

# Equity and the Unlawful Practice of a Profession

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## COMMENTS

### EQUITY AND THE UNLAWFUL PRACTICE OF A PROFESSION

The availability of injunctive relief as a restraint on the unlicensed and, therefore, illegal practice of a profession has from equity's infancy presented the courts with a veritable spectrum of problems. In surveying this vexatious situation, it is necessary to (1) analyze equity's jurisdiction to enjoin the commission of a crime; (2) survey the cases in which an injunction to restrain the unlicensed practice of a profession has been sought, and the theories upon which such relief has been predicated; and (3) examine the desirability of affording such relief.

#### EQUITY'S CRIMINAL JURISDICTION

In the earliest days of the English Court of Chancery, injunctions were occasionally issued to restrain the commission of certain criminal acts, notwithstanding the protests of the common-law courts.<sup>1</sup> This criminal jurisdiction, however, was confined to cases in which other tribunals were too weak to protect the poorer and more helpless classes of the community against the power of the great nobles; consequently, when the common-law courts developed the capacity for coping with these injustices, the jurisdiction disappeared along with the reasons for its exercise.<sup>2</sup> Today, the primary province of equity is the protection of property and pecuniary rights; thus, as it is in no sense a court of criminal jurisdiction, equity will not grant an injunction to restrain an act, merely because it is criminal, if the act complained of does not also demand that an injunction issue for the protection of rights cognizable in equity.<sup>3</sup> Where the acts, against which relief is prayed, are such as to call for the interference of equity according to established principles, however, the fact that the acts are criminal in nature and punishable as crimes is no defense to the suit in equity, for a wrongdoer will not be permitted to shield himself from the power of equity by pleading the criminal nature of his acts.<sup>4</sup> "The criminality of the act, it is said, neither gives nor ousts the jurisdiction in chancery."<sup>5</sup>

The now famous declaration of the United States Supreme Court in the

<sup>1</sup> Plucknett, *A Concise History of the Common Law* 139, 245 (1929).

<sup>2</sup> See, for a discussion of this early criminal jurisdiction of chancery courts, *Stuart v. Bd. of Supervisors of La Salle County*, 83 Ill. 341 (1876).

<sup>3</sup> Pomeroy, *Equity Jurisprudence* § 1890 (5th ed., 1941).

<sup>4</sup> *Burden v. Hoover*, 9 Ill. 2d 114, 137 N.E. 2d 59 (1956); *State v. Barron*, 136 Kan. 324, 15 P. 2d 456 (1932); *Bennington v. Hawks*, 100 Vt. 37, 134 Atl. 638 (1926).

<sup>5</sup> *New Orleans v. Liberty Shop*, 157 La. 26, 29, 101 So. 798, 800 (1924).

case of *In re Debs*,<sup>6</sup> which provoked such a storm of protest when reported,<sup>7</sup> discloses generally the scope of equity's criminal jurisdiction:

Again, it is objected that it is outside of the jurisdiction of a court of equity to enjoin the commission of crimes. This as a general proposition, is unquestioned. A chancellor has no criminal jurisdiction. Something more than the threatened commission of an offense against the laws of the land is necessary to call into exercise the injunctive powers of the court. There must be some interferences, actual or threatened, with property or rights of a pecuniary nature, but when such interferences appear the jurisdiction of a court of equity arises, and is not destroyed by the fact that they are accompanied by or are themselves violations of the criminal law.

To say, however, that to confer equitable jurisdiction there must be an interference with "property or rights of a pecuniary nature" merely poses rather than resolves the ultimate issue, viz., what bases for assuming jurisdiction, as distinguished from grounds for the issuance of equitable relief, must be affirmatively demonstrated by the complainant to bring the case within the cognizance of a court of equity, notwithstanding the fact that a violation of the penal laws of the state may also be involved? The failure to distinguish between pleading a cause of action within the jurisdiction of equity, and proving grounds to warrant equitable intervention, has caused considerable confusion, particularly among the earlier cases concerned directly or collaterally with the problem of equity's criminal jurisdiction. For, as revealed by the subsequent discussion, persuading the chancellor to grant equitable relief is secondary to inducing him to assume jurisdiction and hear the complainant.

Before any consideration can be given to the merits of the suit, the complainant must satisfy the fundamental jurisdictional requirements of a court of equity. Paramount among them is the requirement that the complainant have an inadequate remedy at law, for the office of equity is to supplement and not to supplant the law.<sup>8</sup> Indeed, it is said that the absence of a plain and adequate remedy at law is the only test of equity jurisdiction.<sup>9</sup> The cases are legion holding that the jurisdiction of equity cannot be invoked for the purpose of obtaining an injunction restraining acts for which the actor can be punished by the criminal or penal laws, if no property rights will be injured;<sup>10</sup> however, many of these and

<sup>6</sup> 158 U.S. 564, 592 (1895).

<sup>7</sup> Cf., e.g., Gregory, *Government by Injunction*, 13 L. Q. Rev. 347 (1897); Lewis, *A Protest Against Administering Criminal Law by Injunction*, 33 Am. L. Reg. 879 (1894).

<sup>8</sup> *Stone v. Jefferson*, 317 Mo. 1, 293 S.W. 780 (1927).

<sup>9</sup> *Payne v. Hook*, 74 U.S. 425 (1868); *Thompson v. Railroad Companies*, 73 U.S. 134 (1867).

