The Granting and Dissolution of the Interlocutory Injunction

Michael Francis McNamara
Cornell Law School

Follow this and additional works at: http://scholarship.law.cornell.edu/historical_theses
Part of the Litigation Commons

Recommended Citation
McNamara, Michael Francis, "The Granting and Dissolution of the Interlocutory Injunction" (1895). Historical Theses and Dissertations Collection. Paper 29.

This Thesis is brought to you for free and open access by the Historical Cornell Law School at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Historical Theses and Dissertations Collection by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.
THESIS.

THE GRANTING AND DISSOLUTION OF THE INTERLOCUTORY INJUNCTION.

SUBMITTED TO
THE FACULTY OF THE CORNELL UNIVERSITY SCHOOL OF LAW
FOR
THE DEGREE OF BACHELOR OF LAWS

JUNE 20, 1895.

BY

MICHAEL FRANCIS McNAMARA,

ITHACA, N. Y.

-----------------------------------------------
CONTENTS.

I. Introduction.

2. Description of remedy.

3. General principles in regard to granting.


5. Use of the injunction in fraudulent transfers of property.

6. Its use in limited divorce actions.

7. Injunctions to stay actions at law and judicial proceedings

8. Injunctions affecting real property.
   a. Mortgage foreclosure.
   b. Taxes
   c. Trespass
   d. Waste
   e. Nuisance 1. Against dwellings 2. To water.


II. Copyright.

12. Trade marks and labels.

13. Partnership.


   Dissolution.

   1. General principles.

   2. Dissolution before answer.

   3. Dissolution upon answer.
4. Dissolution at a hearing on the merits.
There is no branch of the law which seems to give mere pleasure to litigants than to compel their adversary to do something he does not wish to, or restrain him from doing as he pleases, during the expensive and unpleasant process of the litigation. Hence it becomes essential to the practising attorney, that he should become familiar not only with these rules and principles which may be used as a means to afford pleasure to clients but in many instances to save them from irreparable injury or, such injury as can have no adequate compensation in damages. It is a great temptation to persons engaged in a lawsuit, in case they think they are liable to be beaten, to place their property beyond the reach of execution; or in case the litigation affects the title to real property to cut timber or to commit other waste upon the property. Hence the necessity and use of the interlocutory injunction.

It is that form of preventative relief given by a court of equity at any time before the final hearing, usually upon the filing of the bill, and continues until a hearing can be had upon the merits, or until the answer is brought in, or until the further order of the court. It's nature is that of a provisional remedy and it never concludes a right. The presence or absence
of the injunction is not taken into consideration in determining upon the final relief to be given by the court. It's whole province in granting a preliminary injunction is to preserve the subject matter of the litigation in statu quo without determining any question of right between the parties; but merely to prevent the perpetration of a wrong that would result in irreparable injury to the plaintiff, when he would be entitled to final relief by a perpetual injunction, or where the disposition of his property is threatened in such a way as to render a final judgment ineffectual if awarded against him.

It is the one barrier which equity interposes in order that a person, while litigation is pending, may not act to the injury of his adversary or dispose of his property with intent to outwit the court, in case judgment is rendered against him. In nearly every case it lies in the sound discretion of the court, and not ex debito justitiae, whether or not they will grant the relief of the interlocutory injunction. -Welde and Logan V.Scotten 59Md.72. -Stoddart V. Vanlaningham 4/Kan.18.

However, a distinction seems to be drawn in the case of matters of public right. It is held that the relief, being in the nature of a prerogative remedy on the part of the Attorney General; that it is a matter of duty on the part of the court to grant the writ. -Att'lyGen.V.R.R Co. 35 Wis.425. In general it is not enough for the plaintiff
to show that the circumstances complained of will do him an injury in order to entitle him to an interlocutory injunction; but he must also prove to the court, by a fair preponderance of evidence, that he will be entitled to a perpetual order. -Ward V. Dewey 7 How. 7.

Formerly the injunction was a mandate issuing from the court in the form of a writ; but at the present the writ of injunction has been abolished in New York and the court grants an order, upon interlocutory application when the affidavits and pleadings show that it is necessary to protect the plaintiff from some threatened injury. The injury must be a substantial one and be established to the satisfaction of the court. Hence it would be a fatal objection that the plaintiff had no claim of title to the lawsuit sought by the litigation. O'Brien V O'Conell 7 Hun 228.

