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INJUNCTIONS - INTEREST NECESSARY TO ENJOIN THE PRACTICE OF A PROFESSION WITHOUT A LICENSE

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INJUNCTIONS — INTEREST NECESSARY TO ENJOIN THE PRACTICE OF A PROFESSION WITHOUT A LICENSE — Three individual plaintiffs, as registered optometrists, and the Michigan Society of Optometrists, on behalf of themselves and duly registered members of their profession, filed a bill to enjoin the defendant corporation from violating a section of the Michigan Optometrical Act, and to specifically enjoin the advertisement of glasses and using in connection with such advertisement the statement, "Scientific eye examination included." *Held*, suit may be brought by parties engaged in a profession to enjoin unfair trade and practice even though such practices are punishable by criminal penalties. *Seifert v. Buhl Optical Co.*, 276 Mich. 692, 268 N. W. 784 (1936).

The injunction was granted on common-law principles, since the statute involved merely provided that it was unlawful to advertise in the manner pursued by the defendant.[1] The court seems to say that a property interest in the individual party plaintiff is sufficient to maintain this injunction.[2] In other types of professions as well, the right of a licensee to practice his profession has been recognized as a sufficient property interest to maintain an injunction.[3] Suits by the state on a theory of public nuisance to enjoin the illegal practice of professions or conduct of a business have been more common.[4] It would seem

[1] Mich. Comp. Laws (1929), § 6788 (h).

[2] The court says (276 Mich. 692 at 700), "It is further claimed that plaintiffs have not a sufficient property interest in the subject matter so as to entitle them to an injunction. . . . 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. . . ." The court cites Glover v. Malloska, 238 Mich. 216, 213 N. W. 107, 52 A. L. R. 77 at 79 (1927), and Sproat-Temple Theatre Corp. v. Colonial Theatrical Enterprise, 276 Mich. 127, 267 N. W. 602 (1936). Both were cases where an individual plaintiff was allowed to enjoin operation of a lottery scheme in violation of a state statute; in the former the court found an injury to property right of a pecuniary nature; and in the latter the right to the injunction was not questioned.

[3] Medicine: Sloan v. Mitchell, 113 W. Va. 506 at 509, 168 S. E. 800 (1933), where the court says, "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 right in the nature of a property right, or a valuable franchise, or a valuable privilege." Dentistry: Kentucky State Board of Dental Examiners v. Payne, 213 Ky. 382, 281 S. W. 188 (1826). License to fish: Walker v. Stone, 17 Wash. 578, 50 P. 488 (1897), where one licensee was allowed to enjoin a subsequent licensee from violating the statute on the ground that the first licensee had a right in the nature of a franchise. *Contra*: dicta in an early Kansas case, Baxter Telephone Co. v. Cherokee County Mutual Tel. Assn., 94 Kan. 159 at 165-166, 146 P. 324 (1915), the court saying, "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 see Depew v. Wichita Retail Credit Assn., 141 Kan. 481, 42 P. 214 (1935).

[4] Chiropody: State v. Maltby, 108 Neb. 578, 188 N. W. 175 (1922). Medicine: Redmond v. State ex rel. Atty. General, 152 Miss. 54, 118 So. 360 (1928), in both cases injunction denied; State v. Lindsay, 85 Kan. 79, 116 P. 207 (1911); State v. Stoddard, 215 Iowa 534, 245 N. W. 273 (1932); State v. Anderson, 6 Tenn. Civ. App. 1 (1915). Suit to enjoin broadcasting without a license: United States v. American Bond & Mortgage Co., (D. C. Ill. 1929) 31 F. (2d) 448, affd. (C. C. A. 7th,

that the violation of a statute is not a nuisance per se.[5] In any of these suits the fact that criminality is involved has generally been held not to deprive the equity court of its jurisdiction.[6] Recently the question has been raised chiefly in connection with unauthorized practice of law. Ohio was the first to grant an injunction against the illegal practice of law.[7] The illegal practice of law is usually in the form of practicing without a license.[8] The right of a bar association to bring suit for injunctions has not been questioned.[9] Quo warranto has been used, but chiefly to question the right of a corporation to practice law.[10]

1931) 52 F. (2d) 318. In almost all these cases the court talks about actions of defendant in terms of nuisance.

[5] Held not a nuisance per se: State v. Maltby, 108 Neb. 578, 188 N. W. 175 (1922); City of Mt. Vernon v. Seeley, 74 App. Div. 50, 77 N. Y. S. 250 (1902); Redmond v. State ex rel. Atty. General, 152 Miss. 54, 118 So. 360 (1928). Held a nuisance in State v. Lindsay, 85 Kan. 79 at 84, 116 P. 207, 35 L. R. A. (N. S.) 810 (1911), where the court approves a statement in State v. Crawford, 28 Kan. 726 at 733 (1882) that "Every place where a public statute is openly, publicly, repeatedly, continuously, persistently, and intentionally violated is a public nuisance." Nuisance by statute: State ex rel. v. Retail Credit Men's Assn. of Chattanooga, 163 Tenn. 450, 43 S. W. (2d) 918 (1931), noted in 10 TEX. L. REV. 507 (1932).

