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THE WERNER CASE: A THERAPY FOR LITIGIOUS PARANOIACS

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In 1945 the California Legislature saw fit to completely overhaul the then existing retraction statute. The result of this legislative effort is the controversial section 48a of the California Civil Code. It provides that in any action for damages for the publication of a libel in a newspaper or of a slander by radio broadcast, plaintiff shall recover no more than special damages unless a correction be demanded within twenty days after notice of the publication, and such correction be not published. Such correction must be published either prior to demand or within three weeks thereafter. The statute defines general damages as damages for loss of reputation, shame, mortification and hurt feelings. Special damages are defined as all damages which plaintiff alleges and proves that he has suffered in respect to his property, business, trade, profession or occupation. Exemplary damages are defined as damages which the court may assess by way of punishment and example on account of the defendant's malice.[1]

Thus it appears that when a retraction is published the plaintiff may recover neither general nor exemplary damages. It also appears that the statute classifies publishers of libel and thereby also classifies plaintiffs in libel actions. Because of the operation of the statute thus, great controversy has arisen over its constitutionality.

The issue was presented to the California Supreme Court in the case of *Werner* v. *Southern California Associated Newspapers.*[2] In that case the defendant newspaper reported that plaintiff had been convicted of bribery and grand theft and sentenced to San Quentin. Plaintiff brought suit, alleging that the matter published by the defendant was false. He further alleged that the published material was known to be false and was published with actual malice. He asked damages in the sum of $100,000, failing to set out specifically the items of damage. Defendant demurred for failure to comply with the provisions of 48a. The demurrer was sustained in the trial court and judgment was given for the defendant. On appeal to the District Court of Appeals the judgment was reversed, the court holding the statute to be unconstitutional on the grounds that it violated the due process and equal protection clauses of the Federal Constitution and article I, section 9 of the California Constitution. The defendant appealed to the California Supreme Court, which reversed the District Court and held the statute to be constitutional with Justices Carter and Schauer dissenting.

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[1]Calif. Civ. Code, § 48a (Deering 1949).

[2]Werner v. So. Calif. Associated Newspapers, 35 Cal.2d 121, 216 P.2d 825, 13 A.L.R.2d 252 (1950).

This case has given rise to much comment and criticism. It is the purpose of this comment to set out reasons why the decision in the Werner case is sound. The discussion will be limited to a treatment of the due process and equal protection issues inasmuch as they have not been set at rest by a decision of the United States Supreme Court. The *Werner* case settled the constitutionality of the statute under the state constitution. It is believed that no constructive purpose would be served by reopening that discussion here.

The due process clause has for its express purpose the protection of life, liberty, and property. Life and liberty are obviously not involved here. Property has been defined as interests which are protected by the law.[3] The due process argument under consideration is founded upon the objection that damages for loss of reputation, shame, mortification and hurt feelings, and punitive damages are being deprived by the statute.

As for general damages, it must be remembered that there is no vested right in any remedy.[4] There is no right to damages until the damages have accrued.[5] The statute prevents the accrual of these damages until the conditions stated therein are met. Hence the only question is whether the prevention of the accrual of these damages leaves unprotected property rights which were protected at common law by the action of defamation. To determine what interests are protected by the law of defamation it is necessary to discover just what is the cause or foundation for which such an action will lie, i.e., what is the gist of the action of defamation.

In the following discussion it will be helpful if it is understood that in the law of defamation, the following terms are synonymous: actual damage, special damage, and pecuniary loss; all refer to the injury to the plaintiff as distinguished from damages which are merely the award given to compensate the injury.

The gist of the action for defamation was pecuniary loss, i.e., the interest protected was pecuniary in nature. The action did not lie unless actual damage was proved.[6] Reputation and the right to freedom from emotional distress were not protected by the action for defamation as they were not pecuniary interests. That this is so may be discovered by an examination of the common law.

The first remedy which was given for defamation was an action on the case for words, which later became known as "slander."[7] It was clear at this period of the law's development that the gist of the action was neither loss of reputation nor emotional distress. Damages for loss of reputation,

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[3]Ludlow-Saylor Wire Co. v. Wollbrinck, 275 Mo. 339, 352, 205 S.W. 196, 199 (1918); Fields v. Michael, 91 Cal.App.2d 443, 449, 205 P.2d 402, 407 (1949).

