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The Body Politic Comes to Court - Equitable Protection of Political Rights

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THE BODY POLITIC COMES TO COURT

EQUITABLE PROTECTION OF POLITICAL RIGHTS

IN VENTURING upon a consideration of equitable intervention in Colorado in protection of political rights, attention should first be directed to the distinction between equity writs and the common law writs of *mandamus* and *quo warranto,* since where relief at law is adequate there is no need of equitable intervention.

Mandamus is in no sense an equitable proceeding, but a common law remedy to compel performance of a legal duty, and it issues only for the enforcement of a clear and specific legal right.[1] It is a summary writ issuing, commanding an official to perform a specific legal duty which the party applying is entitled of legal right to have performed.[2] The reasoning that writs of mandamus, which command, and writs of injunction, which restrain, are the converse or reciprocal of one another, is correct in many cases but not all,[3] and where the former lies the latter should not issue if all rights can be determined in the legal proceedings.[4]

Quo warranto, on the other hand, as defined by Blackstone, is a writ against one who claims or usurps any office or franchise or liberty, to inquire by what authority he supports his claim to determine the right.[5] In most cases of violations of political rights, the remedy at law is adequate,[6] but where it is not, protection of public rights may demand the injunction in equity,[7] and it is on this principle equity functions in Colorado.[8]

The principle of universal application that an injunction will not issue when its object is to try title to a public office, has been well established in Colorado. "That a court of equity has not jurisdiction to try a disputed title to a public office is too clear for argument."[9] If, however, the controversy involves rights of franchise, or the rights of the state in a sovereign capacity,[10] or if the claimant holds a certificate of election seeking injunctive relief until title is determined by quo warranto proceedings,[11] equity should intervene, as dicta of Colorado decisions seem to indicate, where irreparable injury or conservation of great public interests are involved. However, disapproval of intervention even in such cases is expressed in *People v. District Court of Elbert County,* 46 Colo.

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[1]6 A. L. R. Digest 6435.

[2]People ex rel. Dean v. County Commissioners, 6 Colo. 202 (1882).

[3]People ex rel. v. McClees et al., 20 Colo. 403, 38 P. 468 (1894); Orman et al. v. The People ex rel. Cooper, 18 Colo. App. 302, 71 P. 430 (1903).

[4]Pomeroy's Equity Jurisprudence, Vol. 4 (4th Ed., 1919), p. 4053; Walsh on Equity (1930), p. 278.

[5]See People ex rel. Barton v. Londoner, 13 Colo. 303, 22 P. 764 (1889).

[6]Bispham's Principles of Equity (11th Ed., 1931), p. 26.

[7]Walsh on Equity (1930), p. 280.

[8]As to the validity of distinction between these common law remedies and injunctive relief labels in code states, see Walsh on Equity (1930), at page 279.

[9]People v. The District Court, 29 Colo. 277, 280, 68 P. 224 (1901); see also Town of Pagosa Springs v. The People, 23 Colo. App. 479, 490, 496, 130 P. 618 (1913).

[10]People v. McClees, 20 Colo. 403, 38 P. 468, 26 L. R. A. 646 (1894).

[11]Note 9, supra; Lawrence on Equity Jurisprudence (1929), p. 75.

1, 101 P. 777 (1909), in which the court says, "It is keenly regretted, in light of the Hinkley case (note 9), supported by such sound reasons * * * that trial courts still decline to follow it, but persist in undertaking to adjudicate these questions in equitable suits, making applications like this not only possible, but absolutely necessary for public protection, to the hindrance, annoyance, and humiliation of all concerned."

The injunction to restrain unauthorized acts by public officials in discharge of their duties, just as mandamus is used to supply defects and to compel performance of official acts, cannot issue against an executive officer to restrain execution of administrative acts within the scope of his authority, since it would be contrary to our theory of government of separation of powers for the judicial department to interfere with the reasonable discretion of the executive.[12] But where there is no discretion involved, both law and equity will interfere without hesitation;[13] however, no injunction will issue against the execution of an authorized discretionary order.[14] It is manifestly sound that the injunctive process should be bound by the same limitations of the common law writ of mandamus, for to assume jurisdiction to control the exercise of executive or political powers or to protect *individuals* in the employment of purely political rights, would be to invade the domain of other departments of the government.[15] An injunction "has been denied on grounds of expediency in many cases where the remedy at law is confessedly not adequate. This occurs whenever a dominant public interest is deemed to require that the preventive remedy, otherwise available for protection of private rights, be refused and the injured party left to such remedy as the courts of law may afford."[16] While it is properly held equity may not restrain passage of legislation because of the separation of powers, dicta in *Lewis v. Denver City Waterworks Co.*, 19 Colo. 236, 34 P. 993 (1893), indicates that on a showing that irreparable injury will immediately result

