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Injunctions to Restrain Threatened or Impending Criminal Prosecutions

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any time he was dissatisfied. The court held that this could not be the basis for a criminal prosecution. They said.

> "It is true, as suggested by counsel for the state, that the character of an instrument depends upon the intention of the parties as disclosed by the language used to express the intention of the parties and not by a particular name given it by them. But it is also true that we are not permitted to make the instrument before us the basis of a criminal action even though we may be able to concur in the suggestion that it was artfully and adroitly drawn for the purpose of avoiding a conflict with a penal statute of the state."

Further, they said,

> " the instrument before us cannot be characterized as a lease or transfer of any interest in property because it lacks many of the essential elements of a lease, while on the other hand it bears all the characteristics of an agreement of hiring."

In conclusion, it would seem that if the intention of the legislature in the act was to keep the agricultural land of the state in the hands of citizens, that the act has failed. Through technicalities and construction the courts have to a large extent "taken the teeth out of the act." JACK D. FREEMAN.

INJUNCTIONS TO RESTRAIN THREATENED OR IMPENDING CRIMINAL PROSECUTIONS

The general rule is always stated to be that an injunction will not be granted to stay criminal or quasi-criminal proceedings.[1] The original basis of the rule, it is quite generally agreed, was founded upon the theory that to sustain a bill in equity to restrain or relieve against proceedings for the punishment of offenses would constitute an invasion of the law courts.[2] This theory was the natural outgrowth of the lack of relation between equity and law courts as they formerly existed in England.[3] With the gradual ebb in the jealousies and antagonisms between courts of law and of

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[1] *Dalton Adding Machine Co. v. Va. State Corp. Comm.*, 236 U. S. 699, 37 Sup. Ct. 480, 59 L. Ed. 797 (1914) *Standard Oil Co. of N. J. v. City of Charlottesville*, 42 Fed. (2nd) 88 (1930) 32 C. J. 279; 14 R. C. L. 426.

[2] *Littleton v. Burgess*, 14 Wyo. 173, 82 Pac. 864 (1905) Pomeroy Equitable Remedies (2nd Ed.), Sec. 2065, Clark, Equity (3rd Ed.), Sec. 245.

[3] *Huntworth v. Tanner* 87 Wash. 670, 152 Pac. 523 (1915) In *Holderstaffe v. Saunders*, 6 Mod. 12, Holt, Ch. J., said, "surely chancery will not grant an injunction in a criminal matter under examination in this court, and if they did this court would break it and protect any that would proceed in contempt of it."

equity, culminating in the joining of the two, much of the force of this theory disappeared. Without in any way abandoning the general rule, however, courts began to find and apply other reasons for asserting it. By far the most important reason modernly assigned for the denial of injunctive relief against criminal prosecutions, is that there is an adequate remedy at law [4] By this it is meant that the opportunity of the party accused to establish his innocence, or the invalidity of the law, by motion to dismiss, habeas corpus, plea, or by taking an appeal if convicted, is an adequate remedy [5]

Exception to the General Rule

As was to be expected, the general application of this strict rule soon submitted to modifications in the form of recognized exceptions. The most widely recognized and applied exception to the general rule is that where the statute or ordinance is unconstitutional or otherwise invalid, and where in the attempt to enforce it there is a direct invasion of property rights resulting in irreparable injury, an injunction will issue to restrain the enforcement thereof.[6] While this exception is perhaps as well settled as the general rule itself, the courts are not altogether agreed as to its application. Under this exception, it will be observed that the mere invalidity of the statute under which the prosecution is sought, where no property is involved, is now sufficient to invoke equity cognizance.[7] Conversely, where the law is valid, mere injury to property is not a ground for relief.[8] It has further been generally held that equity will not grant relief where a question of construction, and not of validity of the statute is involved, although there is a substantial minority to the contrary [9] It is somewhat difficult to find a logical basis for the distinction which the majority of courts have here made, since the construction or applicability of the statute is just as much a question of law as is the question of its validity

Nature of Property Right Protected

Under the strict application of the general rule, wherein equity refused to take jurisdiction to restrain criminal prosecutions under invalid laws, the presence or absence of a property right was, of course, immaterial. But it was not long before courts noticed that

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[4] *Sherod v. Aitchinson*, 71 Ore. 146, 142 Pac. 351, Ann. Cas. 1916C 1151 (1914) *Kissinger v. Hay*, Tex. Civ. App. 113 S. W 1005 (1908).

