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The Use of the Injunction to Abate Saloons

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THE USE OF THE INJUNCTION TO ABATE SALOONS

The extension of equity into certain fields not generally conceded to be within its ordinary jurisdiction, for example, by the use of the injunction to prevent crimes and nuisances, is a subject of considerable discussion and by no means free from conflicting opinions. A study of articles and decisions reveals a wide difference of belief and a doctrine that is far from settled. It is the purpose of this paper to discuss and attempt to uphold the use of the injunction to abate nuisances which affect the public morals and decency as exemplified by saloons.

It is contended that the extension of equity by use of the injunction to prevent crimes and nuisances is a usurpation of the power of the criminal courts and without basis or jurisdiction. If a court of equity used its power to prevent a crime as such, that contention would be true, and wherever it has been attempted on such ground, equity has refused to take jurisdiction of the case. The fact of the matter is that equity will not enjoin an act because it is criminal, but because there are other well recognized grounds for jurisdiction. That the first part of the above is true will scarcely be argued today. "At the present time there is no pretense of enjoining criminal acts as such; in every case there is a legitimate ground for equity jurisdiction." It is around cases where legitimate grounds exist that the controversy rages.

An act will not be enjoined as a nuisance merely because it is criminal. If it is a nuisance, it will be enjoined, although criminal. Before equity will interfere there must be reasons for it doing so. If reasons exist equity will issue an injunction and it is immaterial whether the act enjoined is a crime or not.

In exercising its power to abate nuisances equity is not getting into an entirely new field nor going beyond its jurisdiction. Judge Story says, "In regard to public nuisances the jurisdiction of courts of equity seems to be of very ancient date,

2 Lyne, 21 Ky. L. J. 81.
3 Pomeroy on Equity, Sec. 1941.
5 Story, Equity Jurisprudence (Vol. 2), Sec. 921.
and has been distinctly traced back to the reign of Queen Elizabeth." And continuing, "The ground of this jurisdiction undoubtedly is their ability to give a more complete and perfect remedy than is attainable at law, in order to prevent irreparable mischief, and also to suppress oppressive and vexatious litigations." He points out that equity can prevent threatened nuisances as well as restrain those already existing and by perpetual injunction make the remedy complete for future time, whereas a court of law can only reach present nuisances, leaving future acts to be subject to new prosecutions and proceedings.

The power to abate a nuisance may be said to be inherent in equity. Practically from the time of its establishment it has done so. In a very early case equity enjoined a nuisance, the court holding it was against the law of the land. That there is a general equity jurisdiction as to public nuisances has also been recognized in this country.

The fact that equity furnished a more complete and adequate remedy for abating a nuisance than could be had at common law was a factor in the growth of its jurisdiction in this type of action. Certainly today the abatement of a nuisance by injunction is far more efficient and complete than abatement by the criminal courts. Consider, for example, where under the criminal law, officers shut up and abate an illegal saloon and fine its proprietor. This procedure having been carried out as demanded by law, the worthy proprietor shortly reopen for business and continues to flourish until the officers again descend on him. The same procedure is repeated and, chances are, may be repeated again and again, unless equity steps in and abates the nuisance.

When it does so, a perpetual injunction is granted against ever again using the property as a saloon and against the proprietor from conducting his nefarious trade. The citizens of that neighborhood will no more be harassed by the operation of the nuisance complained of.

Those opposed to the natural expansion of equity, and zealous of an inflexible system of criminal law, overlook the existence

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*Ibid., Sec. 924.
*Beveridge v. Lacey, 3 Rand. (Va.) 63 (1824); Bridge Co. v. Summers, 13 W. Va. 484 (1878).
of a common nuisance and protest that equity is enjoining a crime. They do not know or refuse to acknowledge that "a crime may be a public nuisance at common law or under a general nuisance statute. If so, an equitable proceeding has some marked advantage over a prosecution. It protects the public without punitive consequences to the defendant for his past conduct. It operates very rapidly with less risk of miscarriage than a jury trial involves."

