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# Temporary Restraining Orders

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## TEMPORARY RESTRAINING ORDERS

There exists in Kentucky a procedural device which deserves critical analysis due to the injustice which it makes possible. The matter in question is Kentucky's brand of temporary restraining order;[1] the possibilities of injustice are numerous.

Kentucky has a very loose procedure for the issuance of temporary restraining orders. The code provides that "If it appear from the petition that the plaintiff is entitled to the relief demanded, a temporary injunction may be granted to restrain ..."[2] any act normally susceptible to the jurisdiction of equity. There is no requirement of notice to the adverse party if the court is "... satisfied by the facts set forth in the affidavit of the applicant, or by other evidence, that irreparable injury will result to the applicant from the delay of giving notice ..."[3] Two potential possibilities of oppression available to harass unfortunate parties by the weight of an injunction are thus apparent. The first: one may find himself subjected to injunctive restraint, the application for which he was completely without knowledge. The second: the code provides no guaranty of truth in the search for facts upon which to base such a temporary restraining order.

*Ex parte* proceedings are a form of procedure which have never been favored by the law. No legal principle could be more fundamental than that every litigant should receive notice that an action is pending against him and have opportunity to make an appearance prior to his subjection to a judgment of law or equity. Pursuant to the rule of the Kentucky Code, the applicant for a temporary restraining order may dispense with any requirement of notice by satisfying the judge that he will suffer irreparable injury by the delay necessitated by the giving of notice. The applicant may show this "by evidence"[4] not even being compelled to produce it in affidavit form. Presumedly, the "evidence" sufficient to establish the point could be the bare statement or complaint of the applicant himself. The establishment of jurisdictional grounds, a prerequisite to any action of equity also receives cursory treatment in the procedure. In order to accomplish this, it need only" ... appear from the petition that the

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[1] "... Injunctive writs are of three general classes: first, the temporary restraining order or injunction *ad interim*, which in the ordinary course issues *ex parte*, without notice or hearing; second, the temporary injunction or injunction *pendente lite*, issuing after notice and opportunity to be heard; third, the permanent injunction, based on a full hearing and enforcing the final decision on the merits." FRANKFURTER AND GREENE, THE LABOR INJUNCTION 53 (1930); MC CRACKEN, STRIKE INJUNCTIONS IN THE NEW SOUTH 7 (1931).

[2] KY. CODE C|V. PROC. ANN. sec. 272 (Carroll's 1948).

[3] *Id.* at 276.

[4] *Ibid.*

plaintiff is entitled to the relief demanded .,"[5] and from affidavits or other evidence that he is about to suffer irreparable injury.[6] There is no requirement for any sort of hearing; the entire procedure can be transacted on paper. The life of an order thus granted is a variable which cannot exceed twenty days.[7]

The legal principle behind any sort of injunctive relief without notice is the belief that equity, the gloss of the law, should afford relief to one who is faced with immediate irreparable injury when subsequent damages would not compensate for the injury sustained. That there is merit in the tenet cannot be denied. It, however, as is the case throughout the field of jurisprudence, has its confines beyond which it becomes generosity to the plaintiff, rather than redress, and oppression to the defendant, rather than impartial adjudication. The balance is tripped in the name of speed. When one comes to equity in quest of injunctive relief equipped with allegations that he about to suffer great harm for which an action for damages will not adequately compensate, and that even a normal injunction on the merits of the cause will be too late to save him from his doom, it is the natural impulse for everyone to agree that he should have it. Speed, the master of modern society, refuses to be ignored by the courts. Sober reflection reveals, however, that speed in numerous instances is not worth the toll it exacts from accuracy This truism is axiomatic in the field of adjudication.[8]

The injustices engineered by the accessibility of immediate restraining orders against defendants not present, indeed, even without notice, are numerous. Kentucky, fortunately, has not been plagued by evils brought on by abuse of the injunctive powers of the courts. Other jurisdictions have not been receptive of such good fortune.[9]

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*Ibid.*

*Supra*, Note 2.

The Kentucky Code provides; "The restraining order, if made by the court, or any circuit or other judge of similar jurisdiction, shall set forth a reasonable place and time, not to exceed ten days from the day upon which the order is made, at which the applicant shall move the court or judge to grant the injunction; and the order shall remain in force until the motion is heard and determined, but not for a greater length of time than ten days after the day fixed in the order for hearing the application." KY. CODE CIV. PROC. ANN. sec. 273 (Carroll's 1948).

