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# Equity -- Injunction Against Criminal Prosecution Proper Where Statute Allegedly Violated Found Inapplicable

later reexamined in the courts of a sister state on the jurisdictional fact of domicile.[22] The burden is cast upon the party challenging the decree to show that the divorcing spouse was not a bona fide resident[23] of the state in which the divorce was granted.[24] Cognizant of the aforementioned burden the court granted the injunction in the instant case[25] as an incident to the separation action.

The decision apears to be a natural outgrowth of *Williams v. North Carolina*,[26] inasmuch as a foreign divorce if granted would adversely affect the wife's marital status and tend to render ineffectual a separation judgment in the wife's favor. Therefore it would seem that the migratory spouse is deprived of a forum to test the question of his bona fide residence in another jurisdiction. However, after *final* judgment in the separation suit *Garvin v. Garvin*[27] does *not* preclude the husband from proving a bona fide domicile in the Virgin Islands or elsewhere, and subsequently instituting a divorce action.

## EQUITY — INJUNCTION AGAINST CRIMINAL PROSECUTION PROPER WHERE STATUTE ALLEGEDLY VIOLATED FOUND INAPPLICABLE

Plaintiff sought an injunction to restrain the sheriff from confiscating a miniature bowling alley as a gambling device containing an "element of chance or unpredictable outcome."[1] The chancellor's refusal to grant an injunction was reversed. *Held*, equity will enjoin a criminal prosecution interfering with a machine where its chance or unpredictability is predicated on the player's skill instead of its mechanism, rather than undermine the purpose of a statute by drastically construing it. *Deeb v. Stoutamire*, 53 So.2d 873 (Fla. 1951).

Traditionally, it has been stated that equity has no jurisdiction to enjoin prosecutions under statutes defining criminal offenses.[2] The rationale for this doctrine has been that the enforcement of the criminal law is a

22. Williams v. North Carolina, *supra* note 19.

23. See the definition of "bona fide resident" in Sneed v. Sneed, 14 Ariz. 17, 22, 123 Pac. 312, 314 (1912) (". . . one who is in the state to reside permanently, and who, at least for the time being, entertains no idea of having or seeking a permanent home elsewhere"); see also Caheen v. Caheen, 233 Ala. 495, 496, 172 So. 618, 619 (1937) ("domicile" and "residence" are used interchangeably in divorce statutes); Williams v. North Carolina, *supra* note 19 at 229 (where 'domicile" was defined as a "nexus between person and place of such permanence as to control the creation of legal relations and responsibilities of the utmost significance").

24. See note 19 *supra*.

25. Garvin v. Garvin, 302 N.Y. 96, 96 N.E.2d 721 (1951); Notes, 25 ST. JOHN'S L. REV. 364, 15 ALBANY L. REV. 29 (1951).

26. 317 U.S. 287 (1942).

27. 302 N.Y. 96, 96 N.E.2d (1951).

1. FLA. STAT. § 849.16 (1949).

2. CHAFEE, SOME PROBLEMS OF EQUITY 143 (1950); MCCLINTOCK, EQUITY 469-470 (2d ed. 1948); 4 POMEROY, EQUITY JURISDICTION 978 (5th ed., Symons, 1941).

matter beyond the jurisdiction of chancery,[3] that such injunctions would lead to a great delay in the enforcement of the criminal law[4] and that there are adequate remedies at law.[5] Also, where there is a mixed question of law and fact, equity may deny an injunction on the ground that it might necessitate additional litigation.[6] The fact that one will be subjected to the indignities of criminal prosecution does not, in itself, constitute a ground for injunction.[7] However, many inroads have been made on the doctrine that equity will not enjoin criminal prosecutions. Thus, where a city proceeded criminally against a trespasser while seeking to enjoin his use of city property, the chancellor halted the criminal proceeding to prevent "double harrassing" because parties-plaintiff and parties-defendant were the same in both the equity and criminal proceedings.[8] Injunctions have been granted when statutes were previously declared,[9] alleged[10] or found[11] to be unconstitutional or deemed a condition subsequent;[12] but most courts require irre-

3. Generally on the grounds that equity jurisdiction is restricted to safeguarding civil property rights. Therefore, some of these courts even hold that injunctions restraining such prosecutions may be ignored without subjecting the party to contempt, McCLINTOCK, EQUITY 470, 470n (2d ed. 1948). *But cf.* United States v. United Mine Workers, 330 U.S. 258, 311 (1947); United States v. Shipp, 203 U.S. 563 (1906).