Because a system operates with "marked advantage" to the public is it to be relegated to the judicial bone yard? Because its growth is modern and it dares to "compete" with an old established system, is it to be branded as unsound and declared to be an infringement of legal rights?

The fact that the creation or maintenance of a nuisance is a crime, at common law or under statute, does not deprive a court of equity of the power to decree its abatement. Equity was a going concern and handled certain nuisances long before they were made crimes by statute. The modern trend is but an out-growth of an ancient and established jurisdiction. But simply that the act is criminal, as the violation of a law, is not enough. It is necessary that the nuisance affects civil or property rights, or privileges of the public, or public health and welfare. In short there must be a proper ground for equitable jurisdiction.

Thus the rule of equity refusing to enjoin an act merely because it is a crime, does not preclude injunctive relief where proper grounds are offered for its jurisdiction.

Mack states there are three classes of situations where the jurisdiction of equity has been extended. The second, applicable to the present subject, is, Prevention of the violation of public decency; i.e., saloons and brothels. This jurisdiction, in the absence of statute, has been based on public nuisance, impairment of the value of adjoining property, and protection of public welfare under exercise of the police power of the state.

The cases wherein saloons have been abated by injunction may be divided into two distinct groups. First, those in which courts exercise this injunctive power under statute, and second, those in which the courts base their jurisdiction on the fact that the thing abated is a common nuisance, that it is an injury to property, or that it affects the public welfare.

*Chafee, 34 Harv. L. R. 388, 398.
*Mack, 16 Harv. L. R. 389.*
In several states legislatures have enacted statutes making illegal saloons public nuisances and giving courts of equity jurisdiction to enjoin them. It has been held that a pharmacist, with a permit to sell liquor for medical purposes, who sold it without conforming to the law, could be enjoined from selling it in such manner, according to a statute declaring such sale to be a common nuisance. The rule that parties seeking to enjoin a nuisance must show special injury does not apply to a proceeding under statute to enjoin the maintenance of a nuisance consisting of carrying on the sale of intoxicating liquors.

The leading case of State v. Crawford, stated that if a statute makes a thing illegal it becomes ipso facto a public nuisance. The statute here declared an illegal saloon to be a public nuisance and provided it should be shut up and abated by the proper officers. The court declined to grant an injunction on the ground that the remedy at law, under the statute, was adequate. By way of strong and persuasive dictum, however, the court said in the absence of such statute equity had jurisdiction to enjoin an illegal saloon as a common public nuisance.

Another court has said that under the stamp of a common nuisance equity would have jurisdiction to restrain under "very old Chancery jurisdiction" without aid from any statute, indicating that modern statutes are but declaratory of the established power of equity courts.

Those denying the right of equity to abate saloons by injunction, contend that statutes giving it this right are unconstitutional. Hedden v. Hand, holds such statutes are unconstitutional, but this case stands almost alone. The decision given in this case seems to be contra to all other reported decisions.

On the other hand, with the exception of Hedden v. Hand, the courts have uniformly sustained the constitutionality of statutes conferring upon courts of equity the power to abate a public nuisance, altho the acts constitute a crime and no property rights are involved.

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1 State v. Davis, 44 Kan. 60, 24 Pac. 73 (1890).
2 State v. Ragghianti, 129 Tenn. 560, 167 S. W. 689 (1914).
4 Devanney v. Hanson, 60 W. Va. 3, 53 S. E. 603 (1906).
6 Ibid.
7 Fulton v. State, 171 Ala. 572, 54 So. 688 (1911); State v. Jordan,
The leading case holding such statutes constitutional is *Carleton v. Rugg.*18 Here a statute gave the right to courts to abate or restrain a public nuisance upon instigation of the proper official or upon petition signed by ten or more citizens. In the particular case a petition was presented signed by ten citizens, to abate and enjoin the use of a building for selling liquor. The court granted the injunction and held the act was constitutional. The case says the state can make what it pleases a public nuisance. By the force of this holding the power of equity to enjoin saloons by virtue of legislative authority and the extension of its jurisdiction into the field of "crime prevention" have made tremendous strides that have helped to carry them into many jurisdictions of the land.

