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## INJUNCTIONS TO RESTRAIN LIBEL AND SLANDER.

BY the Common Law Procedure Act of 1854 (17 & 18 V. c. 125, s. 79) 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."

By sec. 82 an *ex parte* injunction may be granted "to restrain the defendant in such action from the repetition or continuance of the wrongful act or breach of contract complained of, 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."

The power of the common law courts under these clauses was much wider than that exercised by the equity courts. But the power was seldom employed. The common law judges had been accustomed to award damages for past offences and were diffident in issuing regulations for future conduct. Practically, therefore, the equity judges monopo-

lized the enjoining power; and in order to retain their sway did not fear to widen the scope of their operations, so as to include the field nominally occupied by their brethren of the law. And in this we hold them justified. Courts of equity never awarded or withheld injunctions according to statutory rules or regulations, but, from time to time, adding precedent to precedent, the courts endeavored to meet the growing necessity for a commanding and prohibiting system of jurisprudence. Without the assistance of legislation, the jurisdiction was extended from one subject to another, and when the legislature had approved of the extension and granted still wider powers to the courts of law, equity judges might well extend their relief up to the statutory limit. *Equitas sequitur legem.*

*Springhead Spinning Co.* v. *Riley*, *L. R. 6 Eq. 551*, marked a distinct advance. In that case, Malins, V. C., (a strong judge, often overruled by more timid brethren) granted an injunction enjoining the posting of placards which were calculated to intimidate workmen from hiring themselves to the plaintiffs, the ground for the order being that the effect of the placards was to destroy the property of the plaintiffs.

In *Dixon* v. *Holden*, *L. R. 7 Eq. 488*, the same judge made perpetual an injunction restraining the publication of a notice which alleged falsely that the plaintiff was a partner in a bankrupt concern. In the course of his judgment the learned judge said: "In the decision I arrive at I beg to be understood as laying down that this court has jurisdiction to prevent the publication of any letter, advertisement or other document which, if permitted to go on, would have the effect of destroying the property of another person, whether that consists of tangible or intangible property, whether it consists of money or reputation."

In *Mulkern* v. *Ward*, *L. R. 13 Eq. 619*, Sir John Wickens, V. C., refused a motion on behalf of the trustees of a permanent benefit building society (being also a bank of deposit,) for an injunction to restrain the publication and sale by the defendants of a book containing alleged libellous paragraphs

in reference to the annual balance sheets and solvency of the society. In referring to *Dixon* v. *Holden*, the Vice-Chancellor said :—" It is not for me to say that the rule so laid down is erroneous ; but I think it was wholly new, and that nothing whatever was said in the case of *The Emperor of Austria* v. *Day*, or in any other case, except possibly in the peculiar and very different case of *Springhead Spinning Co.* v. *Riley*, which supports it in any way."

In *Prudential Assurance Co.* v. *Knott, L. R. 10 Ch. App. 142; Dixon* v. *Holden*, and *Springhead Spinning Co.* v. *Riley*, were expressly overruled. The Lord Chancellor (Cairns) affirmed that " it is clearly settled that the Court of Chancery has no jurisdiction to restrain a publication merely because it is a libel."

In 1873 the Judicature Act was passed in England. By it the Court of Chancery acquired the jurisdiction vested in the common law courts under the sections of the Common Law Procedure Act already quoted. This section would undoubtedly have justified the court in returning to Vice Chancellor Malins' view of the law, but its potency does not appear to have been at once observed.

The first case after the introduction of the Judicature Act appears to be that of *Thorley's Cattle Food Co.* v. *Massam, 6 Ch. Div. 582; 14 Ch. Div. 762.* Joseph Thorley had extensively advertised and sold a compound under the name of " Thorley's Food for Cattle." The process of manufacture was not patented and was known not only to Mr. Thorley but also to his brother, who managed the business. After Joseph died, the business was continued by the defendant, his executor, but the surviving brother withdrew from the management, organized the plaintiff's company, and began the manufacture of the same food compound and under the same name as before Thereupon the defendant, by circulars cautioned the public against purchasing any of " Thorley's Food for Cattle " not made by his establishment, " the proprietors of which were alone possessed of the secret for compounding the famous condiment." The defendants rested their case on *Prudential*

