

1895

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THE GROWTH OF THE EQUITABLE REMEDY
OF INJUNCTION.

A THESIS

Presented for the degree of Bachelor
of Laws

by

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June 1895.

The equitable remedy of Injunction bears such a marked resemblance to certain forms of the interdicts, which were granted by the Praetors under the Roman Law, that it has been said by some authors to have had its origin in the Roman Law. "Interdicts were certain forms of words by which the praetor either commanded or prohibited something to be done; and they were chiefly used in controversies respecting possession or quasi possession." (a) The form of the interdict was usually: "I forbid you to use violence, you must produce, you must restore." -- "Vim fieri veto, exhibeas, restituas." The writ was therefore used in three distinct forms or senses, - prohibitory, restitutory and exhibitory. The prohibitory form was the one which it is said resembles most clearly the injunction which is in use in courts of equity to day. As may be seen from the definition of interdicts given above, its office was, like the injunction, either to restrain the undue exercise of some private right, to prevent the doing of threatened wrongs, or to secure the enjoyment of property rights.

Probably, more correctly, however, the injunction

(a) Sandars' Inst. of Justin.. Lib. 4, Tit. 15, Intro.

may be said to have had its origin with the origin and establishment of the Court of Chancery in England.. The Court of Chancery has been said to have its origin,- and, in all probability it did,- in the decree of Edward III. After the creation of the courts of Common Law, there was still left in the King a reserve power to hear petitions of his subjects, when, because of the restricted jurisdiction and intricate and set forms of procedure in those courts, they were unable to obtain relief.. Whenever a person was unable to obtain relief in the Courts of Common Law he was at liberty to appeal to the King.. These were termed matters of grace. Appeals of this sort becoming so numerous during the reign of Edward III, an order was made by the King referring all these matters to the Chancellor, who was one of the officers of the Select Council of the King, and who was called "Keeper of the King's Conscience".. During the reign of Richard II a statute was passed, which had in view the regulating of the business of the Court. During the reign of Edward IV, however, the jurisdiction of the Court became firmly established.

The injunction has been called by one author, the

"strong arm" of the Courts of Equity.. (a) In the words of the same author it is a "writ framed according to the circumstances of the case, commanding an act which the court regards essential to justice, or restraining an act, which it esteems contrary to equity and good conscience.." Without the injunction, courts of equity would be without one of its strongest and most effectual remedies, without the means of enforcing its judgments. The definition given in Bacon's abridgement is : "An injunction is a prohibitory writ, restraining a person from committing or doing a thing which appears to be against equity and conscience."

Probably the first instance in which an injunction was issued was during the reign of Henry I, when one was issued in the following form: "Rex Anglorum Haimoni Dapifero et Haegoni de Back, salutem. Prohibeo ne piscatores pescant in Tamesia, ante piscaturam de Rovecestra De Ninvera, et si ulterius inveniuntur piscantes, sunt mihi forisfacti." (b)

The granting of injunction by courts of equity, for many years, however, met with the most bitter opposition on the part of judges of the courts of Common Law.. During the

(a) Spelling on Extraordinary Relief

(b) Spence's Equity Jurisprudence p. 108

reigns of Richard II., Henry IV., Henry V., and Henry VI., petitions were presented to the King, by the House of Commons, complaining that Courts of Chancery were encroaching on the jurisdiction of Courts of Common Law by the granting of subpoenas and injunctions. This opposition was felt particularly during the reign of James I., during the pendency of the famous "Earl of Oxford's Case", reported in White & Tudor's Leading Cases in Equity at page 643, when, upon the granting of an injunction by Lord Chancellor Ellesmere restraining an action which was being tried before Lord Chief Justice Coke, a bitter contest arose between these two learned jurists. The matter being at last referred to the King, he, upon the advice of counsel decided in favor of Chancellor Ellesmere, sustaining the jurisdiction of courts of chancery to grant injunctions in such cases.

During the reign of Henry VIII., articles of impeachment were preferred against Cardinal Wolsey for judicial corruption and alleged misconduct in his office of Chancellor. Among the articles were the following:

"21st. Also the said Lord Cardinal hath granted many
 "Injunctions by Writ, and the parties never called there-

"unto , nor Bill put against them; and by reason thereof,
 "divers of your Subjects have been put from their lawful
 "possession of their lands and tenements. And by such
 "means he hath brought the more party of the suitors of
 "this your Realm before himself, whereby he and divers of
 "his servants have gotten much riches and your subjects
 "suffered great wrongs.

