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Injunction under the New York Code

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INJUNCTION UNDER THE NEW YORK CODE.

A THESIS

PRESENTED FOR THE DEGREE OF BACHELOR OF LAW

BY

E. A. BOWMAN.

C O R N E L L U N I V E R S I T Y .

S C H O O L O F L A W .

1896.

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CHAPTER I.

Elementary Principles.

Injunction may be defined as a judicial order, operating in personam, requiring a person (1) to do or (2) abstain from doing some particular act. (High, Inj. arc. I) In the first case, where the injunction, to effect the enforcement of rights, requires the carrying out of some specified act, the injunction is called a Mandatory injunction; in the second case, where, for the prevention of wrongs, some act is forbidden to be done it is called a Preventive injunction. The great body of cases in which the remedy of Injunction is granted comes under the head of Preventive injunctions, since unless the parties so contract, it is comparatively infrequent that a court can directly compel the carrying out of a particular act. (Fetter on Equity, pg 288) Thus in the case where a contract stipulates for services to be rendered by a person having special qualifications as by an eminent actor, the court cannot by injunction compel the actor to carry out his contract but can and will prevent him from acting for another person during the period covered by the contract. (49 How Pr 150) The most frequent use of the Mandatory injunction is where the abatement of a nuisance is sought, but even then it is only granted where there is no other adequate remedy by damages or otherwise. (High Inj, arc 5)

Injunctions are also classified on the basis of the duration of the time for which they are granted. Those granted in pursuance of a final judgment of the court are called Permanent injunctions, while those whose object is merely to conserve the property

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concerned until a final disposition as to the rights of the interested parties is rendered, are called Preliminary or Interlocutory Injunctions.

A statement of some of the law of that comparatively small portion of the subject of Injunctions which comes under this latter head of Preliminary injunctions as set forth in the N.Y. Code of Civil Procedure, is all that will be attempted in the present article.

CHAPTER II.

(3)

Case in which Preliminary Injunctions will lie.

Preliminary injunctions are now only granted in New York in cases prescribed in the Code, in which, however, the classes of cases to which it is extended have been considerably enlarged. (Newstadt v Joel 2 Duer 250)

The cases in which the Code allows this remedy fall into two main heads (1) Those where the right depends on the nature of the action and (2) Those where the right depends upon extrinsic facts. Section 603, in regard to the first of these classes is as follows: "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 granted to restrain it."

Thus to enable a plaintiff to obtain a preliminary injunction under this section, it is seen that the following facts must be present (1) The complaint must show (2) That plaintiff demands judgment against defendant (3) to restrain the commission of some act that would injure plaintiff (4) if carried on during the pendency of the action. Each of the elements of this section has been emphasized by judicial interpretation. Thus in regard to the sufficiency of the complaint it is stated in Hentz v L.I.R.R. 13 Barb at page 254 as follows: "It is not however competent for a plaintiff to add mater-

ially to the cause of action set forth in his complaint, by affidavit. He may for the purpose of obtaining a preliminary injunction fortify his claims, but he cannot enlarge them or prefer others." And again in 49 Hunn "It will be observed that where the application for an injunction depends on the nature of the action and is obtained under section 603, the complaint must show that the plaintiff is entitled to injunction during pendency of the action." A case bearing on the second essential was that of Hulce v Thompson, 8 How Pr 475 ; Here the plaintiff demanded judgment of a portion of the premises only (house and dooryard) and it was held that he could not have a temporary injunction restraining trespasses by the defendant, upon the remainder of the farm which plaintiff claimed to be in his possession, and as to which no relief or judgment was prayed except such temporary relief, i.e. preliminary injunction.

And the third and fourth essentials have been noticed in II ABB N. C. 386 "Where a temporary injunction is of the same nature as that sought by the final judgment, it should not be granted unless some immediate and irreparable injury is probable, which can not be remedied by a final judgment." Many other cases might be cited but it is believed that the preceding are sufficient to show the general scope and force of this section.