*Assurance Co.* v. *Knott, supra.* The Vice Chancellor, Malins, said he should have no hesitation in stopping the defendant's act except for that case, and he was inclined to agree with a suggestion of the plaintiff's counsel that that case was controlled and superseded by the Judicature Act. But as the point was a new one he preferred to reserve his views until the hearing. When the cause came on for trial he granted the injunction, but did not refer to the effect of the statute; nor was it discussed by any of the judges on appeal, when the decree was affirmed. The opinions by James, Baggally and Bramwell are short, and no case is cited in either of them. Malins cited several cases of law and remarked, 'I think these cases establish this—I do not go into the general question of libel—but they have established the doctrine that where one man publishes that which is injurious to another in his trade or business, that publication is actionable; and, being actionable, will be stayed by injunction, because it is a wrong which ought not to be repeated.' The judges on appeal apparently go on the same ground.

The point was clearly raised and decided in *Beddow* v. *Beddow, 9 Ch. Div. 89*, the head note of which is as follows: "The extensive jurisdiction of granting injunctions originally given to the common law courts by the Common Law Procedure Act, 1854, ss. 79, 81 and 82, is now vested, by virtue of the Judicature Act, 1873, in the High Court of Justice. 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. The jurisdiction of granting injunctions thus vested in the High Court 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." See also *Hill* v. *Hart Davies, 21 Ch. Div. 798.*

To entitle the plaintiff to an injunction restraining the publication of a libel, it has been held that it must not merely be "untrue and injurious to the plaintiff," but "there must be also the element of *mala fides* and a distinct inten-

tion to injure the plaintiff apart from the honest defence of of the defendant's own property." *Halsey* v. *Brotherhood, 19 Ch. Div. 386.*

*Hermann Loog* v. *Bean* is the latest case upon the subject. In that case it was held that:—an injunction may be granted to restrain oral slanderous statements concerning another's business, and in such case it is not necessary to show actual loss. This jurisdiction, however, should be exercised with great caution. B. was employed to manage one of L.'s branch offices for the sale of machines, and resided on the premises. He was dismissed by L., and on leaving gave the postmaster directions to forward to his private residence all letters addressed to him at L.'s branch office. He admitted that among the letters so forwarded to him were two which related to L.'s business, and that he did not hand them to L. but returned them to the senders. After his dismissal he went about among the customers making oral statements reflecting on the solvency of L., and advised some of them not to pay L. for machines which had been supplied through himself. L. brought an action to restrain B. from making statements to the customers that L. was about to stop payment or was in difficulties or insolvent, and from in any manner slandering L. or injuring his reputation or business, and from giving notice to the post office to forward to B.'s residence letters addressed to him at L.'s office, and also asking that he might be ordered to withdraw the notice already given to the post office. An injunction was ordered.

The law upon this subject in the United States forms the latter half of an important article in *The American Law Register* for November, 1884. It is as follows:—

"The way now seems clear for saying, confidently, that the English decisions regarding restraints upon trade-libels in cases arising subsequent to that of *Prudential Assurance Co.* v. *Knott* (decided just before the Judicature Act of 1873 went into operation), are not generally applicable to cases of trade-libel in this country. In England, as we have seen,

the remedial power of injunction has been made almost, if not quite, co-extensive with the right to maintain an action at law; but one needs not to be reminded that, in the absence of special local statutes, the law is otherwise in the United States. The point seems obvious enough, and yet we apprehend that it is a point one may easily overlook when citing English cases for the purpose of guiding our courts in the development of the doctrine under discussion.