[6] 81 A. L. R. 292 (1932); 92 A. L. R. 173 (1934); Paul v. Stanley, 168 Wash. 371, 12 P. (2d) 401 (1932); Dworken v. Apartment House Owners' Assn. of Cleveland, 38 Ohio App. 265, 176 N. E. 577 (1931), noted 31 COL. L. REV. 1190 (1931); State Bar of Oklahoma v. Retail Credit Assn., 170 Okla. 246, 37 P. (2d) 954 (1934), noted 10 WASH. L. REV. 171 (1935); Kentucky State Board of Dental Examiners v. Payne, 213 Ky. 382, 281 S. W. 188 (1926); United States v. American Bond & Mortgage Co., (D. C. Ill. 1929) 31 F. (2d) 448, affd. (C. C. A. 7th, 1931) 52 F. (2d) 318; Sloan v. Mitchell, 113 W. Va. 506, 168 S. E. 800 (1933).

[7] Dworken v. Apartment House Owners' Association of Cleveland, 38 Ohio App. 265, 176 N. E. 577 (1931), seems to be the first case of its kind. It was a suit by an attorney at law on behalf of himself and all other attorneys at law similarly situated and on behalf of the public and the courts of Cuyahoga County to enjoin the illegal practice of law by the defendant corporation. The court said (38 Ohio App. 265 at 275), "We are of the opinion that the plaintiff and those similarly situated as members of the legal profession have an interest in the nature of a property right such as will support the authority of the plaintiff in this action to proceed as a proper party."

[8] Hicks and Katz, "Practice of Law by Laymen and Law Agencies," 41 YALE L. J. 69 (1931); 16 MINN. L. REV. 196 (1931); 8 WASH. L. REV. 33 (1933). Collection of cases, 81 A. L. R. 292 (1932) and 92 A. L. R. 173 (1934).

[9] See 81 A. L. R. 292 (1932); 92 A. L. R. 173 (1934). Childs v. Smeltzer, 315 Pa. 9, 171 A. 883 (1934); Fitchette v. Taylor, 191 Minn. 582, 254 N. W. 910 (1934); State Bar of Oklahoma v. Retail Credit Assn., 170 Okla. 246, 37 P. (2d) 954 (1934), noted 10 WASH. L. REV. 171 (1935). State on behalf of bar association: State ex rel. v. Retail Credit Men's Assn. of Chattanooga, 163 Tenn. 450, 43 S. W. (2d) 918 (1931), noted 10 TEX. L. REV. 507 (1932), in case where contempt was the only penalty; People ex rel v. People's Stock Yards Bank, 344 Ill. 462, 176 N. E. 901 (1931); People ex rel. v. Motorists Assn. of Illinois, 354 Ill. 595, 188 N. E. 827 (1933).

[10] State ex rel. v. Perkins, 138 Kan. 899 at 906, 28 P. (2d) 765 (1934), where the court said, "The 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 pro-

Illinois has punished corporations for contempt when found practicing law.[11] Wherever suit has been allowed by an individual, on the theory that the right to practice law is a valuable property right, it has always been in the form of a representative suit, in the name of all other individuals similarly situated.[12] It is not clear, in any of the cases finding a property interest, just exactly what is the nature of such interest.[13] The practice of bringing a representative suit has probably been adhered to because it is easier for the court to find a property interest in all the members of the profession than in a single member.[14] It is very unlikely that a single attorney's interests would be materially affected by the practice of law by another without a license. Dicta in a recent Massachusetts case would seem to indicate that the court does not believe there is a suffi-

cedure by which a charge or complaint is entertained, and the one charged is given proper notice, and in which there is a full hearing fairly conducted, would appear to be sufficient." People v. Merchant's Protective Corp., 189 Cal. 531, 209 P. 363 (1922), where the court holds the corporation is a creature of the state and hence the state possesses the right through the medium of this writ to prevent the unlawful exercise of its chartered powers. Accord: People ex. rel Los Angeles Bar Assn. v. California Protective Assn., 76 Cal. App. 354, 244 P. 1089 (1926); People v. Merchants' Protective Corp., 189 Cal. 531, 209 P. 363 (1922), noted 11 CAL. L. REV. 120 (1923); State ex rel. Lundin v. Merchants' Protective Corp., 105 Wash. 12, 177 P. 694 (1919); Matter of Co-Operative Law Co., 198 N. Y. 479, 92 N. E. 15 (1910). See 73 A. L. R. 1327 (1931).

[11] People ex rel. v. Peoples' Stock Yards State Bank, 344 Ill. 462, 176 N. E. 901 (1931), noted 27 ILL. L. REV. 58 (1932); also People ex rel. v. Motorists Assn. of Illinois, 354 Ill. 595, 188 N. E. 827 (1933), noted in 14 ORE. L. REV. 475 (1935), where the court held a corporation can be punished for contempt if it performs services which "can not lawfully be rendered by a person not admitted to practice law."