4. *Ex parte* State *ex rel.* Martin, 200 Ala. 15, 75 So. 327 (1917); Joyner v. Hammond, 199 Iowa 919, 200 N.W. 571 (1924); Reed v. Littleton, 275 N.Y. 150, 9 N.E.2d 814 (1937); Buffalo Gravel Corp. v. Moore, 201 App. Div. 242, 194 N.Y. Supp. 225 (4th Dep't), *aff'd*, 234 N.Y. 542, 138 N.E. 439 (1922); Denton v. McDonald, 104 Tex. 206, 135 S.W. 1148 (1911). This has been viewed as the only persuasive argument against enjoining criminal prosecutions, 46 YALE L.J. 855 (1937).

5. Troy Amusement Co. v. Attenweiler, 137 Ohio St. 460, 30 N.E.2d 799 (1940) (suggesting malicious prosecution actions against arresting officers), 54 HARV. L. REV. 1240 (1941) (criticizing on grounds that malicious prosecution actions are usually futile and in addition police officers are generally judgment proof); Rutzen v. Belle Fourche, 71 S.D. 10, N.W.2d 517 (1945) (can plead injunctive grounds as a defense in criminal trial), 46 YALE L.J. 855 (1937) (that this view overlooks loss of reputation suffered as a result of criminal prosecution; also, time consumed at trial would otherwise be available to petitioner to obtain livelihood); Denton v. McDonald, *supra* note 4 (could secure dismissal by writ of habeas corpus).

6. Reed v. Littleton, *supra* note 4 (should equity decide the facts against the petitioner, it is not res judicata, and he has right to trial in subsequent criminal prosecution). *But cf.* Huntworth v. Tanner, 87 Wash. 670, 15 Pac. 523 (1915) (in seeking injunction, defendant waives jury trial).

7. Beal v. Missouri Pacific R.R., 312 U.S. 45 (1941); Spielman Motor Sales Co. v. Dodge, 295 U.S. 89 (1935); Miami v. Sutton, 181 F.2d 644 (5th Cir. 1950); *see* Watson v. Buck, 313 U.S. 387, 400 (1941). For criticism of this view see 54 HARV. L. REV. 1240 (1941), 46 YALE L.J. 855 (1937).

8. Mayor of York v. Pilkington, 2 Atk. 302, 26 Eng. Rep. 584 (Ch. 1742); *cf.* Gulf Theatres, Inc. v. State *ex rel.* Ferguson, 133 Fla. 634, 182 So. 842 (1938). For discussion of American acceptance of this rule see 17 CHI-KENT REV. 83 (1938).

9. Kenyon v. Chicopee, 320 Mass. 528, 70 N.E.2d 241 (1946).

10. Blitch v. Ocala, 142 Fla. 612, 195 So. 406 (1940); Gulf Theatres, Inc. v. State *ex rel.* Ferguson, *supra* note 8. *Contra:* Miami v. Sutton, *supra* note 7; *cf.* Watson v. Buck, *supra* note 7; Rawls v. Miami, 82 Fla. 65, 89 So. 351 (1921).

11. Loftin v. Miami, 53 So.2d 654 (Fla. 1951).

12. Mizelle v. Sweat, 130 Fla. 345, 177 So. 709 (1937).

parable injury to personal[13] or property rights[14] to be shown also. Upon a showing of irreparable injury, an injunction has been awarded because the statute under which petitioner would have been prosecuted was declared inapplicable.[15] Injunctions are also issued to prevent multiplicity of criminal actions for the alleged criminal offense,[16] criminal prosecution and seizure where plaintiff's property is damaged if there can be no appeal[17] or prosecutions made in bad faith.[18] When an injunction is dissolved after determination that the statute involved is constitutional, the courts are divided as to whether the petitioner should be penalized for his criminal activity during the time the interlocutory injunction was in effect.[19]

The courts of Florida have modified the traditional doctrine and have, in "proper" cases, enjoined criminal prosecutions.[20] By so doing, they apparently have been striving to safeguard individual and property rights against unnecessary criminal prosecutions. This appears true even in cases where injunctions have been denied;[21] yet when criminal prosecutions have been

13. Meyer v. Nebraska, 262 U.S. 390 (1923); Truax v. Raich, 239 U.S. 33 (1915); Watson v. Centro Español de Tampa, 158 Fla. 796, 30 So.2d 288 (1947); Kenyon v. Chicopee, *supra* note 9; Thompson v. Smith, 155 Va. 367, 154 S.E. 579 (1930).