So varied are the causes for which a preliminary injunction may be asked; it is impossible to lay down any rule or set of rules that would serve as an absolute guide in every case Ludvigh V. Dusseldorf 8 Weekly Dig. 490. Multiplicity of suits. This seems to be one of the favorite grounds for the remedy of injunctions. In the case of one common right in which several persons were interested, equity will generally interfere by injunction and restrain all the suits but one, Woodruff and Stocking V. Fisher 17 Barb.

224. on the ground that it will be of benefit to both parties and save the multiplicity of suits and expenses which would otherwise be necessarily incurred
in prosecuting or defending extra litigations. As a rule it should not be granted without the usual notice of eight days unless a pressing necessity be shown, Adrovette v.

Browne 15 Howards Practice, 76, or unless the complaint unqualifiedly states sufficient ground for injunction and is supported by affidavit. In case a final injunction is the ultimate relief sought, such facts as are relied upon must be stated in the complaint, McHenry v. Jewett 90 N.Y. 58.

The affidavit may be in the form of a verified complaint, where all the facts entitling the plaintiff to the order are stated as of positive knowledge and not as matters of information and belief. In case the material facts, for which an interlocutory injunction is claimed, are stated merely on information and belief he will not be entitled to the order, unless such information was derived from the defendant. Cole v. Savage Clarke N.Y., Chancery 361.

Hence in stating matter on information and belief it is always well to state the source of the information and the grounds of the belief, in order that the court may give to such allegations their proper weight, and thus determine the true merits of the controversy.

The granting or refusing of the injunction is wholly discretionary with the court except where the granting of such relief would effectually dispose of the merits of the controversy, or where it's refusal would tend to render the final judgment ineffectual.
Brohn V. Riley 50 Hun, 489. The fair test seems to be whether or not the court feels compelled from a fair preponderance of evidence that the complainant has established his case. Ives V. Smith 3 N. Y. Supp. 645. But even then if there is an adequate remedy at law it will be withheld because it is considered a harsh remedy and might cause more damage to the defendant than the continuance of the wrong would to the plaintiff. For this reason the court of equity will leave him to his action at law for damages. Savage V. Allen 54 N. Y., 458.

It is held by some writers notably Mr. Pomeroy in his work on equity that the mandatory injunction may in strictness be called an interlocutory injunction, where at the final hearing in a case of nuisance or interference with easments, the relief is granted; which compels the removal of the obstructions. It is so framed that while it purports only to restrain the further commission of a wrong, and while negative in its terms, it may restrain him from allowing his wrongful acts to operate. The effect of the preliminary mandatory injunction is similar to the interdict of the Roman law and its granting has been more freely exercised by the courts of England than by those of America. Some of our American courts and judges go so far as to say that a preliminary mandatory injunction would never be granted; but this doctrine
is regarded as contrary to the weight of authority and also in contravention of the principle which regulates the admission of preventative relief. *Pomeroy's Equity Jurisprudence*, 392.

It seems that where a perpetual injunction is the final relief sought, and the case is sufficiently proven, an injunction pendente lite will almost invariably be granted; where it is necessary to protect the plaintiff from injury for which there is no adequate compensation in damages, and he is able to show that he will be entitled to the final relief sought. In cases necessary to entitle the plaintiff to a preliminary injunction, do not exist at the time of the filing of the bill but occur afterward, while the action is pending, they may be brought to the attention of the court by supplemental bill and a temporary order obtained. *McHenry v. Jewett* 90 N. Y., 58. Upon the other hand, under the old equity pleading, in case a defendant was entitled to the affirmative relief of injunction it could only be accomplished by the aid of a cross bill. In those states which have adopted the reform procedure, if the defendant sets up an answer stating facts sufficient to entitle him to relief he may have an injunction pendente lite against the plaintiff.

