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MEANS OF EQUITABLE PROTECTION AGAINST TORTS

By William Q. de Funiak

Where equity prevents a threatened wrong or injury or proceeds to repair an injury, it accomplishes this by the writ of injunction. Injunction is an order or process issuing from the court addressed to the defendant, commanding him to abstain from doing, or commanding him to perform, a certain act. It may be, therefore, either preventive or remedial in its operation and, consequently, injunctions are divided into two great classes, prohibitory injunctions and mandatory injunctions. Prohibitory injunctions are those requiring the defendant to abstain from doing a certain act or from pursuing a certain line of conduct. These constitute by far the larger part of injunctions granted by courts of equity. Mandatory injunctions are those which require the defendant to do some act.

Injunctions are also subject to division pursuant to another plan of classification. One kind is the preliminary or interlocutory injunction, the other is the final, permanent or perpetual injunction. This division has reference simply to the stage of the case when the injunction is issued and to its duration, not to its character otherwise. Injunctions are frequently issued upon the filing of the suit or soon after and before the cause has been heard and decided upon the merits. Such injunctions are the preliminary or interlocutory injunctions. They continue until further order of the court. They are always within the control and discretion of

1. Acknowledgment is made to Merwin, Principles of Equity (1895), pp. 424-428, for much of the discussion relating to the kinds and nature of injunctions.

2. Preliminary or interlocutory injunction may be mandatory in form. Keys v. Allgood, 178 N.C. 16, 100 S.E. 113 (1919).
the court and may, upon proper motion and proper cause shown at any time during the progress of the cause, be modified or dissolved. If the final decision upon the merits is in favor of the defendant, then as a matter of course such injunctions are dissolved. If the final decision on the merits is in favor of the plaintiff, then such injunctions are usually made final or permanent.4

A strong prima facie case should be shown to justify interposition by an equity court by an injunction before the rights of the parties have been determined by a full trial. The justice of the preliminary or interlocutory injunction lies in keeping everything in status quo until those rights can be determined. Where the act, condition or situation complained against by the plaintiff may cause great damage if not halted or suspended pending the trial on the merits, a final decision on the merits in the plaintiff’s favor will be of little or doubtful value.5

Final, permanent or perpetual injunctions are those which are ordered after a final hearing of the cause upon its merits when the decision is in favor of the plaintiff. Such an injunction constitutes a part of the final decree of judgment.6 With the usual decree of judgment, unless the court reserves some right or power to modify it, or to set it aside, it passes from the control of the court and can be modified or set aside only upon a rehearing or review of the cause. But a final injunction embodied within a decree or judgment presents a different situation. It is uniformly recognized that the court may dissolve or modify the final or permanent injunction where changes in circumstances or conditions warrant it.7 Frequently, the injunctive decree provides an opportunity for the defendant to remove

4 Temporary restraining order distinguished from interlocutory injunction, see Wetzstem v. Boston, etc., Min. Co., 25 Mont. 135, 63 Pac. 1043 (1901).
6 Contents of decree granting temporary injunction, see, e.g., Local 309, etc., C.I.O. v Gates, 75 F Supp. 620 (1948).
the cause of the injury and its permanence depends upon
whether or not he accomplishes such removal.\textsuperscript{8}

\textbf{Enforcement of Injunction—Contempt}

Equity in accomplishing its purposes and affording relief
to the complainant acts upon the person of the defendant. It
lays its command upon the defendant personally to desist or to
act.\textsuperscript{9} The injunction represents the formal expression of this
demand and defines the extent or the limits of what the de-
fendant must or must not do.\textsuperscript{10} If the defendant fails or refuses
to obey the injunctive decree or process of the court, he is in
contempt of court.\textsuperscript{11} The court may proceed against him to pun-
ish him for such contempt. The contempt is that which is desig-
nated as civil contempt, as distinguished from criminal con-
tempt.\textsuperscript{12} While the proceeding to punish for civil contempt may
involve the idea of retribution for defying the court and setting
at naught the judicial processes of orderly government, its pri-
mary purpose is to compel the defendant to obey the order or
decree of the court and thus obtain for the plaintiff the relief to
which the court has adjudged him entitled. Accordingly, it is
not usually a separate proceeding but is merely part of the
case in which it arose.\textsuperscript{13}

The punishment imposed for contempt may be either by
fine\textsuperscript{14} or imprisonment\textsuperscript{15} or both.\textsuperscript{16} The defendant can remove