<sup>10</sup> *State v. Barron*, 136 Kan. 324, 15 P. 2d 456 (1932); *State v. Iola Theater Corp.*, 136 Kan. 411, 15 P. 2d 459 (1932); *Gallup v. Constant*, 36 N.M. 211, 11 P. 2d 962 (1932); *People v. Kuca*, 245 Ill. App. 202 (1924).

succeeding cases have failed to distinguish the jurisdictional competency of equity to hear the case, which is predicated upon the inadequacy of the remedy at law,<sup>11</sup> and the substantive requirements essential to issue an injunction directed against the criminal conduct. Many of the apparent inconsistencies and divergent attitudes reflected by the numerous decisions discussing the grounds which must be established before an injunction can be issued<sup>12</sup> may be reconciled to a great extent by noting the failure of the courts to make this basic distinction.

Having properly emphasized the fundamental requirement of the inadequacy of the plaintiff's remedy at law, numerous courts have considered the question of whether the failure of prosecuting officers to prosecute, or juries to convict, constitutes such inadequacy of the legal remedy as will justify a court of equity in taking jurisdiction. The great weight of authority is to the effect that if there is a remedy in the law courts, however inconvenient or speculative, equity will decline to act, even though the legal remedy is rendered ineffective by the failure of the law courts to perform their duties.<sup>13</sup>

After establishing standing in court by virtue of the inadequacy of his legal remedy, the complainant then must bear the burden of convincing the chancellor that his alleged grievance merits equitable intervention by injunction, notwithstanding equity's ancient antipathy to restrain the commission of a crime. This reluctance to exercise criminal jurisdiction is based largely upon the principle of English and American jurisprudence, expressly guaranteed by fundamental law in most states, which gives to a person accused of a crime the right to a trial before his peers, who are to determine his guilt or innocence;<sup>14</sup> consequently, it is incumbent upon the complainant to induce the court to disregard the criminal feature of the acts complained of and issue an injunction for the protection of rights

<sup>11</sup> *State v. Barron*, 136 Kan. 324, 15 P. 2d 456 (1932).

<sup>12</sup> *Jansen Farms, Inc. v. Indianapolis*, 202 Ind. 138, 171 N.E. 199 (1930); *Ky. State Bd. of Dental Examiners v. Payne*, 213 Ky. 382, 281 S.W. 188 (1926); *People v. Kuca*, 245 Ill. App. 202 (1924).

<sup>13</sup> Thus, it has been held that the remedy at law is adequate in spite of: (1) failure of juries to convict, *State v. Crawford*, 28 Kan. 726, 42 Am. Rep. 182 (1882); (2) failure or refusal of officers of a law court to perform their duties, *People v. District Court*, 26 Colo. 386, 58 Pac. 604 (1899); and (3) an erroneous view as to the validity of a criminal statute taken by the trial court, *Higgins v. Lacroix*, 119 Minn. 145, 137 N.W. 417 (1912). The Illinois court in *Stead v. Fortner*, 255 Ill. 468, 479, 99 N.E. 680, 684 (1912), appears to adopt a contrary attitude, for it observed that "if ordinary methods are ineffective or officials disregard their duties and refuse to perform them, the court ought to apply the strong and efficient hand of equity and uproot the evil." *State v. Heldt*, 115 Neb. 435, 213 N.W. 578 (1927) and *Ky. State Bd. of Dental Examiners v. Payne*, 213 Ky. 382, 281 S.W. 188 (1926), appear to be in accord with the Illinois view.

<sup>14</sup> *Hedden v. Hand*, 90 N.J. Eq. 583, 107 Atl. 285 (1919); *Heber v. Portland Gold Min. Co.*, 64 Colo. 352, 172 Pac. 12 (1918); *State v. Ehrlick*, 65 W. Va. 700, 64 S.E. 935 (1909).

cognizable in equity. It is the diverse interpretations accorded the "property or rights of a pecuniary nature" requirement of the *Debs* case, promulgating, as it did, the prevailing judicial attitude on the one hand and stimulating subsequent extensions on the other, which has provided the basis for the various theories on which injunctions restraining criminal conduct have been predicated.

The first injunctions were issued by the equity side of the Court of Exchequer to restrain a public nuisance known as a purpresture, which was an encroachment upon, and an enclosure of, the property of the Crown in a highway, river, or harbor.<sup>15</sup> Relying on these and other cases,<sup>16</sup> Chancellor Kent in *Attorney-General v. Utica Insurance Company*<sup>17</sup> declared:

If a charge be of a criminal nature, or an offense against the public, and does not touch the enjoyment of property, it ought not to be brought within the direct jurisdiction of this court, which was intended to deal only in matters of civil right, resting in equity, or where the remedy at law was not sufficiently adequate. Nor ought the process of injunction to be applied, but with the utmost caution. It is the strong arm of the court; and to render its operation benign and useful, it must be exercised with great discretion, and where necessity requires it. . . . It is an extremely rare case, and may be considered, if it ever happened, as an anomaly, for a court of equity to interfere at all, and much less, preliminarily, by injunction, to put down a public nuisance which did not violate the rights of property, but only contravened the general policy.