[12] Unger v. Landlords' Management Corp., 114 N. J. Eq. 68, 168 A. 229 (1933), action by plaintiff attorney and two incorporated associations of members of bar on behalf of others; Depew v. Wichita Retail Credit Assn., 141 Kan. 481, 42 P. (2d) 214 (1935); Paul v. Stanley, 168 Wash. 371, 12 P. (2d) 401 (1932), noted 8 WASH. L. REV. 33 (1933); Dworken v. Aparment House Owners' Assn. of Cleveland, 38 Ohio App. 265, 176 N. E. 577 (1931), noted in 31 COL. L. REV. 1190 (1931); Land Title Abstract & Trust Co. v. Dworken, 129 Ohio St. 23, 193 N. E. 650 (1934). It is to be noted that the principal case also followed this procedure.

[13] Dworken v. Apartment House Owners' Assn. of Cleveland, 38 Ohio App. 265, 176 N. E. 577 (1931), noted in 31 COL. L. REV. 1190 (1931); Fitchette v. Taylor, 191 Minn. 582, 254 N. W. 910 (1934); Unger v. Landlords' Management Corp., 114 N. J. Eq. 68, 168 A. 229(1933); Paul v. Stanley, 168 Wash. 371, 12 P. (2d) 401 (1932), noted 8 WASH. L. REV. 33 (1933) and 3 OKLA. S. B. J. 117 (1932); see also, 10 IND. L. J. 448 (1935); 10 WASH. L. REV. 171 (1935).

[14] In Fitchette v. Taylor, 191 Minn. 582, 254 N. W. 910 (1934), the court says, "Attorneys, as officers of court, exercise a privilege peculiar to themselves and not enjoyed by those outside the profession. Hence it is in a very real sense a franchise and property right. . . . That is enough to show that these plaintiffs, suing not for themselves alone but for the benefit of all the affected members of their profession are entitled to injunction to prevent the unlawful intrusion of defendant Taylor into their office and professional field."

cient property interest.[15] Some courts, instead of talking in general terms about property interests, have called the plaintiffs' interest a franchise.[16] However, it would seem that the authority to engage in the practice of law should be regarded as a license rather than a franchise. Two courts have held that an injunction will be allowed, not to protect a property right, but to protect the public from illegal and harmful conduct by the defendant.[17] It will be noticed that the principal case was also a representative suit. The general statements of the court should be received with this in mind. It would hardly seem that the court meant to lay down a new rule on an individual plaintiff's right to enjoin the illegal practice of a profession.

[15] Steinberg v. McKay, (Mass. 1936) 3 N. E. (2d) 23. The court did not have to consider whether the plaintiff had a right in the nature of a franchise right, because the complaint failed to allege he was a practicing attorney. However, the court cites Wollitzer v. Nat. Title Guaranty Co., 148 Misc. 529, 266 N. Y. S. 184 (1933), affd. 241 App. Div. 757, 270 N. Y. S. 968 (1934), leave to appeal denied 241 App. Div. 817, 270 N. Y. S. 987 (1934), where plaintiff sought to enjoin the illegal practice of law by the defendant corporation. Cropsey, J., said (148 Misc. 529 at 533-534), "But if the complaints were otherwise sufficient they should be dismissed because the plaintiff has no right to the relief sought." He then reviews the Ohio decisions and disagrees with their result.

[16] Unger v. Landlords' Management Corp., 114 N. J. Eq. 68 at 69, 70, 168 A. 229 (1933), the court says "attorneys-at-law in New Jersey are holders of a franchise granted by the state," and also, "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." Fitchette v. Taylor, 191 Minn. 582, 254 N. W. 910 (1934). In a recent Ohio case, Land Title Abstract & Trust Co. v. Dworken, 129 Ohio St. 23 at 35, 193 N. E. 650 (1934), the court says, "It is quite generally held that the right to practice law conferred by the state is a special privilege in the nature of a franchise. . . ." The court failed to cite or mention the earlier case of Dworken v. Apartment House Owners' Assn. of Cleveland, 38 Ohio App. 265, 176 N. E. 577 (1931), where the opinion talked only in general terms of property right.

[17] Depew v. Wichita Retail Credit Assn., 141 Kan. 481 at 485-486, 42 P. (2d) 214 (1935), suit by eight attorneys on behalf of themselves and all other attorneys. The court said, "So whether or not the interest of the plaintiffs in their professional capacities is in the nature of a property right, they have under the allegations of their petition and these definitions a special privilege, franchise and duty as officers of the court to protect the legal profession, the courts, and the administration of justice generally." See also State Bar of Oklahoma v. Retail Credit Assn., 170 Okla. 246, 37 P. (2d) 954 (1934), noted 10 WASH. L. REV. 171 (1935).