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Equity

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though he did have intercourse with his wife at the approximate time of conception.[44]

In *Langel v. Langel*[45] the husband sued for divorce and denied paternity of the child. The testimony of the parties on access at the time of conception was in conflict, and the court accepted blood tests as relevant to corroborate the husband's testimony of no access at time of conception (and thus indirectly, on the issue of paternity). The court also held that the wife was not entitled to a jury trial on the issue, and that the appointment of a guardian ad litem is not necessary to protect the rights of the child. On this last point, some states do require the appointment where the legitimacy of a child born to a married woman is in issue, but the general rule is that it is not necessary, because the child is not a party to the divorce action and the decision is not binding on his right to inherit from the husband.

The second case in which the presumption was rebutted, *Koch v. Miller*,[46] was a probate court decision on the legitimacy and inheritance rights of a child born to a married woman. After the birth of the child, the marriage was terminated by divorce and the mother remarried a man whom she had known while married, and who accepted the child as his own. The court held that the clear evidence of acknowledgement of paternity by the second husband was enough to rebut the presumption that he was not her father, and the child was allowed to inherit from him.[47]

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EQUITY

INJUNCTIVE RELIEF

Injunctive Relief — Criminal Conspiracy

The most important and most widely publicized equity case to come before the Ohio Supreme Court in 1961 was *State ex rel. Chalfin v. Glick*.[1] A county board of education sought an injunction as a matter of right against an Amish school system. The board sought to enforce minimal state educational attendance standards as set by state statute[2] and by regulations of the State Board of Education. The private Amish schools,

44. It seems clear that while blood tests are not deemed conclusive in Ohio, as they are in some states, the validity of the tests are widely recognized and have contributed to a weakening of the presumption.

45. 175 N.E.2d 312 (Ohio App. 1960).

46. 178 N.E.2d 186 (Ohio P. Ct. 1961).

47. *Ibid.*

on the other hand, refused to conform to state standards because of the religious tenets of their faith which call for an early termination of a child's education to pursue a quiet, withdrawn way of life. The Hardin County Common Pleas Court granted the injunction, closed the Amish private schools, and directed the Amish parents to send their children of compulsory school age to public schools. The court of appeals reversed, denying the injunction petition.

The Ohio statutes provide for the assessment of fines and/or imprisonment of a parent who refuses to send a child of compulsory school age to school.[3] The rule is well settled in equity that an injunction is not the proper remedy to be used to enforce criminal or penal laws.[4] However, the board of education contended that it did not have an adequate remedy at law since (1) it would be a slow process to prosecute each parent under the state statutes, and (2) the statutory penalties are not strict enough to promote compliance. The supreme court answered these contentions by holding that injunctive relief will not be granted simply because the adoption of the available remedy at law would cause administrative inconvenience and would result in a multiplicity of suits. The court also indicated that the board's argument that injunctive relief would be more severe than the statutory penalties was an argument against rather than in favor of injunctive relief.

At the same time, the court recognized that the criminal nature of an act does not completely bar equity jurisdiction if an injunction is necessary to prevent irreparable injury. However, the court held that such an injunction is not to be granted as a matter of right but rests with the discretion of the court. The board claimed that such an irreparable injury existed because (1) the refusal of the Amish parents to send their children to school amounted to a criminal conspiracy to subvert the morals of their children, and (2) the operation of Amish schools under such conditions constituted a public nuisance. The court held that no evidence had been presented to support either contention, and in affirming the decision of the court of appeals, ruled that in the absence of express statutory direction, the court of appeals had not abused its discretion by refusing to grant the injunction.

The board's contention of "conspiracy to subvert the morals of the Amish children" seems out of line with the stipulation of all parties to the action that the establishment of the Amish schools had been dictated solely by the tenets of the Amish faith, conscience, and religious convictions. Its contention illustrates the fact that the questions of equity juris-

1. 172 Ohio St. 249, 175 N.E.2d 68 (1961).
2. OHIO REV. CODE §§ 3321.02-.04, .07.
3. OHIO REV. CODE §§ 3321.38, .99, 4109.99.
4. 43 C.J.S. *Injunctions* § 150 (1945); 29 O. JUR. 2d *Injunctions* § 104 (1958).

diction raised by this case have arisen from a basic conflict between religion and education.