But even after this analysis of the section and a reading of the judicial opinions that have been rendered in regard to the provisions therein contained, we are still, without additional light, unable to state in just what actions a preliminary injunction will

be granted. It is seen that this section covers those cases in which a permanent injunction is the remedy which, if any, will be granted by the final judgment. We must therefore turn our attention to the general law of injunction to find in what cases a final injunction may be granted. This is admirably stated by Fetter on Equity at page 289 where he says "To warrant the issuance of an injunction, complainant must show (a) That he has no plain, adequate, and complete remedy at law (b) That an irreparable injury will result unless the relief is granted. These conditions being present, the remedy may be used (1) To restrain proceedings at law (2) To restrain breaches of contract (3) To restrain the commission of tort (4) To restrain a breach of duty and violation of equity rights." This is of course a very general classification but to enumerate the special cases under these broad headings would require a thesis in itself and is of course necessarily beyond the scope of the present paper.

The second class of cases in which, under the Code, a preliminary injunction may be granted is where the right depends, not upon the nature of the action but upon extrinsic facts. Section 604 reads "In either of the following cases, an injunction order may 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, an act in violation of the plaintiffs rights 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 from affidavit that ~~the~~ deft, 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. These sections need but little explanation. "Subject of the action" is said in 6 IN. Y. at page 233 to mean "the things, money, lands, chattels, or the like, in relation to which the suit is essential, or the rights which it is sought to be enforced." In 6 How 341 emphasis is laid on the fact that the act to be enjoined must be an impending future act and not one already done. The court says. "But it is only when the act is threatened, or about to be done, and not when it has been done, that the court is authorized to interfere during the pendency of the action. The remedy is preventive merely." "During the pendency of the action" is a term which the courts have taken especial pains to define. Thus in People ex rel Kaufman, 136 N. Y. at page 263 the following somewhat lengthy explanation is found. "In both section 603 and in Section 604 the phrase "during the pendency of the action" relates to the time when ~~the~~ injunction order may be granted, and in order to judicially satisfy the judge that the defendant threatened to do some act during the pendency of the action that will impair or defeat the plaintiff's remedy, it is not necessary to show that the action has actually been commenced, it is enough, if it appears that there is a cause of action, which the plaintiff is about to prosecute, and that defendant threatens to do an act which will render the judgment ineffectual, to confer jurisdiction upon the judge to grant the injunction which however will

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not become operative unless served with or after the summons."

CHAPTER III

PRACTISE.

A. The Application for an Injunction.

(1) When application may be made.

(2) On what papers.

(3) To whom plaintiff must apply.

B. The Service of the Order.

C. The Security to be given.

(1) Effect if no security is given.

D. The Denial or Vacation of an Injunction.

The Application, when it may be made: "The order may be granted to accompany the summons, or at any time after the commencement of the action and before final judgment." (Sec. 608). It is thus one of the few cases in which a court has power to do a judicial act before acquiring jurisdiction over the party, but such jurisdiction must be acquired either before or at the time of the service of the order. So in *Liffingwell v Chave*, 5 Bosw. 703, it is held that though the order may be granted before service of the summons, it will become operative only when the action is begun. The last phrase of the section, i.e. "Before final judgment" has been interpreted in *Spears v Matthews* 65 N.Y. 127 where it is emphatically stated that the court has no power to grant or revive, or continue a tempor

injunction after judgment in the action.

On what papers Injunction may be granted: If the injunction order is sought to be obtained under section 603, where the right depends on the nature of the action, a complaint is necessary. This, if verified upon knowledge and not upon information and belief is considered as an affidavit (sec. 3343, subdiv. I). Sec. 607, "The order may be granted, where it appears to the court or judge, by the affidavit of the plaintiff, or any other person, that sufficient grounds exist therefor." If the application is made under sec. 604, the case where the right to the relief depends on extrinsic facts, no complaint need be drawn. The reason for demanding a complaint in the former case is probably based on the ground that if the injunction depends on the special relief sought in the action, it should be made to so appear to the court, and that can best be done by means of a complaint showing why the action is brought. Any additional affidavits can only be used, in connection with the complaint, to substantiate facts alleged therein, and not as a means of bringing new facts before the court. (Stull v Westfall, 25 Hun I).

To whom plaintiff must apply: An injunction may be granted by the court in which the action is pending, by any judge of that court, or by a county judge in actions in the Supreme Court. There is however one exception to this rule, i.e. the restraining

of a State Board, or Officer, or persons employed by them in the execution of a duty imposed by statute. In such cases the order can only be granted by the Supreme Court, sitting in the department in which the officer or board is located, or wherein the duty is required to be performed. (Sec. 605-6).

