

## EQUITY

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The material presented in the field of Equity is summary, chiefly because of its incidental coverage in other contributions to this symposium. Much of the subject matter of Equity will be found in the fields of Contracts, Security, Property, Procedure, and Labor Law. Thus, in view of the meagerness of non-ancillary Equity material and the desire not to be repetitious, it is felt that a mere cataloging of the materials in that field will suffice.

### *Legal and Equitable Remedies.*

The case of *Rubens v. Marion Washington Realty Corp.*<sup>1</sup> was discussed in the material under Corporations, *supra*. A stockholder sued for payment of dividends on corporate stock which the corporation should have declared, but had not. The court first pointed out that in regard to dividends, no duty of payment exists until after a declaration by the directors, and that if directors arbitrarily and without cause refuse to make a declaration, then the stockholder's remedy is in equity to compel the declaration. Since the complaint in the instant case sounded in express *assumpsit* as for money due, the court held that the plaintiff had failed to state a cause of action under the theory upon which she sued, that her suit should have been an equitable one to compel a declaration of dividends.

In spite of the adoption of code pleading and the abolition of all distinctions between an action at law and a suit in equity,<sup>2</sup> the court refused to consider the case as one in equity, although admitting<sup>3</sup> that the complaint probably alleged a *prima facie* duty on the part of the corporation to declare and pay the dividends, and also "the probability of a right to a mandatory injunction or writ of mandamus to compel the appellee to declare the dividend." Since the issue of the validity of the complaint in its equitable aspect was not one of those presented to the Appellate Court, the court was

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1. — Ind. App. —, 59 N.E. (2d) 907 (1945).

2. Ind. Stat. Ann. (Burns, 1933) §2-101.

3. At 911.

probably technically correct in saying<sup>4</sup> that it should not pass on that issue because to do so would "foreclose the appellee's opportunity of so testing it and predicating error on the ruling." It would seem however, that at this late date, no test need be made of the sufficiency of a complaint which alleges an equitable cause of action under a legal theory.

*Multiplicity; Bills of Peace.*

*American Lead Corp. v. Davis*<sup>5</sup> holds that a plaintiff may enjoin separate actions at law by different persons where there is a community of interest among the persons bringing them. The facts of the case were that individual actions for damages had been brought by about 150 residents of a community in which plaintiff operated its plant, all predicated on the issue of damages arising from the operation by plaintiff of a nuisance. Since the interest was the same in all cases, the court held the plaintiff entitled to an injunction against the prosecution of the claims separately. This type of suit is in its nature very similar to the Common Law Bill of Peace.<sup>6</sup>

*Jury.*

*George v. Massey Harris Co.*<sup>7</sup> holds that a suit to foreclose a chattel mortgage was of exclusive equitable cognizance before 1852, so that under the present statute<sup>8</sup> both legal and factual questions must be tried by the court without a jury. Even though certain elements of an action at law may incidentally be involved, if the essential part of the cause is exclusively of equitable cognizance, then the right of trial by jury does not obtain.

*Laches.*

In *Engel v. Mathley*,<sup>9</sup> the plaintiff, discharged from her school without cause, taught in another township for three and a half years, then returned to the school from which she had been discharged and taught there under definite yearly contracts for four years without making any claim

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4. *Ibid.*

5. 111 Ind. App. 242, 38 N.E. (2d) 281 (1941).

6. See McClintock, *Equity* (1936) §169, Walsh, *Equity* (1930) §118.

7. 109 Ind. App. 305, 34 N.E. (2d) 956 (1941).

8. Ind. Stat. Ann. (Burns, 1933) §2-1204.

9. 113 Ind. App. 458, 48 N.E. (2d) 463 (1943).

to her rights as a tenure teacher before her discharge. Then upon refusal of the township trustee to renew her yearly contract, the plaintiff sued for a mandatory injunction ordering the trustees to permit her to teach as a tenure teacher.

In spite of her seven and one-half year silence as to her original tenure rights, the court held her not to be barred from relief by laches. In arriving at this position, the court pointed to the plaintiff's relation with the defendant township for the four-year period after she resumed her teaching there, and quoted<sup>10</sup> *Lost Creek School Township v. York*,<sup>11</sup> Indiana's leading teacher tenure case, to the effect that "a permanent tenure teacher's indefinite contract is a protected contractual right entitling the teacher to a succession of definite contracts." Thus, whatever her degree of slumber prior to the time when she resumed teaching with her former employer, she was a tenure teacher during that four-year period and as such, did not have to assert her rights which were during that time accorded full recognition anyway. Hence her demand was not "stale".

