Kentucky Law Journal

Volume 20 | Issue 2 Article 7

1932

The Criminal Jurisdiction of Equity--Purprestures and Other Public Nuisances Affecting Health and Safety

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THE CRIMINAL JURISDICTION OF EQUITY—PURPRESTURES AND OTHER PUBLIC NUISANCES AFFECTING HEALTH AND SAFETY*

The function of a court of equity is not to protect the public against crimes.[1] On the contrary, the foundation of equity jurisdiction is in the enforcement of the civil law.[2] At one period in English history, from the reign of Richard II to the end of the fifteenth century, equity played an important role in the enforcement of the criminal law, but this need vanished with the years. However, in view of jurisdiction to protect the person and property of an individual from irreparable injury, equity will not fail to intervene simply because the act may also be a crime.[3] In other words, equity may protect at the same time both public and private rights.

It is the purpose of this paper to examine some instances where equity has gone beyond the pale of civil rights and protected the public rights of the community. This involves a study of equity intervention in purprestures and other public nuisances affecting the health and safety of the people. A public nuisance is a crime at common law, subject to indictment and punishment by the state.[4] This paper will, therefore, attempt to show, in a limited group of cases, equity enforcing the criminal law.

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*This is the second of a series of notes on "The Use of the Injunction to Prevent Crime". The first appeared in the November, 1931, issue.

The following authorities will aid in a study of this problem: Mack, Revival of Crim. Eq., 16 Harv. L. Rev. 389; Chafee, The Progress of the Law, 34 Harv. L. R. 388; Shabaz, The Historical Development of the Power of Equity Courts to Enjoin Nuisances, 11 Marq. L. R. 32-8; Schofield, Equity Jurisdiction to Abate and Enjoin Illegal Saloons as Public Nuisances, 8 Ill. L. R. 19; Pound, Injunction Against Liquor Nuisances, 9 Har. L. R. 521; Walsh, Equitable Relief Against Nuisance, 7 N. Y. U. L. R. 352, 374; Walsh, Equity, pp. 197, 201; Clark, Equity, Secs. 222 and 223; Chafee, Cases on Equitable Relief Against Torts, pp. 438-440; Pomeroy, Eq. Jurisp., sec. 1893; Durfee, Cases on Equity, p. 592; Summary Abatement of Nuisances, 2 Col. L. R. 203; 20 R. C. L. 385; 69 Am. St. Rep. 271.

[1] *Attorney General* v. *Utica Ins.* Co., 2 Johns. Ch. 370.
[2] Mack, Revival of Criminal Eq., 16 Harv. L. Rev. 389.
[3] Ibid, P. 392.
[4] Clark and Marshall on Crimes, sec. 446.

The problem will be divided into two parts; (1) Historical review of public nuisance cases; and (2) basis of equity jurisdiction.

(1) Historical Development of Equitable Intervention in Public Nuisance Cases.

(A) Purprestures and other public nuisances affecting health and safety.

The first instance of an injunction against a public nuisance appears in 1587 in *Bond's* Case.[5] In that case a tenant was restrained from building and maintaining a pigeon-house on the ground that such would be a common nuisance. In the case of *Baines* v. *Baker,*[6] the plaintiff tried to get an injunction against the building of a smallpox hospital. Lord Hardwicke denied the injunction, saying if it were any kind of nuisance it was public, and if it were a public nuisance the action should have been brought on information in the name of the attorney general.[7] These two cases show equity intervening where a wrong has been done to the public. The wrong is principally one of menacing the health and safety of the King's subjects.

In *Attorney General* v. *Richards,*[8] the complaint alleged that defendants had erected a wharf, docks, and other buildings between high and low water mark in Porstmouth harbor so as to prevent the vessels from sailing or mooring there, and to endanger the harbor by preventing the current from carrying off the mud. The information prayed for an injunction to restrain further building and an abatement of the present structures. The relief was granted on the ground that "where the king claims and proves a right to the soil, where a purpresture and nuisance have been committed, he may have a decree to abate it." Here, then, is a case where equity protected the Crown and the public from unlawful obstruction of navigation. The encroachment on the Crown's soil amounts to a purpresture, while the accompanying interference of the public rights to use the soil amounts to a public nuisance.[9]

[5] Moore, 238 No. 372.