[4]Gibbs v. Zimmerman, 290 U.S. 326, 332 (1933).

[5]Munn v. Illinois, 94 U.S. 113, 134 (1876); Harlow v. Ryland, 78 F.2d 784 (8th Cir., 1949).

[6]Jones v. Jones, [1916] 2 A.C. 481, 490.

[7]3 STREET, FOUNDATIONS OF LEGAL LIABILITY 250 (1906).

shame, mortification and hurt feelings were given when pecuniary loss was proved, but not otherwise. No independent cause of action existed for them. They might, therefore, be termed "parasitic" damages because they had no independent existence but would only attach when a cause of action was made out by proving pecuniary loss.[8] Certainly, they were not the gist of the early action for defamation.

It later developed that if the defamation imputed crime, disease, or business unfitness, then because of the seriousness of the imputations, actual damage was presumed.[9] Such language is termed "actionable per se."[10] After the development of the printing press, the same presumption was extended to the action for libel when the words held the plaintiff up to hatred, contempt, or ridicule. This was because of the extent and permanency of the publication. Such writing also came to be regarded as "actionable per se."[11]

The presumption, in these instances, was merely a rule of evidence. It was introduced as an aid to plaintiffs because it was felt that pecuniary loss, however difficult if not impossible to prove, necessarily must have followed such serious or widespread publications. Without the presumption, many plaintiffs would suffer a nonsuit for failure to prove pecuniary injury or loss. "This, however, is only a rule of evidence and the rule of right remains intact—that a pecuniary loss must be shown to entitle to a remedy."[12] The gist of the action for defamation remains unaffected by this rule of evidence. The sole effect of the rule is that the showing of pecuniary loss is aided in certain fact situations within the general scope of the action. In these instances, as well as those in which the words are not actionable per se, parasitic damages for loss of reputation, shame, mortification and hurt feelings would be given when the substantive cause of action was proved. But in the "per se" actions, the proof of pecuniary loss was supplied by presumption and parasitic damages attached automatically. Merely because they did attach automatically does not thereby mean that injury to the interests of reputation and freedom from emotional distress became the gist of the action; it does not mean that these interests became the interests protected by the defamation action.

Thus it can be seen that in an action for defamation, the only difference between words actionable per se and words not actionable per se is that in the former pecuniary loss is proved by presumption while in the latter such loss must be actually shown. Note carefully that in either case pecuniary loss

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[8]PROSSER, TORTS 806 (1941).
[9]Jones v. Jones, note 6 *supra.*
[10]Pollard v. Lyon, 91 U.S. 225, 226 (1875).
[11]TOWNSHEND, LIBEL AND SLANDER 187, 188 (1868).
[12]*Id.* p. 60.

or injury is essential to any recovery. Therefore, the gist of the action remains a pecuniary loss and the interest protected remains a pecuniary one. Reputation and freedom from emotional distress are not such pecuniary interests and therefore are not property rights protected by the law of defamation. More precisely, the law did not directly protect reputation; it protected against monetary loss resulting from an injury to reputation.

However, there is a line of authority which has stated that there is a property right in reputation and that the interest protected is reputation. This position is set out by Veeder, *The History and Theory of the Law of Defamation:*[13]

> "The injury to the reputation is the gist of the action; special damage is but evidence of loss of reputation, and is necessary only where without some evidence it would not be clear that reputation had in fact been injured."

This position is historically unsound. It grew out of the effect of the rule of evidence, above referred to, in actions for language actionable per se. By virtue of this rule, damages for loss of reputation were recoverable upon the bare showing that the language used was actionable per se. Therefore, it was an excusable *non sequitur* on the part of some courts to proceed on the theory that the interest protected was the interest in reputation. Thus developed the idea that loss of reputation was the gist of the action. It stemmed from a failure to recognize that the only reason these damages for loss of reputation were given was because the pecuniary loss, necessary to maintain the action, was proved for the plaintiff by operation of this rule of evidence. To show further that this position is unsound, we need only turn to those actions for defamation wherein the rule of evidence does not apply, i.e., where the words are not actionable per se. "As to these, it has never been doubted that a pecuniary loss must be shown to entitle the plaintiff to a remedy."[14] Thus it is seen that reputation is not an interest protected by the action for defamation, and hence cannot be considered a property right.

