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The Use of the Injunction to Prevent Crime

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NOTES

THE USE OF THE INJUNCTION TO PREVENT CRIME*

In this paper the writer will attempt, first, to give something of the history of Equity and its jurisdiction, showing how Equity, at one time, exercised a criminal jurisdiction and later relinquished it, and second, how the general rule has become well established that a court of equity is not a court of criminal jurisdiction.

After this consideration of the historical growth of the equity court, we shall briefly consider the question: does the fact that the criminal law is not enforced give sufficient ground for a court of equity to intervene and enjoin the commission of crime?

A court of equity is not a court of criminal jurisdiction, but lest there be a misinterpretation of this statement, the writer wishes to make clear that there should be made a qualification of this statement, and a more accurate statement of the rule is that a court of equity does not have jurisdiction to enjoin criminal acts as such.

This qualification is necessary because courts of equity do in fact enjoin acts which are crimes. But this jurisdiction is not founded and is never exercised because the acts enjoined are crimes, but because they would result in irreparable injury to property, or because they are public nuisances affecting the health, safety, or morals of the community, and against which the remedy at law is inadequate.

It is true that there has been in recent years a marked growth in the law, and the jurisdiction of courts of equity in some cases has been founded by a looser construction of the established principles, such as public nuisances, and there has been a different interpretation placed on the requirement that the remedy at law must be inadequate, which has been much more favorable to the jurisdiction of the equity court.

However, the writer believes that there has been no direct departure from the established principles governing equity

*This is the first of a series of notes to be published under the same general heading.

jurisdiction. So, with this qualification, that is, that a court of equity cannot enjoin crimes as such, the established rule that a court of equity is not a court of criminal jurisdiction will be found to hold true.

As the purpose of this note is chiefly to give some insight into the origin of equity and the growth of its jurisdiction as it is today, let us proceed to a study of the history of equity. Equity has been defined as that system of justice which was administered by the High Court of Chancery in England in the exercise of its extraordinary jurisdiction.[1] In order to understand what equity is it is necessary to understand what the English High Court of Chancery was and how it came to exercise its extraordinary jurisdiction.

After the Norman Conquest, the local tribunals which were already in existence were retained, but the supreme judicial authority was vested in the king, assisted by his councils.

The king had two councils. The great council later became the parliament, and it consisted of the bishops, earls, barons, and such knights as held lands directly from the king. There was no sharp line drawn between executive and judicial functions, and the great council was in both branches an advisory rather than a potential body. The small, or ordinary, council advised the king during the intervals when the great council was not in session, and it appears to have formed part of the great council when in session.[2]

The king was the source of all power and all justice emanated from the crown. The king, in theory and perhaps in fact, enacted laws and redressed particular grievances.

The ordinary council was composed of barons chosen by the king, and certain officers of the palace, and to these there were added persons learned in the law, styled justiciarii, together with others sometimes specially summoned by writ from the chancellor's office.[3]

The theory was that all power and justice was vested in the king. The council was the great judicial center of the kingdom, and from it all justice emanated. The supreme authority, including the supreme judicial power, was vested in this council. The king sometimes sat in person with this council, together with the

[1] Bispham: Principles of Equity, p. 1.
[2] 1 Spence: Equity 329.
[3] Ibid. 107; 1 Foss' His., Judges 9.

chief justiciary and the chancellor, attending to complaints and grievances.