"What, let us now inquire, is the law where courts are governed solely by the general principles of equity jurisprudence? Prior to the Judicature Act of 1873, *Prudential Assurance Co.* v. *Knott, supra*, was the law in England, and the same reasons which supported its doctrines there make it now an authority here. The Supreme Court of Massachusetts cites it with approval in *Boston Diatite Co.* v. *Florence, 114 Mass. 69*, and in *Whitehead* v. *Kitson, 119 Id. 484*. Both of these cases, to be sure, were decided before the Act of 1877, which gave the court full chancery powers; but there is no reason to suppose that its jurisdiction was thereby enlarged with respect to the doctrine in question. In New York the law cannot be said to be settled. *The New York Juvenile, &c', Society* v. *Roosevelt, 7 Daly 188 (1877)*, follows *Prudential Assurance Co.* v. *Knott*, and *Brandreth* v. *Lance, 8 Paige 24 (1839)*, is in accord with the same doctrine. So, too, is the case of *Mauger* v. *Dick, 55 How. Pr. 132 (1878, Sup. Ct.)*, which cites with approval the first of the two Massachusetts cases, and Speir, J., remarked: 'The jurisdiction of a court of equity does not extend to false representations as to the character or quality of the plaintiff's property or to his title thereto, when it involves no breach of trust or contract; nor does it extend to cases of libel or slander.'

"In *Wolfe* v. *Burke, 56 N. Y. 115*, and *Hovey* v. *Rubber Tip Pencil Co., 57 Id. 119 (1874)*, the facts were such that it was not necessary to pass upon the question, so that the cases are not authorities either way. In the latter the court refused to grant an injunction: first, because the issues

presented questions arising under the United States Patent Laws, and hence not within the jurisdiction of the State courts; and second, because the defendant had acted with reasonable fairness in the defence of his supposed rights. The inference that may be drawn from the last ground is not of much consequence, but the case of *Croft* v. *Richardson*, *59 How. Pr. 356*, decided in the State Supreme Court in 1880, is unquestionably opposed to the other New York decisions. The defendants were sending threats and warnings to the plaintiff's customers, alleging that a carpet exhibitor made and sold by the plaintiffs was an infringement of the defendant's patent, and that the plaintiffs were intending 'to make a considerable profit before legal proceedings put a stop to their nefarious efforts.' A motion for an injunction was granted, the judge relying upon the *Thorley Food Case* (then just reported in the Albany Law Journal), and remarking that the language of the circular was too excessive and ill-chosen to convey the simple information that the plaintiffs had no right to make and sell the article of which they claimed to be the patentees. This decision, so far as we have been able to learn, stands alone among the few American cases. Of its authority it may be said, first, that the opinion was not given by a judge of the highest court; and second, that the case upon which it was founded was not (for reasons already given) applicable in the state of New York. *The Celluloid Manuf. Co.* v. *The Goodyear Dental Vulcanite Co.*, *13 Blatch. 375* (*Southern Dist. of N. Y.*), contains a reference to the earlier English cases, but decides nothing. The only other decisions in the United States that we are aware of are; *Caswell* v. *Central Railroad and Banking Co.*, *50 Ga. 70*, and *Life Association of America* v. *Boogher*, *3 Mo. App. 173* (*1876*), both of which state the law in accordance with the doctrine of the Massachusetts cases. The ground of the decision, however, in the Missouri case is peculiar. To stop the circulation of the printed matter, libellous as it might be, would be to violate the State constitutional provision that 'every person may freely speak, write or print on any subject, being

responsible for the abuse of that liberty.' The responsibility laid in the qualifying clause was held to be only such as the courts may enforce, civilly or criminally, *after* the abuse has occurred. The question would seem to us to have been brought before the Missouri court apart from any consideration of the constitutional provision, and to have raised just the points that are involved in the decision of the main question by any court of general equity jurisdiction; but the judges in the case chose a short cut to a determination of the matter in the way we have here indicated.

"The following, if not an exhaustive list of the classes of cases in which injunctions are granted to prevent the commission of a tort, certainly contains every class in which, by analogy, such cases as we have been considering might fall: waste, trespasses, nuisances, infringement, patents and copyrights. literary property (including works of art), as distinct from copyright trade-marks. *See Pomeroy, vol. iii., ss., 1346–1358.* The principle which will thread them all is, that a court will act in behalf of private as distinguished from public interests only where it may prevent a *direct and immediate* injury to some species of property. The mere analogy of preventing trespassers or any of the wrongs here enumerated, is not enough to warrant an exercise of the jurisdiction. Perhaps a court would be justified in interfering in favor of one injured by false statements persistently made, which lessened the value of his goods by slandering his title to them. The analogy presented by such a case might be sufficiently close to the principle of the cases which received the protecting power of injunction; but the jurisdiction could not be stretched further across never so slight a distinction, without admitting the whole line of cases which come within the scope of the English doctrine.