"28th. Also when matters have been near at Judgment
 "by Process at your Common law, the same Lord Cardinal
 "hath not only sent Injunctions to the parties but also
 "sent for your Judges, and expressly by threats, command-
 "ing them to defer the judgment, to the evident subversion
 "of your Laws, if the Judges would so have ceased."

Courts of equity having become firmly established
 the remedy of injunction was applied by such courts, - not
 without great opposition, at first, on the part of judges of
 the Courts of Common Law, - in all cases where, in equity and
 good conscience the parties were entitled to such relief,
 and where the Courts of Common Law were unable to grant adep-
 quate relief, subject, of course, to certain rules of Court,

some of which will be dwelt on more at length later.

When Courts of Equity existed as separate Courts in the State of New York, the granting of injunctions was governed by certain prescribed rules of court. Rule 30 of the Chancery Court Rules provided for the appointment of a Master in Chancery in each circuit. As, later on, under the Code practice, it was held in *Hovey v. McCrea* (a) that the complaint must contain a demand for an injunction, so, under the separate equity practice, it was held in *Walker v. Devereux* (b), that, to authorize the granting of a preliminary injunction, there should be a formal prayer for such process in the Bill. Rule 34 provided certain cases in which injunctions should not be granted by Masters in Chancery, such as injunctions "to suspend the general and ordinary business of any bank or other monied corporation, or of any banking association" &c., &c. This rule also provided for the requiring of security from the plaintiff. Rule 32 gives Masters in Chancery discretion to direct an order to show cause to be served on defendant before granting an injunction. Rule 33 required that complainant in action to restrain suit

(a) 4How.311

(b) 4 Paige Rep.229

at law should state in his bill the situation of such suit
&c., &c. Rule 34 provided means by which defendant could
move to set injunction aside.

The jurisdiction of Courts of Equity to grant injunctions was also formerly in the State of New York regulated by Statute. It was provided that, upon filing of the Bill the process would issue in six cases: 1. To restrain judgment creditors from disposing of their property. 2. To restrain usurpation of corporate powers. 3. To restrain alienation of property by corporations. 4. To restrain insolvent corporations. 5. Against banking corporations under the Act of 1829, and 6. To stay proceedings at law. (a)

It has been held that under Section 602 of the New York Code of Civil Procedure, writs of injunction were specifically abolished. Section 603 provides: "Where it appears from the complaint, that the plaintiff demands, and is entitled to a judgment against the defendant, restraining the commission or continuance of an act, the commission or continuance of which, during the pendency of the action, would produce injury to the plaintiff, an injunction order may be

(a) Eden on Injunctions.

Granted to restrain it. The case provided for in this section, is described in this act, as a case where the right to an injunction depends upon the nature of the action."

Section 604 provides that : "In either of the following cases an injunction may also be granted in an action.

1. Where it appears, by affidavit, that the defendant, during the pendency of the action is doing, or procuring or suffering to be done, or threatens, or is about to do or to procure, or suffer to be done, an act in violation of the plaintiff's right, respecting the subject of the action, and tending to render the judgment ineffectual, an injunction order may be granted to restrain him therefrom.

2. Where it appears, by affidavit, that the defendant during the pendency of the action, threatens, or is about to remove, or to dispose of his property, with intent to defraud the plaintiff, an injunction order may be granted to restrain the removal or disposition."

Under this Section the granting of the injunction depends upon facts which are extrinsic to the cause of action. Under the first subdivision, the defendant must have done or

threatened to do some act during the pendency of the litigation, which would tend "to render the judgment ineffectual" to entitle the plaintiff to the remedy of injunction. (a)

Under the second subdivision the defendant must have removed or disposed of his property with intent to defraud the plaintiff to entitle the plaintiff to a restraining injunction. It has been held that a mere refusal by the defendant to pay a debt to the plaintiff would not be sufficient to be construed as defrauding the plaintiff, and therefore not sufficient to entitle the plaintiff to an injunction. (b)

Section 605 provides for the granting of injunctions restraining State officers. Section 606 provides that:

"Except where it is otherwise specifically prescribed by law, an injunction order may be granted by the court in which the action is brought, or by a judge thereof, or by any county judge; and where it is granted by a judge, it may be enforced as the order of the court." The subsequent Sections provide for the proof necessary to be furnished by the plaintiff before he is entitled to an injunction and at what time an injunction may be granted; when notice of application for in-

(a) Sebring v. Laut, 9 How. 346.

Hovey v. McCrea, 4 How. 31

(b) Pomeroy v. Hindmarsh, 5 How. 437

junction is required; service of injunction; requiring of plaintiff the giving of security; measure of damages and the vacating and setting aside of injunctions.