There are many cases in which the ultimate end for which the action is brought would be defeated in case the interlocutory injunction should not be granted.
When such facts the court will almost invariably grant the relief; but this fact will not of itself deprive the court of the power of using its discretion in the matter. Young v. Crandall 75 N. Y., 525. However, the court may sometimes impose conditions upon the granting of the writ. These conditions may be imposed by the court either upon its own motion or upon the suggestion counsel. Ewing v. Filly 43 Pa. State, 394. One of the most frequent causes for which the interlocutory injunction is granted is that described in the N. Y., Code sec. 604 where affidavits are prepared in which it appears that the defendant is doing, procuring, or suffering to be done, while the action is pending, some action that affects the subject matter of the litigation, as to render the final judgment ineffectual, or to cause a serious violation of the plaintiff's rights. Also when the plaintiff, while the action is pending, threatens to remove or place his property beyond the jurisdiction of the court. In such cases an injunction will be granted restraining him from so doing.

In nearly every case where a limited divorce is the ultimate object of the action together with maintenance and alimony, a preliminary injunction will be granted where the complaint besides stating the cause of action, also alleges that the defendant threatened to dispose of his property and to remove from the state without providing for the plaintiff. Vermilyea v. Vermilyea.
In an action by a creditor to set aside a chattel mortgage, real estate mortgage, assignment or other fraudulent transfer of property to the damage of judgment or lien creditors a preliminary injunction will be granted pending the action to restrain the sale of the property, upon foreclosure proceedings and thus perfect the title in the assignee or fraudulent transferee. Bank of Montreal v. Gleason 16 St. Reporter, 768. In general the court will grant an injunction pendente lite in favor of a judgment or lien creditor and restraining the defendant from disposing of his assets either legal or equitable and will also restrain the disposition or sale of such property by the fraudulent transferee, during the pendency of the action to set the fraudulent conveyance aside. Hyde v. Ellery 18 Md. 496. Findley v. Findley 93 Mo. 493. There seems to be one exception to the rule that they must be judgment or lien creditors in order that an injunction may be granted. If the withholding of the relief would cause a multiplicity of suits and in this way and in this way cause injury to both parties; then the injunction would be granted, on the ground that the whole matter could be determined in one proceeding and thus save the cost of extra litigation. Ballen v. Ferst 55 Ga. 545. Seligman v. Ferst 57 Ga. 561.
Another favorite ground for the remedy of injunction is to stay actions at law and judicial proceedings, either before or after judgment. The injunction is addressed not to the court but to the litigant parties and hence does not abridge or deny the jurisdiction of the legal tribunal. It is to control the parties to whom it is addressed and prevent them from taking an aid of the law, for which the law can give no adequate relief. - Story's Equity Jurisprudence sec. 875.

In the case of Hayes v. Carr 44 Hun, 372 an injunction was issued to restrain the collection of a judgment for costs which had been assigned to the attorney while the assignor, at the same time, owed the defendant a large sum of money and was practically insolvent.

Held that an injunction restraining the enforcement of the judgment, by the assignee, was properly granted inasmuch as the assignee took the judgment subject to all the equities which existed between the parties. Hence these equities should be adjusted by the court before he would be permitted to institute proceedings for the collection of the judgment. In the case of Shaw v. Dwight 16 Barb. 536, where the holder of senior judgments which had been satisfied and said judgments were fraudulently kept on foot, and a junior judgment creditor was prejudiced thereby, and he was proceeding to sell the property on execution, the junior creditor has the right to have the
proceedings stayed by injunction, as they constitute a cloud upon his title. The language of the chancellor in Hayes v. Morse & Paige 108 is quoted by the court with approval, and is practically the same language used by the N. Y. code which provides that "where it shall appear from the complaint that the plaintiff is entitled to the relief demanded, and such relief or any part thereof, consists in restraining the commission or continuance of some act which, during the litigation would produce an injury to the plaintiff" etc, an injunction may be granted to restrain such an act. Incase a judgment has been rendered; which it would be unconscionable to enforce a court of equity may interfere by injunction to stay execution upon such judgment pending an appeal or other determination of the case. this point was strenuously denied by the early common law but they have been obliged to accede to the equity and justice of the situation, rather than to their own ideas.

In cases of this kind it must be shown not only that justice would be done but that he was guilty of no negligence in the matter; which contributed to the result. On the other hand he must show a clear case of diligence, to entitle him to the order. Such a case will sometimes arise where there is a defence sufficient to defeat the recovery which was not discovered until after the judgment was rendered.
Hence it would be against conscience to allow the execution of such a judgment, unless there was an adequate remedy at law, and even then a man should not be compelled to resort to a legal remedy to gain from his adversary a substantial advantage he ought never to have gained.