[12]Pomeroy's Equity Jurisprudence, Vol. 4 (4th Ed., 1919), p. 4062; Giles v. Harris, 189 U. S. 475, 488 (1902); Brandeis' dissenting opinion in Truax et al. v. Corrigan et al., 257 U. S. 312, 374 (1921); Mississippi v. Johnson, 4 Wall. 475 (1867). But see Greenwood Cemetery Land Co. v. Routt, 17 Colo. 156, 28 P. 1125, 15 L. R. A. 369 (1892), a mandamus proceeding holding that the powers and duties which the governor, as a member of the state board of land commissioners, exercises in relation to issuance of patents to purchase are not political functions which solely appertain to the executive and are therefore subject to judicial control.

[13]Kendall v. United States, 13 Peters 524, 9 L. Ed. 1181 (1838), where mandamus issued to compel performance of purely ministerial acts; Pueblo & A. V. R. Co. v. Board of Prowers County, 5 Colo. App. 129, 38 P. 112 (1894), holding an injunction would lie to restrain the board from interfering with fencing a right of way obstructing a public road, the existence of which the railroad company denied.

[14]Frost v. Thomas, 26 Colo. 222, 56 P. 899 (1899), refusing to restrain the executive from executing a law merely because it is alleged to be unconstitutional; reaffirmed in People v. District Court, 29 Colo. 182, 191 (1901).

[15]Lawrence on Equity Jurisprudence (1929), p. 74; Taylor v. Kercheval, 82 Fed. 497 (1897). "Apart from damages to the individual, relief from a great political wrong, if done, by the people of a state and the state itself, must be given by them or by the legislative and political department of the government of the United States." Giles v. Harries, 189 U. S. 475, 488 (1902).

[16]See Truax v. Corrigan, note 12, supra; Lawrence on Equity Jurisprudence (1929), p. 988.

from the passage of a municipal ordinance, an injunction will issue to restrain the passage of the ordinance which is within the powers conferred on the mayor and trustees, if such would impair the obligation of contract.

In general, a public officer may be restrained in a case coming under some recognized head of equity jurisprudence, from acting illegally to the injury of individuals.[17] "In application for relief by injunction against the acts of public officials, the material question, generally speaking, is, whether they are acting within the scope of their authority, or whether they are transcending their authority. If they are doing the latter, and the resulting injury is not susceptible of reparation by proceedings at law, they may be enjoined from the commission of such illegal act * * *. It is true * * * that the judicial department of the state has no power by injunction to control an official in the exercise of his official functions of a governmental and executive nature[18] * * * but here the defendant was doing an act the law prohibits him from doing."[19] An extension of this principle is found in *Speyer v. School District No. 1, City and County of Denver*, 82 Colo. 534, 261 P. 859 (1927), which was a suit brought to enjoin enforcement of an order of a school official. On allegations of bad faith and malice on the part of the official, the court held sufficient equities were present to warrant granting injunctive relief to preserve the complainants' business interests. At page 539 the court said, "if the rule is a reasonable one and made in good faith * * * it is of no consequence that it injures plaintiff's enterprises or that the defendants are glad that it does so; but when * * * the officer acts in bad faith, with malice, and from no purpose or motive except to injure another, the case is different."

The question then presents itself: Is it essential that a property right exist before equity, in Colorado, will take jurisdiction to determine a political issue? Whether such is absolutely necessary for equity to entertain jurisdiction in any suit may be questioned;[20] however, authority looks to the historical requisite of a property right, and where such exists, though the validity of some political action will be determined in order to decide the existence of a property right, the courts do not hesi-

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[17]See Colorado decisions, note 13, supra; Pomeroy's Equity Jurisprudence, Vol. 4 (4th Ed., 1919), p. 4049.

[18]People ex rel. Alexander v. District Court, 29 Colo. 182 (1901).

[19]City and County of Denver v. Pitcher, 54 Colo. 203, 224, 129 P. 1015 (1913), cited with approval in Elkins v. Milliken, Secretary of State, 80 Colo. 135, 249 P. 655 (1926).

