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THE HISTORICAL DEVELOPMENT OF THE POWER OF EQUITY COURTS TO ENJOIN NUISANCES

CYRUS D. SHABAZ

THE recent cases where injunctions have been granted in favor of the State to abate a nuisance are in reality no new thing to equitable jurisdiction. It is nothing but a mere harking back to the old court of chancery, where no limitation was put on that court and it served to protect people and property from violence.

There was a turbulent time in early England when chancery was used frequently to preserve peace and prevent crime. But this jurisdiction was always unpopular and the rights of equity to intervene in criminal matters gradually was lost, due to much more efficient prosecution by the government which was becoming more stable. Toward the end of the fifteenth century the jurisdiction almost ceased,¹ but it was not until the eighteenth century that the chancery court became firmly established and then made no more attempt at all to enforce the criminal laws. In 1818, equity refused to take jurisdiction, and Lord Eldon said, in that year, "The publication of a libel is a crime, and I have no jurisdiction to prevent the commission of crime."² Upon this decision equity has based her refusal to assume jurisdiction in criminal matters.

But equity always could protect property from irreparable injury, even though the act was also a crime, and in the following classes of cases equity always took jurisdiction, which jurisdiction was an exception to the very general and important rule that equity could not interfere in the enforcement of the criminal laws.

1. To restrain perpetures of public highways and navigation.
2. To restrain threatened nuisances, dangerous to the health of the whole community.
3. To restrain ultra vires acts of corporations, injurious to public right.

Except for these three classes of cases equity almost universally refused to intervene in criminal matters but still an occasional case was decided wherein equity enjoined against the commission of a crime and around these scattered decisions the present equitable jurisdiction grew. In 1861 the Lord Chancellor granted the Emperor of Austria an injunc-

¹ "Revival of Criminal Equity," 16 Harvard Law Review 391.

² *Gee v. Prichard*, 2 Swans. 402 at 413.

tion restraining one Kossuth from printing and passing counterfeit notes, even though the act complained of was a crime.³

Thus the jurisdiction to abate nuisances developed through a crystallization of these cases and the name nuisance was applied to any place conducted in a noisy or wanton manner.

The Supreme court of Indiana in 1895⁴ granted an injunction in the name of the State against a corporation where the corporation was misusing its charter and maintaining its property as a nuisance, even though the act was a crime also, Chief Justice Howard said, "Extraordinary emergencies in many cases call for extraordinary remedies. The rule to be observed from such cases is quoted at page 366 from Lord Chancellor Cottenham 'That it is the power of courts of equity to adopt its practice and course of proceedings, as far as possible, to the existing state of society, and to apply its jurisdiction to all those new cases which, from the progress daily making in the affairs of men, must continually arise, and not from too strict an adherence to forms and rules established under very different circumstances.' "

So here we have this court, and other equally respectable courts, under the general jurisdiction of equity issuing an injunction to prevent a threatened nuisance which at the same time, if committed, is also a crime.

In Missouri in 1907,⁵ equity under its general jurisdiction issued an injunction against a bull fight to be held near the World's Fair Exposition. An act displayed before a public audience, which is debasing in its character, is a public nuisance which equity will enjoin, notwithstanding that the act may also be a crime. Though one charged with a crime has a constitutional right to a jury trial, one who intends to commit an act which is both a crime and a public nuisance has no constitutional right to commit it in order that he may enjoy the right of trial by jury, but may be enjoined from committing the act by a court of equity.

This has not been a universal rule of equity but courts all over the country have gradually been getting in line and following the decisions of the above cases.

Mr. Olmstead in his article in the American Bar Association Journal⁶ seems to differ with the writer of this article saying, "No case has been cited where, under the general jurisdiction of a court of equity, an injunction has been granted in behalf of the public to restrain a person from selling intoxicating liquors, or from keeping them for sale in

³ *The Emperor of Austria v. Day and Kossuth*, 3 De. G. F. and J. 216.