When the defense was not discovered, until too late to move for a new trial the judgment should be enjoined, sufficient reason being given why the defense was not discovered. However the injunction only stays the execution and does not interfere with the lien of the judgment.

It may be laid down as a general rule that if defendant was ignorant of important facts which were material to the establishment of a defense, and judgment was rendered against him, such ignorance in the absence of latches, will warrant a court of equity in granting the relief Inglehart V. Lee 4 Md. Chancery 514.

Affecting Real Property. As a general rule it may be laid down that equity will not interfere by injunction to change the title to real property, but sometimes it may stop the sale of such property, on the ground of unavoidable accident or mistake; where great injury would result to the plaintiff in case the sale was allowed to proceed?

Wrights heirs V. Christeys heirs 39 Mo. I25

There seems to be an exception to the rule that equity will not interfere by interlocutory injunction, pending an action to try title to real property.
In the case of mining land where otherwise they might greatly depreciate in value, and where there could be no adequate compensation in damages. It may also be granted in an action of ejectment, in case the title to the property cannot be properly determined in proceedings at law. R. R. 20'S V. Stewart 18 C. E. Green 489.

Also where expenditures have been encouraged, upon the land to such an extent that the party making them cannot be reimbursed except by the actual enjoyment of the land. In such a case an action of ejectment may be enjoined pending an appeal or an action to try the title of the lessee to the property. Iron Co's Appeal 54 Pa. State 361.

Many fruitful sources of litigation arise between landlord and tenant in which the injunction plays a prominent part. Thus a tenant may be enjoined from committing waste upon the premises as the removal of crops, Pultney V. Shelton 5 Vesey 147 or the unauthorized sale of the personal property of the landlord. Musser V. Brink 18 Mo. 358.

Mortgages. Mortgages will sometimes be restrained by injunction in case it would result in great hardship or irreparable injury to an innocent party. Brown V. Coherry 56 Barb. 635. For example in case the assignee of property was ignorant of the power of sale contained in a mortgage and the fault
was not his own the mortgage never having been recorded.

Such a sale will be restrained by injunction. Platt V. McClure 3 Wood R. and M. 151. A payment of the mortgage indebtedness is usually a ground for intervention to stop foreclosure proceedings Hubbard V. Jasinski 46 Ill. 160%, also in case there has been usuary in the mortgage indebtedness the foreclosure may be enjoined until an accounting can be had of the amount of the principal and interest legally due on the mortgage Hooker V. Austin 41 Miss. 717.

when there has been a mistake of fact as to the drafting of a mortgage, and such mortgage includes more land than was intended, and foreclosure proceedings are begun on such mortgage an injunction will be granted pending an action to reform the mortgage. Smith V. Building and Loan Association 73 N. C. 572.

Taxes. The collection of taxes may sometimes be restrained by injunction where it would result in a cloud upon the title of the person against whom it was levied Crane V. Jaynesville 20 Wis. 305. This could perhaps only occur when tax was assessed to a person to whom the land did not belong. Hence as this situation seldom occurs the use of the interlocutory injunction in tax cases will seldom be of any account.

Diminishing The Value Of Real Property. In the case of waste, trespass, and the protection of easements the use of the injunction may be said to come more property under
the head of real estate law. In the case of waste it may be laid down as a general rule that where there is no chance of an adequate remedy at law, and waste has been committed, an injunction will be granted, in case there is a privity of title. But an injunction will not be granted against a stranger.

In case the trespass was committed by a stranger the law will not interfere as it regards him as a mere trespasser, and hence will leave the other party to an action, at law, for damages. Wixen v. Condram I Ired. Eq. 380.

In case a person has only an equitable title he may restrain by injunction the cutting of timber, or other waste upon the property if it is necessary to protect his security from becoming diminished or impaired. Camp v. Bates' II Conn. 511. Where the title to freehold estates comes into question it becomes necessary to stop the cutting of timber pending an action to try the title to the property. Such conduct will ordinarily be restrained when the defendant is unable to respond in damages, and the timber constitutes the chief value of the land. Kinsler v. Clark 2 Hill Ch. 612.