[20]International News Service v. Associated Press, 248 U. S. 215, 39 Sup. Ct. 68, 2 A. L. R. 293 (1918), unfair competition restrained; American Mercury, Inc. v. Chase et al., 13 F. (2d) 224 (1926), enjoining threats of criminal prosecution. "While the cases abound in dicta to the effect that a 'property right' must be shown, there seem to be few actual decisions denying relief on the ground that no such property right was shown," Cook's Cases on Equity (2nd Ed., 1932), note 50, p. 266.

tate to act.[21] In City and County of Denver v. Pitcher[22] other equities than the illegal acts of the assessor in making a horizontal reduction of an assessment are difficult to find, the suit being entertained on behalf of a taxpayer in his own right. Existence of a property right in an action brought by a taxpayer to restrain by injunction a misapplication of public funds[23] or in an action for preliminary injunction to restrain holding a local election in which fraud was used in obtaining the petition[24] seems fanciful. Lack of any substantial property right is apparent in suits by taxable inhabitants and property-holders resorting to equity to restrain misappropriation of public funds, but the propriety of entertaining such suits cannot be denied, since the bill must be filed by the complainants on behalf of themselves and all others in the same situation.[25] Thus, the actions are analogous to actions in protection of public interests against public nuisances which endanger public health and morals, involving protection of no property right, but lacking an adequate remedy at law to protect the same. "Surely the jurisdiction in the sense of power to act exists in the courts of equity in these cases. The exercise of that power (however) should be strictly limited to cases where public interests demand its exercise, and petty matters of party politics as a matter of expediency should be left to party organizations and the voters."[26]

Entertaining such suits in Colorado has been well established under the constitutional provision, Art. 6, Sec. 11, providing that district courts have original jurisdiction of all causes, both at law and equity. In an action to enjoin the city council from issuing liquor licenses, on allegation that the local option was fraudulently conducted, the district court took jurisdiction, involving the validity of the election, under a consideration of justice and duty to a majority of legal voters, holding that "a plain, natural interpretation of the language of section 11 supports the fullest exercise of equity powers in the district court in this proceeding."[27] The liberality of the court in placing such a construction on the Constitution is apparent in the decision. At page 489 of the decision the court said, "If under the early practice of the courts of equity they assumed the right to meet every new situation wherein the law was inadequate, and to extend their jurisdiction to new subjects or controver-

[21]32 C. J. 41, 254, 274; Town of Pagosa Springs v. The People, 23 Colo. App. 479, 490, 130 P. 618 (1913); Walsh on Equity (1930), p. 278; Pomeroy's Equity Jurisprudence, Vol. 4 (4th Ed., 1919), p. 4049.

[22]Note 18, supra; compare Coleman v. Board of Education of Emanuel County, 131 Ga. 643, 63 S. E. (1908), where the court determined collaterally the legality of a tax election so it could determine a property right; 9 Col. Law Rev. 359.

[23]Leckenby v. Denver Post, 65 Colo. 443, 176 P. 490 (1918), a bill by a taxpayer to restrain payment of money under an illegal appropriation by the general assembly.

[24]Dicta, Ernest Guebelle et al. v. John J. Epley et al., 1 Colo. App. 199, 202 (1891).

[25]Packard et al. v. Board of County Commissioners of Jefferson Co., 2 Colo. 338, 350 (1874). "The general rule would require that all taxpayers should be made parties to the suit, but as this is impracticable the law will admit one or more to sue on behalf of themselves and others." Cited with approval in Elkins v. Milliken, 80 Colo. 135, 249 P. 655 (1926).

[26]Walsh on Equity (1930), p. 280.

[27]Town of Pagosa Springs v. The People ex rel., 23 Colo. App. 479, 486, 504, 130 P. 618 (1913).

sies not previously known to have been of equitable cognizance, what good reason can be given why modern courts of equity may not follow the same practice? The very gravamen of the case at bar is fraud * * * which has always been of equitable cognizance." It seems unfortunate that the court rested its conclusion on the constitutional provision, rather than on a frank recognition of the inherent power to prevent consummation of a wrong which would otherwise go unredressed; it is likewise unfortunate that the court proceeded to say that the question involved was not totally political, for if the court was given jurisdiction by the Constitution over such matters, then that alone would be determinative.[28] The decision, in reality, was based on the principle announced in *McCrary on Elections*, Sec. 389, which was quoted by the court: "An adequate remedy will always be found, either at law or equity, for frauds perpetrated against the purity of elections. If the result has been secured by fraud, and the statute has provided no mode of redress, it by no means follows that no redress can be had."[29]

