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Equity - Interlocutory Mandatory Injunctions - Negative Decree Ordering Defendants to Cease from Refraining to Purchase Advertising Space

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No attempt at contempt proceedings took place in the instant case. Had they been attempted, the logical answer on the part of the newspapers would have been that it was the congressional committee which caused and stimulated the pre-trial publicity and which therefore might be considered the proximate cause of the evil. Moreover, if the newspapers had been silenced by contempt proceedings, an important objective of the Congressional committee would not have been attained,[18] since the committee had stated that considerations of public interest demanded a public investigation at that particular time.[19] Of what value would a public investigation be if there were no vehicle of expression to carry the results to the public? In its larger aspects, the problem in cases such as this is at least partially concerned with the doctrine of separation of powers.[20] Since contempt proceedings in cases of this type obviously present no remedy of a practical character, the only other course of action open is to delay the trial until public attention becomes centered upon other matters.

The only North Dakota case dealing with such a problem was decided in 1914.[21] An editor who had charged that a pending hearing in the North Dakota Supreme Court was the result of a plot to hold a fake hearing before an approaching election was convicted of contempt of court. In its opinion the court said, "Surely there must come a time when the rights of the free speaker are overshadowed by the rights of other men to unhampered justice." [22]

ALBERT M. CHRISTOPHER

EQUITY — INTERLOCUTORY MANDATORY INJUNCTIONS — NEGATIVE DECREE ORDERING DEFENDANTS TO CEASE FROM REFRAINING TO PURCHASE ADVERTISING SPACE. — The plaintiff was engaged in the publication of news in interstate commerce. The defendants, owners and operators of hotels and restaurants in the area, jointly decided to discontinue advertising in the plaintiff's newspaper, thereby threatening its continued publication. Plaintiff brought action under the Sherman Anti-Trust Act on the theory that the discontinuance of his paper would create a monopoly in the only other paper in the vicinity. On Plaintiff's motion for a preliminary injunction the court *held* that an interlocutory injunction having the mandatory effect of ordering Defendant to continue advertising in Plaintiff's newspaper would be issued. *Greenspun v. McCarran*, 105 F.Supp. 66 (D.Nev. 1952).

In this case the use of the extraordinary power of the court when acting as a court of equity appears to have been carried to an unprecedented extreme. Relief by affirmative mandatory injunction was at one time

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is prosecuted by a politician before a political judge. Actually trial by newspaper could be stopped if judges, even those who are not elected, would use the contempt powers that are in their hands. See Perry, *The Courts, the Press, and the Public*, 30 Mich. L. Rev. 228 (1951).

18. *Cf.* Stroble v. California, 343 U.S. 181 (1952).
19. See Delaney v. United States, 199 F.2d 107, 110, 114 (1st Cir. 1952).
20. *Cf.* Myers v. United States, 272 U.S. 52, 293 (1926) (dissenting opinion).
21. State v. Nelson, 29 N.D. 155, 150 N.W. 267 (1914).
22. *Id.* at 162, 150 N.W. at 269.

considered beyond the power of a court of equity.[1] There were times however when the early chancery judges found their respect for precedent outweighed by their sense of justice and in such cases they often phrased a mandatory injunction in the negative form, ordering the defendant to refrain from not doing the questioned act.[2] Later this form was dropped in favor of the directly worded decree,[3] though the instant case shows that the former practice still persists. Courts were even more reluctant to employ the interlocutory mandatory injunction and occasionally asserted that such relief could not be given under any circumstances.[4] Courts are still extremely reluctant to grant a mandatory injunction before there has been a full hearing of the issues.[5] However where only this special relief can save a complainant from great and irreparable injury,[6] most modern courts would issue mandatory injunctions on preliminary motion, subject to certain rules and limitations.[7]

A rule applied by a number of courts is that this extraordinary relief will not be decreed unless it is necessary to maintain the status quo,[8] or as asserted by some courts, where the status to be maintained is one of action and not of rest.[9] Several courts have issued interlocutory mandatory injunctions where the defendant secretly altered his status while the aid of equity was being invoked[10] or in anticipation of the court's intervention.[11] It is generally agreed that such relief will be granted where

1. *See* Smith v. Smith, L. R. 20 Eq. 500, 504 (1875) (defendant ordered to remove wall that obstructed light).

2. Lane v. Newdigate, 10 Ves. Jun. 192, 32 Eng. Rep. 818 (1804) (negative injunction granted ordering defendant to repair canal); Robinson v. Lord Byron, 1 Brown C.C. 589, 28 Eng. Rep. 1315 (1785) (defendant ordered to control the flow of water from a lake on his property). *But see* Rolt v. Lord Sommerville, 22 Eng. Rep. 644 (1737); Vane v. Lord Barnard, 2 Vern. 739, 23 Eng. Rep. 1082 (1716) (for two very early cases allowing what appear to be directly worded mandatory injunctions).

3. Keys v. Alligood, 178 N.C. 16, 20, 100 S.E. 113, 115 (1919) (injunction granted) "Why not call this process by its right name. instead of granting what is really mandatory, under the guise of preventive relief?"; Smith v. Smith, L.R. 20 Eq. 500 (1875).