As to the remaining elements of parasitic damage—shame, mortification and hurt feelings—there is no authority which contends that these represent property rights protected by the action for defamation.

Because the only interest protected by the action for defamation is a pecuniary one, and because the statute only affects the plaintiff's recovery of damages for a non-pecuniary loss, it can be concluded that no valid constitutional objection can be raised on the ground that the statute prevents recovery of damages for loss of reputation, shame, mortification and hurt feelings.

The due process objection is also directed at the alleged deprivation

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[13] 4 COL. L. REV. 33, 34 (1904).
[14] Townshend Op. Cit. *supra* note 11 p. 61.

of a property right in punitive damages. There is no such right. "They are awarded on ground of public policy and not because the plaintiff has a right to the money, but it goes to him merely because it is assessed in his suit."[15] Punitive damages exist to serve an admonitory purpose on behalf of the sovereign. There is not and never has been a right in an individual to admonish other individuals who act with malice. That right is the exclusive province of the state. The state may exercise it or not at its discretion. That there is no property right in punitive damages is sustained by the overwhelming weight of authority. Wherever retraction statutes have been construed to apply solely to punitive damages, they have been sustained.[16] Thus it is apparent that there is no constitutional objection merely because the statute operates to deprive a plaintiff of punitive damages.

A further constitutional objection may be found in the fact that 48a requires *proof* of damage when a retraction has been published. As pointed out above, at common law plaintiff had the benefit of a presumption of injury. It was shown that this was a rule of evidence. It is conceded that a change in rules of evidence which affect substantial rights may be stricken as unconstitutional unless the change is made with due process of law.

> "The due process clauses have not deprived government of the power to modify or abolish rights existing under the common law where such action constitutes a reasonable exercise of its police or other regulatory power."[17]

The police power of a state is simply its power to regulate its internal affairs for the protection and promotiton of the public health, safety, morals, and general welfare.[18] The due process clause merely requires that the exercise of this power be not unreasonable or arbitrary.[19] Therefore, to determine whether section 48a is constitutional, it is necessary to ascertain whether the Legislature could reasonably find that the objects of the statute are properly within the police power, and that the means chosen will fairly attain those objectives.

The primary object of the statute is evident. It is to promote the free and rapid dissemination of news by press and radio. That the unfettered dissemination of news is of primary public importance in a free society is shown by an examination of the constitutions of the 48 states and of the United States. The First Amendment of the Federal Constitution, declaring that "Congress shall make no law . . . abridging the freedom . . . of the press . . .," is exemplary. Article I, section 9 of the California Constitution

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[15]Osborn v. Leach, 135 N.C. 628, 47 S.E. 811 (1904).
[16]See cases collected in note, 13 A.L.R.2d 277, 284.
[17]ROTTSCHAEFFER, CONSTITUTIONAL LAW 545 (1939).
[18]Bacon v. Walker, 204 U.S. 311 (1907).
[19]Jones v. City of Portland, 245 U.S. 217, 224 (1917).

proclaims this same freedom. It is obvious that the very foundation of democracy embodies a public policy of unfettered dissemination of the news. That this policy has not waned is indicated by a recent opinion of Fee, J., reported in The Recorder:

> "The American press is one of the key factors of freedom. . . . In practice, the fearless expression of fact and opinion has rid numberless communities in this country of organized crime and has exposed disloyalty and plots to overthrow the government of the United States. Newspapers laid the way in the exposure of the political corruption in government."[20]

It was not unreasonable for the Legislature to conclude that the public interest in the dissemination of news overshadows individual interest in the admittedly speculative process of awarding damages without proof of actual loss. Nor can it be considered an arbitrary act of the Legislature to decide that an encouragement of free and rapid dissemination of news would necessarily promote the general welfare.