[5] *Buffalo Gravel Corp. v. Moore*, 201 App. Div. N. Y. 242 (1922) *Arbuckle v. Blackburn*, 51 C. C. A. 112, 113 Fed. 616, 65 L. R. A. 616 (1902).

[6] *Truax v. Raich*, 239 U. S. 33, 60 L. Ed. 135, 36 Sup. Ct. 7, Ann. Cas. 1917B 283 (1915) 32 C. J. 279.

[7] *Kearney v. City of Canton*, 273 Ill. 507, 113 N. E. 98 (1916).

[8] *Crighton v. Dahmer* 70 Miss. 602, 13 So. 237, 25 Am. St. Rep. 666, 21 L. R. A. 84 (1893).

[9] Denying relief: *Greyhound Assn. v. Quigley*, 223 N.Y. Supp. 830 (1927) *Greiner-Kelly Drug Co. v. Truett*, 97 Tex. 377, 79 S. W 4 (1904) *Davis v. Amer Society*, 75 N. Y. 362 (1878) *Harris & Co. v. O'Malley*, 7 Alas. 201 (1924). Granting relief: *Hoffman Co. v. McElligott*, 259 Fed. 525 (1909), permitting an injunction on the ground that officer is transcending his authority· *Wichita Falls Traction Co. v. Raley*, 17 S. W (2nd) 157 (1929) 5 N. Y. U. Law Rev. 79.

valuable property rights were often involved, for the impairment or destruction of which the remedy at law frequently proved inadequate. It was for the purpose of relieving this situation that the main exception to the general rule, noted above, was first devised, and hence it naturally followed that the existence of a property right was an essential allegation of all who sought the aid of equity in this type of case. In this particular, the courts were simply applying the fundamental principle that equity protects only property rights, and the growth and expansion of the concept of property in general equity jurisprudence is closely paralleled in the particular phase of such jurisprudence now being considered. Hence it is to be expected that the courts came to deny relief in the absence of distinct tangible property rights.[10]

One of the earliest instances of the growth of this doctrine is found in the case where equity took jurisdiction to protect the franchise of a public-service corporation from serious impairment which a threatened prosecution under an invalid statute would have effected.[11] At the present day, it is quite generally agreed that an established business is a property right deserving of protection in equity, and prosecutions under invalid laws have been restrained to protect employment agencies,[12] food manufacturers,[13] motor bus operators,[14] and the like. A still greater departure from the original conception of property rights was attained when equity courts first offered protection to the right of employment, professional or otherwise. This extension of the doctrine early manifested itself in the type of case under consideration, when an injunction was granted to restrain the enforcement of the Arizona anti-alien labor law, although the employment protected in that case was not even under contract, but was at will.[15] One or two jurisdictions have gone to the extent of granting injunctive relief although it was admitted that no property rights was involved.[16] This appears to be the more candid and logical position, especially in view of the fact that the historical basis of the principle that a property right must be involved, no longer exists.[17] Yet, in the absence of legisla-

[10] *Flaherty v. Fleming*, 58 W Va. 669, 52 S. E. 857, 3 L. R. A. (n.s.) 461 (1906) *Osborn v. City of Shreveport*, 143 La. 932, 79 So. 542 (1918) The Law of Injunctions, Lewis & Spelling, Sec. 3; 14 R. C. L. 365.

[11] *So. Exp. Co. v. Ensley*, 116 Fed. 756 (1902) *Bessemer v. Bessemer City Waterworks*, 152 Ala. 391, 44 So. 663 (1907).

[12] *Wiseman v. Tanner* 221 Fed. 694 (1914).

[13] *Shawnee Mill Co. v. Temple*, 179 Fed. 517 (1910).

[14] *Nolan v. Riechman*, 225 Fed. 812 (1915).

[15] *Truax v. Raich*, 239 U. S. 33, 60 L. Ed. 135, 36 Sup. Ct. 7 (1915).

[16] *Foley v. Ham*, 102 Kan. 66, 169 Pac. 183, L. R. A. 1918C 204 (1917) *Alexander v. Elkins*, 132 Tenn. 663, 179 S. W 310, L. R. A. 1916C 261 (1915).

