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Injunction - Preliminary and Interlocutory Injunctions - Whether a Failure to Seasonable Raise a Statutory Objection to the Issuance of a Preliminary Injunction Bars an Award of Damages on the Susequent Dissolution of the Injunction

M. F. Hauselman

charged so that he may prepare for trial.''[15] This end could just as properly be fulfilled by the use of an information. Under a waiver provision the accused is given a new privilege without depriving him of any right. By waiving indictment, the accused has the benefit of a trial unhampered by undue delay and the taxpayers have the benefit of a less costly and less cumbersome accusatory procedure.

J. H. ALESIA

INJUNCTION — PRELIMINARY AND INTERLOCUTORY INJUNCTIONS — WHETHER A FAILURE TO SEASONABLY RAISE A STATUTORY OBJECTION TO THE ISSUANCE OF A PRELIMINARY INJUNCTION BARS AN AWARD OF DAMAGES ON THE SUBSEQUENT DISSOLUTION OF THE INJUNCTION—Further illumination of the right of a defendant against whom an injunction has been wrongfully issued to receive an award of damages has been provided in the recent case of *Presbyterian Distribution Service* v. *Chicago National Bank*.[1] The case arose with the entry of a judgment by confession in favor of the defendant and against the plaintiff herein. Upon notice and hearing in the trial court, a preliminary injunction was issued in favor of the plaintiff which restrained the defendant from enforcing the judgment. At that time, the defendant failed to object even though the bond required by statute was not posted.[2] Shortly thereafter, the defendant successfully moved to vacate the order granting the injunction on the ground that the plaintiff had failed to post the mandatory bond and, at this suggestion, was awarded damages by the trial court.[3] The Appellate Court for the First District of Illinois reversed the award since the defendant neglected to interpose an objection which, in all probability, would have been successful and thus prevented the ensuing damage.

The Illinois General Assembly has heretofore enacted two statutes inaugurating the right to an award of damages upon the dissolution of a wrongfully issued preliminary injunction. The first measure was enacted

[15] State v. Roche, 135 N. E. (2d) 789 (Ohio App., 1955).

[1] 21 Ill. App. (2d) 188, 157 N. E. (2d) 789 (1959).

[2] Ill. Rev. Stat. 1959, Vol. 2, Ch. 69, § 8, provides that prior to the issuance of an injunction restraining the enforcement of a judgment the plaintiff must post a bond in double the amount of the judgment and costs, plus an additional amount to cover any damages that may be awarded in the event the injunction is dissolved.

[3] Ill. Rev. Stat. 1959, Vol. 2, Ch. 69, § 12, which, in effect, provides that where a preliminary injunction is dissolved, the successful party may be awarded any damages sustained while the injunction was in force.

Ill. Rev. Stat. 1959, Vol. 2, Ch. 69, § 8, which, in effect, provides that upon the dissolution of an injunction issued to restrain the enforcement of a judgment the plaintiff can be assessed damages not to exceed ten per cent of the monetary value of the judgment released, exclusive of interest and costs.

in 1819 and provided a remedy upon the dissolution of a preliminary injunction which had restrained the enforcement of a judgment at law.[4] This legislation was adopted to penalize errant judgment debtors who wrongfully obtained injunctive relief to stay the execution of a judgment.[5] Apparently the legislature, at that early date, had no intention of allowing full compensation to the injured judgment creditor, since no award of damages could lawfully exceed six per cent of the monetary value of the judgment, exclusive of court costs and legal interest.[6] In 1827, the act was amended by increasing the arbitrary damage limitation to ten per cent of the dollar value of the judgment.[7] A ten per cent award of damages was by no means mandatory and the court had the power to hear any evidence of damages in order to formulate an equitable award within the statutory limitation.[8] The act as amended is in substance the law in effect today.[9]

The second provision was passed in 1861 and expressly applied "in all cases" wherein a wrongfully issued preliminary injunction was dissolved.[10] Unlike the earlier statute, the act of 1861 was void of any restriction or limitation on the amount of damages assessable, but it did contain the added requirement that the litigant seeking damages submit, in writing, suggestions of damages. This remedy remains in force today.[11]

Each of the aforementioned statutes provided a different remedy to the litigant who successfully obtained the dissolution of a wrongfully issued preliminary injunction which had enjoined the collection of a judgment. As a result of the inconsistency in the remedies available, the question was generated as to whether the earlier statute was impliedly overruled with the passage of the act of 1861.[12] There were two factors which motivated an affirmative answer to the question. First, the legislation expressly applied "in all cases" which was indicative of the fact that the scope of the act of 1861 was meant to be all inclusive. Secondly, from an economic viewpoint the remedy set forth in the latter law was much more favorable than its earlier counterpart, since it was free from arbitrary limitations on the amount of damages assessable. Yet, in 1864, the Supreme Court of Illinois held that the act of 1861 was not intended to be

4 Laws 1819, p. 173, § 17.
5 Hollister v. Sobra, 264 Ill. 535, 106 N. E. 507 (1914).
6 Id.
7 Laws 1827-35, p. 306, § 11.
8 Dunn v. Wilkinson, 26 Ill. App. 26 (1887).
9 Ill. Rev. Stat. 1959, Vol. 2, Ch. 69, § 8.
10 Laws 1861, p. 133, § 1.
11 Ill. Rev. Stat. 1959, Vol. 2, Ch. 69, § 2.
12 The question arose in Roberts v. Fahs, 36 Ill. 268 (1864).

all inclusive and did not encompass that class of cases theretofore governed by the terms of the act of 1819 as amended in 1827.[13] Since 1864, the courts have consistently ruled that the litigant who successfully obtained the dissolution of a preliminary injunction which had stayed the collection of a judgment could under no circumstances recover damages in excess of ten per cent of the monetary value of the judgment.[14]