Injunctive Relief — Upholding Deed Restrictions

Although restrictions on the use of property are not generally favored, the Ohio courts continue to invoke equity jurisdiction to enforce restrictions which are clearly indicated by covenants in a deed. In *Swigart v. Richards*[5] the defendant planned to place a house trailer on a lot within an allotment which restricted each lot to a single family "building" maintained as a residence. The plaintiff, an owner of property in the allotment, sought an injunction to exclude the trailer. Her petition alleged that the trailer was not a "building;" thus it violated the allotment's deed restrictions which confined parcel use to "buildings." The court set forth an extended discussion on the development of mobile homes, but ultimately decided that despite modern accessories "it would take a heap o' claustrophilia to make a trailer a home."[6] Under the facts in this case it held that a trailer was a vehicle and did not fit the definition of "building" intended by the parties drafting this allotment's deed restrictions. Use of the trailer was enjoined.

In *Myers v. Smith*[7] deed restrictions were enforced by a matter of inches. The defendant wished to attach a garage to his home which would extend to within one foot of the sideline of plaintiff's lot. The allotment's deed restrictions would not permit a building to be closer than five feet unless it was a detached garage. Testimony indicated that eighty of the eighty-five garages in the allotment were less than five feet from their neighbor's sideline. However, the rule is well established in Ohio that as long as there is substantial value in a deed restriction, it will be enforced despite numerous existing violations.[8] The *Myers* court felt that the plaintiff's property would benefit by having the restriction enforced; therefore, it granted the request for an injunction. Plaintiff had objected promptly to his neighbor's plans and could in no way be considered guilty of laches despite his failure to object to similar violations by others in the allotment.

Injunctive Relief — Special Assessments

The hilly terrain around Athens, Ohio, caused construction difficulties for engineers constructing a sewer and brought forth a flood of equity suits from the property owners assessed with the cost. Drainage in the

5. 87 Ohio L. Abs. 37 (C.P. 1961).

6. *Id.* at 39.

7. 112 Ohio App. 169, 171 N.E.2d 744 (1960).

8. Brown v. Huber, 80 Ohio St. 183, 88 N.E. 322 (1909); Romig v. Modest, 102 Ohio App. 225, 142 N.E.2d 555 (1956). See also 15 O. JUR. 2d *Covenants* § 138 (1955).

sewer district under consideration flowed in four separate directions, necessitating four sewers instead of one. An unusually high cost resulted. In *Dorman v. Kincaid*[9] the plaintiffs sought to enjoin the assessments on several grounds, the most important being that the costs exceeded the benefits to the property assessed. At one time it was the law in Ohio that a court of equity could not enjoin an assessment as long as the property was benefited to some extent.[10] However, Ohio Revised Code section 727.04 clearly indicates that assessments shall not be in excess of the benefits conferred upon the property by the assessment.[11] The court in *Dorman v. Kincade* upheld recent cases which have ruled that if an assessment is in excess of the benefit, payment of the excess should be enjoined.[12] The *Dorman* court enjoined the portions of assessments which would exceed one-third of the expected value of the property after the sewer construction.[13] Moreover, the court enjoined the complete assessment on lots being used as a driveway since the sewer conferred no direct benefit on the lots themselves. As a result, property owners were not assessed for sewer costs according to the amount of property owned. Rather, the court felt it equitable to fully assess only those properties which were being, or probably would be, used for homes since they would be the ones actually to benefit from the new sewer.

Injunctive Relief — Protection of Trade Marks and Trade Secrets

Confidential customer lists are regarded as trade secrets, and they may be protected from disclosure by the granting of an injunction.[14] Thus, in *Hance v. Peacock*,[15] an employee was enjoined from contacting those customers on his former employer's customer list who had contracts with the employer. He was enjoined even though there was no express provision not to compete in his employment contract. However, equity is a two-way street — "He who seeks equity must do equity." The court enjoined the employee from contacting customers under contract with his former employer, but it also required the employer to clarify his relations

9. 176 N.E.2d 872 (Ohio C.P. 1961).

10. Baxter v. Van Houter, 115 Ohio St. 288, 153 N.E. 266 (1926); Rogers v. Johnson, 21 Ohio App. 292, 153 N.E. 167 (1926).

11. This section provides that "assessments under section 727.03 of the Revised Code shall not be in excess of the special benefits conferred upon such lots and lands by the public improvement mentioned in such section . . . ."

12. Cristo v. City of Niles, 170 Ohio St. 59, 162 N.E.2d 521 (1959); Laskey v. Hilty, 91 Ohio App. 136, 107 N.E.2d 899 (1951).

13. Ohio Revised Code section 727.15 provides: "In no case shall there be levied upon a lot or parcel of land in the municipal corporation any assessment or assessments for any or all purposes within a period of five years, in excess of thirty-three and one-third per cent of the actual value thereof after improvement is made."