[6] 1 Amb. 158 (1752).

[7] Some doubt has been expressed as to whether he meant an information in Chancery.

[8] 2 Anstr. 603 (1795).

[9] A purpresture is not necessarily a public nuisance, for to have the latter there must be something which subjects the public to some degree of inconvenience or annoyance. Take the case where a part of

In most cases a purpresture is both a purpresture and a public nuisance. There is, in other words, some infringement of the public rights by virtue of the encroachment upon the property held by the state (or crown) for the public enjoyment.[10]

In *State* v. *Goodnight*,[11] the defendant enclosed public school lands for the purpose of pasturing cattle. It was alleged that such enclosure prevented the use of the land by the people of the state for grazing cattle, and interfered with public travel generally. The Court declared the enclosure to be both a purpresture and a public nuisance, and subject to a mandatory injunction to compel the defendant to remove such structures and refrain from erecting any more. The Court went on to say that even though public nuisances were indictable at common law, yet they were at the same time subject to an injunction.

In *Hibbard* v. *City of Chicago*,[12] the plaintiff sought to enjoin the city from taking down an awning erected over a street in the city. The Court ruled that the permission given by the city was a mere license, revocable at any time, and that the permanent structure on the street was a purpresture and a public nuisance and could not be maintained.

In *People* v. *Vanderbilt*,[13] an injunction was asked to restrain defendant from proceeding with the erection of a pier in the New York harbor on the ground that it was an obstruction to navigation and thereby a public nuisance. The Court held the act a purpresture and a public nuisance, and issued an injunction.

Equity, in abating and enjoining structures on land held by the state or crown for the public, such structures amounting to public nuisances, has gone over into the domain of public rights. Or, in other words, equity is enforcing the criminal law. Perhaps it is better to say that equity never ceased to assert its right to

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the land appropriated for a highway is enclosed, but it happens to be a part which the public never uses. Such an act would be unlawful and could be abated and enjoined as a purpresture, but it would not be a public nuisance. *Attorney General* v. *Evart Booming Co.*, 34 Mich. 462, 473. Some cases deny relief where there is a purpresture and no public nuisance. *People* v. *Davidson*, 30 Cal. 379; *People v. Mould*, 55 N. Y. Sup. 453. Other cases grant relief under like circumstances. *Revell* v. *People*, 177 Ill. 468, 479; *Attorney General* v. *Smith*, 109 Wis. 532.

[10] *Commissioners* v. *Long*, 1 Parson's Cases 143.

[11] 70 Tex. 682, 11 S. W. 119.

[12] 173 Ill. 91; 50 S. E. 256.

[13] 26 N. Y. Rep. 287.

protect property, even if the act also constituted a crime.[14] Chancellor Kent,[15] commenting on *Attorney General* v. *Richards,* says that the precedents cited there show that equity jurisdiction in public nuisance cases lay dormant for a century and a half, or from the time of Charles I until 1795. The reluctance of equity to enjoin public nuisances shows that the court sensed an invasion of none too safe a ground. This reluctance continued after 1795,[16] and was as characteristic of early American judges as it was of the English judiciary.[17]

The jurisdiction of equity in public nuisances is now definitely settled. A state may intervene to prevent obstructions to highways and to navigation, and to enjoin businesses injuriously affecting the health and safety of the community. The first clear case, other than purpresture, of an injunction at the suit of the state against a public nuisance appears in *Attorney General* v. *Hunter.*[18] The defendant was maintaining a mill pond near the city of Raleigh. The complaint alleged that such was destructive to the health and comfort of the citizens of Raleigh, and asked that the defendant be restrained from continuing the pond. The court declared the pond a public nuisance and granted the injunction. Equity goes a step further here to prevent a crime. Not only must the individual be protected in his right to use property held by the state for its subjects, but his health and safety will be protected where the injury results from a public nuisance.

