Notre Dame Law Review

Volume 6 | Issue 2 Article 1

1-1-1931

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Recommended Citation

William M. Cain, *Extension of Equity Jurisdiction*, 6 Notre Dame L. Rev. 141 (1931).
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NOTRE DAME LAWYER

"Law is the perfection of human reason"

VOL. VI JANUARY, 1931 NO. 2

EXTENSION OF EQUITY JURISDICTION

During comparatively recent times, there has been a marked extension of the jurisdiction of courts of equity, both in this country and in England. Technically, of course, "jurisdiction" means the power to hear and determine, but here it will be used to denote those subjects of litigation of which courts of equity take cognizance to the exclusion of courts of law. The design of this article is to indicate, in a general way, to what extent equity jurisdiction has been enlarged and the causes thereof, with brief suggestions of the recognized benefits and potential perils that have resulted. To do this, it seems necessary, or at least expedient, to consider the extraordinary powers of equity, to note those instances in which its jurisdiction is undoubted, those in which its exercise, though challenged, has been vindicated, and, lastly, those in which the wisdom of its interference is open to grave doubt.

First, we consider the quality of equity, which is sometimes defined as being that system of justice administered by the High Court of Chancery of England by chancellors appointed by the sovereign and bearing the royal seal. The origin of these courts is somewhat shrouded in the mists of history, but it is certain that they have existed in England for more than five centuries, and that they were brought into being by the necessity for justice which the common law courts, either from the rigidity of their forms or from the quality of relief granted, did not afford. At the time

of the inception of courts of chancery, the forms of actions at law had become so fixed and unbending that, unless a prospective litigant's cause happened to fall within one of them, he was barred from even a hearing by formalism alone. Thus the common law courts, in numberless instances, were inadequate to deliver justice, a sinister fact widely recognized, except by the common law judges and the lawyers who practised before them. The situation in England at this time was a reproach to the very name of justice.

It is worth while, at this point, to remember that one of the first duties of sovereignty, of either the kingly or democratic sort, is to administer justice to the people, be they either subjects or citizens. This duty has been recognized in all civilized countries. The coronation oath of the king binds him to perform that duty, and the first object of our own government as stated in the preamble to our Constitution is "To establish justice." Likewise, the right of the people to petition their sovereign for redress of their grievances has long been conceded in all civilized lands. It is, therefore, easy to understand that the people of England would petition their sovereign for that justice which the ordinary courts denied. It is equally easy to visualize the king referring the petitioners to his common law judges, and of their replying that "the law is inadequate to afford justice, that it is a case of conscience," and that the king would have a chancellor to decide all questions affecting the royal conscience, and that this officer should be, as he was for centuries, an ecclesiastic of the royal household. And, curiously enough, to this day and in the United States, courts of equity are universally called "courts of conscience," and no suitor may enter them unless he "comes with clean hands," nor if the courts of law can afford him adequate relief. Likewise, it causes us no surprise to learn that the principles of equity are nearly identical with those of the civil law of Rome in which those ecclesiastics were learned.

Broadly speaking, what has been said gives an authentic hint of the rise of the court of chancery in England. The twin system of justice prevailing in England, common law and equity, was adopted by our Constitution, and it was Chancellor Livingstone of New York who administered the oath to George Washington as the First President of this Republic, on April 30, 1789.

The Lords Chancellor of England spoke in the name and by the authority of their sovereigns and so possessed extraordinary powers. For violation of their orders and decrees, they could impose fines and imprisonment. They could enjoin the execution of judgments procured by fraud in the courts of law. So great a power possessed by a single individual was instantly and vigorously challenged by the common law bench and bar of England, and the battle raged for two centuries. Since one of the objections, then urged against the exercise of such power based only upon the discretion of the chancellor, is being urged in this country today, we note the classic example of "The Chancellor's Foot," from Selden's Table talk, wherein a law serjeant said:

> "Equity is a roguish thing; for law we have a measure, know what to trust to; equity is according to the conscience of him that is Chancellor, and as that is larger or narrower, so is equity. 'Tis all one, as if they should make his foot the standard for the measure we call a Chancellor's foot; what an uncertain measure would this be! One Chancellor has a long foot, another a short foot, a third an indifferent foot; 'tis the same thing in the Chancellor's conscience."

In most states of the Union, equity and common law are administered by the same judge, and it is to the shining credit of the judiciary that, with occasional exceptions later to be noted herein, the judges have administered equity according to its established principles, and not according to their individual whim and caprice. Only a very few justify the imputation of the earnest serjeant at law.

Courts of equity, by their decrees, command defendants to do or to refrain from doing some specific act. As has

been stated, refusal to obey such orders has constituted contempt of the court making them, for which the offender may be punished by fine or imprisonment or both, and there is no legal limit to the amount of the fine or the duration of the imprisonment. Such is the law today, and moreover, a sentence for contempt of court is beyond the reach of executive clemency, as was illustrated in a recent case in Indiana. Obviously, in a free country, the possession of such power alone demands moderation and circumspection in its exercise, since, otherwise, it would soon be degraded into an instrument of tyranny. With few exceptions, courts of equity have confined themselves to the protection of property rights. Some, however, have invaded the limitless field of moral behavior, and it is with this novel invasion that this article is principally concerned.

For purposes of comparison, we here note those subjects of litigation in which the jurisdiction of equity is well established and its action unchallenged. For example, such courts, in their decrees requiring affirmative action, may direct:

That a valid contract be performed specifically where the legal remedy of damages for its breach would be inadequate, and the contract is capable of being performed specifically.

That certain agreements, void at law for want of prescribed written formality but so far performed that it would be inequitable to admit the legal defense, be performed to completion.

That deeds, mortgages or other written instruments be executed, reformed or cancelled where equitable principles require.

That land, the legal title to which has been fraudulently acquired or held, be conveyed to the true owner.

That trust funds or property be delivered to the *cestui que* trust.

That conveyances of property made to defraud credit-

ors be set aside, and the property subjected to the payment of debts of the grantor.

That an insolvent estate be liquidated through a receiver, or agent, appointed by the court.

That where there are a multitude of claims between parties too complicated for a jury an adjustment be made in a suit for an accounting in equity.

That, in some instances, where an adjudication of differences between the same parties and involving the same questions would require a multiplicity of actions at law, the whole controversy may be brought into equity and settled in a single suit.