⁴ *Columbia Athletic Club v. State*, 40 N. E. 914.

⁵ *State ex rel. Attorney General*, 105 S. W. 1078.

⁶ American Bar Association Journal, Vol. XI, No. 6, June 1925.

violation of statutes, or from doing similar acts which have been prohibited on general considerations of public policy. So far as appears, courts acting under their general equity powers have refused to entertain suits brought for this purpose." And in support of his stand cites *Missouri v. Uhrig*⁷ and *State v. Crawford*.⁸

No doubt Mr. Olmstead has overlooked the two cases cited by this writer, *Columbia Athletic Club v. State* and *State ex-rel Attorney General v. Canty* (Supra) which are contrary to the proposition Mr. Olmstead states. Even the case he cites as his authority does not support him when given more than a superficial reading, meaning the case of *State v. Crawford* (Supra.)

In that case, Justice Valentine says, "In *Attorney General v. Utica Insurance Co.*,⁹ Chancellor Kent seems to express an opinion that courts of equity do not have jurisdiction to restrain the commission of nuisances or other acts which are at the same time criminal offenses. We cannot follow this decision to its full and entire extent; for, unquestionably, the great weight of authority as well as of reason is against that doctrine. We think courts of equity certainly have jurisdiction to enjoin nuisances, although such nuisances may at the same time be public offenses."

So, while the injunction was refused, the case is no authority at all for Mr. Olmstead's article, as the court distinguished the cases and, while refusing the injunction in the instant case, admitted equity had authority under a different set of facts to restrain the illegal sale of liquor.

These cases show how equitable jurisdiction has developed in its power to abate and close a saloon, even without an express statute declaring the saloon to be a nuisance. At common law the legislature had the unquestioned power to define a public nuisance and extend it to new classes of cases, as was done in 1833 when Parliament passed an act prohibiting erection of a building within ten feet of the road and declared any building erected contrary to this law a nuisance.¹⁰

This old rule has been followed and brought down to date in *United States v. Reisenweber*¹¹ and the court said, "It is within the power of the legislature to prescribe what shall be a nuisance, and it may make that a nuisance which was not one at common law. See *Moss v. United States*, 16 App. D.C. 428, 50 L.R.A. 532; *State v. Beardsley*, 79 N.W.

⁷ *Missouri v. Uhrig*, 14 Mo. Appeals 413.

⁸ *State v. Crawford*, 28 Kansas 726, Book 31 Pacific State Reports Extra Annotated.

⁹ *Attorney General v. Utica Ins. Co.*, 2 Johns Ch. 371.

¹⁰ 5 B. & A. D. 555 (110 Eng. Reports 895).

¹¹ *U. S. v. Reisenweber*, 288 Fed. 520.

138; 68 L.R.A. 402.) And inasmuch as the Eighteenth Amendment makes the traffic in intoxicating liquor for beverage purposes unlawful, we do not doubt the constitutional power of Congress to enact that any place where liquor is sold in violation of this act is declared a common nuisance, as provided in section 21."

So Congress in passing the Volstead Act took advantage of this common law power, as have many state legislatures, and declared saloons a common nuisance. The law has been upheld in almost all courts and in only a few cases have courts held it unconstitutional. In a Nebraska case the law was held squarely unconstitutional but this case seems out of line with the authority and the doctrine announced by it has not been followed in any other court. Nevertheless, part of the case can be distinguished and brought in line with the rest of the cases. Justice Woodworth simply held and correctly, that Congress cannot take ordinary evidence and raise it to the level of conclusive evidence, as they have done when they declare an act, which was a nuisance within sixty days previous to the filing of the writ is presumed to be a nuisance at time of the hearing. The judge held that the government must show the nuisance actually in existence at the time of the hearing, or the writ will be dismissed. So the case went off on a point of evidence on which Justice Woodworth held, correctly, with the weight of authority that the law, as to that part of the Prohibition act which deals with the presumption must be declared unconstitutional.¹²

So with the discovery of this old common law power Congress "put teeth" into the Volstead Act by enacting sections 21, 22, and 23. Congress, foreseeing the troubled sea over which the act would have to sail, brought out this seemingly novel remedy which really was hundreds of years old. Valid and legitimate remedies often lie dormant for years, simply because no fair opportunity is presented to put them in operation, as was the case here. But Congress was guided by decisions of courts construing statutes similar to the Volstead act and passed in the states years previous.