In England, the Courts of Equity have been similarly restricted and governed by Statutes in the granting of this remedy. By subdivision 70 of the Common Law Procedure Act of 1854 (17 & 18 Vict. c. 125) it is provided that: "In all cases of breach of contract or other injury, where the party injured is entitled to maintain and has brought an action, he may, in like case and manner as hereinbefore provided with respect to mandamus, claim a writ of injunction against the repetition or continuance of such breach of contract or other injury, or the committal of any breach of contract or injury of a like kind, arising out of the same contract, or relating to the same property or right; and he may also in the same action include a claim for damages or other redress." Section 81 provides: " x x x and in such action judgment may be given that the writ of injunction do or do not issue, as justice may require; and in case of disobedience, such writ of injunction may be enforced by the court when such court shall not be sitting, by a judge. "

The jurisdiction of granting injunctions thus granted to Common Law Courts, was then by the Judicature Act of 1873, vested in the High Court of Justice. Section 25, Subdivision 8 of that Act provides:

"A mandamus or an injunction may be granted or a receiver appointed by an interlocutory Order of the Court in all cases in which it shall appear to the Court to be just or convenient that such Order should be made; and any such Order may be made either unconditionally or upon such terms and conditions as the Court shall think just; and if an injunction is asked, either before, or at, or after the hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass; such injunction may be granted, if the Court shall think fit, whether the person against whom such injunction is sought is or is not in possession under any claim of title or otherwise, or (if out of possession) does or does not claim a right to do the act sought to be restrained under any colour of title; and whether the estates claimed by both or by either of the parties are legal or equitable."

All acts, therefore, which a common law court, or a court of equity only, could formerly restrain by injunction, can now be restrained by the High Court of Justice. (a)
The jurisdiction of granting injunctions thus vested in the High Court of Justice is practically unlimited, and can be exercised by any judge of the High Court in any case in which it is right or just to do so, having regard to settled legal reasons or principles. It has also be held that, by virtue of this Judicature Act, the power of the Court to grant injunctions has been enlarged.. (b)

In the United States Supreme Court, in the equity branch, the granting of injunctions is also governed by certain prescribed rules of Court. Rule 28 of the General Equity Rules provides that the prayer for relief in the Bill will be sufficient without repeating the same in the prayer for process. Rule 55 provides circumstances under which the injunction will be granted as of course. The language of the rule is: "Whenever an injunction is asked for by the Bill to stay proceedings at law, if the defendant did not enter his appearance and plead, demur or answer to the same within

(a) *Bedden v. Bedden*, 9 L. R. Ch. D. 89

(b) *Thomas v. Williams*, 14 L. R. Ch. D. 864

the time prescribed therefor by these rules, the plaintiff shall be entitled, as of course, upon motion, without notice, to such injunction. But special injunctions shall be grantable only upon due notice to the other party by the Court in term, or by the judge thereof in vacation, after a hearing, which may be ex parte, if the adverse party does not appear at the time and place ordered. In every case where an injunction, - either the common injunction or a special injunction, - is awarded in vacation, it shall, unless previously dissolved by the judge granting the same, continue until the next term of the court, or until it is dissolved by some other order of the Court?"

Section 7 of the Act of June 1, 1872, provides:

"That whenever notice is given of a motion for an injunction out of a Circuit or District Court of the United States, the court, or judge thereof, may, if there appear to be danger of irreparable injury from delay, grant an order restraining the act sought to be enjoined until the decision upon the motion. Such order may be granted with or without security, in the discretion of the court or judge; provided,

that no justice of the Supreme Court shall hear or allow any application for an injunction or restraining order except within the circuit to which he is allotted, and in such cases, at such places outside of the circuit, as the parties may in writing stipulate, except in causes where such application cannot be heard by the circuit judge of the circuit or the district judge of the district.

The jurisdiction of the Federal Courts to grant injunctions is also restricted, according to the decision in *Parker v. Winnipiscogee L. Co. & W. Co.*, (a) by Section 16 of the Judiciary Act of 1789, which provides that suits in equity shall not be sustained in either of the Courts of the United States in any case where plain, adequate, and complete remedy can be had at law. Section 718 of the Revised Statutes of the United States provides:

"Whenever notice is given of a motion for an injunction out of a circuit or district court, the court or judge thereof" &c, &c. the same as provided for in the Act of 1872, mentioned above. Section 719 provides:

"Writs of injunction may be granted by any judge" &c.

(a) 2 Black 545

etc., the same as contained in Rule 55 of the General Equity Rules, mentioned above. Section 720 provides:

"The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in case where such injunction may be authorized by any law relating to proceedings in bankruptcy."

Section 3224 provides that injunctions are not to be granted to restrain the collection of taxes..