The source from which this restriction on equity's jurisdiction (protection of property rights) emanated, compelled virtually complete compliance by contemporary authorities;<sup>18</sup> the eminence of its author did not, however, suppress inevitable dissatisfaction with the restraints imposed by the rule, for as early as 1837 articulate criticism was voiced, particularly with regard to the learned Chancellor's interpretation of the cases relied on as authority.<sup>19</sup> Having shed this initial restraint, equity

<sup>15</sup> See *Attorney-General v. Richards*, 2 Anst. 603, 145 Eng. Rep. 980 (1794), where the court discusses the case of *Attorney-General v. Philpot*, decided in the Court of Exchequer about 1633, in which encroachments on the Thames were declared to be purprestures and their abatement ordered.

<sup>16</sup> *Attorney-General v. Cleaver*, 18 Ves. Jun. 212, 34 Eng. Rep. 297 (1811); *Mayor of London v. Bolt*, 5 Ves. Jun. 129, 31 Eng. Rep. 507 (1799); *Baines v. Baker*, 27 Eng. Rep. 105 (1752).

<sup>17</sup> 2 Johns. Ch. 371, 378, 380 (N.Y., 1817).

<sup>18</sup> Cf., e.g., *State v. Schweickardt*, 109 Mo. 496, 19 S.W. 47 (1892) and *Sheridan v. Colvin*, 78 Ill. 237, 247 (1875), where the court in the latter case said: "It is elementary law, that the subject matter of the jurisdiction of the court of chancery is civil property. . . . The court has no jurisdiction in matters merely criminal or merely immoral, which do not affect any right to property."

<sup>19</sup> *State v. Mobile*, 5 Porter 279, 316, 30 Am. Dec. 564, 571 (Ala., 1837), where the court declared: "If the Chancellor intended to be understood according to the literal import of the terms he employs, either he is in error, or else the learned judges and authors whom we have cited have mistaken the law, and with all deference for his judgment, we are disposed to think the former most probable."

courts were permitted greater latitude within which to exercise their discretionary powers, resulting in the widespread use of injunctive relief in situations theretofore considered sacrosanct. This deluge of injunctive relief can best be understood and evaluated by examining the four general areas into which injunctions have been channeled.

(1) Perhaps the most frequent use to which an injunction is put within the heretofore inviolable area of criminal jurisdiction is to restrain a nuisance;<sup>20</sup> it may be a nuisance because declared to be such by a valid statute, or because in fact, and legal effect, it is a nuisance.<sup>21</sup> In the leading case of *People v. Laman*,<sup>22</sup> the New York court indicated its attitude toward the prior rule circumscribing equitable relief when it declared:

Although invasion of property rights or pecuniary interests is emphasized in some of the earlier cases as a basis for equitable interference, there appeared later a recognition that public health, morals, safety, and welfare of the community usually required protection from irreparable injury.<sup>23</sup>

On this basis injunctions have been issued in nuisance cases on the orthodox property concept,<sup>24</sup> and to prevent injury to public health or morals.<sup>25</sup>

(2) The use of the injunction to protect purely personal rights of indi-

<sup>20</sup> Joyce, *Treatise on the Law Governing Nuisances* § 5 (1906) observes: "A public or common nuisance is an offence against the public order and economy of the State, by unlawfully doing any act or omitting to perform any duty which the common good, public decency or morals, or the public right to life, health, and the use of property requires, and which at the same time annoys, injures, endangers, renders insecure, interferes with, or obstructs the rights or property of the whole community or neighborhood, or of any considerable number of people. . . ."

<sup>21</sup> The statement in *State v. Crawford*, 28 Kan. 726, 733 (1882) that "every place where a public statute is openly, publicly, repeatedly, continuously, persistently, and intentionally violated is a public nuisance" must be accepted with considerable caution, for equity will intervene only if the violation injured, or threatened to injure, some public, private, or social interest. Cf. *State v. Maltby*, 108 Neb. 578, 188 N.W. 175 (1922).

<sup>22</sup> 227 N.Y. 368, 14 N.E. 2d 439 (1938).

<sup>23</sup> The court cited *Stead v. Fortner*, 255 Ill. 468, 99 N.E. 680 (1912), where the Illinois court on p. 478 said: "The maintenance of the public health, morals, safety, and welfare is on a plane above mere pecuniary damage although not susceptible of measurement in money, and to say that a court of equity may not enjoin a public nuisance because property rights are not involved, would be to say that the State is unable to enforce the law or protect its citizens from public wrongs."

<sup>24</sup> *Lyric Theatre Co. v. State*, 98 Ark. 437, 136 S.W. 174 (1911); *State v. Ehrlick*, 65 W. Va. 700, 64 S.E. 935 (1909); *People v. Condon*, 102 Ill. App. 449 (1902); *State v. O'Leary*, 155 Ind. 526, 58 N.E. 703 (1900); *State v. Capital City Dairy Co.*, 62 Ohio St. 123, 56 N.E. 651 (1900).

