89 U. PA. L. REV. 291 (1941); PROSSER, TORTS 760 (2d ed. 1955).
5. Smith, *Disparagement of Property—I*, 13 COLUM. L. REV. 13, 14-17 (1913).
6. Glieberman v. Fine, 248 Mich. 8, 226 N.W. 669 (1929).
7. HARPER AND JAMES, TORTS 474 (1956); PROSSER, TORTS 763 (2d ed. 1956).
8. State v. Kuriloff, 6 N.J. Misc. 27, 141 Atl. 314 (1928).

*Paull v. Halferty*,[9] an early Pennsylvania decision, where the property owner had been negotiating for the sale of a tract of ore-bearing land. The defendant falsely told the prospective vendee that the land was nearly exhausted of its ore, with the result that the purchaser discontinued negotiations for the purchase of the plaintiff's interests. In a suit for slander to property the plaintiff recovered damages occasioned by the loss of his sale. However, the court advanced the proposition that no recovery would have been granted had the negotiations resulted in a contract of sale.

The next consideration is what types of interests are protected. *The Restatement of Torts*[10] indicates that the plaintiff's interest may be real, personal, tangible, intangible, possessory, or reversionary, as long as it is a salable interest. Equitable interests[11] and interests in debt claims[12] have been denied protection in some instances. Prosser contends that these last two interests ought to be protected whenever they are salable.[13] Recovery has been granted where plaintiff's marriage has been falsely claimed to have been illegal, thus casting doubt upon property acquired by the marriage.[14] In another case, plaintiff recovered when his title was placed in doubt by a defendant's remark that a predecessor in title to the plaintiff's interest was insane.[15] Hence, it can be seen that the disparagement can arise from remarks directed at plaintiff's predecessor in title as well as to the title of property itself.

Having considered the interests of the plaintiff essential to maintaining the action of disparagement of property, we may now consider the other elements of the action. For an action of disparagement to lie, it is also necessary that the disparagement be published. A statement made only to the property owner is not sufficient.[16] This is obvious since the action is designed to protect the salability of the property; without communication to any possible purchaser, there is no interference with a sale. Similarly, the disparager is not liable when the publication is done by the property owner himself, as there is no interference with an attempted sale in such a case.[17]

The publication may be brought about through oral or written communication or by the actions of the defendant, as, for instance, by filing a lien

9. 63 Pa. 46, 3 Am. Rep. 518 (1869).
10. RESTATEMENT, TORTS § 624, comment *c* (1934).
11. Hurley v. Donovan, 182 Mass. 64, 64 N.E. 685 (1902).
12. Pickens v. Hal J. Copeland Grocery Co., 219 Ala. 697, 123 So. 223 (1929).
13. PROSSER, TORTS 763 n.17 (2d ed. 1955).
14. Bold v. Bacon, Cro. Eliz. 346, 78 Eng. Rep. 594 (1790); but see Freeman v. Busch, 98 F. Supp. 963 (D.C. Ga. 1951).
15. Pitt v. Donovan, 1 Maule and S. 63, 105 Eng. Rep. 238 (1813).
16. Womack v. McDonald, 219 Ala. 75, 121 So. 57 (1929).
17. Nevada Potosi Zinc Co. v. Mahoney, 36 Nev. 390, 139 Pac. 1078 (1913).

on the property.[18] The only matter that need be proved is that the publication resulted in a loss of an attempted sale or lease of the property.

In addition to having been published, the disparagement must be false. The plaintiff has the burden of proving its falsity.[19] Prosser has stated the reason for placing this burden upon the plaintiff as follows: "Although it has been contended that there is no essential reason against liability, where the truth is published for the purpose of doing harm, the policy of the courts has been to encourage the publication of the truth, regardless of motive."[20] To encourage such publication, there is a presumption that the statement was true. Hence, the burden of proof is placed upon the plaintiff. It is readily seen, however, that such a general statement would permit a person to disparage by implication. For instance, a person can make several true statements, omitting others, and thus creating a false impression in the mind of another. Should he not be liable for disparagement in such an instance for breach of a duty to tell the entire truth or nothing at all?