In Georgia there was an optional prohibition law in effect and in 1897 the supreme court of that state issued an injunction restraining the threatened illegal sale of liquor. The court said:

The presiding judge granted the injunction on the sole ground that a judicial sale of spirituous liquors in a county where the option law is in effect is a public nuisance and contravenes the terms of the act. If, in the exercise of the discretion vested in him by law, he should find that the facts alleged are true, he has full power to prevent an irregular or illegal sale, either by grant or an injunction or other direction.¹³

¹² *U. S. v. Lot 29, City of Omaha*, 296 Fed. 729.

¹³ *State v. Fegar*, 29 S. E. 463 (Ga.).

Under a similiar statute an injunction was issued in Iowa over the contention of the plaintiffs that they should have a jury trial because the act committed was also a crime.¹⁴ But the court did not punish the act as a crime but merely as a violation of the injunction and the plaintiffs could still get their jury trial when they were punished for the crime.

This was followed by a later case in the same court where the judge said, "The right to trial by jury in chancery cases was not guaranteed in the constitution and Iowa courts having well-settled jurisdiction to abate nuisances before the act was passed, that statute is not unconstitutional because it declares the illegal sale of intoxicating liquors a nuisance."¹⁵ And authority to support this is listed in 16 A.L.R. at page 397; 149 Mass. 550; 66 N.H. 39; 46 Kan. 695; 5 N. Dak. 147.

The same remedy was also used effectively against bawdy houses where by statute these places were declared nuisances and equity took jurisdiction and closed them. In Massachusetts the courts recognized this old principle and in following the case of *Carlton v. Rugg*¹⁶ the court thirty years later in *Chase v. Proprietors Revere House*¹⁷ spoke to the same effect saying, "jurisdiction of equity over abatement of a nuisance, whether public or private, is settled, and may be exercised, although the nuisance is made by statute an indictable offense."

Wisconsin has a statute similar to the Massachusetts statute referred to, and under section 280.09 bawdy houses may be closed for one year. The supreme court of Wisconsin in 1916¹⁸ declared that an injunction may issue closing, for one year, property used for purposes of lewdness upon satisfactory showing of such use.

These cases show the law among the several states and to this can be added the unqualified support of the U. S. Supreme Court. When the *Eilenbecker* case (supra) was appealed to that court, the court said, "If the objection to the statute is that it authorizes the nature of a suit in equity to suppress the sale of intoxicating liquors, and to abate a nuisance which the statute declares such acts to be, we respond that it appears to us that all powers of a court, whether at common law or in chancery may be called into operation to suppress this objectionable traffic; and we know of no hindrance in the Constitution of the United States. Certainly it seems to us to be quite as wise to use the process of the court to prevent the evil as to punish the offense after it has been committed."¹⁹

¹⁴ *Eilenbecker v. District Courth of Plymouth County*, 28 N. W. 551 (1886).

¹⁵ *State v. Jordan*, 34 N. W. 285.

¹⁶ 149 Mass. 550; 5 L.R.A. 195.

¹⁷ 232 Mass. 88; 122 N.E. 162.

¹⁸ *State Ex rel. Zavel v. Grefig*, 164 Wis. 74, 159 N.W. 560.

¹⁹ 134 U.S. 31.

This last case is based on the holding of a previous case, *Mugler v. Kansas*²⁰ which lays down the proposition that the state has the authority to prohibit the sale of intoxicating liquors for other than medical purposes. We do not doubt her power to declare any place, kept for the sale of such liquor, to be a common nuisance, and, at the same time, provide for indictment if the offender. One is against the property used for a forbidden purpose, and the other for the punishment of the offender.