This small council was called the Curia Regis, and it appears to have become in the reign of Henry I, the court of ultimate appeal from all the courts of ordinary jurisdiction. Out of this council, or Royal Court, the Court of King's Bench, the Court of Exchequer, and the Court of Common Pleas gradually arose.[4]

We now come to the position of the Chancellor in the system. Blackstone said the chancery derived its name from that of its presiding officer, the chancellor, who was so called because he cancelled the king's letters patent when issued contrary to law. He was an officer of great distinction, and the office may be traced back to the Saxon Kings, many of whom had their chancellors.[5]

The chancellor was secretary to the king and keeper of the king's Great Seal. He was a member of the council as the keeper of the Great Seal and personal advisor of the king. We shall see that he held a very close connection with both the king and the law courts. The beginning of the chancery as a separate department of the government dates from 1238 when Henry the Third dispensed with baronial chancellors, holding office for life, and took the office into his own hands. He appointed his chancellor, and started the system of taking the profits of the seal for the use of the crown and paying the chancellor a fixed sum for the maintenance of a body of clerks who served under him.[6]

As keeper of the Great Seal, the chancellor was destined to become much more than a mere departmental chief, for it put him at the head of the entire English legal system. He exercised the power to cancel the king's letters patent when issued contrary to law, and he had supervision over all public letters, charters, and other instruments passing under the Great Seal.

The power of the chancellor which was of the utmost importance was the power to issue original writs. The English legal system was a system of royal justice, and before any suit could be brought in the king's courts, the suitor had to get a writ, authorizing him to bring his suit. This was issued out of

[4] Bispham's Principles of Equity, 9th Edit. p. 5.
[5] 3 Blackstone 45.
[6] Holdsworth: Hist. of Eng. Law, Vol. 1, p. 395.

the chancery, and was sealed by the chancellor. The power of the chancellor as keeper of the Great Seal and the power to issue writs constituted the ordinary jurisdiction of the chancellor, or chancery department. But the function of the chancellor as keeper of the king's conscience was what constituted his extraordinary jurisdiction.

As the king's council still retained its general supreme authority, applications for relief were frequently made to that body when for any reason redress could not be otherwise obtained. These petitions were made to the king's conscience, and in considering them the advice of the chancellor was usually followed or they were left entirely for his disposal.[7]

As it was the duty of the chancellor to issue original writs, it was he who passed on the question of whether the case presented came under one of the writs in use or whether it would call for the exercise of the extraordinary jurisdiction held in reserve. This extraordinary jurisdiction included cases for which there was no writ in use and other cases in which the remedy in the courts of common law was for any reason inadequate.[8]

This extraordinary jurisdiction was likely to increase because of the fixed forms of action, the tendency of the common law courts to hold rigidly to precedent, and the refusal of the common law courts to adopt equitable principles and remedies. Also, the ambitions of the chancellors led them to give redress by exercising this extraordinary jurisdiction, which they exercised as a royal prerogative for the king, rather than by directing a writ to be issued to bring the cause before the ordinary tribunals.[9]

Thus, by this power to issue original writs, the chancellor became very powerful. But the rising power of Parliament in the thirteenth and fourteenth centuries began to fetter this power of the chancellor. The forms of action in use did not cover the cases in which the plaintiff suffered indirect or consequential injury from the acts of the defendant, and, too, the barons did not favor the extensive exercise of the extraordinary jurisdiction of the chancellor; they passed the Statute of Westminster II in 1285, which gave the chancellor the power and

[7] Bispham's Prin. of Equity, 9th Edit. p. 8.
[8] Bispham's Prin. of Equity, 9th Edit. p. 8; 1 Spence Equity, 330.
[9] Bispham's Prin. of Equity, 9th Edit. p. 9.

authorized him to vary slightly the forms of actions in order that justice might be rendered in similar cases in the courts of common law, and as a result of this statute came the writ of trespass on the case.