And, in the exercise of its restraining jurisdiction, courts of equity may issue injunctions:

To prevent a party who has fraudulently obtained a judgment at law from enjoying its fruits.

To prevent threatened repetitions of trespasses upon land.

To prevent the occupant of land from committing waste thereon, which is a permanent injury to the prejudice of the reversioner.

To prevent a threatened injury to property where the injury, if committed, would be irreparable.

To prevent executive officers of a state from enforcing a legislative act which is plainly unconstitutional and void, and affects a large number of people in the enjoyment of their property.

In the foregoing subjects of litigation, the jurisdiction of equity has long been firmly established, and no one doubts or questions it.

We now come to another general class of matters, largely incident to the rise of industrialism, in which the jurisdiction of equity has been more or less seriously questioned, but in which it has become fairly well recognized as being necessary to the protection of rights that have come to be regarded as property rights. Of course, there was an early recogni-

tion of the right of the owner of land to have the air around it and the streams flowing through it remain unpolluted by human agency, and the quiet unbroken by unreasonable and unnecessary noises, and the light unobscured. Invasion of these rights which were incidental to ownership of land directly depreciated its value and thus plainly was an injury to property. But with the great multiplication of industries and complexities of commercial transactions, and the relations between capital and labor, a new set of circumstances arose in which the legal questions involved were not so easy of solution. However, in a general way, it may safely be said that equity will interfere in clear cases to prevent unfair competition in business, it now being well established that the business of a person, firm or corporation is property; and it has been said that "Courts of equity no longer tolerate business tactics which amount to fraudulent or unfair competition." A familiar instance is that in which one seeks to avail himself of the benefit of an established favorable reputation of goods made by another by falsely representing his to be the same, either from substantial identity of distinguishing name, or by adopting another's trade mark. An illustrative case on this point is *American Waltham Watch Co. v. United States Watch Co.*[1] in which the plaintiff had for many years manufactured watches in the town of Waltham, Massachusetts, which had been called "Waltham Watches" and had acquired a wide repute as such, and the defendant had been using the name of the town on its watches. The court enjoined the continuance of that deceptive practice. Another illustrative case is *Yellow Taxi Operating Co. v. Martin*[2] in which the defendant sought to profit by the reputation of the "Yellow Cab," by painting their own cabs the same color with only such slight differences as would not be noticed by the general public. The

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1 171 Mass. 85, 53 N. E. 141, 43 L. R. A. 826 (1899).
2 91 N. J. Eq. 233, 108 Atl. 763 (1919).

court enjoined the practice. These two cases show that equity will prevent unfair and fraudulent competition in business. Equity, also, will enjoin a person from betraying trade secrets of his former employer gained in such confidential relation.

The jurisdiction of equity in industrial strikes has been vigorously asserted and violently disputed. There is some divergence of judicial opinion, of course, but it may be asserted with some degree of safety that courts of equity will enjoin activities of strikers which result in physical injury to the property of the employer. In the matter of boycotting, there is a twilight zone in the adjudications which it would be profitless to enter here. It may be said, however, that the right of labor to organize, and to quit work or threaten to quit work in order to obtain better terms or conditions is universally recognized by the courts; and the corresponding right of the employer to hire and discharge whom he will is also recognized.

In order to make clear what is to follow, it seems appropriate to notice what is sometimes called the "merger" of law and equity. By 1616, the Court of Chancery had become firmly established in England, and soon thereafter its jurisdiction had been extended to nearly its modern scope. To a certain extent and little by little, the principles of equity had rationalized and humanized the common law of England, and it was inevitable that this process should go on, but differences of mere procedure impeded its progress. In Walsh on Equity,[3] these difficulties are noticed with admirable clarity, and he then says:

> "No reason existed why law and equity should not be merged in a single system with a single court and a common system of practice and pleading, except the inertia and conservatism of bench and bar."

In the face of this hostility, however, New York became the pioneer and, in 1848, enacted the Code of Civil Proced-

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[3] Sec. 7.

ure, which has been substantially adopted in twenty-nine other states of the Union, and in many other states there exists what practically amounts to a merger. In New Jersey, Delaware, Alabama, Arkansas, Mississippi, and Tennessee separate courts of equity are still maintained. In all other states and in all Federal Courts, equity and law are administered by the same tribunal. All these codes substantially follow the New York Code, which provides as follows:

> "The distinctions between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing are abolished; and there shall be in this State hereafter but one form of action for the enforcement or protection of private rights and the redress of private wrongs which shall be denominated a civil action."

It will be observed that the foregoing provision relates only to matters of form and procedure, not to the matter of substance. Then came the Judicature Act of England, enacted in 1873 and effective in 1875, by which it was provided that law and equity should be administered by a single court but sitting in divisions. Significantly enough, this Act provides that where there is a conflict between the Rules of Common Law and the Rules of Equity with reference to the same matter, the Rules of Equity shall prevail. So, at last, equity had come into its own. The only reason for noticing this matter of merger here is that some courts apparently have thought the abolition of distinction of form between law and equity had also extinguished the difference in the nature and functions of the two systems, which, of course, was impossible, and have employed equitable remedies in causes which were not essentially equitable, with consequent confusion.

It is further necessary to bear in mind certain principles relating to its jurisdiction and of universal application, except where modified or dispensed by statute. One of these principles is that equity will never assume jurisdiction of any controversy, if there is an adequate remedy at law.

Another is that chancery itself has always declined to declare the exact boundaries of its own jurisdiction, for the sufficient reason that, if it did, chicane and fraud would operate just outside such boundary. Still another is that equity has almost always refused to take any part in the administration of the criminal law or of strictly political questions, so that, on the whole, with few exceptions, equity has confined itself strictly to the protection of property rights. This jurisdiction has been enlarged by statute in many states. In Pennsylvania it has been curtailed, for in that state, equity has no jurisdiction except by statute. The general rule is well stated by the United States Supreme Court in the case of *In Re Sawyer*[4] as follows:

> "Under the Constitution and laws of the United States, the distinction between common law and equity, as existing in England at the time of the separation of the two countries, has been maintained, although both jurisdictions are vested in the same courts. (Citing cases.)
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> "The office and jurisdiction of a court of equity, unless enlarged by express statute, are *limited to the protection of rights of property*. It has no jurisdiction over the prosecution, the punishment, or the pardon of crimes or misdemeanors, or over the appointment and removal of public officers. To assume such a jurisdiction or to sustain a bill in equity to restrain or relieve against proceedings for the punishment of offenses, or for the removal of public officers is to invade the domain of the courts of common law, or of the executive and administrative department of the government." (Citing cases.)