<sup>25</sup> *Gallup v. Constant*, 36 N.M. 211, 11 P. 2d 962 (1932); *State v. Heldt*, 115 Neb. 435, 213 N.W. 578 (1927); *Fears v. State*, 102 Ga. 274, 29 S.E. 463 (1897). In *Commonwealth v. McGovern*, 116 Ky. 212, 238, 75 S.W. 261, 267 (1903) it was stated: "Nor do we think that the right of the Chancellor to so employ the writ of injunction in this case is dependent upon the fact that a property right be involved. It may be justified upon the higher ground that the morals and safety of the public are involved, and that the public good is of the first consideration."

viduals in the field of civil liberties has attained a significant degree of importance in recent years, with attempts made to obtain protection for freedom of speech, religion, right of assembly, the right to vote, and immunity from unreasonable search and seizure.<sup>26</sup> Although most of the cases predicate the protection of personal rights on a nominal property right,<sup>27</sup> the Supreme Court of the United States restrained an interference with the rights of free speech and assembly without resorting to the property right concept.<sup>28</sup>

(3) An infrequent but potentially effective object of equitable intervention by injunction is to restrain the *ultra vires* acts of private corporations. A Missouri court,<sup>29</sup> as early as 1883, declared that the jurisdiction of equity to restrain *ultra vires* acts of corporations injurious to public right is one of the three recognized exceptions to the general rule that equity will not enjoin criminal acts.<sup>30</sup> This jurisdiction does not depend on the protection of any property right,<sup>31</sup> and where the Attorney-General charged a corporation affected with a public interest with a violation of the criminal laws, and asked for an injunction restraining such violations, the court held an injury to the public will be presumed.<sup>32</sup> Equity's jurisdiction in such cases appears to be limited to those cases where there is a danger of injury to the public through mismanagement,<sup>33</sup> for, if such mismanagement is not affected with the public interest the proper remedy is a stockholders' suit for mismanagement.<sup>34</sup>

<sup>26</sup> "The state is not bound to wait until the object of the illegal combination is effected, which will deprive people of their liberties and constitutional rights, but may bring an action at once to prevent its consummation; and while the writ of injunction may not be employed to suppress a crime as such, yet when the acts, though constituting a crime, will interfere with liberties, rights, and privileges of citizens, the state not only has the right to enjoin the commission of such acts, but it is its duty to do so." *People v. Tool*, 35 Colo. 225, 228, 86 Pac. 224, 227 (1905).

<sup>27</sup> *Kenyon v. City of Chicopee*, 320 Mass. 528, 70 N.E. 2d 241 (1946); *Harfst v. Hoegen*, 349 Mo. 808, 163 S.W. 2d 609 (1946); *Orloff v. Los Angeles Turf Club, Inc.*, 30 Cal. 2d 110, 180 P. 2d 321 (1947); *Borchert v. City of Ranger*, 42 F. Supp. 577 (D.C. Tex., 1941); *Reid v. Borough of Brookville*, 39 F. Supp. 30 (D.C. Pa., 1941); *Kennedy v. City of Moscow*, 39 F. Supp. 26 (D.C. Idaho, 1941); *Zimmerman v. Village of London*, 38 F. Supp. 582 (D.C. Ohio, 1941); *Brinson v. Jackson*, 168 Ga. 353, 148 S.E. 96 (1929); *Stark v. Hamilton*, 149 Ga. 227, 99 S.E. 861 (1919); *Gee v. Pritchard*, 2 Swans. 403, 36 Eng. Rep. 670 (1818).

<sup>28</sup> *Hague v. C.I.O.*, 307 U.S. 496 (1939).

<sup>29</sup> *State v. Uhrig*, 14 Mo. App. 413 (1883).

<sup>30</sup> The court confined the exercise of equity's criminal jurisdiction to: (1) restrain purprestures of public highways or navigations; (2) restrain threatened nuisances dangerous to the health of the whole community; and (3) restrain *ultra vires* acts of corporations, injurious to public right.

<sup>31</sup> *Trust Co. of Ga. v. State*, 109 Ga. 736, 35 S.E. 323 (1900).

<sup>32</sup> *North American Ins. Co. v. Yates*, 214 Ill. 272, 73 N.E. 423 (1905).

<sup>33</sup> *State v. Milwaukee Elec. Ry. and Light Co.*, 136 Wis. 179, 116 N.W. 900 (1908).

<sup>34</sup> *Fletcher*, 10 *Cyclopedia of the Law of Private Corporations* § 4860 (1931).

(4) The final area, which will be considered at length in the succeeding portions of this comment, is the use of injunctions to restrain the unlicensed, and therefore unlawful, practice of various professions. Depending upon the extent to which the court before whom the complainant presents his case deems itself unfettered by precedent, additional opportunities, therefore, are afforded upon which equitable intervention may be predicated.

#### RESTRAINING THE UNLAWFUL PRACTICE OF A PROFESSION

There is a definite conflict among the authorities with reference to the jurisdiction of a court of equity to restrain the unlicensed practice of a profession. As but one aspect of the general topic of equity's criminal jurisdiction, the aforementioned fundamental principles of equitable jurisdiction are applicable a fortiori; it is within this restricted sphere, however, that the question of the inadequacy of the plaintiff's legal remedy assumes peculiar significance, since the inadequacy must be affirmatively demonstrated to the court to invoke its equitable jurisdiction, whereas in fact the adequacy, if not the availability, of the appropriate legal remedy is subject to serious doubt in these cases. Courts declining to invoke equitable jurisdiction have done so on the tenuous ground that equity is reluctant to enjoin a crime,<sup>35</sup> quo warranto is available,<sup>36</sup> or that the state is the proper party plaintiff to maintain such a suit.<sup>37</sup> A consideration of the theories employed by the courts in granting injunctions in unlicensed practice cases, or the proper party in interest to maintain the suit, however, is in effect irrelevant unless the complainant persuades the court that his legal remedy is inadequate, and thereby induces it to take jurisdiction. A Kansas court stated:

[T]he form in which the matter is called to the court's attention is not so important. Since the court has jurisdiction of the subject matter, any recognized procedure by which a charge or complaint is entertained, and the one

<sup>35</sup> *Healy v. Sidone*, 127 Atl. 520 (N.J. Eq., 1923); *State v. Maltby*, 108 Neb. 578, 188 N.W. 175 (1922); *Morris and Essex Ry. v. Prudden*, 20 N.J. Eq., 530 (1869). This reluctance, however, has fallen into disrepute among the more progressive authorities, who have espoused the principle—that if grounds for equitable intervention are present an injunction may issue even though the conduct objected to is also a crime—considered at length in the foregoing analysis; cf. *Burden v. Hoover*, 9 Ill. 2d 114, 137 N.E. 2d 59 (1956); *Rhode Island State Bar Ass'n. v. Automobile Service Ass'n.*, 55 R.I. 122, 179 Atl. 139 (1935); *State v. Fray*, 214 Iowa 53, 241 N.W. 663 (1932); *Dworken v. Apt. House Owner's Ass'n.*, 38 Ohio App. 265, 176 N.E. 577 (1931); *Ky. State Bd. of Dental Examiners v. Payne*, 213 Ky. 382, 281 S.W. 188 (1926).

<sup>36</sup> *People v. Merchants' Protective Corp.*, 189 Cal. 531, 209 Pac. 363 (1922). The efficacy, as well as the practicality, of this remedy is questionable, since it is difficult of commencement and slow to completion.

<sup>37</sup> *State v. Smith*, 43 Ariz. 131, 29 P. 2d 718 (1934); *State v. Jewett Market Co.*, 209 Iowa 567, 228 N.W. 288 (1929); *State v. Lindsay*, 85 Kan. 79, 116 Pac. 207 (1911).

charged is given proper notice, and in which there is a full hearing fairly conducted, would appear to be sufficient.<sup>38</sup>

Most courts, to the contrary, have attached considerable importance to the party who brings the suit to its attention. Where the state is the party plaintiff, as is usually the case, the unlicensed practice of a profession is enjoined on the basis of public policy. The theory employed is that such practice is so dangerous to public health and welfare that it constitutes a public nuisance,<sup>39</sup> although some jurisdictions have denied relief on this basis.<sup>40</sup> Where the party plaintiff is an individual suing in a representative capacity on behalf of himself and those in the profession similarly situated, most courts grant the injunction on the basis that there is a property right in the group such as will allow the maintenance of the suit on their behalf.<sup>41</sup> Many of the older cases, however, have refused to recognize that the right of a licensed professional man to practice his profession is such a property right as will entitle him to an injunction against the unlicensed practice by others, where he is suing only for himself and not in a representative capacity.<sup>42</sup> The courts have required that to maintain his standing in court, the individual plaintiff must suffer a "special injury" different from that suffered by the public generally.<sup>43</sup> Thus it can be seen that the question of who can or who must bring the suit is of considerable significance, second in importance, perhaps, only to the problem of invoking the jurisdiction of the court.

Having established equitable jurisdiction and the plaintiff's capacity to sue, the courts have developed three rather flexible theories on which they rely to justify issuing injunctive relief, viz., (1) the license required to practice a profession is a franchise in the nature of a property right which equity will protect; (2) the unlicensed practice of a profession may constitute a public nuisance, which equity will abate; and (3) the unlicensed practice constitutes unfair competition, which equity will not permit.

<sup>38</sup> *State v. Perkins*, 138 Kan. 899, 906, 28 P. 2d 765, 772 (1934).

<sup>39</sup> *Commonwealth v. Pollitt*, 258 Ky. 489, 80 S.W. 2d 543 (1935); *State v. Howard*, 214 Ia. 60, 241 N.W. 682 (1932); *Commonwealth v. Brown*, 239 Ky. 197, 39 S.W. 2d 223 (1931); *State v. Retail Credit Men's Ass'n.*, 163 Tenn. 450, 43 S.W. 2d 918 (1931).

<sup>40</sup> *Redmond v. State*, 152 Miss. 54, 118 So. 360 (1928); *State v. Maltby*, 108 Neb. 578, 188 N.W. 175 (1922).

<sup>41</sup> *Ezell v. Ritholz*, 188 S.C. 39, 198 S.E. 419 (1938); *Seifert v. Buhl Optical Co.*, 276 Mich. 692, 268 N.W. 784 (1936); *Sloan v. Mitchell*, 113 W. Va. 506, 168 S.E. 800 (1933); *Unger v. Landlords' Management Corp.*, 114 N.J. Eq. 68, 168 Atl. 229 (1933); *Ky. State Bd. of Dental Examiners v. Payne*, 213 Ky. 382, 281 S.W. 188 (1926).

<sup>42</sup> *Drummond v. Rowe*, 155 Va. 725, 156 S.E. 442 (1931); *Baxter Telephone Co. v. Cherokee County Mutual Telephone Ass'n.*, 94 Kan. 159, 146 Pac. 324 (1915); *York v. Yzaguirre*, 31 Tex. Civ. App. 26, 71 S.W. 563 (1902).

<sup>43</sup> See, e.g., *Ex parte Wood*, 194 Cal. 49, 227 Pac. 908 (1924); *People v. Prouty*, 262 Ill. 218, 104 N.E. 387 (1914).