That an act making the illegal selling of liquor a nuisance and giving equity jurisdiction to enjoin it, does not violate the due process clause of the Fourteenth Amendment nor abridge the right of trial by jury, was held by *State v. Marshall.*19 In this case the defendant conducted a soft drink stand in Vicksburg. Actually he was engaged in the illegal sale of intoxicating liquor and used the soft drink designation as a false front. In regard to the argument that jury trial was denied by the statute, the court said, "The contention is utterly without merit. The court has jurisdiction, and the trial must be conducted by the rules of procedure that prevail in a chancery court and jury trial is no more a matter of right in this than in any other chancery cases." As to due process the court declared "The procedure authorized by this statute gives full opportunity for a hearing, and does not violate the due process clause of the Constitution of the state or the United States."

In granting this injunction the court said, "When a business is a public nuisance, no matter how it gets to be such, whether inherently so or made so by law, the court of chancery has power to enjoin."

It was held in *State v. Murphy,*20 that a law, authorizing the

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19 100 Miss. 626, 56 So. 792 (1911).
20 71 Vt. 127, 41 Atl. 1037 (1898).
legislature to declare an establishment selling liquor a public
nuisance and to empower the chancery court to enjoin it, did not
invade any right of trial by jury. The court said, "A proceed-
ing against the respondent for violating the injunction would be
no more a criminal proceeding than one would against him for
violating an injunction in a civil proceeding in reference to a
private nuisance."

An Iowa case, Littleton v. Fritz, held a statute providing
any citizen of a county may maintain an action in equity to enjoin
and abate a nuisance caused by keeping a place for selling liquor,
contra to law, was not unconstitutional as depriving a citizen of
the right of trial by jury. Under this statute the citizen could
bring the action without showing that he was specially damaged
by such nuisance. The court said, "It is important to inquire,
in what cases was right of trial by jury inviolate when the con-
stitution was adopted? For it will be observed that the provi-
sion is that the right 'should remain inviolate.' This provision
or its equivalent is common to the constitutions of many states
of the Union, and it has been held that it secures the right of
trial by jury in all cases in the trial of which a jury was neces-
sary according to the principles of the common law." There is
no provision giving absolute right to jury trial in equity cases.

Where statutes confer power to abate nuisances on courts in
general, by necessary implication a court of chancery is vested
with jurisdiction by statute. The statute there made it unlaw-
ful to manufacture and sell intoxicating liquors and made any
place used for such purposes in violation of the statute a common
nuisance, and required such place to be abated as a public
nuisance. The court held the statute constitutional and that a
state under its police power may abate any nuisance prejudicial
to the health or morals of the public. Such action is not taking
property without just compensation, the court pointed out, as
the owner could still use it in a lawful way.

The statutory basis of equity jurisdiction is not the only
basis upon which equity must rely to abate saloons. That a
saloon is a common nuisance, an injury to property, or injuri-
ously affecting the public welfare may furnish a basis for juris-
diction. Injury to property as a jurisdictional factor is undis-

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265 Iowa 488, 22 N. W. 641 (1885).
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puted, but it is not the only one. The general American rule is that the attorney general or certain citizens can enjoin acts which do not injure specific property. In the case of a public nuisance it is held that the fact that no property rights are involved is not material. The state may restrain a criminal act when its interests or the interests of those entitled to its protection are affected. Under its police power it may act to protect public morals and decency.