No attempt will here be made to search out and state the many modifications of this jurisdiction made by the statutes of several states because this article is mainly confined to general trends. Some courts have gone beyond the ancient landmarks of equity jurisdiction in response to express statutory mandate, and others apparently for no better reason than a fine moral frenzy. In a few instances, courts of equity have lent their aid to the suppression of acts deemed criminal or immoral by them and thus, by coining new crimes, have usurped legislative power. In

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4 124 U. S. 200 (1887).

still other cases, they have enjoined the commission of acts denounced by the legislature as criminal, and, by holding the violation of such injunctions to be contempt of court, have created a potential excess of punishment over that fixed by the legislature. We shall point out only a few of such instances that, however, reveal some disquieting tendencies. In the main, we let the courts speak for themselves.

The first case to be specially considered is the Kentucky case of *Respass et al. v. Commonwealth*[5] in which the court, on the motion of the Attorney General, restrained the operation of a gambling poolroom in the city of Covington, when such operation was a crime under the Kentucky statute. In partial excuse for this decision, it should be stated that a Kentucky statute makes it the duty of all judges to "exercise all the powers vested in them for the prevention of crimes and misdemeanors," and, also, that the case was one of peculiar aggravation, as the State had repeatedly prosecuted and convicted the defendants under the criminal statute, but was unsuccessful in stopping the criminal practice. The chief criticism of the case is that it announces the novel doctrine that the state is the guardian of the morals of its people. Let the decision itself speak:

> "But it is earnestly insisted that the rule should not be applied to nuisances which affect only the morals of the community. We cannot see the force of this distinction. The state is interested in the character of its people, no less than in their health or personal safety. The character of a state depends upon the character of the individuals constituting it. If the people become depraved, the state cannot long exist. It may have wealth, it may have all that goes to make a great state, and, yet, if its men are without character, it is a crumbling ruin. The State is as much interested in restraining those things which destroy the character of its people as in those things which destroy their health or personal security."

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5 131 Ky. 807, 115 S. W. 1131, 21 L. R. A. (N. S.) 836 (1909).

The foregoing contains some sound abstractions which might well be addressed to the legislative branch of a government, but we are now considering the proper extent of the jurisdiction of courts of equity. And in the syllabus of this case, we find this significant proposition:

"A nuisance which affects only the morals of a community can be enjoined, as well as one affecting health or personal safety."

If the protection of the morals of a community is, in any case, a legitimate function of the state, we suggest that it should be performed by the legislative, not the judicial, branch of government. Otherwise, the differing opinions of judges of what constitutes a menace to the morals of a given community might and, likely, would lead to intolerable confusion and perpetual discord. It is quite true that, in this Kentucky case, the court did not declare anything to be immoral but what the legisature had already so denounced, and the sweeping statement of law in the syllabus seems to be *obiter*. Nevertheless, it, like every other judicial decision in this country, is a precedent upon which other courts might justify their embarking upon the quixotic and perilous business of regulating private morals; and such an exploit would be contrary to the genius of American institutions.

The doctrine of this Kentucky case was denied in the West Virginia case of *State v. Ehrlick*[6] in which the court refused an injunction to restrain a similar gambling crime on the ground that the criminal law provided an adequate remedy. For the same reason, an injunction was refused in the case of *State v. Vaughan.*[7] To the same effect is *State v. Scott.*[8] In *State v. Vaughan* the court said:

"It is demonstrably true that it is a sound principle of equity jurisprudence that an injunction will not lie at the instance of the state to restrain a public nuisance where the nuisance is one arising from the

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6 64 S. E. 935 (W. Va. 1909).

7 81 Ark. 117, 98 S. W. 685, 7 L. R. A. (N. S.) 899 (1906).

8 80 Conn. 317, 68 Atl. 258 (1907).

illegal, immoral, or pernicious acts of men, which, for the time being, make the property devoted to such use a nuisance, where such nuisance is indictable and punishable under the criminal law. On the other hand, if the public nuisance is one touching civil property rights or privileges of the public, or the public health is affected by a physical nuisance, or if any other ground of equity jurisdiction exists calling for an injunction, a chancery court will enjoin notwithstanding the act enjoined may also be a crime. The criminality of the act will neither give nor oust jurisdiction in chancery."

To the same general effect as the foregoing Arkansas case is the case of *O'Brien v. Harris.*[9]

We next examine the case of *Ex Parte Warfield,*[10] but, before doing so, should note that Texas is one of the states where the jurisdiction of equity to grant injunctions has been widely extended by statute. Sections 1 and 3 of article 4642 of the present statute of that state provide not only that courts may grant injunctions where the plaintiff shows himself entitled thereto "under the principles of equity and the provisions of the statutes of this state relating to the granting of injunctions" but, also, simply "where the applicant is *entitled* to the relief demanded and such relief or any part thereof requires the restraint of some act prejudicial to him." With that statute in mind, we read the *Warfield* case, which was a habeas corpus case in which it was admitted that the prohibited act was committed, and the sole question was whether equity had jurisdiction of the cause in which the injunction had been granted. Morris, as plaintiff, had brought a suit against Warfield in a Texas district court, seeking $100,000 damages for "partial alienation" of his wife's affections by Warfield, which, of course, was plainly an action at law. But, in the same case, Morris asked for and obtained an injunction restraining Warfield "from visiting or associating with plaintiff's wife, or going to or near her at a certain house, No. 129 Marion street, or any other house or place in the

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9 105 Ga. 732, 31 S. E. 745 (1898).
10 40 Tex. Crim. Rep. 413, 50 S. W. 933 (1899).