14. See cases cited in 29 O. JUR. 2d *Injunctions* §§ 98, 99 (1958).

15. 169 N.E.2d 564 (Ohio C.P. 1960).

with his customers. The employer's business was changing ownership. Furthermore, it became clear from the evidence presented at the court's hearing that many of the employer's customers had not read the provisions in their contracts requiring notice of termination to be given to the employer. Thus, the employer was required to write all his customers notifying them of the change of ownership in his business and reminding them of their contractual obligations.

The court in *Younker v. Nationwide Mutual Insurance Company*[16] reiterated the rule that injunctive relief is extraordinary relief and that it should not be granted unless the plaintiff has established a "clear, incontestable and well defined right . . . ."[17] The plaintiff in the *Younker* case operated a small local insurance agency, selling a general line of life insurance. The agency was incorporated under the name of "Securance Service, Incorporated." Several years after the agency was incorporated under that name, Nationwide began to nationally advertise a one-package insurance program known as "Family Securance Service." Following the appearance of this program, Securance Service, Incorporated, applied for and was granted the trade name and trade mark rights to the word "securance." It then declared its exclusive property rights to the word and sought an injunction to prevent Nationwide from using it as a trade name or trade mark.

The plaintiff sought the injunction despite the fact that it had only used "securance" twice as a trade mark; once in a high school newspaper advertisement at a cost of one dollar, and once on calendar cards at a cost of fifteen dollars per five hundred. On all other occasions the plaintiff's advertising had promoted the corporate name or the individual officers of the company.

The basis of the plaintiff's injunction petition was unfair competition; however, Nationwide is a national insurer, and the plaintiff, a local general insurance agency. The two businesses are so different that not even a remote possibility existed that the public would be misled into thinking the services advertised by Nationwide were the services of Securance Services, Incorporated. Thus, the court found that all the plaintiff had done was to make an isolated use of a word which anyone could find in a dictionary. Such a use did not indicate that the plaintiff had an incontestable property right which deserved injunctive protection. Moreover, the court found that in fact Securance Services, Incorporated, was guilty of an attempt to capitalize on Nationwide's advertising program and that its trade mark rights to "securance" had been improperly obtained and should be canceled.

16. 176 N.E.2d 465 (Ohio C.P. 1961). See also discussion in *Trade Regulation* section, p. 537 *infra.*

17. *Id.* at 471.

COURT OF APPEALS — EQUITY JURISDICTION

The Worthington City Council passed an ordinance in July, 1959, changing the zoning of an area of land owned by the plaintiff to permit commercial and apartment house construction. A month later the citizens of Worthington filed a petition calling for a referendum to contest the zoning change. The referendum was scheduled to be placed on the ballot at the next general election in November, 1960. The plaintiff waited until October, 1960, to file an original action for mandamus in the court of appeals, coupled with an appeal for injunctive relief.[18] The court of appeals has original jurisdiction to issue writs of mandamus, but it has no original equity jurisdiction. The court stated that in order to enjoin the referendum election, it would be necessary for it to make an equitable determination of the validity of the steps taken to obtain the referendum. This it could not do since it had no original equitable jurisdiction.

The court also refused to grant the injunction because it found the plaintiff guilty of laches. More than one year had elapsed before the plaintiff's petition was filed, and less than a month remained from the time of filing until the date of the general election. In view of this unexplained delay it would have been inequitable to enjoin the referendum when insufficient time remained to file a new referendum petition in time for the general election.

EQUITABLE CONVERSION

The general rule of equitable conversion is that a contract to sell real property vests the equitable title to the property in the purchaser even though the transfer of legal title has not been completed. Therefore, if an equitable conversion has taken place and the property is destroyed before the contract is completely performed (if neither party is guilty of causing the destruction), the loss must be borne by the purchaser. In *Sanford v. Breidenbach*[19] the parties signed a contract of sale, but while the necessary papers were being prepared to transfer title, the home was totally destroyed by fire. Included in the provisions of the contract of sale was an agreement that funds would not be deposited in escrow by the purchaser until the seller had furnished him with a satisfactory septic tank easement. The easement agreement had not been furnished at the time of the fire. Thus, when the seller sought specific performance of the contract following the fire, both the trial court and the court of appeals refused to grant it. The court of appeals stated that when real property is involved, the seller must show literal and exact performance of all material acts on his

18. Friedman v. Donahue, 175 N.E.2d 525 (Ohio Ct. App. 1960).
19. 111 Ohio App. 474, 173 N.E.2d 702 (1960).