Having pointed out that equity will enjoin a common or public nuisance whether the power be inherent or the result of long use, or granted by statute or in connection with other jurisdictional grounds, the consequence is that if a saloon be a common or public nuisance, equity can exercise its power to enjoin it. Moreover, this power may be invoked against a place for the sale of liquors, tho there has been no criminal conviction of the keeper of the place. It would seem that the criminal conviction would be immaterial, as, in exercising this power, equity is not concerned with the criminal aspect but is interested only in abating a nuisance.

A liquor nuisance, a common term for a saloon, has been held to be a public nuisance if it annoys such part of the public as necessarily comes in contact with it. "Blind tigers" where liquor is sold on the sly and contrary to law are public nuisances and may be abated. Wherever intoxicating liquor is sold, dispensed, given away, or drunk, is a nuisance, and therefore an unlicensed social club for use of members only, dealing in liquor in any way mentioned above is a nuisance. And in Georgia it was held an "illegal sale of intoxicating liquor is a public nuisance, affecting the whole community in which it is carried on . . ." It has been held in New Jersey that habitual unlawful sales of intoxicating liquor constitute the place where sold a nuisance, while in another state one who in violation of the law

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20 Col. L. R. 605.
24 Columbian Athletic Club v. State, 40 N. E. 914, 143 Ind. 98 (1895); State v. Canty, 207 Mo. 439, 105 S. W. 1078 (1907)
23 State v. Riesen, 165 Wis. 253, 161 N. W. 747 (1917)
26 State v. Tabler, 34 Ind. A. 93, 72 N. E. 1039 (1905)
27 Shreveport v. Maroun, 134 La. 430, 64 So. 388 (1914)
30 State v. Kapicski, 105 Me. 127, 73 Atl. 830 (1909)
28 Lofton v. Collins, 117 Ga. 434, 43 S. E. 708 (1903)
30 City of Millville v. Everingham, 101 N. J. Law 826, 129 Atl. 921 (1925)
sells liquor and has the reputation of so doing, maintains a liquor nuisance.\textsuperscript{31}

The fact alone that a liquor nuisance is a persistent and continuing public wrong is a very strong reason why equity should undertake to suppress it.

The case of \textit{Walker v. McNelly},\textsuperscript{32} illustrates the extent of equity jurisdiction to abate a saloon because it is a nuisance. In this case the defendant operated a saloon illegally and the action to abate it by injunction was brought by the solicitor general in behalf of the people. The case held since the saloon was maintained and operated illegally it was a public nuisance which the court of equity could abate by injunction. The court went on to say that even tho the sale was illegal and the persons engaged therein could be punished under the penal law, since the unlawful selling was a public nuisance, injuring the entire community, equity would abate it upon an information filed by the solicitor general. The case stands for the fact that equity has jurisdiction in a suit by the state to abate and enjoin a liquor nuisance, without reference to statute or to property rights, even tho the acts constituting a nuisance also constitute a crime.

An Illinois case appears to be based on the fact that an illegal saloon is a nuisance and within the jurisdiction of equity to abate. In \textit{Stead v. Fortner},\textsuperscript{33} the defendant opened up a saloon in a dry town and the officers of the law refused or neglected to take action. The attorney general filed a bill to enjoin the defendant on the ground of a public nuisance, contrary to the law and detrimental to the health and morals of the community. The court granted the injunction and apparently based their decision on the fact that the defendant was conducting a public nuisance, and since equity has jurisdiction to abate a public nuisance, it was properly exercising its power by enjoining the defendant and abating the nuisance.

The case might well have had another ground for the interference of equity—protection of public morals and welfare. The attorney general included a prayer for such protection in his bill asking for the injunction. It has been held that a sham restaurant, wherein liquor is surreptitiously bartered and sold, is

\textsuperscript{31} \textit{Allshouse v. Carragher}, 171 Iowa 307, 151 N. W. 443 (1915).
\textsuperscript{32} 121 Ga. 114, 48 S. E. 718 (1904).
\textsuperscript{33} 255 Ill. 468, 99 N. E. 689 (1912).
a resort of various persons whose conduct tends to injure public morals, peace, and welfare, and can be enjoined.\textsuperscript{34}