The Service of the Order: It is important that service be made strictly in accordance with statutory requirements, and the manner of service differs according to whether the order is made by the court or a judge. If the order is issued by a court, a certified copy thereof must be served on the party enjoined. If it is a judges order, service is made by exhibiting the original order to the party restrained, and delivering to him personally a copy thereof. Service upon a corporation is made in the same manner as the ordinary personal service of a summons. In all cases copies of the papers on which the order is made should be also served. If made under section 603 a copy of the summons, complaint, undertaking, affidavit, and the injunction order should be served. If made under section 604, as it is not thereunder necessary to draw a complaint until later, unless it is already drawn it need not be served until it is prepared. The effect of an irregular service has been variously determined, but the better rule seems to be that a party enjoined is not justified in ignoring an injunction irregularly served. The following cases hold it unsafe to pay no attention to such an order

so served, 1 Duer 451. 23 Howard 1. 14 Civ.Pro.71.

The security to be given: Section 690 describes the character of the security that, in ordinary cases, must be given. The security must be executed by the party, or by one or more sureties, as the court or judge may direct, and it is to the effect that the plaintiff will pay to the party enjoined such damages not exceeding the sum specified in the undertaking as he may sustain by reason of the injunction, if it is finally decided that the plaintiff was not entitled thereto. The exceptional cases sections 61119' include all those where an injunction is sought to restrain or suspend legal proceedings. An interesting question arises in this connection as to the effect of an injunction granted without security. In 2 Hun 373 it is held that the defendant may move to vacate an order thus granted upon which the court will generally permit the plaintiff to remedy the defect by filing an undertaking, but that a defect of this kind does not, in itself make the order a nullity. If no security is given and no objection made, and on trial the injunction is dissolved, the defendant has no redress for injuries in the meanwhile, unless the prosecution was malicious. Therefore if the plaintiff bring an action for an injunction, and it is decided that he is not entitled to it, if no security was given the plaintiff can only recover the costs. Hence good security is always desirable.

The Denial or Vacating of an Injunction: This subject is treated in sections 626-7 of the Code, section 626 explaining when an injunction may be vacated or modified without notice being given and 627 giving the case in which notice is required. If the injunction order was made ex parte, as it may be when granted before answer a motion to vacate or modify may also be made without notice. In such cases, application must be made to the same judge or court granting the order, and upon the same papers. Therefore, such modification or vacation is confined to some defect in the original papers on which the order was based.

CHAPTER III.

A SET OF INJUNCTION PAPERS.

SUMMONS

COMPLAINT.

AFFIDAVIT.

UNDERTAKING.

ORDER.

SUPREME COURT : TOMPKINS COUNTY .

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JOHN DOE

v s

RICHARD ROE and the BOARD OF
SUPERVISORS OF TOMPKINS COUNTY.

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TO THE ABOVE NAMED DEFENDANTS: ,

You are hereby summoned to answer
the complaint in this action, and to serve a copy of your answer on
the plaintiffs attorney within twenty days after the service of
this summons, exclusive of the day of service; and in case of your
failure to appear or answer, judgment will be taken against you by
default for the relief demanded in the complaint.

Trial desired in Tompkins County.

B.O.Mann,

Plaintiffs Attorney,

Office and P.O. Address,

I State St., Ithaca, N .Y.

Dated the I day

of May, 1895.

SUPREME COURT: TOMPKINS COUNTY .

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JOHN DOE

vs

RICHARD ROE and the BOARD OF SUPERVISORS OF

TOMPKINS COUNTY,

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The complaint of this plaintiff respectfully shows to this court that he is a resident and taxpayer of the town of Ithaca county of Tompkins, and State of New York, and that he has now and has had for several years prior to the commencement of this action a large amount of real estate situate in said town, which is liable to be assessed for town, county, and state purposes.

That the defendant, Roe, is also a resident of said town of Ithaca, and have been for some time prior to the commencement of this action.