Extension of this principle to enjoin the holding of an election for municipal incorporation was denied on grounds of want of jurisdiction (apparently not in the strict sense, but on a failure to show proper equitable grounds) in *Ernest v. Guebelle*, 1 Colo. App. 199 (1891), since equity will not interpose to prevent an individual from doing a foolish act when he does it at his own expense, or to prevent illegal voting. Allegations that voters have been illegally imported for purposes of the election are insufficient as equity will not prevent a perpetration of a felony or a misdemeanor.[30] If they voted in violation of laws, they could be properly punished after the offense was committed; moreover, if the election proceeded without judicial interference and the prophecies had been fulfilled, the remedies at law or equity would be sufficient. (But see note 42, infra.)

Nor can individuals restrain a canvass of the returns or certify the results of a municipal election, though the election was illegal, since the

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[28]Lawrence on Equity Jurisprudence (1929), p. 74.

[29]In an action brought upon service by publication against 24,000 registered voters without a list of addresses to determine their legal status to qualify as such, it was held that the status of all the defendants making appearance could be determined by the court; the decision is apparently based on this and other Colorado cases hereinafter discussed. The dissenting opinion, analyzing the Colorado decisions, said: "If, today, without due process of law the vested right of the qualified citizen to exercise his franchise at the polls is taken from him without due process of law, the vested right of ownership of property may be taken away." Pierce et al. v. Superior Court in and for Los Angeles County, 37 P. (2nd) 453 (1934); see also same case, 37 P. (2nd) 460. It is to be noted that actions in Colorado were against officials and not against voters.

[30]But see State ex rel. Smith, Atty. Gen. et al. v. McMahon et al., 128 Kans. 772, 280 P. 906, 66 A. L. R. 1072 (1929); Commonwealth v. McGovern, 116 Ky. 212, 75 S. W. 261, 66 L. R. A. 280 (1903). If the suit is brought on behalf of the people, jurisdiction should be extended to prevent fraud, multiplicity of suits, and unwarranted expense to taxpayers. (See notes 24, 25, supra.) The decision at page 202 casts doubt on whether there was lack of jurisdiction in the strict sense. See in accord with the Colorado case, 32 C. J. 41, note 98; compare with People v. Tool, 35 Colo. 225, 86 P. 224, petition instituted in the supreme court, acts enjoined to prevent perversion of an election, though such acts if committed would be criminal.

question is purely political and not judicial, and hence equity has no jurisdiction to inhibit this power, even though the complainant may suffer a pecuniary loss pending a determination of the validity of a franchise by quo warranto proceedings.[31] Likewise, the district court is without jurisdiction to enjoin the county clerk from certifying and having printed on official ballots, names of candidates for county commissioners.[32]

By a peculiar construction placed on the Colorado Constitution, the Colorado Supreme Court has held[33] that the state may through its attorney general apply to the Supreme Court for an injunction to restrain the consummation of a conspiracy to violate the election laws by padding registration lists, permitting falsified returns. That the court in so doing is exercising a judicial and not a political function by enforcing statutes relating to elections, is a position held by few courts.[34] Whether or not equity's power to supervise elections by injunctions in restraining officers canvassing fraudulent returns is based on any recognizable rule of equity jurisprudence,[35] the decision seems sound from a practical view. "The cardinal principle of our government is that it shall be controlled by the people through the medium of the ballot box. Destroy this right and the government itself is destroyed. The people are entitled to have an election honestly conducted and the ballots honestly counted * * *. The true precedent is the correct principle applicable to the particular facts of a particular case."[36] It is clearly established that such suits cannot be maintained by individuals, but must be by the state in its sovereign capacity as *parens patriae* to protect its citizens when they are incompetent to act for themselves, since the matters involved are strictly public and not private. Furthermore, such suits can only be instituted in the Supreme Court, since district courts are without jurisdiction.[37] The Supreme Court by Art. 6, Par. 3 of the Colorado Constitution is given the right to issue high prerogative writs of the common law, which right is not possessed by the district courts under Art. 6, Par. 11, and therefore the latter cannot control or supervise elections even though a property right may be involved.[38] The only limitation upon this power is evidently one of feasibility in carrying out the decree, and thus it is doubtful if a decree would be entered against others than officials, the voters as a group being difficult to bind by a court decree. "In determining whether a court of equity can take jurisdiction, one of the questions is what it can

[31]Vickery v. Wilson, 40 Colo. 490, 90 P. 1034 (1907); Fletcher v. Tuttle, 151 Ill. 41, 37 N. E. 683 (1894).