14. Pierce v. Society of Sisters, 268 U.S. 510 (1925); Packard v. Blanton, 264 U.S. 140 (1924); L. Maxcy, Inc. v. Mayo, 103 Fla. 552, 139 So. 121 (1932); Brown v. Nichols, 93 Kan. 737, 145 Pac. 561 (1915); Shuman v. Gilbert, 229 Mass. 225, 118 N.E. 254 (1918).

15. The Evelyn D., 14 F.2d 321 (S.D. Ga. 1926); Watson v. Centro Español de Tampa, *supra* note 13; Mayo v. Winn & Lovett Grocery Co., 155 Fla. 318, 19 So.2d 867 (1944). *Contra:* Troy Amusement Co. v. Attenweiler, *supra* note 5.

16. Mobile v. Orr, 181 Ala. 308, 61 So. 920 (1913); Foley v. Ham, 102 Kan. 66, 169 Pac. 183 (1917); Sentinel-News Co. v. Milwaukee, 212 Wisc. 618, 250 N.W. 511 (1933). *Contra:* Bisbee v. Arizona Ins. Agency, 14 Ariz. 313, 127 Pac. 722 (1912); Bainbridge v. Olan Mills, 207 Ga. 636, 63 S.E.2d 655 (1951).

17. American School of Magnetic Healing v. McAnnulty, 187 U.S. 94 (1902); *cf.* Hannegan v. Esquire, Inc., 327 U.S. 146 (1946).

18. Gurtov v. Williams, 105 S.W.2d 328 (Tex. Civ. App. 1937); *accord*, McCormick v. Proctor, 217 N.C. 23, 6 S.E.2d 870 (1940).

19. Hamilton v. Birmingham, 8 Ala. App. 534, 189 So. 776 (1939); State v. Keller, 8 Idaho 699, 70 Pac. 1051 (1902); State v. Wadhams Oil Co. 149 Wisc. 58, 134 N.W. 1121 (1921); *see* Ray v. Belton, 162 S.W. 1015, 1016 (Tex. Civ. App. 1914) (penalty recommended). *Contra:* United States v. Mancuso, 139 F.2d 90 (3d Cir. 1943); State v. Chicago, M. & St. P. Ry., 130 Minn. 144, 153 N.W. 320 (1915) (penalty prohibited). The latter cases are approved on the ground that otherwise an injunction would be of dubious value because petitioner would be unjustifiably penalized if the judge's determination of the law were reversed on appeal, 92 U. OF PA. L. REV. 321 (1944). *Query*, should the public's right to deter criminal acts be sacrificed because petitioner is forced to gamble as to whether his actions are consonant with public policy?

20. Gulf Theatres, Inc. v. State *ex rel.* Ferguson, *supra* note 8 (parties same in both equity and criminal suits). Blitch v. Ocala, *supra* note 10; Gulf Theatres, Inc. v. State *ex rel.* Ferguson, *supra* (plaintiff alleged statute was unconstitutional). Loftin v. Miami, *supra* note 11 (ordinance found unconstitutional). Mizelle v. Sweat, *supra* note 12 (statute held condition subsequent). Watson v. Centro Español de Tampa, *supra* note 13 (irreparable injury to individual rights threatened). Miami v. Lithgow, 152 Fla. 394, 12 So.2d 380 (1943); Miami Beach v. Gulf Oil Corp., 141 Fla. 642, 194 So. 236 (1940); Miami Beach v. Texas Co., 141 Fla. 616, 194 So. 368 (1940); Snedigar v. Keefer, 131 Fla. 191, 179 So. 421 (1938); L. Maxcy, Inc. v. Mayo, *supra* note 14 (irreparable injury to property rights threatened). Watson v. Centro Español de Tampa, *supra*; Mayo v. Winn & Lovett Grocery Co., *supra* note 15 (statute held inapplicable).