In *Haas v. Holder*,<sup>12</sup> another tenure teacher was denied a position in 1930. However, she again taught in 1931 and 1932, then was refused again in 1933, and every year thereafter. She was held not to be guilty of laches in waiting until 1938 to sue.

In *Phillippe v. Axe*,<sup>13</sup> a tenure teacher was given notice by his school board that it had fixed a date for the consideration of his contract. The teacher made no request for a hearing within fifteen days, as authorized by statute,<sup>14</sup> and after due consideration of the contract, the board cancelled it. In a later suit by the teacher for an injunction against the board's interfering with his employment, the court held that the teacher's silence should be treated as a consent to whatever action the board might take.

In another case where a temporary restraining order was given without notice to the defendant and a date set for hearing on a temporary injunction, waiver of the hearing by the agreement of both parties was held to have the effect

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10. *Id.* at 468, 48 N.E. (2d) 463, 467.

11. 215 Ind. 636, 21 N.E. (2d) 58 (1939).

12. 218 Ind. 263, 32 N.E. (2d) 590 (1941).

13. 219 Ind. 328, 38 N.E. (2d) 341 (1942).

14. Ind. Stat. Ann. (Burns, 1933) §28-4308.

of continuing the restraining order as a temporary injunction.<sup>15</sup>

*Intervention for Injury to Reputation.*

In *Dodd v. Reese*,<sup>16</sup> the plaintiff sued to set aside a decree and order of adoption on the ground that it had been obtained through the fraud of an attorney. The attorney petitioned to intervene on the ground that his reputation would be irreparably damaged by the charge of fraud made indirectly against him, and that because he could not estimate the money value of such injury he would have no other remedy by which to cleanse the taint from his name. Thus, he asked to be permitted to intervene as a party in the suit to set aside the adoption and try to prevent the injury.

The court, although allowing the intervention, pointed out that in divorce proceedings, persons charged with adultery with the defendant are not permitted the right to intervene to protect their names in the absence of statute. The court also cited the English practice of refusing intervention in such cases unless the pleadings contained scandals against them which were altogether impertinent and immaterial to the trial of the cause. However, the court justifies its allowance of the petition by referring to that part of the State Constitution which reads: "All courts shall be open; and every man, for injury done to him in his person, property, or reputation, shall have remedy by due course of law."<sup>17</sup> The court interpreted this to mean that the interest in reputation should be on the same plane as the interest in property, so that a remedy must be given. Thus, the right to intervene as a party<sup>18</sup> was granted.

*Property Rights; Criminal Prosecution and the Operation of Criminal Statutes.*

In *Department of State v. Kroger Grocery & Baking Co.*,<sup>19</sup> the plaintiff chain store asked for a declaratory judgment to the effect that its sale of certain vitamin tablets was

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15. *Merrifield v. Williams*, 221 Ind. 619, 51 N.E. (2d) 9 (1943).

16. 216 Ind. 449, 24 N.E. (2d) 995 (1940).

17. *Italics ours*. Ind. Const. Art I, §12.

18. The petitioner had been allowed *amicus curiae* status in the trial court, but the Supreme Court felt that this was not sufficient remedy for his wrong since an *amicus curiae* appearance gives no right to exceptions and appeal from adverse rulings.

19. 221 Ind. 44, 46 N.E. (2d) 237 (1943).

not subject to the state statutes regulating the sale of drugs<sup>20</sup> because such tablets were merely "accessory food factors" containing no drugs or poisonous chemicals. The court held that equity has no jurisdiction to restrain either criminal prosecutions or the operation of criminal statutes unless a major property right is involved. Not finding any property right in connection with the plaintiff's case, the court refused to give a declaratory judgment since it could not operate to bar a criminal prosecution should one be brought.

*State ex rel. Indiana Alcoholic Beverages Comm. v. Circuit Court of Marion County*<sup>21</sup> held that equity has no jurisdiction which would enable it to enjoin the Alcoholic Beverages Commission from revoking a liquor license, since such a license does not involve a property right.