Where an injunction is sought against the destruction of trees it must be shown that the trees have an especial value or are important to the estate, as fruit or ornamental trees, while in the case of timber it must be shown that its destruction will result in irreparable injury to the
property. Green v. Keen 4 Md. 98.

Trespass. In trespass where the continued wrongful acts will result in great and irreparable injury to the plaintiff and a party is in possession, such wrongful acts will be enjoined. Lewandes v. Butler 33 L. J. Ch. 451.

Although as a general rule the property must be in the one seeking the order. In case the title to real property is in dispute an injunction will not usually be granted against the person in possession, on account of trespass, until his claims are established in an action at law. It is held proper, in case of mining property to grant a preliminary injunction to restrain a defendant from so working his mines as to endanger the plaintiff, at the same time to give them directions to bring an action at law to establish their title at law. Duke v. Morse 6 Hare 340.

Nuisance. The jurisdiction of the courts of equity in the restraining of nuisances is similar to that exercised in the case of trespass. It seems to be settled that in order to warrant the granting of the preventative relief of injunction, a strong case must be made out, of imperative necessity and it must appear that the nuisance is in derogation of rights which have been previously enjoyed. Van Bergen v. Van Bergen 3 John. Ch. 282.

In the case of special nuisances some special damage must be shown by the person complaining, in addition to
that which would necessarily be suffered by the public in order that he may be entitled to an interlocutory injunction.

Nuisances against dwellings. Where a nuisance interferes with the private rights of a party in such a way that irreparable injury may result to him by reason of not being allowed the proper enjoyment of his property, such nuisance may be restrained by interlocutory injunction. As in the case of a hospital for contagious diseases conducted in such close proximity to the residence of the plaintiff as to render the enjoyment of his property dangerous. In such a case the carrying on of the hospital will be restrained until a final hearing of the case. Biglow v. guardians 57 L. J. R. U. S. Ch. 762.

It has also been held, that where in a saloon, a piano was played until late at night and dancing was carried on thus depriving the neighbors of sleep; that an injunction would be granted restraining the parties from playing on the piano after nine o'clock.

The different circumstances under which an interlocutory injunction would be granted where the injury affects the dwelling of a person

The enumeration would be impossible, but it seems to be a well established principle applicable to all, that where the thing complained of will result in injury to the health, comfort or convenience of the resident then it may be restrained.
Another familiar use of the injunction is in the case of nuisance to water or the infringement of the rights of riparian owners. Thus in case a person is entitled to the use of water or a riparian owner or other person brings an action to recover damages for the pollution of water or diverting it from its proper course, or materially diminishing its quantity to the prejudice of the lower riparian owners. In case an injunction is the final relief sought, or the right to divert the stream depends upon an action at law, an interlocutory injunction will usually be granted pending the action, unless there is an adequate remedy at law for this violation of the plaintiffs rights. It was held in Ogletree v. Mc Quaggs 67 Ala. 580 that where a mill dam was to be constructed that an interlocutory injunction might be granted to stay the construction pending a trial as to whether it will endanger the health or convenience of the parties living in the neighborhood, and particularly the health, comfort, or convenience of the plaintiff.

Bridges. It was held in the case of Stillman v. Hudson River Bridge Co. 4 Blatch. 74, that the court might grant the preventative relief in a case where there was doubt as to the right to construct a bridge over a navigable river, when such bridge would be a material obstruction to navigation.
Patents. This field of the law furnishes a wide equity jurisdiction. In patent cases it is usually a condition to the granting of such relief that the withholding of the relief would cause a greater injury to the plaintiff than it's granting would to the defendant. Irwin v. Brown 4 Fish. 359. However it is in the discretion of the court whether or not they will grant the writ, or possibly to impose some condition upon it's granting or refusal.

Copyrights. In the case of copy rights although discretionary with the court, it would seem that they will usually grant the writ where its granting will better satisfy the ends of justice. However as in the case with patents the inquiry will usually be made whether greater damage will result to the defendant by granting the injunction than to the plaintiff by it's refusal. The ethics granted or refused, it may impose a duty upon the defendant to keep an account, in case the injunction is refused and order to give an undertaking that he will pay the damages in case the title of the plaintiff is proved and it's infringement established. O'Neill v. Williams II Jur. 344.