[17] An admirable discussion of this point is to found in *Huntworth v. Tanner*, 87 Wash. 670, 152 Pac. 523 (1915) one of the most able opinions delivered in recent years upon the whole topic being considered. Mr. Justice Chadwick, after reviewing the history of the equity doctrine that a property right must be involved, invokes the old maxim, *'Cessante ratione legis, cessat et ipsa lex,'* the reason of the law ceasing, the law itself ceases also.

tive enactment, as in England and Texas, few courts today assume to depart from the ancient principle, and almost invariably the statement is included somewhere in the decision that equity protects only property rights. However, as noted above, the courts have greatly expanded the application of the original principle, and this has been done largely by bringing new rights formerly considered personal rights, or mere priveleges, within the old definitions.[18]

INADEQUACY OF THE REMEDY AT LAW

In general, it appears that the usual considerations upon which equity determines whether or not the remedy at law is adequate, are applicable to cases where relief is sought against the enforcement of an invalid criminal statute. There are, however, a number of factual situations arising under the type of relief being considered, which are worthy of examination. As before noted, the opportunity of the party accused to establish his innocence, or the invalidity of the statute or ordinance in the criminal prosecution, was considered as an adequate remedy by those courts which followed the strict rule that equity will not take jurisdiction in such cases.[19] But, while it is true that the merits of threatened or impending prosecution will undoubtedly be justiciably determined, if left to the criminal courts, it is likewise true that the complainant may, in the meantime, have suffered irreparable damage or have been put to a multiplicity of suits. In either case, it cannot be said that the complainant has an adequate remedy at law Hence it seems only equitable that the complainant be given an opportunity to show such special circumstances as to clearly indicate that the remedy in the criminal courts, although correctly disposing of the merits of the charge, to be inadequate relief in the particular case. It is this view of the situation which has moved most courts, modernly, to follow the exception to the general rule where the facts permit, and indeed, the exception itself is founded upon this theory [20]

Under the classification of irreparable injury, falls the cases where the threatened prosecution is under a law which forbids the carrying on of a certain business, or so restricts or impairs the business as to render any reasonable operation of it a violation of the law In such case enforcement of the law means suspension of the business, and where the criminal prosecution with its appeal to a higher court consumes a period of months, or even years, the good will of the business is often completely lost, which, together with the injury to the business reputation of the complainant, frequently effects a total destruction of the business, regardless of the final outcome of the criminal prosecution.[21] The same reasoning

[18] The Law of Injunctions, Lewis & Spelling, Sec. 7.

[19] See note (5) *supra.*

[20] *Boyce's Executors v. Grundy*, 3 Pet. (U. S.) 210, 7 L. Ed. 655 (1830) *Meyer v. Town of Boonevill*, 162 Ind. 165, 70 N. E. 146 (1904) Mr. Simon Fleischmann in 9 Am. Bar Assn. J. 169 (1923)

[21] *Merchant's Exchange v. Knott*, 212 Mo. 616, 11 S. W 565 (1908)

applies as well to the case of the complainant who is professionally employed. Such cases can be readily distinguished from the situation where the statute under which the proposed prosecution will proceed, does not forbid the carrying on of the business, or seriously impair it, but merely provides for the licensing of the same. In such case it is evident that the complainant need not suffer irreparable injury, since he need only pay the license fee to escape prosecution, or at least pending the outcome of the criminal prosecution, without in any way interrupting his business or professional activities.[22]

Multiplicity of suits has often been classified as a separate exception to the general rule that equity will not relieve against a threatened criminal prosecution. Yet this ground for relief is seldom urged unless a property right is said to be involved, and unless the law under which the prosecution is pending is claimed to be void. Therefore it would seem that multiplicity of suits is merely a consideration in determining whether or not the remedy at law is adequate, under the main exception to the general rule.[23] Multiplicity of suits is often urged in proof that the remedy at law is inadequate, in cases where a number of plaintiffs join together, all of whom are threatened with prosecution under the same law. In such cases equity will often stay the prosecution of all but one of the plaintiffs, pending the outcome of the criminal prosecution of that one.[24] It is also urged where a single complainant is threatened with a number of prosecutions, as, for example, where one is threatened with an arrest each day, under a statute which provides that each day's violation is a separate offense.[25]

Distinction Between Threatened or Pending Prosecution

An examination of the cases where equity jurisdiction is sought to be invoked to restrain prosecutions under an invalid statute, indicate that in many of them the prosecution has merely been threatened, while in an equal number, prosecution is already pending in the form of arrest and release on bail pending a hearing. There are, of course, many cases where both circumstances exist, as where the complainant seeks relief from future threatened prose-

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[22] *Brown v. Nichols*, 93 Kan. 737, 145 Pac. 561, L. R. A. 1915D 227 (1915) *Boise Artesian Hot & Cold Water Co. v. Boise City*, 213 U. S. 276; 53 L. Ed. 796, 29 Sup. Ct. 426 (1909). On the other hand, relief has sometimes been given even in this type of case, as where a multiplicity of suits was threatened, *Clark Teacher's Agency v. City of Chicago*, 220 Ill. App. 319 (1920) or where the plaintiff's property had been levied on to pay the license, *Wofford Oil Co. v. City of Boston*, 170 Ga. 624, 154 S. E. 145 (1930) or where the city refused to issue the license to the plaintiff, *DeLuxe Motor Cab Co. v. Dever*, 252 Ill. App. 156 (1929).