The 1945 case of *State ex rel. Zeller v. Montgomery Circuit Court*<sup>22</sup> is much like both those above. The Supreme Court held that an injunction would not lie to restrain the enforcement of an allegedly criminal statute cancelling a beer wholesaler's permit for the same reason, that no property rights were involved in such a permit, and that equity could not enjoin the operation of a criminal statute unless substantial property rights were present.<sup>23</sup>

#### *Obstruction of Highways.*

*Burton v. Sparks*<sup>24</sup> holds that a person cannot maintain an action for the obstruction of a public highway unless he can prove that he has sustained some special damage, different in kind and not merely in degree, from that suffered by the public. The court found that there was evidence of such injury in the case.

#### *Injunctions against Crimes; Practicing Dentistry and Medicine without a License.*

*State ex rel. Ind. State Board of Dental Examiners v.*

20. Ind. Stat. Ann. (Burns, 1933) §63-1101 et seq.

21. 221 Ind. 572, 49 N.E. (2d) 538 (1943).

22. .... Ind. ...., 62 N.E. (2d) 149 (1945).

23. Richman, C. J. and Gilkison, J. agreed in the result of the case so far as the equity problem was involved, but dissented to the use put by the majority of the court on the writ of prohibition where the trial court had jurisdiction of the parties and of the subject matter, but no jurisdiction over the particular class of case involved.

24. 109 Ind. App. 531, 36 N.E. (2d) 962 (1941).

*Boston System Dentists*<sup>25</sup> holds that although the practice of dentistry without a license is a crime punishable under the criminal code, an injunction will lie against one illegally engaged in that profession, as the defendant corporation was. While the court admitted that in the absence of statute, equity will rarely give an injunction against acts punishable as crimes, that power may be used in such cases as the instant one where the public welfare is so deeply involved. The right is however, expressly given in Indiana by statute.<sup>26</sup>

In *State ex rel. Bowers v. Moser*,<sup>27</sup> it was held that under the statute regulating the practice of medicine and authorizing the issuance of an injunction against violation,<sup>28</sup> it is not necessary for a plaintiff either to allege or prove threatened continuance of the illegal practice or irreparable injury to the state. The statute provides for an injunction upon a showing that the defendant at a certain time engaged in the practice of medicine without a license "without averring any further or more particular facts concerning the same".

*Interference with Superior Rights.*

In *Glendenning v. Federal Land Bank of Louisville*,<sup>29</sup> a mother had conveyed realty to her son, reserving maintenance and the right to live on the property for as long as she desired, such reservation being granted by the son as a part of the consideration for the conveyance. The defendant bank later acquired title to the property through foreclosure of a mortgage executed by the son alone, sued the son in ejectment, and obtained a writ of seizure. Then the mother sued for an injunction against the mortgagee's interfering with her right to live on the premises. The court gave the injunction and held the right to live in the house, along with the right to her maintenance, board, clothing, and medical attention, to be a lien on the premises superior to the mortgage lien and judgment of the mortgagee.

In a later suit by the mortgagee bank,<sup>30</sup> it was held that the bank was not entitled to an injunction against interfer-

25. 215 Ind. 485, 19 N.E. (2d) 949 (1939).

26. Ind. Stat. Ann. (Burns, 1933) §63-513.

27. 222 Ind. 354, 53 N.E. (2d) 893 (1944).

28. Ind. Stat. Ann. (Burns, 1933) §63-1311.

29. 112 Ind. App. 162, 44 N.E. (2d) 251 (1942).

30. —Ind. App. —, 61 N.E. (2d) 184 (1945).

ence with its harvesting of crops on the land. The court said that it should not give a new injunction as long as the old one was in force, that the old one might be modified if a sufficient change of circumstances were shown.<sup>31</sup>

### *Labor Relations.*

Much of the recent Indiana law as to injunctions in labor disputes is restated in three appeals arising out of the same dispute. In the first,<sup>32</sup> the evidence in the case was not before the court. It was an appeal by the plaintiff from a temporary injunction, and the court had only the special findings of the trial court. Upon the basis of those findings, the trial court's action in granting the injunction was, for the most part, approved. However, the second case, *Local No. 1460 of Retail Clerks Union v. Roth*,<sup>33</sup> was appealed after final judgment in the trial court enjoining the picketing in question, and thus the evidence was brought into the record. The court held the employer not to be entitled to injunctive relief because the evidence showed that he had asked his employees to sign a letter of resignation from the union. This constituted such an interference with the employees that the employer was barred from injunctive relief under the statute.<sup>34</sup> The third case merely reiterated the holding of the second.<sup>35</sup>

In 1943, in a *per curiam* decision<sup>36</sup> the court held that the picketers could not be enjoined from informing truck drivers who drove to the rear of the store with deliveries that the store was being picketed. Such acts were held to be within the exercise of free speech.