[32]Sherlock v. District Court, 39 Colo. 41, 88 P. 396 (1907). Relief, however, was probably denied on grounds that no protests were filed within the statutory time allowed for such purposes, in protest to the nomination of the candidates.

[33]People v. Tool, 35 Colo. 225, 117 Am. St. Rep. 198, 6 L. R. A. (N. S.) 822, 86 P. 224 (1905).

[34]Pomeroy's Equity Jurisprudence, Vol. 4 (4th Ed., 1919), p. 4073.

[35]J. Steele's dissenting opinion in People ex rel. Graves v. District Court, 37 Colo. 443, 92 P. 958 (1906).

[36]People v. Tool, 35 Colo. 225, 232, 233, 86 P. 224 (1905).

[37]These limitations were not announced in the Tool case, but were decided in People v. District Court, 37 Colo. 443, 86 P. 87, 92 P. 958 (1906).

[38]Note 36, supra; Aichele v. The People, 40 Colo. 482, 90 P. 1122 (1907).

do to enforce any orders it may make * * * the court has little practical power to deal with the people of a state in a body."[39]

Though a district court cannot assume jurisdiction over and supervise a state and county election, though it probably may do so as to municipal elections, it has jurisdiction over matters preliminary to the election, such as fraudulent alterations of initiative petitions,[40] or cancellation of certification of fraudulent registration lists.[41] In an action to enjoin the county clerk from issuing fraudulent and fictitious lists by voters to election judges, equity can render harmless such illegal acts, and in so doing is in no sense supervising or controlling the conduct of an election. Likewise, the district court has proper jurisdiction to restrain election judges from striking qualified voters,[42] or by mandamus to compel insertion of names in registration books. Moreover, in a suit brought on a proposition to vote bonds, modified one week before election in such a manner as to become a new proposition, the election being illegal since there would not be sufficient time to give notice required by law, the district court was held to have jurisdiction, by dicta, to enjoin the election.[43]

In summation, equitable intervention will be denied in Colorado: (1) when the sole object is to try title to a public office, though temporary restraining orders may issue until such is established by quo warranto proceedings; (2) to restrain a discretionary executive act; (3) by the district courts to control or supervise state or county elections; (4) to enjoin canvassing of returns of illegal municipal elections, since there is an adequate remedy at law. Equity will intervene: (1) to relieve against results of fraudulent elections under its inherent equitable powers; the existence of a "property right" as a requisite for jurisdiction is doubtful; (2) to restrain illegal acts and unwarranted, malicious orders of officials; (3) upon petition on behalf of the state instituted in the Supreme Court, to supervise and control county and state elections; (4) through the district courts to control fraudulent preliminaries to elections; (5) to enjoin waste of public monies, on petition in behalf of all taxpayers. Equity probably has jurisdiction: (1) to enjoin illegal municipal elections by the district courts on proof of fraud, irreparable injury, and inadequate remedy at law; (2) to restrain passage of an unconstitutional municipal ordinance on showing of immediate irreparable damage.[44]

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[39]Giles v. Harris, 189 U. S. 475 (1902).

[40]Elkins v. Milliken, 80 Colo. 135, 249 P. 655 (1926).

[41]Aichele v. The People, 40 Colo. 482, 90 P. 1122 (1907).

[42]People v. District Court, 33 Colo. 16, 78 P. 684 (1904).

[43]Packard et al. v. County Commissioners of Jefferson Co., 2 Colo. 338 (1874); the suit was dismissed on other grounds, note 24, supra. For cases in accord with enjoining an illegal or unconstitutional election, see Harries v. McCrea, 219 P. 533; Hawke v. Smith, 253 U. S. 221, 40 Sup. Ct. R. 495, 10 A. L. R. 1504 (1920). The main case is not in conflict with Sherlock v. District Court (note 31, supra), since in that case there was an adequate means of protesting the nomination which the complainant had not pursued. Dicta in Ernest Guebelle v. John J. Epley (ibid, note 23), on showing of fraud, insufficient notice, irreparable injury, the district court could enjoin a municipal election.

[44]As a possible and sound limitation in addition to all such actions, see note 28 and material supported by note 38.