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ABATEMENT AND REVIVAL - EXCEPTION FROM SURVIVAL STATUTE OF ACTIONS FOR SLANDER AS PREVENTING SURVIVAL OF ACTION FOR SLANDER OF TITLE

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RECENT DECISIONS

ABATEMENT AND REVIVAL — EXCEPTION FROM SURVIVAL STATUTE OF ACTIONS FOR SLANDER AS PREVENTING SURVIVAL OF ACTION FOR SLANDER OF TITLE — Pending plaintiff's action for slander of title, defendant died. A statute provided that no action should abate by the death of either party thereto except actions for libel, slander, malicious prosecution, nuisance, or actions against a justice of the peace for misconduct in office. *Held*, the action abated, because, although slander of title was not expressly excepted from the operation of the statute, still the action of slander as specifically excepted by the statute embraces the action of slander of title. *Billingsley v. Townsend*, 132 Ohio St. 603, 9 N. E. (2d) 690 (1937).

At common law all tort actions, whether real, personal or mixed, abated at the death of either party.¹ The common-law rule, however, has almost universally been changed or modified by statute.² The court concluded that the legislative intent in the instant case was to include slander of title within the meaning of the word slander. There are, however, important differences between the two actions which might have led to a different result. Slander is defamation, whereas slander of title is known as disparagement of property. In an action of slander of title the plaintiff must assume the burden of proving the untruth of the defendant's statements,³ whereas in an action of slander the burden of proving the truth of his statements is upon the defendant.⁴ In slander actions in which the words used are actionable per se, damage need not be proved,⁵ but in actions for slander of title special damages must always be proved.⁶ It is not necessary to prove malice in slander actions,⁷ but it is usually necessary to prove malice in actions of slander of title unless the action be against a stranger claiming no right in the title disparaged.⁸ An action of slander of title is more closely related to a property action than it is to a personal action like slander, because it is intended to protect the marketability of the plaintiff's property; an action of slander is designed to protect a plaintiff's interest in personal reputation.⁹ Would the legislature intend that an action of slander of title should abate as readily as an action of slander? What was the probable intent of the legislature in excepting slander from actions which do not abate? It seems probable that the death of the defendant would itself abate a great deal

¹ 1 C. J. S. 85 (1936).

² 1 C. J. S. 86 (1936).

³ *Long v. Rucker*, 166 Mo. App. 572, 149 S. W. 1051 (1912).

⁴ *McAllister v. Detroit Free Press Co.*, 85 Mich. 453, 48 N. W. 612 (1891).

⁵ HARPER, TORTS, § 238 (1933).

⁶ *Malachy v. Soper*, 3 Bing. (N. C.) 371, 132 Eng. Rep. 453 (1836); 37 C. J. 132 (1925); *Dent v. Balch*, 213 Ala. 311, 104 So. 651 (1925).

⁷ *Coleman v. MacLennan*, 78 Kan. 711, 98 P. 281 (1908).

⁸ *Ward v. Mid-West & Gulf Co.*, 97 Okla. 252, 223 P. 170 (1924); ODGERS, A DIGEST OF THE LAW OF LIBEL AND SLANDER, 6th ed., 72 (1929).

⁹ Smith, "Disparagement of Property," 13 COL. L. REV. 13 (1913); 37 C. J. 135 (1925).

of the harm to the plaintiff, because much that a man says is soon forgotten after he dies, as the sanction which his presence gives to the memory of the things he has said about the plaintiff no longer exists. Furthermore, the action of slander was probably given at common law to deter the slanderer from making further invasions upon the plaintiff's reputation. In the early common law, torts were regarded much in the same light as crimes and the theory of vengeance was a strong factor in the origin of the actions.¹⁰ There is no satisfaction in getting vengeance against a dead man, nor is there any deterrent effect in an action brought against his estate. Hence at common law all tort actions abated. We have, however, receded from these early concepts. Today we have put aside the idea of vengeance in tort law and the concept of compensation has replaced it.¹¹ One can be compensated as well from a man's estate as by the man himself. There seems no just reason why a man's estate should be enriched simply because he dies pending a tort action. There seems to be no policy served in permitting tort actions to abate upon the death of the defendant. The court in the principal case, therefore, would have been justified in holding that slander of title was intended by the legislature to survive and not to come within the exception under the classification of slander. There has been a tendency in the common-law decisions to hold that actions involving property rights as distinguished from personal rights should not abate upon the death of the wrongdoer.¹² The analogy between slander of title and inducing a breach of contract seems clearer than that between slander and slander of title. An action for damages for inducing a breach of contract would apparently not abate. In the absence of a clear legislative intent to bar slander of title actions, a court would be justified in reaching a decision contrary to that reached here.

¹⁰ 14 NEB. L. BUL. 282 (1936).

¹¹ 48 HARV. L. REV. 1008 (1935).

¹² *Sullivan v. Associated Billposters & Distributors*, (C. C. A. 2d, 1925) 6 F. (2d) 1000; 1 C. J. S. 96 (1936).