The power to issue original writs tended to become ministerial as Parliament and the law courts became stronger, but the chancellor continued to exercise the royal right to administer equity when for any reason the petitioner could not get an adequate remedy in the courts of common law. These matters were conisdered as matters of favor and not of right, and they came to be known as matters to be granted as of grace. Until the latter half of the thirteenth centry the chancellor was considered as acting under and following the king and merely exercising a royal prerogative for the king, acting merely as the king's advisor and personal agent; but the Ordinance of 1280[10] provided that all petitions which involved the issuance of any document or writ under the Great Seal should go first to the chancellor. A still better recognition of the chancellor as the proper person to administer the extraordinary jurisdiction in matters of grace is contained in a proclamation of Edward the Third to the sheriff of London, which provided that petitions relating to the grant of the king's grace should be brought before the chancellor or the keeper of the Privy Seal, and not to the king in person.[11] Several other statutes of the reign of Edward the Third gave jurisdiction over specified matters to the chancellor. The chancellors without hesitancy exercised their powers to protect persons and property from violence, and their powers were extended by Edward the Third, who authorized them to protect the poor and the weak.[12]

Because of the close relation and connection of the chancellor with the king, the council, and the common law courts, he was able to give any relief needed, and in 1340 the Chancery is mentioned as a court along with the courts of common law.[13]

By the middle of the fifteenth century, the chancery was becoming a well established court with its jurisdiction fairly well settled. Some matters were referred to the chancery by the parliament and the council. The chancellor was not only the

[10] Stat. 8 Edw. 1st. 1280.
[11] Stat. 22 Edward 3rd. 1348; Bispham: Prin. of Equity, 9th Edit. p. 11.
[12] Mack: Revival of Criminal Equity, 16 Harv. L. Rev. 390.
[13] Stat. 14 Edw. 111, 1340.

head of the chancery, but he was also a member of the council, and he very often presided over the council when complaints were heard before it. He had long been a powerful officer, but did not become the head of an independent court of chancery until the end of the fifteenth century.

However, because the chancery had become, by the end of the fifteenth century, an independent court with its jurisdiction fairly well settled must not be taken to mean that the powers of the chancellor were greater than ever; on the contrary, we shall see that by this time the scope of his jurisdiction was considerably limited. It was becoming possible to classify the various cases which came before the chancellor and the council rather than before the courts of common law.[14] They are as follows: (a) cases which fell altogether outside the common law, such as cases concerning alien merchants, and cases of Maritime or Ecclesiastical law, (b) when the common law afforded a remedy, but the plaintiff could not get relief or the courts could not enforce their remedies because of the power of the defendant, and (c) cases in which the law itself was in fault and afforded no remedy.

Through the Middle Ages, the weakness of the government, the turbulence of the times, and the power of strong defendants was the ground for the interference of the chancellor as much as the strictness and inadequacy of the law.[15]

In the exercise of this jurisdiction, which was supported by the kings of that period, especially by Edward the Third and Richard the Second, the chancellor protected property from violence and gave relief to the poor and the weak, and, in so doing, the chancellor enjoined many criminal acts. Many of these cases were cases of maitnenance, assaults, trespasses, and a variety of outrages which were cognizable at common law, but for which the petitioner could not get relief in the common law courts. This jurisdiction was exercised because of the inability of the law courts to give relief due to the exigencies of the times.[16]

In the later years of the reign of Edward the Fourth, in the latter half of the fifteenth century, the jurisdiction of the council was revived after the War of the Roses, and it began

[14] Holdsworth: History of English Law, Vol. 1, p. 405.
[15] *Supra*, Note 14.
[16] Bispham's Prin. of Equity, 9th Edit. p. 12.

to hear criminal cases affecting the peace of the state, and left to the chancery jurisdiction over civil cases.[17]

In 1486, the judicial powers of the council came to be exercised by the Court of Star Chamber, established in that year.[18] It tended to become a court of criminal equity, and the council became an executive body.[19] The statute establishing the court cites as premises that by unlawful maintenances and briberies, and for other reasons, the policy and good rule of the realm were almost subdued, and that crimes were increasing. The Act then provided for the organization of the court, making the chancellor a member.