A secondary object of the statute is to mitigate the evil of the use of libel actions virtually to extort money damages based on spurious or exorbitant claims. Writers and courts have long recognized that the giving of money damages without requiring proof of loss is the subject of much abuse. The fact that no proof of loss is required indicates that there is no available criterion by which the measure of damages can be correctly ascertained.[21] Without any such standard, the jury is free "to wander at will and return such sum as imagination might conjure up . . ."[22] The court in the case just cited went on to say:

> "Remembering, however, that the plaintiff was present at the trial, and on the stand as a witness, it isn't any wonder that, giving way to the charm of a talented and captivating woman, the jury inclined to reach into the till of what they considered a 'soulless corporation' and return a sum one-fifth of which would have been thought adequate had the complaining party been a man."[23]

The gravest danger of abuse stems from the out-of-court settlement of spurious and exorbitant claims. Such compromises usually amount to nothing more than extorted money paid to purchase "peace" rather than submit to the risk of a verdict based upon such extraneous factors as sex, wealth, personal attractiveness of the parties, skill of counsel, and the sympathies and prejudices of the jurors.[24] The experience of the New York World is of interest here. In the 20-year period from 1909 to 1930 the World was faced with 220 libel claims. The aggregate cost of settlements

[20]The Recorder, Feb. 26, 1952, p. 1, col. 5.

[21]Donnelly, *The Right of Reply: An Alternative to an Action for Libel*, 34 VA. L. REV. 867 (1948).

[22]Cleveland Leader Printing Co. v. Nethersole, 84 Ohio St. 118, 140, 95 N.E. 735, 741 (1911).

[23]*Ibid.*

[24]*Cf.* MCCORMICK, DAMAGES 443 (1935).

and verdicts amounted to $115,420.36, or an average of $5,496.21 a year. The verdicts accounted for only $45,000 while the settlements and other claims accounted for $70,420.36.[25] The foregoing costs do not take into consideration the cost of litigating and settling these claims. The Chicago Tribune once spent more than a half million dollars in its defense of a suit brought by Henry Ford which resulted in a judgment for the plaintiff for six cents.[26] It is small wonder, then, that these cases are more often settled out of court than in. A large paper like the Chicago Tribune is well able to withstand the financial onslaught of such a suit, but even the threat of such litigation would be sufficient to put most smaller periodicals out of business.

It was not unreasonable and arbitrary for the Legislature to endeavor to correct these evils by enacting this statute. The promotion of the general welfare may be a tenuous concept, but when evils are obvious, their attempted eradication becomes a legislative duty and necessity. In this light, the legislative action is not capricious, arbitrary, nor inconsistent with constitutional principles.

If it be conceded that the objects of the statute—to encourage the dissemination of news, and to mitigate the evil of spurious and exorbitant claims—are well calculated to promote the general welfare, then the only question remaining is whether the statute is fairly calculated to attain these objects. "It is enough if it can be seen that in any degree, or under any reasonably conceivable circumstances, there is an actual relation between the means and the end."[27]

The statute accomplishes the aforementioned objects by permitting the major news distributing services to publish a retraction and thereby eliminate the threat of unfounded claims. This frees these public servants from the burden of choosing between withholding news and paying tribute in the form of money damages for ofttimes baseless claims arising out of erroneous publications. Thus, the free and rapid dissemination of the news, so vital in these times, is encouraged. At the same time, it mitigates the abuse of the libel action by preventing suits based on illusory claims when a retraction is published, while valid claims for actual injury remain protected.

That the means here adopted is not arbitrary and unreasonable is demonstrated by the fact that similar evils have been eliminated by the legislatures of the various states by entirely abolishing causes of action for breach of promise, alienation of affection, seduction, criminal conversation, and negligence to automobile guests. These enactments have been almost

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[25]Donnelly, *supra* note 21, at 879 note 31.
[26]Ford v. Chicago Tribune, Circuit Court, Wayne County, Mich. No. 67,999.
[27]Stephenson v. Binford, 287 U.S. 251, 272 (1932).

universally upheld by the courts as a valid exercise of the police power.[28]

It becomes thus apparent that the deprivation of the presumption of injury is not unconstitutional for such deprivation was accomplished by a reasonable exercise of the state's police power, thus satisfying the requirements of due process.