In *Attorney General* v. *Steward and Taylor,*[19] an injunction was asked to prevent defendants from building a slaughter house in the city, on the ground that it would be a nuisance injurious to the health of the citizens, and render the enjoyment of life physically uncomfortable. An injunction against the building of the house was refused, since it appeared that the defendants intended to carry on the business so as not to constitute a nuisance, but the defendants were enjoined from polluting a nearby stream, as this would constitute a nuisance

[14] Mack, Revival of Criminal Eq., 389, 392.
[15] Supra, Note 1.
[16] *Mayor* v. *Bolt,* 5 Ves. 129 (1799); *Atty. Gen.* v. *Cleaver,* 18 Ves. 210 (1811).
[17] Kent, C., in *Atty. Gen.* v. *Utica Ins. Co., supra,* note 1; Henderson, J., *Atty Gen.* v. *Hunter,* 1 Dev. Eq. 12 (1826); Parker, C. J., *Charles River Bridge* v. *Warren Bridge,* 6 Pick. 376, 398 (1828).
[18] Supra, note 17; Durfee, Cases on Equity, p. 591.
[19] 21 N. J. Eq. 415.

injurious to the health of the community. Thus, equity not only stops a crime which is already in existence, but will also prevent the commission of one.

In *Attorney General* v. *Patterson*,[20] an injunction was asked to restrain the town from discharging sewage into a stream to the detriment of the health and comfort of people living along the stream. The Court granted the injunction. The wrongful act constituted a public nuisance.

These cases serve to illustrate the role which equity is playing in the protection of public health and safety. The cases are today so numerous until equity jurisdiction of public nuisances affecting the health and safety of the community is no longer a question of doubt.[20a]

A review of the cases shows that equity jurisdiction is not limited to the protection of private rights. Public rights are protected where the infringement amounts to a public nuisance. Though equity is not a court of criminal jurisdiction, it takes over such jurisdiction in enjoining public nuisances. The next question which arises is: What is the basis of jurisdiction when equity invades the field of criminal law? Is there some property right to protect? Is the remedy at law inadequate? Other questions of like nature suggest themselves once the problem is stated.

(2) Basis of Jurisdiction.

(A) What is the basis of jurisdiction in purpresture cases which are at the same time public nuisances?

In the early case of *Attorney General* v. *Richards*,[21] it was argued that the wharves upon the space between the high- and low-water mark were both a purpresture and a nuisance, the former an encroachment upon the King's *jus privatum* to the soil, and the latter an interference with the *jus publicum* of free navigation. But the basis of the jurisdiction in this case is recited in the following quotation from it: ". . . where

[20] 58 N. J. Eq. 1; 42 Atl. 749.

[20a] *Atty. Gen.* v. *Jamaica Pond Aqueduct*, 133 Mass. 361 (1884); *People* v. *White Lead Wks.*, 82 Mich. 471 (1890); 46 N. W. 735; *Columbus* v. *Jaques*, 30 Ga. 506 (1860); *People* v. *Gold Run Ditch Mining Co.*, 66 Cal. 138, 155 (1884). See cases cited in footnote, p. 622, Ames, Cases in Equity Jurisdiction.

[21] Supra, note 8.

the King claims and proves a right to the soil where a purpresture and nuisance have been committed, he may have a decree to abate it." Chancellor Kent, in his comment on this case, referred to before[22] has this to say: ". . . the Crown established a right of *property* in the soil, and it was a question of injury to property, like the case of a private nuisance." So the basis of jurisdiction in all purpresture cases seems to be the protection of the property rights of the state or municipality in parks, streets, highways, navigable waters, etc.[23] The state or city is here protected like any other property owner. Such nuisances which interfere with the use and enjoyment of public property are restrained in equity exactly as in private nuisances, and for similar reasons.[24] There should be no objection to this basis of equity jurisdiction in cases of purprestures which amount to public nuisances. There is no doubt about the property interest to protect, and such a view cannot do violence to the well settled rule that equity has jurisdiction in such cases.

(B) What is the basis of jurisdiction in cases of public nuisance, other than purpresture, which affect the health and safety of the community?