city of Dallas, or state of Texas, where said wife might be and that he be restrained from writing or speaking to her, or, in any manner, either directly or indirectly, communicating with her, by word, letter, writing, sign, or symbol." The injunction was granted on the 23rd of February 1899 and served on defendant the next day. Between that date and the 9th of the following month, Warfield violated this injunction by going to the house at 129 Marion street, which he claimed was his boarding house. For violating this injunction Warfield was adjudged guilty of contempt of court, and was assessed a fine of $100 and committed to jail for three days. He then brought this action of habeas corpus. In a long opinion, the Texas Court of Criminal Appeals held that the district court had jurisdiction to grant the injunction, that, hence, its violation constituted contempt of court, and that the judgment of contempt was legal, and remanded Warfield to the custody of the sheriff, basing its decision upon the statute referred to, saying that the prohibited acts were "prejudicial" to plaintiff. It is true that the court worked out a theory that the husband's marital right to the affection and society of his wife constituted a property right, which a court of equity would protect by injunction, but, nevertheless invoked the statute. This *Warfield* case is interesting in view of the fact that it was cited in the Ohio case to be noted in a dissenting opinion, and, also, because, after twenty-three years or more experience with the enlarged jurisdiction to grant injunctions, the Texas Court of Civil Appeals rather sharply criticised the practice. This was in the case of *City of San Antonio v. Schutte,*[11] decided in December 1922, where equity had been invoked to restrain the violation of city ordinances, relating to service cars operating on the streets for hire. The trial judge had refused an injunction, and, in affirming the decision, the Texas court said:

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11 246 S. W. 413 (Tex. 1922).

"A wave of reckless and promiscuous injunctions seems to be sweeping all over Texas, and men are rushing into courts of equity to obtain injunctions to restrain everything from the election of United States Senators down to the nomination by a political party of precinct officers and the prevention of the execution of all kinds of laws and city ordinances, and, if the execution of law can be prevented, the idea will also obtain that injunctions will be excellent to enforce criminal laws instead of resorting to courts of law for their enforcement. The writ of injunction is intended and should be used as a strong arm of courts of law, but it should not be used to usurp the prerogatives and hamper the different branches of the state government in the exercise of their constitutional functions. It was intended in its first conception, and should be yet, as an aid to the courts in performing their duties, and not to seize their power, or to be used by the courts to cripple or hamper government in the discharge of its well-defined duties. It was intended and should be used only to prevent irreparable injury to him who seeks its aid, and not to destroy law, hamper justice or wreak vengeance or malice on others. It is a protective and preventative rather than a restorative writ, and should not be used where the law provides ample and efficient means for the prevention and punishment of crime and the preservation of rights."

We now approach the unique case of *Snedaker v. King*,[12] decided in 1924, where the clash of judicial opinion on this subject is especially well illustrated. Grace King, wife of Homer King, filed a suit in the court of common pleas against Miss Jessie L. Snedaker claiming $20,000 damages for the "partial alienation" of her husband's affections, and asking that Miss Snedaker be restrained and enjoined "from visiting or associating with plaintiff's husband, or going to or near him at plaintiff's home or elsewhere, or at any other house or place where said husband may be; that she be restrained and enjoined, either in person or through an agent or employee, or otherwse from writing or speaking to him, or, in any manner, either directly or indirectly, communicating with him by word, letter, writing, sign or symbol, or doing or causing to be done any act or thing whatever preventing or tending to prevent plaintiff's husband from giving to plaintiff his love, affection, companion-

12 111 Oh. St. 225, 145 N. E. 15 (1924).

ship, or conjugal relation, or support; that the defendant, her agents or servants, be restrained from interfering with the plaintiff in her peaceful efforts to speak, talk, write, and communicate with her husband, and to regain his love, esteem, support and conjugal relation, and that upon final hearing the injunction be made perpetual." Thus the judicial arm of government was invoked to stifle the allurements made to a straying husband, and aid the wife to regain his affections. This was a novel field for equity. There was a trial to the court of common pleas, during which the plaintiff waived all claims for damages except for $5, and the court decided in her favor, and granted the perpetual injunction she asked. But, on appeal to the Supreme Court of Ohio, the judgment was reversed by a majority of the court and the injunction dissolved. The majority opinion so wisely discusses the question we copy it entire:

"*Per Curiam.* The decree in this case is an extreme instance of government by injunction. It attempts to govern, control and direct personal relations and domestic affairs. Among other restrictions placed upon the defendant by this decree is that of remaining away from any place where plaintiff's husband may be, and from interfering with plaintiff's efforts to communicate with her husband, and with her efforts to regain his love, esteem, support and conjugal relation. It would be only a little more extreme if the husband had been made a party defendant, and a mandatory injunction decreed requiring him to discharge all the duties of companionship, affection, love, and all other obligations, legal and moral, assumed by him when he entered the conjugal relation.

"Ample and adequate provision has been made by statute whereby the plaintiff's husband may be required to discharge every obligation imposed upon him by law, not only toward the plaintiff, but also in behalf of their children. There is no averment that the husband has failed in any of these particulars. In that respect, the injunction is based upon the apprehension of plaintiff that she may in the future be deprived of support, by reason of the alleged alluring conduct of the defendant toward plaintiff's husband.

"Such extension of the jurisdiction of equity to regulate and control domestic relations, in addition to the legal and statutory remedies already provided, in our opinion is not supported by authority, warranted

by sound reason, or in the interest of good morals or public policy. The opening of such a wide field for injunctive process, enforceable only by contempt proceedings, the difficulty if not impossibility of such enforcement, and the very doubtful beneficial results to be obtained thereby, warrant the denial of such a decree in this case, and require a modification of the judgment in that respect."

Judge Florence Allen, of that court, in a separate concurring opinion, made it clear that the court's decision did not "condone" the acts of the defendant. And we, with equal circumspection, here expressly disclaim such condonation.

Up to this point, the Ohio decision follows recognized and long established principles of equity jurisprudence, but we now turn to the dissenting opinion in the case as showing an ardent desire of the writer to depart from those principles. We quote:

"Marshall, C. J. (dissenting). The statement of facts in the brief *per curiam* opinion shows that this is a case where a lawful, dutiful wife has invoked the aid of a court of equity to protect her marriage contract, her home, and her little brood of infant children, against a 'vampire' who persists in her efforts to win the husband and father from the performance of his duties to his home and family. It must be kept clearly in mind in a discussion of this case that the husband is not a party to the suit, and that the wife, Grace King, brings the action solely against the vampire, Jessie L. Snedaker."

The Chief Justice then proceeds with his seven page dissenting opinion in an attempt to show that the power exists in equity to make such an injunctive order "though it should rarely be exercised." If this was a proper and salutary exercise of equity jurisdiction, and could, by any chance, be made effective, there seems to be no reason why it should be only "rarely" exercised. It should be stated that the intermediate Court of Appeals of Ohio approved the granting of the injunction.