Trade marks. It seems that the unauthorized and unlawful use of a trade mark or label will in many cases furnish ground for the preventative relief of the interlocutory injunction. However the infringement must be
certain and it's continuance result in damage, to the plaintiff, for which there will be no adequate compensation. 

It was held in Foster v. Blood Balm Co. 77 Ga. 216, it was held that it was proper to refuse an injunction on interlocutory application where the fact of the infringement was uncertain and it's granting might result in mere injury to the defendant than it's refusal would to the plaintiff. Labels and trade marks being of essentially the same character practically the same law applies.

Partnership. One of the frequent causes for the application for an interlocutory order is in the dissolution of a partnership, by some of the members and the appointment of a receiver is desired. Upon the dissolution of a partnership as a rule it will be an imperative necessity that none of the partners shall take an active part in winding up the affairs of the firm and hence on application of the receiver an injunction should be granted pending a settlement of the partnership business. Also in the application for an injunction an receiver by one of the partners it must appear that the conduct on which the application was based would be such as would warrant a dissolution of the partnership. Smith v. Jeyes & Beav 50%, otherwise no receiver would be appointed and the injunction would be dissolved upon motion of the other party.

Affecting Husband And Wife. As affecting husband and wife an interlocutory injunction is often granted, most
particularly in divorce proceedings, the theory being that that while the divorce action is pending he might sell or encumber his property and thereby defeat alimony in case alimony was decreed against him. In cases where abandonment or failure to support is threatened, a wife may upon sufficient showing be allowed the interlocutory relief? but in case the husband brings in an answer denying the whole equities of the bill such injunction would be dissolved. Anshultz V. Anshultz. I C. E. Green 162.

Dissolution.

As a general rule in the granting of the interlocutory injunction, so in its dissolution the court has the privilege of exercising a sound discretion and may dissolve the injunction at any time or continue it up until a final hearing on the merits, in case such action best subserves the interests of all parties concerned. Fumiston V. Decamp 2 C. E. Green 309. In case an answer comes in in which the whole equities of the bill are denied the court will as a rule dissolve the injunction. Also if the bill is demurrable; and the demurrer is sustained this will operate as an effective ground for the dissolution of the injunction. However a motion the objection of which is to dissolve an injunction will not be entertained while a general demurrer to the bill is pending inasmuch as the reasons on which the motion is based must necessarily be the same as those of the demurrer. Ransom V. Shuler 8 Ired. Eq. 304.
In case there has been irregularities or the complainant has been guilty of latches in prosecuting his suit a dissolution may be allowed before the coming in of the answer. Depuyester v. Graves 2 John. Ch. 29. It may also be said that where, on its face, the bill is lacking in equity to sustain the injunction or where it was granted contrary to the provisions of some statute, the defendant is entitled to summary relief. Marlatt v. Perrine 2 C. E. Green 49.

Dissolution Upon Answer. An interlocutory injunction will be dissolved upon the coming in of the answer provided the answer denies the whole equities of the bill.

But they should be denied in the answer with the same clearness and certainty that they are charged in the bill.

Where an injunction is so vague and indefinite in its terms as not to state clearly to the defendants the subject matter in regard to which they are enjoined or where good faith has not been exercised in the statement of the facts, and it is apparent to the court that the injunction would not have been granted upon a full statement of the facts, such bad faith will be a sufficient ground for dissolution.

Dissolution at a hearing on the merits. In many instances, where the injunction is only granted pending an action and the interlocutory relief is only ancillary to the main relief sought, if the action at law fails
to establish the right to the final relief, the dismissal of the bill operates as and for a dissolution of the injunction. In other words if the plaintiff is beaten in his action at law the injunction falls there being nothing to support it. Sometimes an order is granted striking the cause from the calendar, even without any final hearing on the merits. When this is done, and the complainant makes no effort to have it placed upon the records, it operates as a virtual dissolution of the injunction Gold V. Johnson 59 Ill. 62., and hence, though not technically dissolving the injunction, it operates as a virtual dissolution of the injunction by removing the cause from the calendar and disposing of the pleadings on which the application is based.

M. J. M. Namara