Thus, we have, by the end of the fifteenth century, the chancery as a separate and well established court of equity with the civil law as the basis of its jurisdiction. However, the chancellor was also a member of the Court of the Star Chamber, which exercised a criminal jurisdiction. The statute creating the court gave it the authority to call persons before it on bill or information put to the chancellor or the king, and such as they found guilty to punish according to the form and effect of the statutes as if they had been convicted by due order of the law.[20]

In 1640 this court was by statute abolished, and the statute provided a penalty for any chancellor, lord councillor, or judge to exercise any such powers. The reasons cited for the abolition of this court were that it had overstepped its powers, that those matters had their redress in the common law of the land, that the reasons for the continuance of the court had ceased, and that it was a means to introduce an arbitrary power and government.[21] These reasons cited in the statute reflect the popular feeling of the times, and indicate the growing power of constitutional government in England.

After the fifteenth century, the incompetence of the criminal law as a ground for the interposition of equity was wiped away. But the court never ceased to assert its right to protect property from irreparable injury, even if the act involved were also a crime.[22]

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[17] Holdsworth: His. of Eng. Law, Vol. 1, p. 408.
[18] Stat. 3 Henry the VII, 1486.
[19] Holdsworth: Hist. of Eng. Law, Vol. 1, p. 409.
[20] Stat. 3 Henry the VII, 1486, *supra.*
[21] Stat. 16 Car. 1, 1640.
[22] *Emporor of Austria* v. *Day,* 3 De G. & S. & F. 217, (1867).

In a case decided by Lord Eldon[23] in which the plaintiff asked that the defendant be enjoined from publishing libelous letters, Lord Eldon said, "The publication of a libel is a crime, and I have no jurisdiction to enjoin the commission of a crime, excepting such cases as belong to the protection of infants—an exception arising from that peculiar jurisdiction of this court." However, Lord Eldon granted the injunction on the ground of the protection of the property right which the writer of letters has in them. This case is now considered the leading case on the proposition that equity protects only property rights.

The jurisdiction of a court of equity to enjoin purprestures and public nuisances was firmly established in 1795.[24]

A brief conclusion of this study of the jurisdiction of the chancellor from early middle ages to the present is that due to the system of royal justice, the weakness of the government, the turbulence of the country, and the inability of the law courts to give adequate relief, the chancellor enjoined many acts which were criminal and protected persons and property from violence. In the latter part of the fifteenth century, the council began to exercise this jurisdiction and left the jurisdiction of the chancery based on the civil law. The Court of Star Chamber, established in 1486, assumed the criminal jurisdiction of the council, and this court was abolished in 1640. Since the fifteenth century the chancellor has not enjoined crimes except in the protection of property or in restraint of public nuisances.

The further question of this study is, does the fact that the criminal law is not enforced furnished sufficient grounds for a court of equity to interfere and enjoin crimes? It has been seen that the chancellor until the middle of the fifteenth century assumed jurisdiction to enjoin criminal acts on the ground that the defendant's power over the local courts was so great that he would not or could not be punished through the ordinary courts. It has been well said in an article on this subject that this ground of jurisdiction is now obsolete and should not be revived. "It is not to be presumed that a court of law will fail to administer justice in cases expressly cognizable by it or that any department of government will fail in the performance of its duties."[25]

[23] *Gee* v. *Pritchard*, 2 Swanst. 402, (1818).
[24] *Atty. Genl.* v. *Richards*, 2 Anst. 603, (1795).
[25] Black: 5 Wis. L. Rev. 19.

The Supreme Court of the United States has laid down the rule on that point in the opinion of Mr. Justice Hunt.[26] The purport of that opinion is that although the remedy at law is temporarily suspended by means of illegal violence, and the execution of the law is prevented, by violence or crime, does not change the fact that the legal remedy is adequate, and the law courts lose no power and the equity courts gain none.

We conclude that a court of equity is not a court of criminal jurisdiction, and the fact that the law is not enforced and cannot be enforced is not sufficient grounds for the interference of a court of equity by use of the injunction.

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[26] *Rees* v. *Watertown*, 19 Wall. (U. S.) 107, 1873.