In the instant case, the defendant moved, after the dissolution of the injunction restraining the enforcement of the judgment, for an assessment of damages.[15] At the hearing on the motion, the defendant was awarded a sum of damages in excess of the total monetary value of the judgment.[16] On appeal, the plaintiff contended that the defendant's conduct, prior to the time the injunction was issued, amounted to a forfeiture of his right to recover any damages from the plaintiff.[17] This contention was predicated on the equitable principle that the defendant ". . . ought to be in no position in a court of equity to demand damages, when he was at fault in not interposing such proper resistance as would probably have controlled judicial discretion in his favor."[18] This concept was announced, although not followed, in the case of *McNevin* v. *Stoolman*.[19] Therein, a preliminary injunction was issued, without any resistance by the defendants, which enjoined the defendants from transferring, selling, or otherwise interfering, in any manner, with the right of the plaintiff to the control of certain shares of corporate stock. Subsequently, the defendants successfully moved to dissolve the injunction on the ground that the stock certificate in ques-

[13] Roberts v. Fahs, 36 Ill. 268 (1864). In accord: Walker v. Pritchard et al., 135 Ill. 103, 25 N. E. 573 (1890); Higgins v. Bullock, 73 Ill. 205 (1874); Forth et al. v. Town of Xenia, 54 Ill. 210 (1870); Smith et al. v. Powel et al., 50 Ill. 21 (1869); Shaffer v. Sutton, 49 Ill. 506 (1869).

[14] Camp v. Bryan et al., 84 Ill. 250 (1876); Joslyn v. Dickerson et al., 71 Ill. 25 (1873); Nicoloff v. Schnipper et al., 233 Ill. App. 591 (1924); Stirlen v. Neustadt, 50 Ill. App. 378 (1893); Dunn v. Wilkinson, 26 Ill. App. 26 (1887); Reed v. New York Exchange Bank, 230 Ill. 50, 82 N. E. 341 (1907), held to the contrary, but was expressly overruled in Hollister v. Sobra, 264 Ill. 535, 106 N. E. 507 (1914).

[15] The defendant claimed damages as provided in Ill. Rev. Stat. 1959, Vol. 2, Ch. 69, § 12.

[16] The amount of the defendant's judgment was $582.00, No. 47586, Appellate Court for the First District of Illinois, Appellant's Brief, p. 13. In addition, the defendant was awarded $673.00 in damages by the trial court, Presbyterian Distribution Serv. v. Chicago Nat. Bank, 21 Ill. App. (2d) 188 at 191, 157 N. E. (2d) 789 at 791 (1959).

[17] The plaintiff also urged that damages could only be awarded pursuant to Ill. Rev. Stat. 1959, Vol. 2, Ch. 69, § 8, since the injunction was issued to enjoin the enforcement of a judgment; therefore, any award of damages that exceeded ten per cent of the dollar value of the judgment would be excessive. Although this contention was not considered by the reviewing tribunal, it seems probable that the plaintiff's contention would have been sustained had it been considered.

[18] McNevin v. Stoolman, 235 Ill. App. 449 at 456 (1924). In general, see 43 C. J. S., Injunctions, § 315 (i), p. 1108, and 21 I. L. P., Injunctions, § 211, p. 745.

[19] 235 Ill. App. 449 (1924).

tion was no longer outstanding, since it had been previously transferred by the plaintiff and cancelled. Pursuant to the applicable statute, damages were awarded the defendants at their suggestion.[20] The reviewing tribunal reversed and remanded the award of damages since it was excessive, but did not preclude the defendants from recovery.

In the principal case, the defendant neglected to raise an objection to the issuance of the preliminary injunction notwithstanding the plaintiff's failure to post the bond required by statute. It seems unlikely that the defendant's failure to interpose resistance was due to a mistake or the like, since the defendant's attorney stated, by affidavit, that on the day prior to the issuance of the injunction he had researched the applicable statute and precedents. It seems probable that, had the defendant called the attention of the court to the statutory requirement, the injunction would not have issued wrongfully and hence no damage would have ensued.[21]

By holding that one is not entitled to recover damages where he fails to seasonably object to the issuance of an injunction the court had adhered to the policy of equity which precludes parties from recovering damages caused by their own errors and omissions. Even though the court is presumed to know and take judicial notice of the laws of the forum, it still remains incumbent upon the litigant to inform the tribunal of the applicable statutory requirements so as to prevent the entry of erroneous orders. To permit parties, who fail to interpose resistance, to recover damages would, in effect, open the door to temptation, since unscrupulous litigants could intentionally remain mute in the hope that an injunction would issue wrongfully and then seek redress by way of damages.

M. F. HAUSELMAN

INTERNAL REVENUE—DEDUCTIONS AND CREDITS—WHETHER PAYMENTS MADE ON A NOMINAL LOAN FROM AN INSURER, WHERE LOAN PROCEEDS WERE USED TO ACQUIRE BENEFITS OF ANNUITY CONTRACT WITH INSURER, ARE PROPER DEDUCTIONS FOR FEDERAL INCOME TAX PURPOSES—A question of general interest to members of the legal profession, those engaged in tax work, and indeed, many taxpayers, was raised in the recent case of *Knetsch* v. *United States*.[1] The plaintiffs there concerned had purchased certain

20 Ill. Rev. Stat. 1959, Vol. 2, Ch. 69, § 12.

21 The issuance of an injunction to restrain the enforcement of a judgment is wrongful when the statutory bond is not posted, Grossman v. Davis, 117 Ill. App. 354 (1904); Packer v. Roberts, 44 Ill. App. 232 (1892).

1 272 F. (2d) 200 (1959), affirming 58-2 U. S. T. C. 69, 739; certiorari granted, 361 U. S. 958.