"It is to be regretted that the line is drawn thus sharply, for one may fairly say, the greater protection afforded by the English courts is demanded by a just regard for the vastness and variety of our commercial interests. Our jurisprudence must in some way meet that demand. In

course of time the result might slowly be worked out by the judges unaided by assistance from the legislators, but an immediate development reaching to the desired end could not be effected without a palpable violation of judicial functions. Legislation therefore is needed, and needed now. Let the law-makers take the matter in hand, recognizing fully the defect of the common-law theory which justifies interference with individual freedom not until after the person has actually committed a wrong, and enact for us statutes which shall embody substantially the provisions of the judicature acts. 'The ideal remedy,' say Professor Pomeroy, 'in any perfect system of administering justice would be that which absolutely prevents the commission of a wrong—not that which awards punishment or satisfaction for a wrong after it is committed.'"

What the law of Manitoba may be we are not in a position to state. If the court in granting an injunction "in equity" can exercise the same jurisdiction as if its order was headed "at law," then there is no doubt that "the greater protection afforded by English courts" can be awarded here. Perhaps any deficiency of jurisdiction may be supplied by the court directing the insertion of the words "at law" at the top of the page embodying their injunction. *Re Fisher* v. *Brown*, *1 Man. L. R. 116.*

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## LAW STAMPS.

THE report of the case of *The Attorney General for Quebec* v. *Reed*, *L. R. 10 App. Ca. 141*, has come to hand. There can be no longer any doubt that the profession in Manitoba can cease subscribing revenue to the Provincial Government as soon as they chose to do so. The Stamp Act is clearly *ultra vires*. It is an indirect tax, and, as such, is not warranted by the B. N. A. Act.

## CONVINCING THE COURT.

IN theory, the proof of a legal proposition is effected by establishing in argument the existence of a law to which the proposition may be referred. In practice, however, argument is very often more effectively directed to what the law ought to be, than to what it is. It may, therefore, be laid down as a good general rule, that a strong effort must be made to—

*Convince the court that the law ought to be in your favor,* that it is unfortunate if it should be found to be out of harmony with common sense. Be careful, however, not to imply, that the law is one way and ought to be another. You must *assume* that it is as it ought to be; show what it ought to be; and *then* prove that it is so. Do not understand by this that your argument should reveal your design. A judge would cease to follow if you appeared to be asking him to formulate new law; while, at the same time, if the "ought-to-be" and "is" are skilfully interwoven, you will produce a piece of workmanship through which your opponent will fail to work a hole, let him pull and tear at it as he may. This may appear to be a recommendation to humbug the judge—to give him an "ought-to-be" pill safely coated with "is" sugar. But this appearance is explained by the fact that while a judge may not legislate directly, he frequently accomplishes the same object by so construing doubtful law as to bring it into harmony with the dictates of reason.

Many persons have listened to the finest exhibitions of advocacy, and while convinced by the argument have failed to observe its construction: their minds are completely satisfied, but they would be utterly unable to produce the same effect. And while we believe that the ideal advocate, as the ideal artist, is born and not made, we believe, also,

that a careful study and practice of the rules governing the production of effects, will enable anyone of ordinary intelligence to take high rank either at the bar or the academy.

Keeping in mind, then, the nature of the warp and woof of an argument, let us observe the method of their application. The plaintiff has recovered a verdict upon a note made by four directors, A., B., C. and D., for goods supplied to their company. The contract was made with D., who was the managing director of the company, and D. procured the note to be signed, and handed it to the plaintiffs. At the time of delivery the words "jointly aud severally" appeared upon the note interlined between the words "we" and "promise." D. having died, the action and verdict are against the other three directors, all of whom have sworn that at the time when they signed the note the words "jointly and severally" were not upon it, and were not added with their knowledge or consent. There is no contradiction of this evidence; and the question is, whether under such circumstances the plaintiff can hold his verdict. Is it possible that the defendants can be liable upon a note altered after signature, in a material feature, without their knowledge. You are of counsel for the plaintiff, and you contend that they are liable. How should you proceed?