That heretofore and since the passage of chapter 664 of the laws of 1892, the said defendant, Roe formulated a plan to procure the signatures of a majority of the taxpayers of the said town of Ithaca, representing more than one half of the taxable property of said town, as provided for in said act, to a certain petition to be presented to the defendant, the Board of Supervisors of the County of Tompkins, praying said Board to levy a tax upon the said town of Ithaca for the purposes specified in said act; and with that end in view, said defendant, Roe, has within the last year circulated among

the taxpayers of said town, a petition, asking the Board of Supervisors to levy a tax upon said town of Ithaca, for the purposes mentioned in said act, namely, to enable said town to refund the money expenses in furnishing substitutes or in commutation, by the men who were drafted into the military service of the United States, and held to service in the several drafts under the conscription act of the United States, entitled "An act for the enrolling and calling out the National forces, and for other purposes", approved March 3, 1893, and the acts amendatory thereto, while the option of commutation by the payment of three hundred dollars remained, and for the relief of the men who entered the service under said drafts.

This plaintiff further alleges that said defendant, Roe, in order to procure the signature of this plaintiff to said petition, stated to this plaintiff that the State had made an appropriation for the payment of the drafted men, and that it was under a State law: that this plaintiff would not feel it in his taxes: that it was just getting their share of the State funds and that in order for them so to get it, they must get the signors to a petition to the Board of Supervisors, which was the sole object of such petition.

That such statement as as plaintiff is informed and believes, false and untrue, is that said petition was in fact for the purpose of authorizing the said Board of Supervisors to levy a tax upon the said town of Ithaca for the sum of thirty thousand

dollars and upwards ,and that there is no State fund out of which it could be paid;and that it would make a difference in this plaintiffs taxes,and would compel him to pay upon his property in the town of Ithaca which is taxable,at least the sum o \$1000.:that the\$ was not merely a state matter but was in compliance with a state law which existed at that time,and of which this plaintiff was ignorant;and that no appropriation had been made to pay the amount sought to be recovered by this petition.

The plaintiff further alleges that this defendant Roe,in order to procure the signatures of other taxpayers of the said town,have falsely stated to divers taxpayers in said town that in case the prayer of said petition were granted,it would involve the expenditure of a small amount of money,not to exceed the sum of five thousand dollars;and that it was not a matter of any expenditure on said to nor said county,but was a means to procure from the general government the money which rightfully belonged to those who wre entitled to the relief under the said act,and that it was a charge upon the general government.

Plaintiff further alleges that since the discovery of the fraud practised upon him in procuring his signature upon said petition as aforesaid,he has made diligent inquiry in regard to the matter in whose hands the said petition now is and believes that the defendant,Roe,is in possession of the same.

That since the discovery of the said fraud,plaintiff has caused a demand to be made upon the said Roe that he erase the

name of this plaintiff from said petition, and that the said defendant deliver up said petition unto this plaintiff, and that said defendant should not deliver same to the defendant, the Board of Supervisors of Tompkins County for its consideration. All of which said defendants declined to do.

This plaintiff further alleges that he has endeavored to ascertain the exact number of names and the amount of taxable property which now appear upon the said petition, but that he is unable to do so, said Roe declining to admit said petition to be inspected; that said defendant, Roe, claims that he has enough or nearly enough names and taxable property to meet the requirements of the said act.

WHEREFORE, this plaintiff demands judgment against these defendants;

(1) That said defendant, Roe, be enjoined and restrained by an order of this court from delivering said petition so signed as aforesaid, to the defendant, the Board of Supervisors of Tompkins County, or to any other person whatsoever.

(2) That the defendant, the Board of Supervisors, be enjoined and restrained by an order of this court from levying any tax upon the said town of Ithaca for the relief prayed for in said petition circulated by the defendant, Roe, and which is in their hands.

(3) That said names to said petition be decreed to have been obtained upon false representations and that said petition be

decreed to be null and void as a petition under Chapter 664 of the law of 1892.

(4) That the plaintiff have such other and further relief or both as shall be just and proper, besides his costs and disbursements herein.

B.O.Mann, Plaintiff's Attorney,

Office and P.O. Address # 1 State St. New York, N.Y.

State of New York

Tompkins County .^{ss.}

John Doe, being duly sworn, says he is the plaintiff in the foregoing action named; that he has heard the foregoing complaint read, and knows the contents thereof, and the same is true of his own knowledge, except as to those matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

John Doe.

Sworn before me this

i day of May, 1895.

A Blank, Notary Public.