Section 5242 provides that injunctions against national banks shall not issue from State Courts.

Section 5106 provides that a bankrupt under the United States Bankrupt Law might, by injunction, stay any proceedings brought by creditor against him to await the determination of the court in bankruptcy on the questions of the bankrupt's discharge..

In addition to these Statutes and rules of Court governing the granting of this remedy, the courts are also guided and controlled by certain set principles of equity, and certain precedents, which must be taken into consideration. Among these are the following: The injunction

cannot be employed retroactively; it is generally preventative - rarely mandatory; injury threatened must be actual and impending; it must be irreparable at law; it is not granted where grievance is available as defence at law; it is not granted for mere technical invasion or slight injury to plaintiff's rights; the right must be clear; the court has discretion to grant or refuse; it is refused where courts of justice would be retarded or defeated by granting it; it is not a remedy to prevent crime or preserve morality; it is only granted upon positive allegations; party seeking relief must not be himself at fault; party seeking relief must not be guilty of laches, etc., etc.

It would be useless for me to attempt to collect, in so small a space which is now at my command all the class of cases in which injunctions may be granted, but I shall state a few.

Probably the most important class of cases in which courts of equity will grant this relief is to stay proceeding at law. The granting of injunctions of this character dates back to the reign of Edward IV, and the assertion of this jurisdiction constituted one of the articles of impeachment

of Cardinal Wolsey, which I mentioned above. Probably the first case in which an injunction was granted for this purpose was in Michaelmas Term, Edward IV, 1483, when Lord Chancellor Rotheram granted an injunction to restrain proceedings in King's Bench after a verdict had been obtained. One of the grounds upon which equity will grant this relief is that complainant shows matters which might have defeated the action at law, had they been discovered in time to prevent the judgment. Where also, through accident, mistake, ignorance or surprise, a defendant has been prevented from defending the action at law, so that a judgment has been issued, equity will prevent its enforcement.

Equity will also grant the injunction to restrain a multiplicity of suits; as where an employe, under a contract of employment, where the wages are payable weekly, brings a separate action at the end of each week for the wages due, equity will, by an injunction compel the employe to combine all his suits in one.

Equity will also grant the injunction in aid of other equitable remedies, to render such other remedies

efficacious..

Equity may also, in proper cases,, grant an injunction to prevent violation of contracts. The jurisdiction to do this is based upon the inadequacy of damages as a legal remedy..

Equity may also grant an injunction in a suit for specific performance of a contract for the sale of real property,, restraining the defendant from disposing of the property during the pendency of the suit.

Equity may also grant to a mortgagee an injunction against a mortgagor restraining the committing of waste.

Equity may also grant an injunction to restrain nuisances, either public or private. The nuisance, however, must be established by clear and positive proof.

Equity may also grant an injunction to prevent the infringement of Letters Patent. This is very frequently resorted to,, as is also an injunction to restrain infringement of trademark and also infringement of copyright..

In the early history of chancery injunctions to quiet the possession of parties before the hearing of a suit,

were almost indiscriminately granted,, the object of them being to prevent a forcible change of possession by either party pending the litigation.

As provided for by the United States Statute, mentioned above, equity may also grant an injunction in case of bankruptcy to aid the bankrupt in procuring his discharge before the prosecution to judgment of suits by creditors. Creditors may also be prevented from using the process of the State court where its use would violate the provisions of the Bankrupt Act. (Bispham)

Equity may also interfere to prevent the disclosure of confidential letters, communications, papers and secret processes.

Equity may also, by injunction, prevent partners from doing any acts which are inconsistent with the articles of agreement between the partners.

Equity may also, by injunction, restrain acts of trespass. The leading case of this character is the case of *Hanson v. Gardiner*, 7 Vesey 305.

Many other classes of cases might be mentioned but for the lack of space. I shall merely call attention to

a class of cases which have arisen of late years, because of the advancement of civilization, and the formation of Labor Union and organizations of that character, controlling the laboring classes. These organizations have, during the past few years been instrumental in creating great disturbances and much harm, through the declaring of strikes, etc., so that there has often been a subsequent great loss of property. Courts of equity have then come to the relief of corporations, restraining these organizations from creating disturbances and interfering with the business of the corporations. Equity of late, has often been called upon to prevent, by injunction, the issuing of circulars and matters of a libellous character.

In closing, I may say, that, whenever, a set of circumstances arises, in which one party may threaten to do, or do, or cause to be done by any other party, acts which shall cause injury to other parties, for which there is no adequate remedy at law in the way of money damages, equity will interfere to prevent such action, being governed and guided by the Statutes and rules of court mentioned above, by the granting of injunctions..