One of the oldest grounds of jurisdiction in the field of abatement by injunction is the protection of property and property rights. Equity has always protected property. In abating nuisances because they injure property rights, equity is standing on firm ground. In basing jurisdiction on this ground the courts adopt what they know to be a safe tho narrow basis. While willing to grant relief on this basis, the courts are strict to require that the acts enjoined be primarily and essentially an injury to property. They will not grant an injunction on that basis if the injury resulting to the property is merely consequential. Where an individual seeks to enjoin a public nuisance he must have suffered special damage and must show it.

Where he has suffered such damage as the result of an unlicensed dramshop in the same block with his apartment house, causing his business in connection with renting apartments to fall off, he may abate the nuisance by a suit in equity.\textsuperscript{35}

"If the use of property is one which renders a neighbor's occupation and enjoyment physically uncomfortable or which may be hurtful to the health—a private nuisance is deemed to be established, against which the power of a court of equity may be invoked."\textsuperscript{36}

The protection of public welfare under the police power of the state as a jurisdictional factor in the abatement of nuisances by injunction, is well recognized and, it would seem, in view of the complexities of modern civilization, a sound one.

The case of \textit{State v. C. B. \& Q. R. Co.}\textsuperscript{37} held a liquor nuisance could be enjoined when it arises from a persistent violation of a statute forbidding intoxication and drinking on railway trains. There the defendant was charged with selling liquor on its trains contra to the laws of the state. The court based its decision partly on the fact that the acts of the defendant corporation were ultra vires. It further stated that the comfort and safety of the traveling public are involved and that the state under its police power must protect them.

\textsuperscript{34} \textit{State v. Lamb}, 237 Mo. 437, 141 S. W. 665 (1911).
\textsuperscript{35} \textit{Hoyt v. McLoughlin}, 250 Ill. 442, 95 N. E. 464 (1911).
\textsuperscript{36} Eaton on Equity, p. 553.
\textsuperscript{37} 88 Neb. 669, 130 N. W. 295 (1911).
Equity will protect public welfare by the use of the injunction even tho a remedy at law is furnished by statute. In the absence of such jurisdiction, the public would continue to suffer where the remedy at law, tho available, was ineffective. In Legg v. Anderson,\textsuperscript{38} citizens were allowed to enjoin a "blind tiger" in the face of a state law which declared such place "shall be deemed a nuisance, and the same may be abated or enjoined as such, as now provided by law."

The defendant contended the remedy "provided by law" was by prosecution and abatement under the criminal law. The court pointed out that criminal prosecutions have not always been effective to deter the unscrupulous and lawless from engaging in the illegal traffic and held the remedy here provided is cumulative of other remedies and could be made available even in a case where other remedies are themselves complete and adequate.

In answering the defendant's contentions the court said,\textsuperscript{39} "A law having for its purpose the suppression of an acknowledged existing evil, which is destructive of the welfare and happiness of individuals, should not, of all laws, be frittered away by construction."

The proposition that equity will enjoin illegal saloons, either on the basis that the power is conferred by statute, or because the subject to be enjoined is a common nuisance affecting property or public welfare, is ably supported by numerous cases, some of which have been cited above. It remains to be seen if equity will enjoin a saloon as a \textit{private} nuisance. It has been held that where a private nuisance, as a saloon, injuriously affects the rights of the complainant in a manner different from that experienced by the public in general, the power of a court of equity to grant relief by injunction is not affected by the fact that the nuisance complained of is also a breach of the criminal law.\textsuperscript{40}

A legal sale of intoxicating liquors cannot be enjoined unless it is a nuisance\textsuperscript{41} and a saloon with a license and operated legally.