It will be well at first to clear the ground a little, and in a few words to impress the court with the possibility that this case may not be within the general rule. Their lordships are perfectly familiar with the rule, and it is too well settled to be shaken; but, What is the extent of its application? Does it cover cases, you ask, where the note has been altered *before as well as after negotiation?* Their lordships hesitate a little. There may be a distinction here, but you must hurry on, for the court will soon settle that point unfavorably to you unless you can show how the time of alteration may be material in another respect. While the court hesitates, keep their lordships' minds open by introducing a wedge; "If the note was altered before

negotiation, may not the defendants be liable upon the note in its original form?" *Of course you would not contend that they were liable upon the note as altered.*

You have now got to a safe stage, and may take a little breathing spell. *The general rule may not be applicable.* Down to this period of your address all argument upon the "ought-to-be" would be entirely irrelevant, and worse than irrelevant, it would be positively injurious; and if you had indulged in it you would probably have succeeded in extorting from the bench some strong indications of dissent and disapprobation—you would have induced an antagonistic frame of mind. You would have been butting your head against a stone wall, and their lordships would have all agreed that your head was getting decidedly the worst of the contest. You must cut a log into planks before your smoothing plane is of much use, and you must show the law to be debatable before your "ought-to-be" arguments can be brought into action.

An opportunity, however, has now arrived, and you seize it at once. There is no reason, you say, why the defendants should not be liable to the extent to which they intended to be liable. The note was not altered by the plaintiff or while in his custody. He gave value for it. If the defence be good, a person entrusted to deliver a note may, without the knowledge of either the maker or the payee, cancel the obligation which both intended to exist. You must not dwell too long upon considerations of this kind, and you must not appear to be referring to them at all for the real purpose you have in view. They must be thrown in, shortly but strongly, as helping to show *the reasons for the distinctions in the cases to which you now propose to draw the court's attention.*

Very much depends upon what the cases may say, but *very much more depends upon what the judges think they ought to say.* If the cases agree with the judges' opinion they will be "undoubted authority"; but if they do not,

they will be shown to be "not in accordance with the earlier cases," to have been "in effect overruled by the later cases," to be "capable of explanation upon other grounds," or "to be taken as mere dicta"—"at all events we do not feel ourselves bound by their decisions." A Jessel would dispose of them all in this way: "Then the argument being exhausted—or for lack of argument—recourse is had to authority, and three cases have been cited. All I can say is, I do not understand them. It is no use my commenting on them, I cannot make out any principle on which they were decided, and I confess I do not understand them. As I have often said, I cannot follow an authority unless I understand its principle. If a case lays down a principle it is a guide to other judges, but a mere decision where you cannot find out the principle is of no use at all. The only use in citing an authority is as an illustration of some principle or rule of law, but where none is to be found and none to be extracted from the case cited, it is utterly useless for the purpose of a judge, however desirous he may be of following it." *Talbot* v. *Frere*, 9 *Ch. D.* 574.

Before citing your authorities you must formulate your proposition. You are asking the court to take a certain view of the cases which you are about to quote. What is exactly the rule, or rather the exception to the rule, that you seek to establish? Put it in words. Let it not be too long or too loose. Dress it nicely and make it look plausible. Let it be clear, reasonable and practicable. A great deal will depend upon the appearance of your proposition. Judges will shy at it if it sound incongruous, illogical, or subversive of any settled notion or usual line of action.