In Hopkins v. Oxley Stone Co., 83 Fed. 912, 925, Caldwell, J., in a dissenting opinion, referring to an argument on behalf of the injunction as a means of administering the criminal law, used language which is applicable to the argument for speed in the issuance of temporary restraining orders; "Those who justify or excuse mob law do it on the ground that administration of criminal justice in the courts is slow and expensive and the results sometimes unsatisfactory." See also note, 41 HARV. L. REV. 909 (1928).

"Defects in court procedure seldom find a place in a President's message to Congress upon 'the state of the Union. But the abuses we have here described were flagrant enough for such attention. In a message to Congress in, 1909, President Taft proposed – a statute forbidding hereafter the issuing of any injunction

These are chiefly the industrial states where agitation for the reform of the injunction has, for the most part, risen out of injunction cases involving organized labor.

To the organized worker, the injunction constitutes the principal barrier to any right connected with union activities that he may possess. The effect of judicial interference with a strike, from the point of view of the laborer, is well illustrated by the quotation from testimony given by a striker before the United States Strike Commission and quoted by the court in *In Re Debs:*

> "As soon as the employes found that we were arrested, and taken from the scene of action, they became demoralized, and that ended the strike. It was not the soldiers that ended the strike. It was not the old brotherhoods that ended the strike. It was simply the United States courts that ended the strike. Our men were in a position that never would have been shaken, under any circumstance, if we had been permitted to remain upon the field among them. Once we were taken from the scene of action, and restrained from sending telegrams or issuing orders or answering questions, then the minions of the corporations would be put to work. Our headquarters were temporarily demoralized and abandoned, and we could not answer any messages. The men went back to work, and the ranks were broken and the strike was broken up, not by the army, and not by any other power, but simply and solely by the action of the United States courts in restraining us from discharging our duties as officers and representatives of our employes."[10]

There can be no doubt that an injunction can destroy a strike, and its force can as well be the downfall of a boycott carried on in the spirit of the law as one accompanied by illegal acts. The pressing issues of the substantive law of injunction are beyond the scope of this paper, but it is believed that there is justifiable quarrel, especially on the part of organized labor, with the speed with which temporary restraining orders often issue and with the flimsy evidence upon which the writ is often based.

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or restraining order, whether temporary or permanent, by an Federal court, without previous notice and a reasonable opportunity to be heard on behalf of the parties to be enjoined; unless it shall appear to the satisfaction of the court that the delay necessary to give such notice and hearing would result in irreparable injury to the complainant and unless also the court shall from the evidence make a written finding, which shall be spread upon the court minutes, that immediate and irreparable injury is likely to ensue to the complainant, and shall define the injury, state why it is irreparable, and shall also endorse on the order issued the date and the hour of the issuance of the order. Moreover, every such injunction or restraining order issued without previous notice or opportunity by the defendant to be heard should by force of the statute expire and be of no effect after seven days from the issuance thereof unless within such seven days or such less period, the injunction or order is extended or renewed after previous notice and opportunity to be heard. " FRANKFURTER AND GREENE, THE LABOR INJUNCTION 65 (1930).

[10] 158 U.S. 564, 597 (1910).

The issuance of any injunction depends upon questions of fact, the accepted mode of proof being the affidavit. It has been pointed out that the Kentucky Code provides not even this minimum of truth assurance.[11] In labor cases particularly, counsel who prepare the affidavits and the affiants themselves are so engrossed in the struggle and so anxious to present their side of the case in as favorable a light as possible that their finished product is such a highly colored, exaggerated statement as to be "an incantation, and not a rational solicitation for judgment."[12] The erroneous issuance of a restraining order, to which such affidavits are highly conducive, may be drastic, indeed disastrous, in labor cases.[13] The writ is, in most instances, sufficient to break a strike, and the usual code provision[14] requiring bond prior to the exercise of the device is in most cases far from compensatory to a labor organization for the loss incurred, resulting from the effects of an injunction on a strike.[15] A hearing on the merits or an appeal from the issuance of a temporary restraining order involves time. Days are precious in an industrial conflict; the lapse of time leading to a hearing on the merits may well be all that is needed by an employer to break a strike.[16] It is apparent that when a labor organization is restrained by a temporary restraining order of which it had no notice, the injunction is very likely to be based on erroneous findings of fact (since only one party has appeared before the court), and that there is no remedy available to the organization to extract itself from the inequities of the position in which it has been placed. It seems, therefore, that there are legitimate objections to any exercise of injunctive powers without notice and opportunity to defend on the part of the enjoined party He should have notice for the purpose of furnishing the court with an adverse litigant, a *sine qua non* for establishing true issue of fact. Moreover, situations where there is justification for waiver of requirement of notice are difficult of conception. One comes to equity complaining of irreparable injury which necessarily must be injury inflicted by human hands in labor disputes. Why cannot notice be served on the identical person who is to be enjoined? It is sub-

[11] *Supra* note 2.