The theory adopted most frequently by the courts is that a franchise, i.e., a privilege or immunity, existing by special grant of the government which does not belong to the citizens of the public by common right, is in the nature of a property right which will be protected by injunction.<sup>44</sup> There is, however, authority for the proposition that licensing statutes issued pursuant to the state police power do not give rise to rights to practice a profession which can be considered a franchise,<sup>45</sup> and that a franchise, to be protected, must be exclusive.<sup>46</sup> The language of the West Virginia court in *Sloan v. Mitchell*<sup>47</sup> manifests the prevailing attitude of the courts with regards to this theory:

Cases are legion holding, in one way or another, that the right of a licentiate to practice his profession is a property right, or a valuable franchise, or a valuable privilege.<sup>48</sup>

The end result of this attitude is reflected by the New Jersey court in *Unger v. Landlords' Management Corporation*,<sup>49</sup> where the court declared that "it is well established that this court has power to protect the holder of an exclusive franchise from irreparable injury by those not entitled to exercise such franchise." The infringement of the franchise is thus the property-right injury which justifies the intervention of equity under this theory.

A second theory frequently employed is that the unlicensed practice of a profession constitutes a nuisance which equity will abate, irrespective of any property right.<sup>50</sup> Having established the existence of a nuisance is not sufficient in and of itself to obtain an injunction, however, for an individual plaintiff, because he must show some special injury to himself—which is usually done by showing a loss of business—before he is entitled to enjoin the nuisance. The policy of the courts which refuse injunctions in these cases because of the absence of any property rights<sup>51</sup> is criticized

<sup>44</sup> *Smith v. Illinois Adjustment Finance Co.*, 326 Ill. App. 654, 63 N.W. 2d 264 (1945); *Fitchette v. Taylor*, 191 Minn. 582, 254 N.W. 910 (1934); *Sloan v. Mitchell*, 113 W. Va. 506, 168 S.E. 800 (1933); *Unger v. Landlords' Management Corp.*, 114 N.J. Eq. 68, 168 Atl. 229 (1933); *Dworken v. Apt. House Owners' Ass'n.*, 38 Ohio App. 265, 176 N.E. 577 (1931).

<sup>45</sup> The leading case is *State v. Green*, 112 Ind. 462, 14 N.E. 352 (1887).

<sup>46</sup> *Mosig v. Jersey Chiropractors*, 122 N.J. Eq. 382, 194 Atl. 248 (1937); *Junction Water Co. v. Riddle*, 108 N.J. Eq. 523, 155 Atl. 887 (1931).

<sup>47</sup> 113 W. Va. 506, 509, 168 S.E. 800 (1933).

<sup>48</sup> There is, however, dictum in *Baxter Telephone Co. v. Cherokee County Mutual Telephone Ass'n.*, 94 Kan. 159, 165, 146 Pac. 324, 327 (1915) to the contrary, for the court said: "Doctors, lawyers, and school teachers require a license or certificate to practice their professions, but none of these could maintain a suit to enjoin another person from engaging in any of their peculiar professions without such certificate. . . ." But cf. *Depew v. Wichita Retail Credit Ass'n.*, 141 Kan. 481, 42 Pac. 214 (1935).

<sup>49</sup> 114 N.J. Eq. 68, 69, 168 Atl. 229, 230 (1933).

<sup>50</sup> *Commonwealth v. Pollitt*, 258 Ky. 489, 80 S.W. 2d 543 (1935); *State v. Smith*, 43 1928).

penetratingly in *Kentucky State Board of Dental Examiners v. Payne*<sup>52</sup> in which the court said:

Moreover, we are unable to see why the remedy would prevail in cases where purely property rights are involved and withheld in cases where health, and possibly life, is involved, since to hazard the latter is as much a nuisance as it is to imperil and impair the former. . . .

To dispel the hesitancy of their courts to issue equitable relief, many legislatures have inserted provisions for enforcement by injunctions in their licensing statutes, thereby supplementing the criminal penalties already present. Just as the decisions which granted injunctions as a means of enforcing the criminal law were attacked because they deprived the defendant of his right to a trial by jury, so have these statutes been attacked as unconstitutional on the same ground. The few cases testing the validity of such provisions have, with but one exception, sustained their constitutionality as proper exercises of the state police power.<sup>53</sup>

The third theory employed by the courts is that the unlicensed practice of a profession constitutes unfair competition.<sup>54</sup> Succinctly, "suit may be brought by parties engaged in a profession or business to enjoin unfair trade and practice which would be injurious to their interests, and the fact that such practices are punishable by criminal penalties is immaterial."<sup>55</sup> This theory is predicated upon the belief that the defendant, by violating the law in failing to obtain a license, can compete more effectively than the licensed practitioner. Here again, however, the complainant must demonstrate an actual competition and an infringement upon his business by the illegal practice before he is entitled to an injunction.<sup>56</sup>

On the basis of one or more of the above theories, injunctions have

<sup>51</sup> *People v. Steele*, 4 Cal. App. 2d 206, 40 P. 2d 959 (1935); *Drummond v. Rowe*, 155 Va. 725, 156 S.E. 442 (1931); *State v. Maltby*, 108 Neb. 578, 188 N.W. 175 (1922); *Dean v. State*, 151 Ga. 371, 106 S.E. 792 (1921).

<sup>52</sup> 213 Ky. 382, 385, 281 S.W. 188, 190 (1926).