\textsuperscript{38}116 Ga. 401, 42 S. E. 720 (1902).
\textsuperscript{39}\textit{Ibid.}
\textsuperscript{40}State v. Ehrlick, 65 W. Va. 700, 64 S. E. 935 (1909); Detroit Realty Co. v. Barnett, 156 Mich. 385, 120 N. W. 804 (1909).
\textsuperscript{41}State v. Kirkwood Club, 187 S. W. 819 (Mo. App., 1916).
is not a nuisance per se, but in the case of *Detroit Realty Co. v. Barnett*, one so conducted was declared to be a private nuisance, and an injunction was granted.

Here the defendant operated a saloon and dance hall under full license from the state and federal governments. The plaintiff owned residences on the same street and in close proximity to the defendant’s saloon. Plaintiff complained of it as a private nuisance and sought to enjoin it. The court enjoined and restrained not only the owner from renting or leasing the premises for such purposes, but perpetually enjoined the defendant operator, as lessee and occupant, from engaging in this trade where it would affect the complainant. It must be observed that here there was no public nuisance but a nuisance affecting the rights of the plaintiff in a different manner from that experienced by the general public. The court cited in its opinion *State v. Collins*, which held that equity has jurisdiction to abate a private nuisance, although the nuisance is a breach of the criminal law.

In exercising its power to abate saloons, equity is acting not to punish the defendant but to protect the public welfare by closing a common nuisance. One of the advantages of equity in this field is that it can prevent nuisances as well as abate them. A further advantage is that equity will prevent a future occurrence of a nuisance which is "temporarily" abated, as by the defendant's own act.

Such advantage is illustrated in the case of *Judge v. Kribs*. Here the defendant had maintained a saloon contrary to law and had constituted a public nuisance thereby. He heard that an injunction would be asked, and, being something of a quick change artist, he suddenly reformed and quit business. It was contended that as he had abated the nuisance, the injunction would not lie. The court felt, however, that the defendant had reformed only as a "temporary expedient", and held the fact that the defendant had quit was immaterial. Said the court, "Having been engaged in violating the law, it is not by any means certain that they will not do so in the future." And that the plaintiff was "not obliged to rest its interest on the
mere assertion of the defendant (made under oath) that he would not repeat the act of infringement."

The court probably knew from past history that the defendant had quit only for the time being and realized the public interest and welfare could better be protected by issuing an injunction. If the defendant had actually quit he would not be prejudiced tho the injunction were granted. As long as he conducted himself in a lawful manner he had nothing to fear. On the other hand all the power of equity would be arrayed against him should he again decide to establish and maintain a common nuisance contrary to public policy. Such far-sighted jurisdiction cannot fail to have a beneficial effect on all within its reach—the one against whom it is invoked as well as those on whose behalf it is employed.

To summarize, equity has had jurisdiction to abate nuisances by means of the injunction from practically the time of its inception. The power to do so is inherent in equity doctrine. In modern times the power is amply conferred by statutes, either directly or by implication. It is exercised, too, in the absence of statute where the nuisance, and specifically the saloon, is a common public nuisance, and even where it is a private nuisance. It is employed to protect property and property rights. It is further strengthened by the police power of the state to protect public morals and decency by means that are speedy, efficient, and complete.

It may be well to repeat that in enjoining nuisances which are also crimes, equity is not acting as a court of criminal proceeding. There is no two-fold jurisdiction of one act but separate and distinct jurisdictions of separate results of the same act. When the result is a crime, unquestionably the criminal court alone has jurisdiction. But where the act results in a common nuisance, equity has jurisdiction to act, regardless of other results. Such exercise of power is not an exception to the rule that equity will not enjoin a crime as such. Such exercise of power is a rule itself, clearly within the jurisdiction of equity. Equity has always had jurisdiction to enjoin a public nuisance and it will do so today, whether the nuisance be a crime or not. There is nothing in such exercise of power that can be construed as an "exception" to any rule.
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The exercise of such jurisdiction—in an era when the administration of criminal law is unsatisfactory and apparently breaking down—is salutary and deserves the serious consideration of those who study and administer the law in the light of future growth and improvement.

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