[23] *Carey v. Atlanta*, 143 Ga. 192, 84 S. E. 456, L. R. A. 1915D 684 (1915) *Bielecki v. City of Port Arthur*, Tex. 2 S. W (2nd) 1001 (1928).

[24] *Houston v. Richter* Tex. Civ. App. 157 S. W 189 (1913).

[25] *So. Covington & C. Street Ry. Co. v. Berry*, 93 Ky. 43, 18 S W 1026, 15 L. R. A. 604, 40 Am. St. Rep. 161 (1892) *Shinkle v. Covington*, 83 Ky. 420 (1885).

cutions, as well as that which is already pending against him. In the great majority of cases, this distinction appears not to have been raised by the courts, while in a few cases, where courts have found a distinction between cases where the prosecution is threatened, and cases where it is already pending, there is some conflict in the result reached. Thus, of the cases which take note of this difference, some deny relief *unless* the prosecution is already pending,[26] some deny relief *if* the prosecution is already pending,[27] while still others, after noting the distinction, hold that it is immaterial.[28] It would seem, if such distinction should ever be drawn, that no arbitrary rule should be set, but that the matter should merely be a consideration in determining if there is a reasonable probability of injury Preventive or protective relief is the peculiar office of an injunction, and hence where prosecution is actually threatened, or even where, as in many cases, the court may safely assume that the prosecuting officers will do their duty in enforcing the statute, injunctive relief should be granted, although actual prosecution has not yet begun. Conversely, although prosecution is already pending in the form of information or indictment, it is submitted that relief should not be denied in an otherwise proper case, since the reason for the old fears of invading the province of a law court have disappeared.

A somewhat different situation exists in the federal courts, where a question of invading the domain of the state courts is always a lively issue. It has therefore recently been held that a federal court will not take equity jurisdiction of a criminal action that is already pending in the state courts.[29] That this holding is based upon the jurisdictional question involved between federal and state courts is proven by the fact that the federal court will enjoin a United States attorney, although the indictment has already been filed.[30]

The Washington Rule

In Washington the courts uniformly apply the general rule denying relief against criminal prosecutions, and likewise, the well established exceptions to that rule. The first case arising in Washington which directly involved the problem was *Hillman v. Seattle*.[31] In that case the plaintiff sought to enjoin the threatened prosecution by the City of Seattle, under a city ordinance which the plaintiff alleged to be invalid. The court, after expressing a willingness to grant the relief if it found the allegations to be true,

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[26] *Dreyfus v. Boone*, 88 Ark. 353, 114 S. W 718 (1908).

[27] *Buffalo Gravel Corp. v. Moore*, 201 N. Y. App. Div 242 (1922)

[28] *Society of Sisters v. Pierce*, 296 Fed. 928 (1924) in which the enforcement of a statute which would not take effect for over two years, was enjoined.

[29] *Cline v. Frink Dairy Co.*, 274 U. S. 445, 71 L. Ed. 1146, 47 Sup. Ct. 681 (1926)

[30] *Weed & Co. v. Lockwood*, 255 U. S. 104 (1920).

[31] *Hillman v. Seattle*, 33 Wash. 14, 73 Pc. 791 (1903).

thereafter found the ordinance to be valid, and for this reason relief was denied. Practically the same result was reached in *City Cab, Carriage & Transfer Co. v. Hayden.*[32] *Huntworth v. Tanner,*[33] appears to be the only Washington case in which an injunction was granted to stay a criminal proceeding. In that case the plaintiff was about to be prosecuted under an employment agency statute prohibiting the collection of fees, and upon satisfactory proof that any arrest or prosecution of the plaintiff would irreparably injure the plaintiff's business of conducting a teacher's agency, the court granted relief, on the ground that the statute was inapplicable to the plaintiff's business. Thus it appears that the Washington court will not only give injunctive relief under the exception to the general rule, but that it will examine the construction or applicability of the statute, as well as its validity In this respect the court has followed the minority rule in the United States, but the rule which seems to be supported by the better reasoning, as before noted.