\textsuperscript{8} See, e.g., Payne v Johnson, 20 Wash. 2d 24, 145 P 2d 552
\textsuperscript{9} See, e.g., Payne v Johnson, 20 Wash. 2d 24, 145 P 2d 552
\textsuperscript{10} It is customary to direct the injunction not only to the person
\textsuperscript{11} It is customary to direct the injunction not only to the person
\textsuperscript{12} It is customary to direct the injunction not only to the person
\textsuperscript{13} Sufficiency of notice or knowledge of order, see Cape May &
\textsuperscript{14} Sufficiency of notice or knowledge of order, see Cape May &
\textsuperscript{15} Sufficiency of notice or knowledge of order, see Cape May &
\textsuperscript{16} Sufficiency of notice or knowledge of order, see Cape May &
himself from further contempt of court by obeying the court’s order. It may be mentioned, incidentally, that the defendant can purge himself of contempt by showing that it is impossible for him to carry out the order, where this inability has not resulted from his own fault and where his conduct has not been willful or contumacious.\(^7\)

It is incumbent upon the plaintiff to call to the court’s attention the fact that the defendant has failed or refused to obey, whereupon notice or process is served upon him, as in other legal proceedings. If he is not so served, there is no jurisdiction in the court to proceed against him for contempt.\(^8\) Is it possible, then, for the defendant to escape carrying out the court’s command and the punishment therefor, by removing himself from the court’s jurisdiction so as not to be reached by service of such notice or process? If he is a nonresident of the state, he may successfully accomplish this design, if one discounts the practical aspects which may involve the necessity of leaving business or property interests unattended. These practical aspects are even more apparent in the case of a foreign corporation doing business in the state. But if he is a domiciliary of the state and leaves the state, by the usual conflict of laws rule he may be served with notice or process by publication or the like, since a domiciliary even though temporarily absent from the state remains subject to the jurisdiction of the courts of his state.\(^9\) Contempt proceedings, accordingly, could be instituted and an adjudication of guilt be entered and a fine imposed which could:

\(^7\) Andrew v. McMahan, 43 N.M. 87, 85 P 2d 743, 120 A.L.R. 697 (1938), and annotation at p. 703.

\(^8\) See Parker v. United States, supra note 12.

\(^9\) While domicile serves as a basis for jurisdiction so that personal service within state may be dispensed with, the substitute that is most likely to reach the defendant is required in order to accomplish substantial justice. McDonald v Mabee, 243 U.S. 90, 37 Sdp. Ct. 343, 61 L.Ed. 608, L.R.A. 1917F 458 (1917).

California is an exception to the foregoing rule, in that personal service within the state is required to give jurisdiction even in the case of a domiciliary. See De La Montanya v. De La Montanya, 112 Cal. 101, 44 Pac. 345, 53 Am. St. Rep. 165, 32 L.R.A. 82 (1898).
be enforced by seizures of the domiciliary’s property in the state.20

ANTICIPATORY MEASURES

May the court, at the outset or during the pendency of the suit, seek to anticipate and prevent the possibility of disobedience of any commands it may lay upon the defendant? It is said that there are no principles of equity to support the sequestration or impounding of assets of property of the defendant to secure obedience to such future commands as may be laid upon him. Whether statutory authorization permitting such action exists must usually be sought in the attachment statutes and these are usually limited in scope to contract actions for a specific sum of money and are inapplicable to suits seeking equitable relief even though as an incident thereof a sum of money is sought.21

Nevertheless, an anticipatory preventive measure of perhaps limited application has existed in equity in the form of the so-called writ of *ne exeat*. Such a writ might be issued upon the commencement of the suit for equitable relief, during the pendency of the suit, or upon issuance of the final decree, to secure its enforcement. But such writ related primarily to the person of the defendant and issued only upon satisfactory proof that he planned or intended to remove himself beyond the court’s jurisdiction so that he might escape obedience to such command as might be or had been laid upon him. The writ has frequently been termed an equitable bail. It involves taking and keeping the defendant in custody until he gives bail or bond in a designated amount, conditioned upon his keeping himself amenable to the enforce processes of the court. Its use seems to have been confined to equitable suits relating to a demand based upon an equitable debt or pecuniary claim and to suits to preserve property and jurisdiction over it.

20Blackmer v United States, 284 U.S. 421, 52 Sup. Ct. 252, 76 L.Ed. 375 (1932), where District of Columbia court issued order to show cause why United States citizen then in France should not be adjudged guilty of contempt in refusing to obey subpoena of the court and there was held to be suitable notice of such order and adequate opportunity to appear and be heard. The imposition of a fine to be satisfied by seizure and sale of his property was valid and proper.