<sup>53</sup> *State v. Kearns*, 304 Mo. 685, 264 S.W. 775 (1924); *King v. Commonwealth*, 194 Ky. 143, 238 S.W. 373 (1922); *Williams v. State*, 150 Ga. 480, 104 S.E. 408 (1920); *State v. Ryder*, 126 Minn. 95, 147 N.W. 953 (1914). In this connection, the intensity of the language, as well as the substance of the fear, found in the lone dissenting case of *Hedden v. Hand*, 90 N.J. Eq. 583, 107 Atl. 290 (1919) merits attention. The court, in holding void the medical license statute provision permitting enforcement by injunction because the legislature could not change the nature of the offense by changing the forum in which it was to be tried, declared: "It is clear that, if the legislature may bestow on the court of chancery jurisdiction to grant an injunction and abate a public nuisance of a purely criminal nature, then there can be no valid argument against the power of the legislature to confide the entire Criminal Code of this state to a court of equity for enforcement."

<sup>54</sup> *Seifert v. Buhl Optical Co.*, 276 Mich. 692, 268 N.W. 784 (1936); *Featherstone v. Independent Service Station Ass'n.*, 10 S.W. 2d 124 (Tex. Civ. App., 1928).

<sup>55</sup> *Glover v. Malloska*, 238 Mich. 216, 213 N.W. 107 (1927).

<sup>56</sup> *Featherstone v. Independent Service Station Ass'n.*, 10 S.W. 2d 124 (Tex. Civ. App., Ariz. 131, 29 P. 2d 718 (1934)).

been granted to restrain the unauthorized practice of dentistry,<sup>57</sup> law,<sup>58</sup> medicine,<sup>59</sup> optometry,<sup>60</sup> and chiropody.<sup>61</sup> The Illinois Supreme Court, in *Burden v. Hoover*,<sup>62</sup> recently had occasion to re-examine the Illinois position with regard to the availability of injunctive relief in cases of the illegal practice of a profession. In 1922, in holding that unlicensed chiropractors could not be restrained from treating human ailments, the Supreme court had said:

The possibility that many persons will violate the law and many suits will be required to enforce it does not warrant relief by injunction. The jurisdiction of a court of equity to issue an injunction in some cases to prevent a multiplicity of suits is not determined by the number of suits. Multiplicity is not synonymous with multitude, and there must be some other ground of jurisdiction besides mere number. The circumstances must be such that the remedy at law will be regarded as inadequate. If appellees, or any of them, are arrested and charged with committing a criminal offense, they have a constitutional right to a trial by jury in determining their guilt, and to sustain the injunction here sought would deny them that right.<sup>63</sup>

By virtue of this decision denying injunctive relief, Illinois was, as the *Hoover* court said, "numbered with the minority." Based upon a desire to protect the public and the rights of the licensed practitioner, the decision in the *Hoover* case remanded the cause with directions to deny the motion to strike the complaint for want of equity, for there were now "sound, compelling reasons for bringing Illinois in line with the majority position and granting relief in a case of this nature." Hershey, C. J., speaking for the majority,<sup>64</sup> declared:

Because the practice of chiropody in this State by one who is not licensed constitutes an infringement of the rights of those who are properly licensed, we hold that the latter may secure relief against such unlawful practice in a court of equity. . . . [T]he prevention of unlicensed practice of chiropractic benefits the public as well. For it helps insure compliance with those laws which have been sustained by this court as a reasonable exercise of the legislature's police power in protecting the public health and welfare. Assuredly, the

<sup>57</sup> *Boggs v. Werner*, 372 Pa. 312, 94 A. 2d 50 (1953); *Curtis v. Registered Dentists of Oklahoma*, 193 Okla. 233, 143 P. 2d 427 (1943); *Ky. State Bd. of Dental Examiners v. Payne*, 213 Ky. 382, 281 S.W. 188 (1926).

<sup>58</sup> *Smith v. Illinois Adjustment Finance Co.*, 326 Ill. App. 654, 63 N.E. 2d 264 (1945); *Dworken v. Apt. House Owners' Ass'n.*, 38 Ohio App. 265, 176 N.E. 577 (1931).

<sup>59</sup> *Palmer v. O'Hara*, 359 Pa. 213, 58 A. 2d 574 (1948); *Sloan v. Mitchell*, 113 W. Va. 506, 168 S.E. 800 (1933).

<sup>60</sup> *Ezell v. Ritholz*, 188 S.C. 39, 198 S.E. 419 (1938); *Neill v. Gimbel Bros., Inc.*, 330 Pa. 213, 199 Atl. 178 (1938); *Seifert v. Buhl Optical Co.*, 276 Mich. 692, 268 N.W. 784 (1936).

<sup>61</sup> *People v. Laxman*, 277 N.Y. 368, 14 N.E. 2d 439 (1938).

<sup>62</sup> 9 Ill. 2d 114, 137 N.E. 2d 59 (1956).

<sup>63</sup> *People v. Universal Chiropractors' Ass'n.*, 302 Ill. 228, 134 N.E. 4 (1922).

<sup>64</sup> *Ibid.*, at 231 and 5. Justice Bristow and Justice Daily dissented with opinions.

legislature could itself have provided for injunctive relief, as has been done in some states, but its failure to do so does not preclude a court from acting.