In *Brown v. Cle Elum,*[34] the court again expressed a willingness to grant relief where the facts bring the case within the recognized exception, but again find that the ordinance is not invalid, and hence deny relief. The recent case of *State ex rel. Potter v. Maybury,*[35] is the latest pronouncement of the Washington court upon this problem. In this case a plaintiff who had been arrested and released on bail pending a hearing upon a charge of selling securities without a license, in violation of the "Securities Act," sought an injunction to restrain the prosecution of that or any future charge based upon the same statute. The court, without considering the validity of the statute, held that there was not such a direct invasion of property rights which will result in irreparable injury to the plaintiff as to justify the court in interfering with the pending or threatened prosecution under a void statute. In reaching this decision, the court of course admitted that equity had jurisdiction to grant such relief, in cases which are brought within the exception to the rule. Thus, while there appears to be but one decision in this state which has actually granted relief against a criminal prosecution, those cases which have denied relief, have uniformly recognized its propriety in proper cases, and may be clearly distinguished on the facts.

It may be observed that in the United States as a whole, as well as in Washington, the consideration upon which equity will afford protection in this type of case are not now fundamentally different from the considerations which will call forth injunctive relief in any type of case. Hence it might very well be said that the general

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[32] *City Cab, Carriage & Transfer Co. v. Hayden,* 73 Wash. 24, 131 Pac. 472 (1913).

[33] *Huntworth v. Tanner, supra.*

[34] *Brown v. Cle Elum,* 143 Wash. 606, 255 Pac. 961 (1927).

[35] *State ex rel. Potter v. Maybury,* 61 Wash. Dec. 141, 296 Pac. 566 (1931).

rule is that equity will grant relief against criminal prosecutions under an invalid statute wherever the facts are such as to state a case for ordinary injunctive relief, viz., injury to property for which there is no adequate remedy at law Yet the present manner of stating the rule, by finding a general rule denying relief, and then an exception which permits relief in all cases where there is an injury to property for which there is no adequate remedy at law, is so well settled, that no change by the courts in the manner of stating the rule is to be expected. In any event, the same result is reached, and it is the universal rule at the modern day, that equity will take jurisdiction to relieve against threatened or pending criminal prosecutions, under an invalid statute, where there will be a direct invasion of a property right for which the remedy at law is inadequate.

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RECENT CASES

SCHOOLS AND SCHOOL DISTRICTS — LIABILITY — TORTS — NEGLIGENCE OF OFFICER. One of the teachers of the school district, with the knowledge and consent of the directors, acted as coach and trainer of the football squad. A student of the school was induced, persuaded and coerced by the coach to train and practice as a member of the squad and as a result sustained injuries, of which the coach knew or in the exercise of ordinary care should have known. While still suffering from such injuries the student was permitted, persuaded and coerced by the coach to play on the football team. He received additional injuries and the father brings this action against the school district to recover for the reasonable and necessary expenses for caring for his son and for loss of services. *Held*: Under Rem. Comp. Stat. 951, providing that an action may be maintained against a school district for an injury to the rights of the plaintiff arising from some act or omission of such district, it is liable for the negligent act of its officer or agent in supervising a football team maintained by the district. *Morris v. Union High School District*, 60 Wash. Dec. 5, 294 Pac. 998 (1931).

There has been no other case where liability was fastened on a public school because of injury or death to a pupil who participated in an athletic contest. In all the years that athletic contests have played their important part in American school and college life, with all the many injuries that have been sustained by playing, not one reported case has gone to an appellate court seeking damages therefor. The case is novel and a most far-reaching decision in its possible effect on future litigation in this state.

The general rule in this country is that a school district, municipal corporation or school board is not, in the absence of a statute imposing it, subject to liability for injuries to pupils of public schools suffered in connection with their attendance thereat, since such district, corporation or board in maintaining schools acts as an agent of the state and performs a purely public or governmental duty, imposed upon it by law for the benefit of the public and for the performance of which it receives no profit or advantage. *Lane v. Woodbury*, 58 Iowa 462, 12 N. W 478 (1882) *Bigelow v. Randolph*, 14 Gray (Mass.) 541 (1860) *School Dist. v. Fuess*, 98 Pa. 600, 42 Am. Rep. 627 (1881). Cases are collected in 9 A. L. R. 911. Another ground for non-liability is that such educational agencies have no means to pay damages for such claims, and all funds placed under their control are appropriated by law to strictly school purposes and cannot be diverted.