This element of falsity and the element of malice have become confused by the courts. It has been said that malice is essential to recovery in an action of disparagement.[21] However, when no defense based upon a reasonable belief in the validity of the defendant's claim to the property has been advanced, the courts generally imply malice.[22] Otherwise, the courts require the plaintiff to show actual malice.[23] Hence, the cases where the disparaging party is a rival claimant must be distinguished from those cases where he is a stranger.[24]

The most frequent problem in this area arises in the situation where the defendant, a rival claimant, honestly asserts in himself an interest inconsistent with that of the plaintiff, but the asserted interest is found to be without merit. In *Olsen v. Kidman*,[25] such a situation was involved. The defendant, a real estate broker, had entered into an exclusive listing contract which was to run for a period of two months. The contract also provided for a commission if the property were sold after the expiration of the two months to any prospect to whom he had offered the property during the aforementioned

18. Coley v. Hecker, 206 Cal. 22, 272 Pac. 1045 (1928). See also Hopkins v. Drowne, 21 R.I. 20, 41 Atl. 567 (1898), involving oral statements; Young v. Geiske, 209 Pa. 515, 58 Atl. 887 (1904), involving printed matter; Coffman v. Henderson, 9 Ala. App. 553, 63 So. 808 (1913) and Kelly v. First State Bank, 145 Minn. 331, 177 N.W. 347 (1920), involving filing of liens and encumbrances.

19. Long v. Rucker, 149 Mo. App. 572, 166 S.W. 1051 (1912).

20. PROSSER, TORTS 764 (2d ed. 1955).

21. Gudger v. Manton, 21 Cal. 537, 134 P.2d 217 (1943); Glieberman v. Fine, *supra* note 6; Womack v. McDonald, *supra* note 16.

22. Andrew v. Deschler, 45 N.J.L. 167 (1883); New England Oil and Pipe Line Co. v. Rogers, 154 Okla. 285, 7 P.2d 638 (1932).

23. Youngquist v. American Railway Express, 49 S.D. 315, 206 N.W. 576 (1926).

24. Smith, *supra* note 5 at 16-24.

25. 120 Utah 443, 235 P.2d 510 (1951); noted in 5 BAYLOR L. REV. 203 (1953).

period. After the expiration of this period, another real estate broker hired by the plaintiffs sold the property to a purchaser contacted originally by the defendant during the period of his contract. The real estate broker thought he was entitled to a lien on the property for his commissions under the contract provision previously mentioned. Accordingly, the plaintiffs brought an action for slander of title when the defendant recorded his lien, and the court granted recovery holding that the defendant had no right to file the lien. In overruling the defense of reasonable belief, the court cited the *Restatement of Torts,* section 624 as a basis for its decision:

> One who, without a privilege to do so, publishes matter which is untrue and disparaging to another's property in land, chattels, or intangible things under such circumstances as would lead a reasonable man to foresee that the conduct of a third person as purchaser or lessee thereof might be determined thereby is liable for pecuniary loss resulting to the other from the impairment of vendibility thus caused.

However, the court apparently did not consider the privilege accorded to a rival claimant by section 647:

> A rival claimant is privileged to disparage another's property in land, chattels, or intangible things by an honest assertion of an inconsistent legally protected interest in himself.

This latter section is made more clear by the comments following that section. They state that a rival claimant is privileged if he honestly believes that there is a substantial chance of the claim being sustained.

In addition to being contrary to the *Restatement,* the *Olsen* case, by denying a conditional privilege of disparagement to a rival claimant, represents a minority viewpoint. The majority view only requires that the defendant assert his claim honestly,[26] in good faith,[27] or with honest intentions.[28] While it has been said that the court will not give protection to a defective title,[29] the *Olsen* decision would tend to produce this result. It would, in effect, require a rival claimant to be sure, beyond any doubt, that his claim was valid against the property owner. It is conceivable that many claimants would be discouraged from bringing forth their claim, thus giving protection to defective titles—a result the courts are trying to avoid.

It should be noted that it is possible for a privilege to expire. After expiration of the privilege, any publication by the former rival claimant can result in liability for disparagement. In *Frega v. Northern New Jersey*

26. Bogosian v. First Nat. Bank of Milburn, 133 N.J. Eq. 404, 32 A.2d 585 (1943).

27. Wheelock v. Batte, 225 S.W.2d 591 (Tex. Civ. App. 1949); Alliance Securities v. DeVilbiss, 41 F.2d 668 (6th Cir. 1930).

28. Glieberman v. Fine, *supra* note 6; Pitt v. Donovan, *supra* note 15.

29. Thompson v. Pratt, 70 Cal. 135, 11 Pac. 564 (1824); but see Welsbach Light Co. v. American Incandescent Lamp Co., 99 Fed. 501 (2d Cir. 1899).