It is refreshing to turn from the dissenting opinion in the Ohio case, to the Illinois case of *People v. Prouty*,[13] in which

[13] 262 Ill. 218, 104 N. E. 387 (1914).

the lower court had added to a decree of divorce an injunction restraining both parties from marrying again, within the time prohibited by statute, unless they married each other. On the defendant being found guilty of contempt of court in violating the injunction by marrying another within four days after the decree, and sentenced to pay a fine and suffer imprisonment, he brought an action in habeas corpus, and the Illinois Supreme Court held that the lower court had no jurisdiction to grant the injunction and that it was a nullity. The facts were as follows: On October 25, 1912, Carrie B. Prouty obtained the decree of divorce and injunction in the lower court. On October 29, 1912, the defendant, Carlton Prouty married Mary Busscher in LaPorte, Indiana, thereby violating the order. The sole question was whether the lower court had jurisdiction to make the order. In holding that it had not, the Supreme Court pointed out that the Illinois statute prohibited divorced persons from remarrying within one year after the decree of divorce in ordinary cases, and fixing imprisonment in the penitentiary for a violation of the statute, besides declaring such remarriage void, thereby furnishing an adequate remedy at law. In the fourth section of the syllabi, the court states the following proposition of law:

> "4. EQUITY. JURISDICTION. A court of equity has no jurisdiction in matters not involving property or civil rights, and no jurisdiction over matters merely criminal, where no property rights are involved."

And in the body of the opinion, the Illinois court says:

> "A court of equity exercising its general powers has no jurisdiction over matters merely criminal or immoral, where no property rights are involved. 'It is elementary law that the subject matter of the jurisdiction of the court of chancery is civil property. The court is conversant only with questions of property and the maintenance of civil rights. Injury to property, whether actual or prospective, is the foundation on which the jurisdiction rests. The court has no jurisdiction in matters merely criminal or merely immoral which do not affect any right to property.' Citing Sheridan v. Colvin, 78 Ill. 237. 'It is no part of the mission of equity to administer the criminal law of the state or to enforce the principles of religion and morality, except so far as it may

be incidental to the enforcement of property rights, and perhaps other matters of equitable cognizance.' " (Citing Cope v. Fair Association of Flora, 99 Ill. 489, 39 Am. Rep. 30.)

The Kansas City Court of Appeals of Missouri, in *Caskey v. Edwards*,[14] used this forceful language in the syllabus:

"Equity cannot be turned into a criminal department, and the chancellor made to serve in the duties of the judge of the criminal court."

New York has followed the general rule, but not without a judicial struggle. In *Baumann v. Baumann*, the question was considered at some length. The facts were these: Berenice L. Baumann and Charles Ludwig Baumann were husband and wife from 1909 to 1921 when they executed a separation agreement, he making provision for the support of his wife and children and she releasing her dower rights, when both were domiciled in the state of New York. Three years later, he went to Mexico, spent a month in that country, and returned with a document issued by an administrative official of the state of Yucatan purporting to grant him a divorce. Two years later, the husband, accompanied by the defendant Ray Starr Einstein, also domiciled in New York, drove to Connecticut and went through a form of marriage with her. Thereafter they resided together in New York as husband and wife, he informing acquaintances that he had obtained a divorce from his first wife, and she assuming the title and claiming the position of Mrs. Charles Ludwig Baumann. Thereupon, Berenice L. Baumann brought suit against Charles and Ray to have the Connecticut marriage declared null and void on the ground that the Yucatan divorce was a nullity, and the lower court so declared, but, also, enjoined the defendants from representing or holding out that they are husband and wife, and from representing or holding out that the defendant, Charles Ludwig Baumann, was divorced from the

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[14] 128 Mo. App. 237 (1908).
[15] 250 N. Y. 382, 165 N. E. 819 (1929).

plaintiff, Berenice; also restraining the defendant, Ray Starr Einstein, from assuming or using the name "Baumann"; also restraining the defendants from going through any marriage ceremony, or "attempting or purporting to have performed any further marriage ceremony between them," during the life of the plaintiff. This injunction part of the decree was assailed as being beyond the equity jurisdiction of the court, and the New York Court of Appeals sustained the contention, reversing the lower court, two of the eight judges dissenting. The pertinent syllabi of the majority opinion reads:

"1. Equity will not award extraordinary relief of injunction except where some legal wrong has been done or threatened, and where there exists in the moving party some substantial right to be protected.

* * *

"3. Equity cannot by injunction restrain conduct which merely injures a person's feelings and causes mental anguish."

In the course of the majority opinion, the court says:

"It cannot be questioned that the conduct of the defendants is reprehensible. That it is illegal has been determined by the judgment herein. That it is socially and morally wrong may be conceded, and doubtless it is humiliating and annoying to the plaintiff. These considerations alone do not, however, justify the granting of an injunction. Equity cannot by injunction restrain conduct which merely injures a person's feelings and causes mental anguish. (Citing cases.)

"The law does not remedy all social evils or moral wrongs . . . . It is not the province of courts of equity to administer paternal relief in domestic affairs. As a matter of practical fact, such decrees cannot be enforced. That fact has long been recognized . . . . Attempts to govern the morals of people by injunctions can only result in making ridiculous the courts which grant such decrees."

Crane and O'Brien, JJ, dissented in separate opinions. As showing the course of resoning adopted by Judge Crane, which superficially appeals to one's sense of justice, we quote from his dissent:

"It is said that the courts may declare the plaintiff to be the wife of Charles Ludwig Baumann, but have no power to prevent another person masquerading in the same locality in this position and relationship. I, for one, cannot understand the reason for such a limita-

tion. Why should a court of equity be impotent in the face of what all parties to this litigation concede to be wrong? I heartily agree that courts of equity should not seek to make people better by injunction, but I do consider it as much their business to protect a wife and mother in her status before the public as in her property. Courts of equity from time out of mind have made persons return property fraudulently obtained; why should not a court of equity make this lady defendant give up a pretended relationship and a name which she is falsely and fraudulently using?"

In Judge O'Brien's dissenting opinion, he used the following words:

"Something unsound appears to lie in a rule which would deny to a court of equity the power to enjoin the masquerade of another's name and title and the infringement of the mingled personal and property rights which include that name and constitute the matrimonial status."

It might here be remarked that the criminal statutes of New York were available to Mrs. Berenice Baumann to put an end to a situation, which all the judges deemed meretricious, without resorting to a court of equity. She, therefore, had an adequate remedy at law.