The court has given finality to its decision that the Volstead Act is constitutional in *Street v. Lincoln Deposit Co.*,²¹ where the court said that the attack of unconstitutionality based on the ground that property was taken without due process must fail because of the decision in *Mugler v. Kansas*. (*supra.*)

These are all the authorities that can be cited here in support of that proposition, except to mention that the rule is followed in *Powell v. Pennsylvania*²² and *Kansas v. Zeibold*,²³ reported with the *Mugler case*. (*supra.*)

The claim as to unconstitutionality because of double jeopardy must also fall, due to the decision of *In re Debs*,²⁴ where the court said that equity has power to interfere by injunction in cases of public nuisances and this interference is not destroyed by the fact that the acts are also violations of the criminal law. The court, enforcing obedience to its orders, is not executing the criminal law, nor invading the constitutional right of trial by jury.

Many more authorities are cited and analyzed by Mr. Chacon of Colorado in his very able article in the American Bar Association *Journal*,²⁵ in which he goes into the recent cases in support of the Volstead Act thoroughly.

The purpose of this article is not to justify or to condemn equitable jurisdiction but just to show the foundation on which it rests. What sections 21, 22 and 23 of the Volstead act do is no novel doctrine. In the beginning, the old chancery court had unlimited power in both criminal and civil matters, but as the government became more stable this criminal jurisdiction fell off and gradually ceased equity then only retained jurisdiction in three classes of criminal cases, notably the right to restrain against a threatened nuisance dangerous to the health of the whole community. Then this application of equity to prohibit

²⁰ *Mugler v. Kansas*, 123 U.S. 623.

²¹ *Street v. Lincoln Deposit Co.*, 254 U.S. 88.

²² *Powell v. Pennsylvania*, 127 U.S. 678.

²³ *Kansas v. Zeibold* 123 U.S. 623.

²⁴ *In re Debs*, 158 U.S. 564.

²⁵ American Bar Association Journal, Vol. XI No. 8—page 663.

nuisances began to be extended, first under the general jurisdiction of equity without an assisting statute. But this extended jurisdiction was not followed in all cases, so legislatures passed statutes defining nuisances and extending it to new classes of cases. And the result of this development is seen in sections 21 and 22 of the Volstead act.

Thus we see that this remedy, while it has not been used locally previous to last year, is not new, but is an old common law doctrine, laid on the solid foundation of equitable jurisdiction, and developed through the ages, merely having laid dormant for many years, waiting for an opportunity to be called into use.

But how are we to explain the startling increasing use of equity in the last few years? Let us hope it does not mean we are going back to something like the turbulent time of Richard II when there was a breaking down of centralized government and the powerful barons so overawed the local courts that the only way to obtain convictions for crime was to give chancery that power. Perhaps the legislatures and congress saw what almost insurmountable difficulties would confront the Prohibition act; that juries would hesitate long before convicting the defendant. Perhaps Congress lost faith in the ability of the prosecuting officials to get convictions and so deemed it wiser to allow equity through the Federal courts to enforce the act, feeling that they are less likely to be moved by political influence. But most likely, the extension of power has been due to a lessening of popular distrust of the judges, due to the elective nature of the judiciary. Then too the existence of new questions to be settled by the courts of equity have gradually accustomed the people to a broader use of equitable jurisdictions and they do not mind it as much as before. But how far will equity go in the future to enforce the criminal laws? Our own court said in 1904, "The jurisdiction of equity is defined by principles not by precedents: the former govern, the latter illustrate. New principles are not to be added by judicial policy but old ones are subject to development to meet new conditions."²⁶

This being the fundamental principle in which equity works, it is entirely problematical as to what may happen in the future but if the extension of the power continues in the future as it has in the past we may expect some startling developments.

²⁶ *Harrigan v. Gilchrist*, 121 Wis. 127, 99 N.W. 909.