*Mortgage Association,*[30] the plaintiffs had contracted with the defendant mortgage company for the financing of their new home. The mortgage company recorded the financing agreement but failed to perform the contract. Before the plaintiffs could secure other financing, they had to have the present agreement of record cancelled. However, the mortgage company refused to cancel the agreement until the plaintiffs paid them an alleged sum of money which they had, in fact, already paid. On appeal, the supreme court reversed the lower court's dismissal of the count in slander of title, holding that there was no longer a privilege in the defendants. Hence, any attempt to assert a privilege of a rival claimant must of necessity begin with an examination of whether the privilege still exists or not.[31]

In addition to the elements already considered, the plaintiff must prove actual damages as a result of defendant's disparagement.[32] There are several statements as to what constitutes causation of the plaintiff's injuries. It has been said that they must be the natural and probable consequence of the disparagement,[33] or that they must be proximately caused by it,[34] or that the disparagement must have been a substantial factor, without which, the damages would not have occurred.[35] In *Fleming v. McDonald,* causation was deemed an important factor.[36] In that case, the plaintiff, a lessee of the defendant, had been negotiating with a third party to sublet the premises. The third party had seen the lease and knew the extent of the plaintiff's interests in the premises and knew that the plaintiff was capable of subletting. However, the third party desired to have the premises for a period beyond the period of plaintiff's lease. He approached the defendant-lessor to inquire about the possibility of leasing the premises beyond the term of plaintiff's lease. The defendant told him that she would not lease the premises beyond the plaintiff's term and that the plaintiff could not lawfully sublet the premises. In an action for disparagement of title, recovery was denied because the defendant's statement concerning the power of plaintiff was not found to be the substantial cause of the loss of the potential sub-lessee. Rather, the court found that the substantial cause was the fact that the third party could not secure an extension of his term beyond that of the plaintiff's lease.

After causation is established, the damages which are recoverable in an action of disparagement are limited to those directly caused, as consequential damages are generally not recoverable.[37] The measure of damages is the

30. 51 N.J. Super. 331, 143 A.2d 885 (1958).
31. RESTATEMENT, TORTS §§ 624-50 (1934).
32. Shell Oil Co. v. Howth, 138 Tex. 357, 159 S.W.2d 483 (1942).
33. Paull v. Halferty, *supra* note 9.
34. Wilson v. Dubois, 35 Minn. 471, 29 N.W. 68 (1886).
35. RESTATEMENT, TORTS § 632 (1934).
36. 230 Pa. 75, 79 Atl. 226 (1911); *accord,* RESTATEMENT, TORTS § 632 (1934).
37. RESTATEMENT, TORTS § 633 (1934).

difference between the price before the disparagement and the diminished price after the disparagement. Of course, depreciation from any other cause is immaterial.[38] In addition, the *Restatement* would allow damages for the expenses of litigation required to remove the doubt cast upon plaintiff's property.[39] The cases are, however, in disagreement on this point.[40] It is submitted that the *Restatement* view is more sound and such expenses should be considered as a reasonably anticipated result of the disparagement.[41]

From the foregoing considerations, an appropriate definition of the action of disparagement of property in all instances is impossible. Unfortunately, many courts have tried to formulate a definitive statement of the action to fit all instances. The result has been that the action has not been completely adapted to modern circumstances. In their search for modern approaches to the action, the courts have not always been successful. The *Olsen* decision[42] is illustrative of this, for it carried liability to an unwarranted extreme. However, the refusal of other courts to permit a recovery for disparagement where the plaintiff has entered into a contract of sale simply because he has a contractual remedy seems to be an unwarranted limitation. There is no reason why the defendant should be able to avoid liability because the plaintiff has an alternative remedy. Why should the plaintiff be compelled to "undergo the delay, harassment and expense of litigation with" his buyer?[43]

Prosser concludes that many of the problems may become solved by the merger of the actions of disparagement, intentional interference with contractual relations, unfair competition, and others similar to these mentioned.[44] Such action would not, however, be necessary were it not for the failure to make distinctions in the past decisions. In spite of the problems which have plagued the action for disparagement of property, it remains a useful tool for the lawyer in protecting the property interests of his clients.

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38. Smith, *Disparagement of Property—II,* 13 COLUM. L. REV. 121, 122 (1913).
39. RESTATEMENT, TORTS § 633, comment *b* (1934).
40. Recovery was granted in Down v. Doris Trust Co., 116 Utah 106, 208 P.2d 956 (1949) and Chesebro v. Powers, 78 Mich. 472, 44 N.W. 290 (1889); but in Barquin v. Hall Oil Co., 28 Wyo. 164, 201 Pac. 352 (1921), recovery was denied.
41. SMITH, *supra* note 38 at 122.
42. 120 Utah 443, 235 P.2d 510 (1951).
43. See Smith, *supra* note 38 at 125-126; Corden v. McConnel, 116 N.C. 875, 21 S.E. 923 (1895); RESTATEMENT, TORTS § 633, comment *b* (1934).
44. PROSSER, TORTS 769 (2d ed. 1955).