Having stated your proposition you turn to the books. You have kept back the cases until you are sure their lordships' spectacles are in proper condition. Your opponent would fain have them a different color from the shade you have imparted to them, but he must wait until you have put every case of importance before the court, and until their

lordships have obtained their impression of it under your guidance. But you must be very candid and fair. You may supply the spectacles but you must not obliterate the page. You may set a case in a certain light, but you must not distort the object itself. You are now putting in the keystone, and if you do it well the arch will stand your opponent's assault; but it will go down as a pack of cards if your pretended stone can be shown to be sand and water. Be careful, therefore, and be frank. Leave nothing wherewith your adversary may startle their lordships out of the settled and satisfied condition in which you intend to leave them. You cannot, perhaps, prevent him spoiling your spectacles. They have served their purpose, and they may go. But you can, and you must forestall him in the presentation of every picture from historic litigation; and, above all, you must deal fully and fairly with his strongest cases. In referring to them you must give their lordships, if you can, some clear ground of distinction. For this purpose you must have read carefully not only the judgments but that which will supply you with what you want, the statements of the facts. These may be long, intricate and tiresome, but you must be thoroughly familiar with them, and able with their assistance to explain the exact significance of the words which seem to tell against you.

It is not necessary, however, or advisable to cite your opponent's cases before your own. If you have succeeded in the first part of your argument their lordships are ready to take your view of the law, and they are longing to see their opinions confirmed by your books. Produce your books then, and let no hint of opposing law disturb the air while you mould the heated iron. When it is cold it will stand a good deal of hammering without much injury. But do not leave fuel for another fire. Exhaust all the enemies' material, for you have no reply, and their lordships may, if they find themselves misled, resent the improper twist that you have given to their opinions, and make the rule absolute with costs. *Be frank.*

# FOAKES v. BEER—STARE DECISIS.

A NOTABLE example of the uncertainty of the best known of our legal propositions is furnished by the recent case in the House of Lords—*Foakes* v. *Beer*, *54 L. J. N. S. Q. B. 130* We had thought that if there was any unimpeachable proposition of law it was "that payment of a lesser sum, on the day, in satisfaction of a greater, cannot be any satisfaction for the whole." This was laid down in *Pinnel's Case*, *Co. Lit.*, *212 b.*, in 1602; the reason given being, "because it appears to the judges that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum."

We were aware that a very slight appearance of benefit to the creditor—for instance, payment of a smaller amount the day before the due date; a payment of a smaller amount at a place other than that agreed upon; or the making and delivery ot a negotiable note—took the case out of the rule, but the rule itself seemed beyond controversy. After 280 years, however, it has reached the House of Lords, and it has had a narrow escape. Their Lordships seem to agree that Sir Edward Coke was wrong, but the majority thought that although the doctrine "may have been criticized as questionable in principle by some persons whose opinions are entitled to respect, it has never been judicially overruled; on the contrary, it has always, since the sixteenth century, been accepted as law." "If so, I cannot think (said the Lord Chancellor) that your Lordships would do right if you were now to reverse as erroneous a judgment of the Court of Appeal proceeding upon a doctrine which has been accepted as part of the law of England for 280 years."

Lord Blackburn was of opinion that the point was open for re-consideration, but in deference to the other judges

concurred in allowing it to stand. We think that everyone will agree with the noble Lord when he says: "What principally weighs with me in thinking that Lord Coke made a mistake of fact, is my conviction that all men of business, whether merchants or tradesmen, do every day recognize and act on the ground that prompt payment of a part of their demand may be more beneficial to them than it would be to insist on their rights and enforce payment of the whole. Even where the debtor is solvent and sure to pay at last, this is often so. Where the credit of the debtor is doubtful, it must be more so."

We need hardly add that the rule has no application in cases of compromises with creditors, where the agreement to abate by one is the consideration for the abatement by the others; nor where there is a release under seal.

A point might arise in this Province, owing to the large amount of property exempt from execution, whether in case after default in payment the debtor agrees to sell some of the exempted property and out of the proceeds to pay a smaller sum in satisfaction of a larger, there would not be a sufficient consideration to support an agreement by the creditor to accept the amount in full. If it were held to be sufficient then if the debtor borrowed the money upon the security of his exempted property the same rule would apply. When Lord Coke's rule was formulated there were no exemptions, and the debtor went to prison in default of payment. A means, therefore, was provided of stripping him of every dollar he owned, *he had no power to keep back anything*, and for this reason it was held that there was no consideration for an agreement allowing him to do so. But in Manitoba the law does permit the withdrawal of a certain amount of wealth from the creditor, and there is consideration, therefore, for an agreement to apply it, either directly or indirectly, in payment of a debt.