We now notice a few grotesque injunctions which appear to have been issued by various courts. These reports are mere newspaper clippings assembled by Dean Pound, but well illustrate the absurd and futile uses to which the writ of injunction may be put. When considering them, it should be borne in mind that the reports are not official, and that the injunctions were likely only preliminary ones which were probably dissolved on final hearing. Here they are:

"Boston. 1920. Judge Lawton of the Superior Court today ordered an injunction to issue restraining Mrs. Tillie Feldman from making any 'rude or improper faces, grimaces, or jeering or scoffing' at Mrs. Minnie Freedman, a Boston milliner. . . .

"Mrs. Tillie Feldman, who formerly lived at Harrison avenue and Davis street, must not, by court order, make any more faces at her one-time neighbor and friend, Mrs. Minnie Freedman of 319 Riverway. This court order was given by Judge Lawton in the equity motion session after a long recital of the spite and jealousy-marked feud be-

tween the two women. The injunction, in full, restrains Mrs. Feldman from going to Mrs. Freedman's home, from in any way harassing or molesting her, from going to her place of business, from telephoning to her personally, from coming in contact with her personally in public, by using any form of language or by making any improper faces or grimaces."

"New York. May 19. For the first time in the history of the New Jersey courts, an order has been issued restraining a lovesick rejected suitor from committing suicide on the doorstep of the jilter's home. . . ."

"Boston. 1925. Charles Sklar of Dorchester yesterday obtained a temporary injunction which forbids Frank Mulvey, also of Dorchester, to enter Sklar's home or threaten, communicate with, touch or otherwise interfere with his wife, Bertha Sklar, or the two Sklar children, Ida, 5, and David, 2. The temporary injunction was issued by an agreement of counsel, pending a hearing on Sklar's bill in equity. . . . "

"New York. 1924. Argument was heard yesterday by Federal Judge Bondy on a motion made by counsel for Frank C. Clark, a conductor of vacation tours, for the dismissal of an action begun by his former wife, Estelle M. Clark, for the annulment of a Reno divorce obtained by Mr. Clark in the fall of 1918. Mrs. Clark's complaint also asks that Mr. Clark be restrained from living with his present wife. . . . Decision was reserved by Judge Bondy."

Final disposition of this Clark case appears in *Clark v. Clark*[16] from which it may be inferred that Judge Bondy refused the injunction.

"Springfield, Mass. Dec. 20. Judge Wallace R. Heady in District Court this afternoon issued an injunction against all love affairs between Mrs. Gladys Thompson, 26, of 31 Myrtle street, and William E. Beach, 37, of 86 Mill street. She was ordered to go away with her husband, Daniel F. Thompson of Indianapolis, Ind., and forget all about Beach."

"Chicago, July 3, 1928. An injunction issued by Judge Sabath today restrains R. Paul Weingarten, President of the Underwriters' Finance Company, from taking his son, Paul Jr. six years old, on airplane trips. Clarence Darrow, in behalf of Mrs. Gertrude Weingarten, the boy's mother, recently divorced, asked for the injunction, pleading that the father was endangering the life of his son. 'Junior is just like his dad,' Mr. Weingarten said, opposing his ex-wife's plea. 'He gets a thrill out of flying. Airplanes are no longer dangerous. I've been going

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16 11 Fed. (2d) 871 (1926).

up since I was Captain in the A. E. F. It's in the boy's blood. He's always begging for a ride.' 'He's nervous and can't sleep after the trips,' said Mrs. Weingarten. Judge Sabath ruled the boy was too young."

Other instances are noted in the collection made by Dean Pound, but these will be sufficient for present purposes, and speak for themselves. They may be contrasted with the rule regarding equity jurisdiction laid down in Pomeroy's Equity Jurisprudence [17] as follows:

"The rules which define these rights and determine the powers of husbands over their wives, parents over their children, guardians over their wards, masters over their servants, belong exclusively to the domain of law. It is only *when some property rights or questions concerning property* arise between husband and wife, parent and child, guardian and ward, that equity can possibly have jurisdiction, and even in such cases the jurisdiction does not extend to merely personal relations."

It should be observed that not only are the major crimes prohibited by law, but, also, abuses in domestic relations, and that, therefore, there is no necessity to resort to equity, the remedy at law being adequate. The legislative prohibitions, under penalty, constitute an injunction upon all persons within the legislative jurisdiction. The intrusion of the preventive jurisdiction of equity into the domain of criminal law is challenged, by the opponents of such intrusion, upon the general grounds:

That, by this means, courts of equity may enlarge the scope of existing criminal statutes, and, by their judgments for contempt, increase the penalties thereof, thereby usurping legislative power.

That such courts could even create entirely new offenses unknown to the legislature.

That defendants would be deprived of their constitutional right of trial by jury.

That thus, courts of equity may become an effective instrument of tyranny, and the liberty of the citizens

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[17] Sec. 99 (4th. ed.).

come to depend upon the arbitrary and varying caprice of the judge.

To these objections, the soothsaying advocates of such an enlargement of equity jurisdiction, in effect, make reply:

That, even though it involves a confusion of the legislative with the judicial functions of government, if and when exercised "for the general welfare and the benefit of humanity," though a departure from our theory of "checks and balances," it is salutary. On the same reasoning, an absolute monarchy can be fully justified.

That the right of trial by jury exists only as to crimes actually committed, not to those threatened to be committed in the future,[6] which equity merely prevents. Superficially, that seems an adequate answer, but when one remembers that, by enlarging old crimes and coining new ones coupled with the device of penalties for contempt of court, the defendant is, in fact, deprived of his right of trial by jury for a criminal offense.

It should not be forgotten that, in most states, so-called "Peace Warrant" statutes exist which cover many prospective crimes, and furnish a complete legal remedy.

In a general way, the foregoing indicates the various contentions that are being made in favor of and in opposition to the extension of equity jurisdiction into the domain of criminal law. To us, the objections to such extension seem more sound that the excuses for it. At all events, the novel excursion has been sternly checked by the overwhelming weight of judicial opinion in the United States.

Of course, equity has been invoked, too, in purely political matters, such as the arranging of ballots, holding of elections, and the actions of political committees. We take a glance at a very few of these attempts, and at what some courts said of them.