If a direct and forthright approach measures with any degree of certainty the conviction of the justices concurring in the ultimate conclusion, the decision unequivocally dispels any doubts which might exist regarding the availability of injunctive relief in this area, irrespective of the propriety of employing judicial legislation to attain the desired result.

Having surveyed the developing scope of equity's criminal jurisdiction as an introduction to a consideration of the availability of injunctive relief as a restraint on the unlicensed practice of a profession, an examination, in conclusion, of the desirability of affording such relief can profitably be undertaken.

#### DESIRABILITY OF AFFORDING INJUNCTIVE RELIEF

Injunctions are theoretically extraordinary remedies granted with great caution and in the exercise of sound judicial discretion in cases of urgent necessity, where adequate and complete relief cannot be obtained at law.<sup>65</sup> An injunction, however, has no mysterious power to prevent a violation of the law, although courts refer to it as if it had. Its purpose simply is to call into operation the process of courts of equity in punishing for contempt, whereas fundamentally, except for a jury trial, the remedies of law and equity are here the same. Injunctions are effective largely because they sanction a method of summary punishment without a jury, for whatever will justify punishment for contempt will equally justify arrest and punishment for the criminal act which constitutes the contempt. The advantages of issuing an injunction—affording relief before instead of after the criminal act are summary punishment for violations of the injunction, and, for those who disparage the efficacy of jury trials, a more competent tribunal.<sup>66</sup> These must be considered in conjunction with the inherent disadvantages such as deprivation of trial by jury; possibility of double punishment, in that the act by which the injunction is violated may subject the defendant to both contempt proceedings and criminal prosecution; the summary nature of preliminary injunction proceedings; and, the fact

<sup>65</sup> Pomeroy phrases it in this fashion: "Wherever a right exists or is created, by contract, by the ownership of property or otherwise, cognizable by law, a violation of that right will be prohibited, unless there are other considerations of policy or expediency which forbid a resort to this prohibitive remedy. The restraining power of equity extends, therefore, through the whole range of rights and duties which are recognized by the law, and would be applied to every case of intended violation, were it not for certain reasons of expediency and policy which control and limit its exercise. This jurisdiction of equity to prevent the commission of wrong is, however, modified and restricted by considerations of expediency and of convenience which confine its application to those cases in which the legal remedy is not full and complete." Pomeroy, *Equity Jurisprudence* § 1338 (5th ed., 1941).

<sup>66</sup> Leflar, *Equitable Prevention of Public Wrongs*, 14 *Tex. L. Rev.* 427 (1936).

that the extension of equity's jurisdiction into the criminal field violates fundamental distinctions between criminal and civil courts intrinsic to our system of jurisprudence.<sup>67</sup>

The concomitant advantages and disadvantages inherent in the granting of injunctive relief should be analyzed by the reader in the light of the following statement made in reference to, and contemporary with, the *Debs* case:

It is indeed true that by the weight of authority the jurisdiction [of a court of equity] is not ousted merely because, as in the case of a public nuisance, the threatened act may be the subject of an indictment. But the foundation of the jurisdiction over public nuisances, as of all jurisdiction in equity, is the greater efficacy of the equitable remedy. . . . Jurisdiction in equity is for the adjudication of civil rights. Preliminary injunctions are to preserve the subject of litigation in status quo and prevent irreparable injury during the pendency of the suit. The mere fact that the act enjoined is criminal may not oust the jurisdiction of the Court, since every crime involves also an infraction of civil rights. But to justify the interference of a court of equity by preliminary or by perpetual injunction, it must be shown that the injunction will prevent some threatened injury for which the law affords no adequate relief. An injunction against destroying property by violence or similar offense against the criminal law accomplishes no such result. . . . Courts of equity cannot with propriety or safety extend their jurisdiction, under the guise of protecting property, by issuing decrees imposing merely cumulative prohibitions against that which the criminal law already forbids, in order summarily to try and punish offenders for acts in violation of these prohibitions.

If the course thus followed can be supported, the principles of equity jurisprudence have received an important extension which may render "government by injunction" more than a mere epithet.<sup>68</sup>

<sup>67</sup> Ralston, *Government by Injunction*, 5 *Corn. L. Q.* 424 (1920).

<sup>68</sup> Dunbar, *Government by Injunction*, 13 *L.Q. Rev.* 347, 356, et seq. (1897).

### PIERCING THE CORPORATE VEIL IN ILLINOIS

The legal fiction that corporations are entities, separate and distinct from their stockholders, has enjoyed judicial sanction since the inception of corporate recognition.<sup>1</sup> As is the case with many legal principles, a policy of too-strict adherence to the corporate-entity theory by the courts would result in injustice.

To be specific: cases arise wherein an individual incorporates with the avowed purpose of avoiding contractual or statutory obligations. In his corporate capacity he proceeds upon a course of conduct which, if taken by an individual, would result in civil liability for damages, or criminal prosecution.<sup>2</sup> This individual is obviously acting unlawfully, or in a man-

<sup>1</sup> *Superior Coal Co. v. Department of Finance*, 377 Ill. 282, 36 N.E. 2d 354 (1942).

<sup>2</sup> E.g., *Relago Rosin Products Co. v. National Casein Co.*, 321 Ill. App. 159, 52 N.E. 2d 322 (1944), wherein it was held that evidence showing shipment of goods from plaintiff to defendant, in the name of a dummy corporation, constituted a prima facie case against defendant for the price of the goods shipped.