In the first named use, the result has been that in many jurisdictions it has been termed a form of imprisonment for debt so as to fall within the general abolition of imprisonment for debt. But other jurisdictions have considered it not an imprisonment for debt and so not within any abolition of imprisonment for debt. Whether or not it has been abolished in a particular jurisdiction, statutory equivalents are frequently found which authorize the court to require security from the defendant that he will carry out the order or decree of the court.

While the writ is directed at the person of the defendant as a means of preventing him from removing himself from the court's jurisdiction and control, it has also been used, by the control over the person, as a means of preventing the removal of property. It will be seen that removal of his property by the defendant would permit him to prevent its application to payment of the equitable debt or pecuniary claim, where that is the subject of the suit, or to remove it from the court's control where its preservation is involved.

The writ of _ne exeat_ may frequently be a more effective means of seeing that the court's command is carried out because it permits preventive measures to be taken before the disobedience actually occurs. Otherwise, it is necessary to wait until the disobedience occurs and then proceed by way of contempt. To wait until a wrongful act is done is not consistent with the customary principles of equity.

**Practicability of Enforcement of Injunction**

It may well happen that an equity court has jurisdiction of the defendant to enter an injunction against him but the circumstances are such as to make it impracticable for the court to see to its enforcement. This may result from the fact that the defendant may easily remove himself from the control of the court.
court or that the acts necessary to be done by him must be done beyond or without the court's jurisdiction where it cannot enforce or supervise a proper performance. Or it may be that the nature of the acts necessary to be done is such that the court has not the capacity or means of supervising them or determining that they are properly performed, even though performance would be carried out within the court's jurisdiction. Where the court has the theoretical power to grant an injunction but enforcement is impracticable or impossible, the court will not grant the injunction. It would be derogatory of the dignity of the court to enter orders it could not enforce.26

Where the defendant is doing an act outside the state which is injuring property of the plaintiff within the state, the court must necessarily order the defendant to do or refrain from doing acts outside the state where the court is without authority.27 Where it is also clear that the defendant can easily remove himself from the court's control or will not remain subject to its control, enjoining him would probably be a useless act. But if, as is usually the case, the defendant will continue to be subject to the court's control, the court is thereby in a position to see that he gives obedience to its command, even though the acts of obedience must be performed beyond the court's jurisdiction.28 If the defendant is a citizen of the state, or is a nonresident or a foreign corporation doing business in the state, it may safely be assumed that the defendant is not in a position to remove him-

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26 See also Walsh, Treatise on Equity (1930), Sec. 18.
27 The situation should be distinguished in which not only is the injurious act being done outside the state but the property injured is also outside the state. In this situation, some courts have not hesitated to act, on the ground that the parties were before it and amenable to its process, as in Alexander v. Tolleston Club, 110 Ill. 65 (1884). Other courts have declined to act in such situation on the ground that the cause of action was local in nature and could only be brought where the property was, as in Ophir Silver Min., etc., Co. v. Superior Court, 147 Cal. 467, 82 Pac. 70, 3 Ann. Cas. 340 (1905).
28 See The Salton Sea Cases, 172 Fed. 792 (1909) noted 23 Harv. L. Rev. 390 (1910); Vineyard Land & Stock Co. v. Twin Falls, etc., Co., 245 Fed. 9 (1917) noted 31 Harv. L. Rev. 646 (1918); 27 Yale L. J. 946 (1918).

A case frequently cited to the contrary is Port Royal R. Co. v. Hammond, 58 Ga. 523 (1877). There the defendant who would have to be ordered to do acts in another state was a corporation incorporated in Georgia and, under the view of corporations at that time, had no legal existence beyond the state of its incorporation so as to be able to do an act in another state.
self or itself from the court’s control without loss, and probably severe loss.

A situation similar to the foregoing is that in which a domiciliary of the state is ordered to discontinue prosecution of litigation which he has commenced in another state, because it imposes undue hardship and pecuniary loss to the defendant in such litigation to be sued there instead of in the state where the injunction is now sought by him. The expediency of granting such injunction rests largely in the court’s ability to control the defendant and coerce him.\textsuperscript{29}

\textsuperscript{29}See, e.g., Reed’s Adm’x v. Illinois Cent. R. Co., 182 Ky. 455, 206 S.W. 794 (1918), Kempson v. Kempson, 58 N.J.Eq. 94, 43 Atl. 97 (1899), id., 63 N.J.Eq. 783, 53 Atl. 625 (1902).