A case illustrative of this invasion of equity into the

realm of politics is that of *Neal v. Young.*[18] Neal brought an injunction suit against Young and others constituting the state Democratic committee to restrain the defendants from interfering with a primary election called and arranged for by the county Democratic committee, and the injunction was granted. What was involved was purely a political contest between the Democratic committee of Jefferson county and the Democratic committee of the state of Kentucky. The county committee had called a primary election to nominate circuit judges, circuit clerks and other officers, whereupon the state committee adopted a resolution forbidding the holding of the election. Then the injunction was issued upon the application of the county committee. Defendants expressly raised the point that the granting of the injunction was beyond the equity powers of the court. In reply, the court said:

> "It was urged in argument that the question here involved is purely a political one, and that the courts should not take jurisdiction of it. My answer is that the court of appeals has a contrary opinion, and Eagan v. Gerwe, Brown v. Republican County Committee, and Young v. Beckman held that it had jurisdiction to enforce individual and legal rights . . . . The necessity for such adjudications has been placed upon the courts by the changes which have been made in the organic and statutory law of the state."

The almost universal rule is against the doctrine, and is well stated in the footnotes at page 1379 of 33 A. L. R. as follows:

> "In 14 R. C. L. sec. 76 of the article on Injunctions, it is stated that a court of equity will not grant an injunction to protect a person in the enjoyment of a political right, or assist him in acquiring such right, as that court has no jurisdiction in matters of a political nature, for, while political rights are as sacred as rights to personal liberty and property, yet they are properly within the jurisdiction of the courts of law."

The case of *Scurry v. Nicholson*[19] is interesting on this point. There Nicholson brought suit for an injunction to

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18 75 S. W. 1082 (Ky. 1903).

19 9 S. W. (2d) 747 (Court of Civil Appeals of Texas 1928).

restrain the Democratic county executive committee from ousting him from its membership, which it did because he, though calling himself a Democrat, had refused to take the pledge prescribed by the committee to support the Democratic presidential and vice-presidential nominees. The lower court had granted a temporary injunction, but the Supreme Court of Texas reversed the judgment of the lower court and denied the injunction, saying in syllabi:

> "In absence of statutory power, courts cannot interfere with judgments of committees and tribunals of established political parties in matters involving party government and discipline, such as regularity of conventions, nominations of candidates, and constitution of committees."

We venture to quote an interesting part of the court's opinion thus:

> "Injunctive relief is granted by the courts on equitable grounds only, and it is a maxim of equity that 'he who comes into a court of equity must come with clean hands.' Can it be said that one, who in a Democratic primary seeks a position as a committeeman, and who refused to take the test of fealty required by the primary law, or takes it with a mental reservation to ignore it if he chooses, and who later openly avows himself opposed to the nominees of the party as made by its highest authorities, and actively aligns himself with the forces of an antagonistic and opposing party, is a person having clean political hands and entitled to honors in the Democratic executive party organization and to the interposition of the courts? We think not."

The Nebraska case of *Winnett v. Adams*[20] has been widely followed by courts and cited by text writers as expressing the true rule, as follows:

> "1. A civil right is a right accorded to every member of a district, community or nation. A political right is one exercisable in the administration of government.
>
> "2. A court of equity will not undertake to supervise the acts and management of a political party for the protection of a purely political right."

And, in the course of the opinion, Commissioner Albert said:

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[20] 71 Neb. 817, 99 N. W. 681 (1904).

"Notwithstanding the array of authorities which support it, we should not care to commit ourselves unqualifiedly to the doctrine that a court of equity will not under any circumstances interfere for the protection of political rights. But we think it perfectly safe to adopt the doctrine to the extent of holding that a court of equity will not undertake to supervise the acts and management of a political party, for the protection of a purely political right. We do not overlook the fact that primary elections have become the subject of legislative regulation, and it may be conceded that each member of a political party has a right to a voice in such primaries, and to seek nomination for public office at the hands of his party. But when he is denied these rights, or unreasonably hampered in their exercise, he must look to some other source than a court of equity for redress. To hold otherwise would establish what could not but prove a most mischievous precedent, and would be a long step in the direction of making a court of equity a committee on credentials, and the final arbitrator between contesting delegations in political conventions. The voters themselves are competent to deal with such matters without the guiding hand of the chancellor, and it will make for their independence, self-reliance and ability for self-government to permit them to do so. It is true, they may make mistakes, but courts themselves have been known to err."

Of course, when it comes to certain matters relating to public officers and their duties and right to hold offices, the citizen is by no means remediless, for he has such strictly legal remedies as quo warranto, mandamus and the like. We are discussing only the jurisdiction of courts of equity in this article. And, in most states, there are ample statutory provisions in regard to elections.

One of the causes of the increasing resort to courts of equity is the growing disgust with the jury system. To some extent in many localities the defects in that system are due to political considerations which affect the selection of the jury panels. Then the verdicts of juries are too often the result of bizarre notions of justice, impatience with the law, and a variety of idiosyncrasies largely of an emotional nature. Frequently, the jury's idea of the proper measure of damages is based solely upon the plaintiff's tears and the defendant's fortune. And, in murder cases, it is well known that the beauty of the female defendant quite generally furnishes the only ground for a verdict of

acquittal. Of course, no such cases can be brought into equity, but they illustrate the tendency to avoid jury trials, if possible. Then, at rare intervals, there arise situations of extreme gravity, where the ordinary processes of the law have proved wholly inadequate to abate acts made criminal by statute, and the aid of equity has been sought. Such a case is *Stead v. Fortner*[21] which was an information by the attorney general to abate a nuisance consisting of the continued operation of a saloon, in dry territory, under a pretended license issued by city officials without authority. The facts in the case were that the town and city of Shelbyville, under an option act of the Illinois legislature, had voted against saloons, notwithstanding which the city council had issued a license for the sale of intoxicating liquors to the defendant, Fortner, and he had been operating under it for several years. Criminal informations had been filed against him, but the county judge had refused to issue warrants; lists of witnesses, who would testify to sales of liquor by Fortner, were presented to grand juries with request that such witnesses be called, and, if the evidence was sufficient, indictments should be returned against persons violating the law; but each grand jury refused to hear witnesses, or consider the evidence, or return any indictment. After these fruitless efforts at law the attorney general resorted to equity, and the court sustained him In the syllabus, the court made a somewhat sweeping statement of the jurisdiction of equity in such matters, which was later modified in *City of Pana v. Central Washed Coal Co.*[22] in the following language:

> "The power of courts of equity to abate or enjoin the continuance of a nuisance, either public or private, is of recent origin and will be exercised only in extreme cases, at least until after the right and the question of nuisance has been settled at law."