31. For other aspects of the same case, see 112 Ind. App. 157, 44 N.E. (2d) 255 (1942), 112 Ind. App. 160, 44 N.E. (2d) 256 (1942), — Ind. —, 63 N.E. (2d) 143 (1945).

32. *Roth v. Local No. 1460, Retail Clerks Union*, 216 Ind. 363, 24 N.E. (2d) 280 (1939).

33. 218 Ind. 275, 31 N.E. (2d) 986 (1941).

34. Ind. Stat. Ann. (Burns, 1933) §40-501 et seq. See in particular §40-502, ". . . it is necessary that he [the employee] have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from interference, restraint, or coercion of employers of labor . . ."

35. *Local No. 1460 of Retail Clerks Union v. Roth*, 219 Ind. 642, 39 N.E. (2d) 775 (1942). It arose by virtue of the trial court's giving another injunction in the new trial.

36. *Local No. 1460 of Retail Clerks Union v. Peaker*, 222 Ind. 209, 51 N.E. (2d) 628 (1943).

In *Spickelmaier v. Chambers*,<sup>37</sup> an injunction against picketing was refused even though it was shown that none of the employees of the place of business involved were union members, and that no disputes between the employer and the employees existed at the time of the picketing. However, under the Indiana Anti-Injunction Act<sup>38</sup> forbidding with few exceptions, the issuance of an injunction in labor disputes, the court held that no injunction should be given because there was a "labor dispute" within the meaning of the act. Such finding was based on the fact that conversations as to wages had been held between the employer and representatives of the union about six months before picketing began, and that following such conversations, the employer had proposed to his employees several plans for wage betterment within the organization. The court held these proposals tended to interfere with the efforts toward organization by the union, such as to preclude the granting of an injunction.

*Long v. Van Osdale*<sup>39</sup> holds that where non-union employees acquiesced in and accepted the benefits of a contract negotiated between the union and the employer, which among other things, set up a committee to approve changes in seniority rights, the non-union men could not have an injunction against such changes.

#### *Arbitration.*

In *Janalene Inc. v. Burnett*,<sup>40</sup> members of a labor union sued for an injunction against breach of a contract which contained a clause calling for arbitration as a means of ascertaining whether or not there had been a violation of the contract. They also asked that the amount of damages resulting from violation be submitted for arbitration under the contract. The court however, refused to imply that term in the contract, saying that even in cases where arbitration as to damages is expressly provided for in a contract, such provisions are seldom upheld in equity.

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37. 113 Ind. App. 470, 47 N.E. (2d) 189 (1943).

38. Cited supra note 34.

39. 218 Ind. 483, 29 N.E. (2d) 953 (1940).

40. 220 Ind. 253, 41 N.E. (2d) 942 (1942).



*Municipal Corporations; Public Officers.*

*Haywood Publishing Co. v. West*<sup>41</sup> holds that equity has jurisdiction to enjoin or invalidate an act of a public officer in cases where the act results in a useless waste of public funds unjustifiable in the eyes of reasonable men.

*Coleman v. City of Gary*<sup>42</sup> holds that a court may investigate the acts of a municipal civil service commission to see if its acts have been capricious or fraudulent, and that such power exists in the absence of statute. The case was one involving demotion of a police officer.

*Restrictive Covenant; Measure of the Violation.*

In *Sorrentino v. Cunningham*,<sup>43</sup> a mandatory injunction was given against selling liquor in a certain neighborhood. The defendant's chain of title contained a restrictive covenant prohibiting such sale on the premises, and the court held it to be one which ran with the land and bound the defendant even though he had no actual knowledge of its existence. The court also held that there was no sufficient change of conditions to justify disregard of the covenant even though the neighborhood in question, residential when laid out, had since become a business district.

In another suit for an injunction against breach of restrictive covenant, the court held that if the erection of a prohibited building is threatened, injunctive relief is available even though the violation has not actually been consummated.<sup>44</sup>

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41. 110 Ind. App. 568, 39 N.E. (2d) 785 (1942).

42. 220 Ind. 446, 44 N.E. (2d) 101 (1942).

43. 111 Ind. App. 212, 39 N.E. (2d) 473 (1942).

44. *Burke v. Gardner*, 221 Ind. 262, 47 N.E. (2d) 148 (1943).