[12] "The most serious complaint that can be made against injunctions, which have become so prominent a part of the law in dealing with strikes in the United States, is the fact that courts have become accustomed to decide the most important questions of fact, often involving the citizen's liberty upon this wholly untrustworthy class of proof." Great Northern Ry. Co. v. Brosseau, 286 Fed. 414, 416 (1923).

[13] *Supra* note 10.

[14] The Kentucky Code has the normal provision for the posting of bond by an applicant for a temporary restraining order. KY. CODE CIV. PROC. ANN. sec. 276 (Carroll's 1948).

[15] See FREY, THE LABOR INJUNCTION 85 (1922).

[16] FRANKFURTER AND GREENE, THE LABOR INJUNCTION 53 et. seq. (1930).

mitted that there is no valid answer to this question short of provisions for notice.

The Federal Rules of Civil Procedure are substantially more specific in their requirements for the issuance of restraining orders. Rule 65 (a) provides that "No preliminary injunction shall be issued without notice to the adverse party." Notice is also the key word in 65 (b) which is concerned with temporary restraining orders. The provision is that:

> "No temporary restraining order shall be granted without notice to the adverse party unless it clearly appears from specific facts shown by affidavit or by verified complaint that immediate and irreparable injury, loss or damage will result to the applicant before notice can be served and a hearing had thereon. Every temporary restraining order granted without notice shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes. On 2 days notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require."

The Federal Rules provide indispensable safeguards which are not present in the Kentucky Code against the misuse of the temporary restraining order. From a reading of Rule 65 it is manifest that few temporary restraining orders will be granted in federal court where there has been absence of notice to the adverse litigant. The threat of immediate irreparable injury must be shown by "specific facts" in the affidavit or verified complaint. The term "specific facts" affords much more protection of truth than merely "facts set forth in the affidavit of the applicant, or by other evidence"[17] which are the guides furnished by the Kentucky Code.[18] Furthermore, in federal procedure,

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[17] *Supra* note 3.

[18] The Code also sets up an elaborate line of succession as to who may issue a temporary restraining order or a temporary injunction. It provides that such injunctions may be granted by "any circuit judge, or by the clerk of the court, or the county judge if the judge of the court be absent from the county, or by two justices of the peace, if the judge and the clerk of the court and the county judge be absent from the county." KY. CODE CIV. PROC. ANN. sec. 273 (Carrol's 1948); The wisdom of a provision conferring anything less than absolute jurisdiction on judges of the circuit courts in these cases is highly arguable. Temporary restraining orders and injunctions *pendente lite* are serious business indeed. Almost complete absence of similar provisions in other jurisdictions is indicative of a strong belief that judges of circuit level alone should handle these procedures. The following states have no provision for anyone othern than judges to have jurisdiction for the issuance of temporary restraining orders and injunctions *pendente lite:* Alabama, ALA. CODE ANN. Tit. 7, sec. 1038 (1940); Arizona, 2 ARIZ. CODE ANN. sec. 21-1605 (1939); Arkansas, except that county judge can grant in the absence of the circuit judge, 3 ARK. STAT. ANN. sec. 32-104 (1947); California, CAL. CODE OF CIV. PROC. ANN. sec. 527 (Deering 1949); Colorado, COLO. STAT.

the reasons for the issuance without notice must be incorporated into the order itself. Judges are apt to be more cautious in the determination of issues of fact when the conclusion must be inserted in the order.

The Rules also supply provisions designed to enable one who finds himself unjustifiably enjoined without notice to salvage as many of his rights as possible. He may go to the judge immediately with his side of the story, and " in that event the court shall proceed to hear and determine " his motion for dissolution "as expeditiously as the ends of justice require."[19] There is no comparable provision in the Kentucky Code; the order expires only after the passage of time or the applicant's defeat in a hearing on the merits. The Kentucky version falls down chiefly because of its mechanical treatment of a highly flexible matter.