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21 255 Ill. 468, 99 N. E. 680 (1912).
22 260 Ill. 111, 102 N. E. 992 (1913).

In both this *Stead* case and the Kentucky case of *Respass, supra,* it will be seen that the information was by the attorney general and only after the criminal laws and officers had failed to stop the criminal practice. In such emergencies, it is possible for courts of equity to assume a jurisdiction they would otherwise decline. In some states there are statutes giving the governor power to remove a faithless public official summarily, and, in such states, of course, there is no occasion to resort to equity.

The latest pronouncement of the Supreme Court of Illinois on this subject seems to be that in the case of *State v. Brush,*[23] decided in October, 1925, which was a proceeding to reverse a conviction for contempt in violating an injunction against using a certain place for dealing in intoxicating liquor contrary to the Prohibition Law of Illinois. The proof showed that the defendant had intoxicating liquor in his possession, but at a place different from the one described in the injunction. The Supreme Court reversed the conviction, which it would seem it might have done for the reason that it appeared that the injunction had not been violated at the place proscribed, but the court went on to notice the case of *Stead v. Fortner, supra,* and others like it, and said:

> "Injury to property or civil rights is the foundation of the jurisdiction of courts of equity, and it is not within their province, in general, to enforce the criminal law or the principles of morality. People v. Prouty, 262 Ill. 218, 104 N. E. 387, 51 LRA (N. S.) 1140, Ann. Cas. 1915B. 155; Cope v. Fair Ass'n, 99 Ill. 489, 39 Am. Rep. 30; Sheridan v. Colvin, 78 Ill. 237. Equity has jurisdiction, however, to abate public nuisances, although those engaged in their maintenance are amenable to the criminal law, and although no question of damage to property is involved, on the ground that there has been an invasion of public rights and that the public safety and morality are concerned. Stead v. Fortner, 255 Ill. 468, 99 N. E. 680."

It might be a fair summary of the Illinois decisions to say that, in that state, equity will enjoin a threatened viola-

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23 318 Ill. 307, 149 N. E. 262 (1925).

tion of a criminal statute only in cases of extreme aggravation where the law has been vainly invoked, or where express statutory authority exists.

We have now indicated that there is a substantial enlargement of equity jurisdiction in some states, some of which is manifestly necessary and wholesome, some of doubtful validity and some entirely absurd and even fantastic. From all this, what are the implications?

Since earliest times, it has been the special concern of courts of equity that their decrees should be effective, and they frequently refuse to grant them for no other reason than that it would be a vain thing and thereby bring the court into disrepute. So it is that nearly all courts of equity decline to attempt to direct and control domestic relations, well knowing that such attempt would be nugatory. Common sense alone would seem to require that, in such matters, equity remit the parties to their numerous remedies provided by law. Even a court of equity, with all its powers, is impotent to restore to a spouse that love of which he or she has been bereft, or to restrain the iniquitous approach of sheik or vampire. And to attempt to do so is manifestly absurd, besides being a wide departure from established equitable principles and an encroachment upon the domain of courts of law.

One of the causes of the extension of equity jurisdiction is the widespread belief that it is a duty of the State to impose good moral behavior by legal force. This strange recrudescence of a long abandoned notion has manifested itself chiefly in legislation, but, at last, has appeared in the judiciary. Consider the rhetorical outburst of the Kentucky court in declaring that the morals of the people are no less the concern of the state than their health and safety. That is followed by a truism, which no one denies, that, if the people decay, the state will not long endure. But is it a legitimate function of government in this country to at-

tempt to bolster up a tottering morality by judicial ukase? And, even if the proposal were sound, how effective could it be made? If the teachings of religion prove inadequate, can law compass the desired end? If persuasion fails, will force succeed? It never has. Will it now? Of course, there are those "progressive" souls, who possess the fond delusion that, since there has been so great invention in the realm of material things, a corresponding advance can be forced in the field of morals, ignoring the fact that a human being differs from a machine. And, moreover, to the well-intentioned zealot impatient of ordinary means, there is fascination in the thought that the forceful agencies of government can bring about that millenium he so ardently desires. Always, they envision "the dawn of a new day," which is an inspiring concept, but it should be borne in mind that nothing can work more havoc than a superb moralistic conviction working through civic force. In such cases nobility of purpose has never been any assurance against disaster of result. And, certainly, it seems most unwise for equity to embark upon a perilous and uncharted sea. For example, the writer disbelieves in so-called "companionate marriage," regarding it only as a transparent pretense to legalize concubinage; but he would not think of making application to a court of equity to enjoin it, preferring to wait for legislative action or until some common law judge holds such a relation to be no marriage at all, in which event, of course, the parties would be subjected to all the penalties of the criminal code. Then, too, the proposal that equity invade the domain of private morals is a direct denial of the theory of personal moral responsibility, which is believed to be common to all moral philosophies. Hitherto, it has been thought that this responsibility could not be transferred to the State, which the notion of a paternalistic supervision of moral behavior contemplates. Such a thing is repugnant to American institutions, and, if put into operation, would destroy that "domestic tranquil-

lity," which was one of the declared purposes for the founding of the government. It is bad enough to witness its working in legislative halls, but, in courts of equity, it is intolerable. Still, it is consoling to reflect that, at present, it amounts to only a trend, and not a substantial menace, for, in nearly all cases, the judges have successfully resisted the pressure. They have realized that their office did not give them a sort of plenary commission "to put down" what they might conceive to be "wrong," individual moral behavior. And, as the New York judge remarked, if they did this, they would have little time for anything else, for, if once the door be opened, it will be crowded. It goes without saying that it is much to be desired that the people should be raised to higher levels of thought and conduct, but the idea that the means employed should be force instead of persuasion is one that the history of the centuries condemns as both futile and perilous.

By patient thought, through the centuries, chancellors have evolved certain established principles of equity founded upon natural justice, the application of which has proved benign. If, as the late Chief Justice Taft observed, the administration of our criminal law is a disgrace to this Republic, its equity jurisprudence is its abiding glory. With few exceptions, the chancellors of the past might rise and confidently demand of history to say whether they have worthily borne the Great Seal of their Sovereign.

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