The early cases do no more than recite the phrase "irreparable injury" as the basis of equity's intervention. The hesitancy of equity to intervene in these early cases has already been pointed out. However, if the right was established at law, equity would issue an injunction to prevent "irreparable injury" to property or health.[25] Plainly, this does not constitute a basis for jurisdiction, but rather a reason for granting relief. Harlan, J., in *Mugler* v. *Kansas*,[26] says the ground of jurisdiction lies in the ability of a court of equity to give a more speedy, effectual and permanent remedy than can be had at law. This same view was accepted in *Missouri* v. *Illinois*[27] citing the *Mugler* case. Here the Sanitary District of Chicago was enjoined from discharging sewage (under authority of the Illinois Statute) into the Mississippi River, such act being dangerous to the health

[22] Supra, note 1.
[23] Walsh, Equity, p. 200.
[24] Walsh, *Equitable Relief* Against *Nuisance*, 7 N. Y. U. Law Rev., 352, 376.
[25] *Crowder* v. *Tinckler*, 19 Ves. Jr. 622; *Atty Gen.* v. *Johnson*, 2 Wilson Chan. 102; *Chalk* v. *Wyatt*, 3 Meriv. 688.
[26] 123 U. S. 623 at 673.
[27] 180 U. S. 108.

of the inhabitants of Missouri. In commenting on this case in *Kansas* v. *Colorado*[28] the court says: ". . . The court there ruled that the mere fact that a State had no pecuniary interest in the controversy, would not defeat the original jurisdiction of this court, which might be invoked by the State as *parens patriae,* trustee, guardian, or representatives of all or a considerable portion of its citizens. . . ." An answer to the same effect was given in *Louisiana* v. *Texas,*[29] where the objection was made to the state not having any property right involved.

It is clear that nuisances which are restrained in equity because they injure the health and safety of the citizens (in most cases at least) involve no property rights, and the reason for equitable relief is the protection of public rights.[30] But what is the *basis* of this jurisdiction? It is difficult in some cases to find a basis. In others, the ostensible basis is the efficacy of equity as compared with the inadequacy at law. Equity can prevent irreparable damage and multiplicity of suits.[31] But perhaps the soundest basis is to be found in the doctrine of the state suing as *parens patriae.*

In order to examine more closely the soundness of this doctrine, it will be necessary to briefly review its origin. In England, the king as *parens patriae,* had general supervision over infants, idiots or lunatics, and charities, which he exercised by the keeper of his conscience, the chancellor. The jurisdiction, however, did not belong to the court of chancery, as a court of equity, but as administering the prerogative and duties of the Crown.[32] This was a personal obligation of the chancellor, and did not belong to his ordinary jurisdiction in chancery.[33] The jurisdiction possessed by the English courts of chancery by delegation of authority of the crown as *parens patriae* is exercised by the courts of the state in this country.[34] The court of chancery operated to protect the rights of those who had no rightful protector. This old doctrine had its origin in the court of chancery. In analogous cases today a court of equity can

[28] 185 U. S. 125, 142.
[29] 176 U. S. 1.
[30] Walsh, Equity, p. 201.
[31] *Campbell* v. *Seaman,* 63 N. Y. 568.
[32] *Fontain* v. *Revenel,* 17 How. 369, 392.
[33] 4 Kent, Com. 508 note.
[34] *Ins. Co.* v. *Bangs,* 103 U. S. 435, 438.

protect its citizens annoyed by a public nuisance, where they, like the infant or beneficiary of charity, cannot protect their own rights. The chancellor is in a sense the representative of the sovereign as *parens patriae,* and the guardian of the people's welfare. It is submitted that such should be sufficient basis for equity to enjoin those cases of public nuisance which affect the health and safety of individuals in the community.

CONCLUSION

Though equity is not a court of criminal jurisdiction, it invades this field in extending its jurisdiction to public nuisance cases. A public nuisance being a crime at common law, equity is enforcing the criminal law, but not as such.

A review of the history of equity's interference in cases of public nuisance shows the great hesitancy with which such cases were taken over. This hesitancy characterized both the English and American courts. But today the jurisdiction of equity is well settled. This applies alike to purpresture cases which amount to public nuisances, and to other nuisances which affect the health and safety of the community.

The basis of equity jurisdiction in purpresture cases which amount to public nuisances is the protection of property rights, similar to cases of private nuisances. The basis of jurisdiction in other nuisance cases, which endanger health and safety, is variously defined. The soundest basis, it is believed, rests in the doctrine of the state suing as *parens patriae.* This doctrine is as deeply entrenched in equity's past as is the principle that equity will protect the property rights of an individual

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