The federal procedure for temporary restraining orders constitutes a considerably more adequate safeguard of the rights of an absent defendant than that furnished by the Kentucky Code. It was not believed, however, that even the more specific federal rule was sufficient effectively to combat possibilities of injustice in labor cases, for cases involving labor disputes do not come within the application of Rule 65. Section (e) of the rule specifies that "These rules do not modify any statute of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee. " This leaves the pertinent provisions of the Norris-LaGuardia Act intact.[20] This statute further narrows the possibilities of temporary restraining orders without notice to the defendant in labor cases by providing that such an order·

> " may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days."[21]

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ANN. c. 8, sec. 165 (1935); Connecticut, 3 CONN. GEN. STAT. c. 404 sec. 8209 (1949); Florida, 2 FLA. STAT. equity rule 73 (1949); Georgia, 2 GEO. CODE, sec. 55-201 (Park 1935); Idaho, 2 IDAHO CODE ANN. sec. 8-403 (1948); Illinois, ILL. REV. STAT. c. 69, sec. 1 (1949); Indiana; 2 IND. STAT. ANN. sec. 3-2101 (Burns 1933); Kansas, KANS. GEN. STAT. ANN. sec. 60-1103 (1949); Louisiana, LA. CODE OF PRAC. ANN. Art. 297 sec. 2 (1927); Michigan, except that circuit court commissioners have power to grant injunctions to stay proceedings at law, 4 MICH. COMP. LAWS sec. 61921 (1948); Minnesota, 2 MINN. STAT. sec. 585.03 (1945); New York, N.Y. CIV. PRAC. ACT sec. 876-a (Thompson 1939); Ohio, 9 OHIO GEN. CODE ANN. sec. 11877 (Page 1938); West Virginia, W VA. CODE ANN. sec. 5344 (1949); Wisconsin, WIS. STAT. sec. 268.02 (1949); United States, Fed. R. 65.

[19] FED. R. CIV. PROC. 65 (b) (1948).

[20] 29 U.S.C. c. 6 (1946).

[21] *Id.* at 107.

The inherent vices of the use of injunctive powers without notice in cases involving labor disputes have thus been recognized by Congress.[22] The requirement of oral testimony is a jurisdictional fact, and cannot be ignored.[23] Suffice it to say there is no comparison between oral testimony and affidavits or complaints in their relative capabilities for the task of getting to the truth. Indeed, the Norris-LaGuardia Act affords protective features which are essential to any guaranty of truth. Furthermore, the act is fair to all; if the rare occasion arises where an applicant is in fact deserving of a temporary restraining order without notice to the other party, there is adequate opportunity for him to obtain it.

It is believed, therefore, that Kentucky would benefit by adoption of code provisions similar to those established by Congress pertaining to the issuance of temporary restraining orders. The courts would then possess a more accurate guide for the quest of truth by virtue of requirement of oral testimony in cases involving labor disputes, thereby minimizing the dangers presented by one sided affidavits. Moreover, applications for temporary restraining orders in cases other than labor disputes would be subjected to more diligent scrutiny by the requirement that the judge make a specific findings of fact which would be incorporated into the order. Finally, the life of such an order would be reduced from the existing Kentucky maximum of twenty days to five in labor cases, ten in the ordinary case. Such procedural reform of the temporary restraining order would be a bulwark of protection to one who is about to be subjected to injunctive restraint without notice.[24] The rights of one who has not had an opportunity to defend should always be jealously guarded by the law

JAMES DANIEL CORNETTE

[22] "The obvious purpose of the five day limit was to prevent restraint without a hearing on the question whether substantial and irreparable injury has been done to the employer, for so long a time as to effect materially the effort of the striking employees." Toledo P. & W R.R. v. Brotherhood of Railroad Trainmen, Enterprise Lodge No. 27, 132 F 2d. 265, 267. (C. C. A. Ill. 1943), Rev'd on other grounds 321 U.S. 50 (1944).

[23] See Lauf v. E. G. Shinner & Co., 303 U.S. 323 (1938).

[24] "Much could be accomplished wihtin the present system by the reform of procedure, especially by narrowly restricting or abolishing *ex parte* orders. The practice of throwing the force of the state on one side of a controversy before hearing the other is a poor compromise between compulsory arbitration and a hands off policy." MCCRACKEN, STRIKE INJUNCTION IN THE NEW SOUTH 143, 144 (1931).