As shown above, some authorities hold that there is a property right in reputation. Conceding, for purposes of argument, that reputation is a property right, this right is unimpaired by the operation of the statute, because a more appropriate, or at least equally appropriate remedy has been substituted by the Legislature for its protection.

"The law of torts is concerned with the compensation of losses suffered by private individuals in their legally protected interests . . ."[29] Compensation has been defined as: "Payment of damages; making whole; that which is necessary to restore an injured party to his former position."[30] Since the function of the law of torts is to give compensation, remedies offered by the courts in the administration of tort law should, as fully as possible, restore an injured party to his former position. In the case of money loss, money damages is perfect compensation. But where the loss is nonpecuniary, money damages obviously fail to compensate adequately. Nevertheless, the courts recognize that a money award is often the only practical remedy in such cases. However, where it is practical to give compensation in kind for nonpecuniary loss, the courts have not hesitated to do so as is evidenced by the actions for replevin, ejectment and injunction. The courts have thus recognized that the most appropriate remedy for a non-pecuniary loss is restoration in kind.

In the earliest history of the law of defamation, compensation in kind was given. If one falsely called another a "thief" he had to hold his nose with his fingers, publicly proclaiming himself a liar.[31] Since the parties who heard the defamation were substantially the same as those who heard the denial, such a remedy tended to restore the injured reputation. As society became more complex, the persons who heard the retraction were no longer substantially the same as those who heard the defamation and the remedy fell into disuse.

Since the reign of Queen Victoria, when the first retraction statute was passed,[32] legislatures have been trying to correct the failure of the law to

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[28] 158 A.L.R. 617 (1945), 111 A.L.R. 1011 (1937).
[29] PROSSER, TORTS 1.
[30] BLACK'S LAW DICTIONARY 377.
[31] VEEDER, *The History and Theory of the Law of Defamation*, 3 COL. L. REV. 546, 548 (1903).
[32] 6 and 7 Victoria, ch. 96, § 1 (1843).

compensate adequately for defamation.[33] Since modern newspapers have wide circulation to substantially the same body of people in successive intervals of time, they are peculiarly suited to the operation of the ancient remedy of retraction. Retraction has become a more effective remedy than money damages because money cannot restore reputation. A retraction, on the other hand, does have a restorative quality. The persons reading the original defamation learn that it was false. Because defamation injures reputation by instilling an erroneous belief in a third party, the dispelling of this belief tends to restore reputation. To this extent there is compensation in kind.

Thus, it appears that a retraction is more within the spirit and policy of the law of torts in general, and the law of defamation in particular, than is the remedy of damages for such an injury, for the plaintiff is publicly vindicated thereby.[34] A judgment for money damages, quietly entered on "the musty roles of a court," comes to the attention of only a few.[35]

It is true that section 48a does not specifically substitute a retraction for money damages. However, it does encourage the giving of retractions by eliminating certain illusory damages if the defaming newspaper publishes a retraction. It would seem that the appellant's rights, rather than being impaired by the statute, are enhanced. Where a retraction is published, his loss of reputation is compensated in kind, and if the retraction is refused, his rights are the same as he had prior to the enactment of the statute.

Even if a retraction is not regarded as a more effective remedy than money damages, it is apparent that the Legislature could reasonably conclude that it is an equally effective remedy. An individual has no vested right in any particular remedy so long as some remedy is provided that adequately protects his rights.[36]

Furthermore, if there be a property right in reputation, this may be taken away by the Legislature if it is acting with due process of law. It has already been shown that the present statute may be considered a valid exercise of the state's police power. It follows that the statute cannot be regarded as unconstitutional, for the requirements of due process have been met.

It is admitted that there are cases which have struck down other retraction statutes. The leading cases are: *Park* v. *Detroit Free Press Co.*,[37] *Hanson* v. *Krehbiel*,[38] and *Byers* v. *Meridian Printing Co.*[39] The latter two of these

[33]European cognizance of the problem antedated that of Anglo-American law by some twenty years. In 1822 France enacted a statute which gave a right of reply as a remedy for defamation appearing in a periodical. Similar statutes have subsequently been enacted by other European countries. Donnelly *supra* note 21 p. 884 *et seq.*

[34]Allen v. Pioneer Press Co., 40 Min. 117, 124, 41 N.W. 936, 938 (1889).