SUPREME COURT :TOMPKINS COUNTY .

#####

JOHN DOE

vs

RICHARD ROE ET AL.

#####

TOMPKINS COUNTY:ss

A.Simple,being duly sworn,Says that he is a resident and taxpayer of the town of Ithaca in said County,and that he has been for some years;that some time ago this defendand,Roe, came to this deponent and asked him to sign a certain petition which is described in the complaint herein;that deponent signed same,believing that the tax which would be levied for the purposes therein set forth would be a State tax;that said Roe stated to deponent that the tax which would result from this levy would increase the rate of each person only a fraction of one per cent .

That deponent now understands and believes that if the prayer of this petition is granted there will be levied upon this town a large tax,and this deponent states that he would not have signed said petition if he had known the facts in the case as he does now.

A.Simple.

Sworn before methis 2 day
of May,1895.

A.Blank,Notary Public

SUPREME COURT: TOMPKINS COUNTY.

#####

JOHN DOE

vs

RICHARD ROE ET AL.

#####

WHEREAS the above named plaintiff is about to apply for an injunction order restraining this defendand Roe from delivering a certain petition, described in the complaint herein, a copy of which is hereby annexed, to the Board of Supervisors of Tompkins County or to any person or persons whate~~x~~er, restraining this defendant from levying a tax upon the town of Ithaca in said County, for the purposes mentioned and described in said petition, and which said tax is provided for in c~~h~~apter 664 of the laws of 1892 of this State, as set forth in the said petition;

NOW, THEREFORE, WE, Z.X., residing in Ithaca, said county, groo-
er, and C.V., residing in the same place, baker, do hereby jointly and severly undertake, pursuant to the statute, that the plaintiff will pay this defendant, such damages, not exceeding the sum of fivehun-
dred dollars, as they may sustain by reason of said injunction, if the court finally decides that the plaintiff was not entitled there
to.

Dated May 5, 1895.

Z.X. L.S.

C.V. L.S.

State of New York.

ss.

Tompkins County.

On this 5 day of May 1895, personally before me the subscriber, came Z.X. and C.V. to me personally known to be the same individuals who subscribed and are mentioned in the foregoing instrument; and they severally duly acknowledged the execution thereof.

Q.W., Justice of the Peace.

State of New York

ss.

Tompkins County.

Z.X. and C.V., surities in the foregoing bond, being each severally and individually sworn each for himself says, that he is a resident and freeholder within the State, and is worth the sum of five hundred dollars, over and above all debts and liabilities which he owes or has incurred, and exclusive of all property exempt by law from levy and sale under an execution.

Sworn and subscribed to me

Z.X.

this 5 day of May, 1895.

Q.W., Justice of the Peace.

I hereby approve the foregoing bond as to its form and manner of execution and of the surities herein contained.

F.G., Justice.

Dated May 7, 1895.

SUPREME COURT:TOMPKINS COUNTY.

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JOHN DOE

vs

RICHARD ROE and the BOARD OF
SUPERVISORS OF TOMPKINS COUNTY

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It appearing from the complaint herein,duly verified and from the affidavit of A.Simple,duly verified and dated May 2,1895 that the plaintiffs demand and are entitled to judgment against the defendant Roe,restricting him from delivering a certain petition,mentioned and described in the complaint herein,to the Board of Supervisors of the said county,or to any other person or persons whatsoever,and that the defendant,the Board of Supervisors be enjoined and restrained from proceeding to levy a tax as provided for in chapter 664 of the laws of 1892,and that the commission of such act,during the pendency of this action would produce great and material injury to this plaintiff,and the said plaintiff having given the undertaking provided for by law;

I do hereby order the said defendant,Roe and his agent, attorneys,and all others acting in aid or assistance of him,and each and every of them,be and they are hereby restrained,prohibited and enjoined,under the penalties prescribed by law,from delivering to this defendant or to any person or persons whomsoever,the said

petition, which is mentioned and described in the complaint, hereto annexed.

I do further order that this defendant, the Board of Supervisors of Tompkins County be enjoined prohibited and restrained from levying any tax upon the said town of Ithaca for the relief prayed for in the petition hereintofore mentioned, until this court shall have made further order or direction in the premises.

F.G., Justice

Dated at Chambers, on the 5
day of June, 1895.