21. De Carlo v. West Miami, 49 So.2d 596 (Fla. 1950) (plaintiff failed to first exhaust his administrative remedy under the ordinance). Jacksonville v. Wilson, 157 Fla. 838, 27 So.2d 108 (1946) (statute authorized police to search places licensed to sell

enjoined, the public interest in combating alleged criminal activity seems to have been protected. The court in the instant case based its decision on the finding that a miniature bowling alley on which it is possible to win a free game by "skill" is *outside* the scope of the statute outlawing machines which offer something of value on the basis of chance or unpredictable outcome.[22] Although neither the majority opinion nor counsels' briefs discussed the rule against enjoining criminal prosecutions, the decree enjoining the sheriff from taking plaintiff's miniature bowling alley appears to be based also on irreparable loss of property due to the threatened seizure and on the inadequacy of the remedy at law.[23] Perhaps those were the considerations that led the majority to override the dissenting justices' "doubt that equity should intervene in this fashion."[24]

While it may be argued that an injunction is a "harsh proceeding,"[25] *query*, should not the accused be protected against confiscation of his property rights in his chattel pending litigation, especially when there is no adequate remedy at law?[26] The state can amply protect the public interest against abuse of the injunctive process by a petitioner who would "shop" for a sympathetic judge if it penalizes one who obtains injunctive relief from criminal prosecution on grounds that are later rejected by an appellate court.[27] On the other hand, one seeking an injunction in good faith should be given the opportunity to risk a penalty, instead of being denied an injunction because the court feels the public is not sufficiently protected.

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liquor beverages). Miami Beach v. Ocean & Inland Co., 147 Fla. 480, 3 So.2d 364 (1941); Stocks v. Lee, 144 Fla. 627, 198 So. 211 (1940); Egan v. Miami, 130 Fla. 465, 178 So. 132 (1938) (statute held constitutional). Taylor v. Trianon Amusement Co., 146 Fla. 447, 200 So. 912 (1941); Coleman v. Greene, 136 Fla. 276, 186 So. 541 (1939) (police may prosecute those maintaining a nuisance). Taylor v. Trianon Amusement Co., *supra*; Merry-Go-Round, Inc. v. State *ex rel.* Jones, 136 Fla. 278, 186 So. 538 (1939) (police may restrain operation of a nuisance). West Palm Beach v. Zellar, 91 Fla. 223, 107 So. 146 (1926) (mandamus available as adequate remedy at law). Sweat v. Daley, 116 Fla. 755, 156 So. 720 (1934) (petitioner's threatened "rights" were of doubtful validity).

22. FLA. STAT. § 849.16 (1949), was also declared inapplicable in Stoutamire v. Pratt, 148 Fla. 690, 5 So.2d 248 (1941). *Contra:* Weathers v. Williams, 133 Fla. 367, 182 So. 764 (1938). In both cases a slot machine mechanically operated a horserace but did not award anything of value. The following machines have been declared illegal under this statute: Sinclair v. Benton, 152 Fla. 138, 10 So.2d 917 (1942) (slot machine offered free games when a certain unpredictable combination was registered); Hernandez v. Graves, 148 Fla. 247, 4 So.2d 113 (1941) ("I. Q." machine awarded prize to one answering an unpredictable question within twenty seconds); Eccles v. Stone, 134 Fla. 113, 183 So. 628 (1938); Weathers v. Williams, *supra*; Grant v. Stone, 133 Fla. 382, 182 So. 770 (1938); Florida Coin Machine Exchange v. Stone, 133 Fla. 382, 182 So. 770 (1938) ("pin ball" machine score predicated on chance and was "adapted" to gambling).

23. See 54 HARV. L. REV. 1240 (1941); 46 YALE L. J. 855 (1937). Even if prosecution of petitioner should be adjudged a miscarriage of justice the state could not be sued for damages, CHAFEE, *op. cit. supra* note 2 at 144. The "remedies" at law against officers participating in an illegal search and seizure are poignantly discussed by Mr. Justice Murphy, dissenting in Wolf v. Colorado, 338 U.S. 25, 41 (1949).

24. Deeb v. Stoutamire, 53 So.2d 873, 875 (Fla. 1951).

25. Deeb v. Stoutamire, *supra* note 24.

26. See note 23, *supra*.

27. See note 19, *supra*.