[35]Werner v. So. Cal. Associated Newspapers, 35 Cal.2d 121, 216 P.2d 825, 13 A.L.R.2d 252 (1950).

[36]Gibbs v. Zimmerman, 290 U.S. 326, 332 (1933).

[37]72 Mich. 560, 40 N.W. 731 (1888).

[38]68 Kan. 670, 75 Pac. 1041 (1904).

[39]84 Ohio St. 408, 95 N.E. 917 (1911).

struck down the statutes under state constitutional provisions which provide that all persons shall have a remedy by due course of law for injuries suffered in person, *reputation,* or property. There is no such provision in the California Constitution. The *Byers* case also mentioned that the statute was being attacked under the Federal Constitution. Both the *Hanson* and *Byers* cases relied heavily upon the authority of the *Park* case. This was unfortunate as the *Park* case is no authority at all for the proposition that such a statute is unconstitutional.

In that case the plaintiff, who was a married man, was erroneously stated to be the defendant in a bastardy action. The effect of this was to impute that he had committed criminal adultery. The state retraction statute expressly exempted cases involving a criminal charge. As pointed out in *Allen* v. *Pioneer Press Co.*, ". . . it [the constitutionality of the statute] was not really in the case, inasmuch as the court held that the publication involved a criminal charge, and hence was not within the operation of the statute."[40] It thus appears that the proposition for which the *Park* case was cited and relied upon was mere dictum.

Furthermore, it does not appear that any of these cases considered whether such a statute might possibly be upheld as a reasonable exercise of the police power. In fact, the same court which decided the *Hanson* case recently intimated, in discussing that case, that had the police power aspect been brought before the court the statute might have been sustained.[41]

Thus it appears that these cases are of no real weight in the determination of the question whether section 48a is constitutional.

A further objection to the constitutionality of the statute is that it violates the guaranties of the equal protection clause of the Federal Constitution.

> "The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary."[42]

We have already shown that the statute here in question was passed to attain a lawful object within the scope of legislative power. Therefore, the only question under the equal protection clause is whether the classification created by the statute to attain that object is wholly arbitrary and unreasonable.

Since the primary object of the statute is to encourage the free and rapid dissemination of news, it is apparent that the only reasonable way to

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[40]40 Minn. 117, 124, 41 N.W. 936, 938 (1889).
[41]Wrights Estate v. Pizel, 168 Kan. 493, 504, 216 P.2d 328, 336 (1950).
[42]Lindsley v. Natural Carbonia Gas Co., 220 U. S. 61, 78 (1911).

attain that object is to set apart the major news reporting media. There is no public interest in back fence gossip or private conversations, hence it is not unreasonable to exclude these "information sources" from the operation of the statute. Magazines, too, are not unreasonably excluded as they cannot be classified as news reporting services, since they serve primarily as commentaries and recapitulations.

It may also be objected that the libel action is abused in other instances as well. But, remembering the primary purpose of the statute, "it is enough that the present statute strikes at the evil where it is felt and reaches the class of cases where it most frequently occurs."[43]

From the foregoing, it is clear that the Legislature did not create an arbitrary and unreasonable classification in setting apart newspapers and radio stations—the major news reporting services—to attain the object of the statute in question. Hence, it cannot be said that the statute violates the equal protection clause.

It is the writers' view that the enactment of this statute violates neither the due process nor equal protection clauses of the Fourteenth Amendment. It has been our purpose in this article to show that the Legislature had reasonable grounds for enacting the statute. It is merely one of a series of efforts which various legislatures have been making in an effort to eliminate some of the anomalies and absurdities of this branch of the law. Courts should be reluctant indeed to interfere with these enactments. By so doing they will merely preserve "a mausoleum of antiquities peculiar to the common law and unknown elsewhere in the civilized world."[44]

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[43]Silver v. Silver, 280 U.S. 117, 124 (1929).
[44]Donnelly, *supra* note 21, at 870.