4. Audenried v. Philadelphia & Reading R. Co., 68 Pa. 370, 376 (1871) (citing cases).

5. American Fire & Casualty Co. v. Rader, 160 Fla. 700, 36 So.2d 270 (1948) (injunction denied); State v. Gillam, 188 Okla. 10, 105 P.2d 773, 775 (1940) (decision granting injunction upheld in part) "ordinarily and generally such relief should not be granted prior to a final hearing of controversy. . . ."

6. United States v. Adler's Creamery, 107 F.2d 987 (2nd Cir. 1939) (decision granting injunction reversed) (no danger of irreparable injury), *cert. denied*, 311 U.S. 657 (1940); State v. Baker, 112 W.Va. 263, 164 S.E. 154 (1932) (necessity and extreme hardship); *accord*, L. & L. Concession Co. v. Goldhan-Zimner Theater Enterprises, 332 Mich. 382, 51 N.W.2d 918 (1952) (serious inconvenience and loss to plaintiff with no great loss to defendant).

7. Pacific Gamble Robinson Co. v. Minneapolis & St. L. Ry. Co., 83 F.Supp. 860 (D. Minn. 1949) (defendant ordered to furnish refrigerator cars for perishable goods); Marks v. Golden Horn Realty Co., 92 N.Y.S.2d 92 (1949) (defendant ordered to provide doorman service as in the past); *see* In re Lennon, 166 U.S. 548, 556 (1896); Bissel v. Olsen, 26 N.D. 60, 76, 143 N.W. 340, 346 (1913) (requiring a strong case).

8. United States v. Adler's Creamery, 107 F.2d 987 (2nd Cir. 1939), *cert denied*, 311 U.S. 657 (1940) L. & L. Concession Co. v. Goldhan-Zimner Theater Enterprises, 332 Mich. 382, 51 N.W.2d 918 (1952).

9. Texas Pipeline Co. v. Burton Drilling Co., 54 S.W. 190 (Tex.Civ.App. 1932) (defendants ordered to continue transporting oil through pipeline).

10. Mutual Oil Co. v. Empire Petroleum Co., 5 F.2d 500 (6th Cir. 1925); O'Donnell v. Lehigh Nav. Coal Co., 324 Pa. 369, 188 Atl. 348 (1936) (order to replace part of railroad siding).

11. Whitman v. Fayette Fuel Gas Co., 139 Pa. 492, 20 Atl. 1062 (1891) (order to continue supplying natural gas).

the defendant has changed his status in violation of a prohibitory injunction.[12]

Courts which grant preliminary mandatory injunctions are almost unanimous in holding that the right violated must be an extremely clear one,[13] there must be great urgency for immediate relief,[14] and the damage must be irreparable and continuing.[15] Some courts have held that a mandatory injunction will not be granted on a preliminary motion where that decree would give the complainant all the relief he could obtain on a final hearing,[16] but a few courts which follow this rule have allowed exceptions.[17] In general the rules which govern the granting of other types of injunctive relief will also govern the granting of a mandatory injunction on an interlocutory application.

It would be well to reconsider the instant case in the light of the rules stated. The injunction here was sought to prevent injury from an alleged violation of the Anti-Trust Act.[18] This Act gives an injured party the right to an injunction to restrain violations of the Act,[19] but the Supreme Court has said that the injunctive relief is available only where the complainant can show special injury.[20] The court found as facts in the instant case that the complainant had suffered special injury in its loss of revenue from the wrongfully refused advertising, and that if this loss were to continue the injury would be irreparable in that Plaintiff's ability to continue in the newspaper business would be endangered. This finding would place the case well within the rule requiring great urgency for relief. If the complainant is entitled to an injunction to maintain the status quo there seems to be little doubt that the only injunction which will suffice is one of a mandatory type.

It is the nature of the acts ordered to be performed that distinguishes the instant decision from previous cases. The defendant is, in effect, ordered to continue buying advertising space in Plaintiff's publication. There are a number of cases in which persons have been ordered to perform certain private duties[21] or provide services,[22] but a search reveals no cases in

12. Elder v. Barnes, 219 N.C. 411, 14 S.E.2d 249 (1941) (order to clear ditch); Vicksburg S.& P. R. Co. v. Webster Sand, Gravel and Construction Co., 132 La. 1051, 62 So. 140 (1913) (spur track removed in violation of injunction).

13. Sims v. Stuart, 291 Fed. 707 (S.D.N.Y. 1922); Pansmith v. Island Park, 64 N.Y.S.2d. 741 (1946). *But cf.* Trautwein v. Moreno Mutual Irrigation Co., 22 F.2d 374, 376 (9th Cir. 1927) (injunction granted) "The right of the plaintiffs to the injunction granted is not entirely clear."

14. Coe v. Louisville & N. R. Co., 3 Fed. 775 (C.C.M.D. Tenn. 1880) (injunction granted) (not to be granted unless the urgency of the case demands it); *see* Local Union No. 57 Brotherhood of P., D. & P. H. v. Boyd, 245 Ala. 227, 16 So.2d 705, 711 (1944) (union ordered to reinstate former member).

15. Watson v. Burnett, 216 Ind. 216, 23 N.E.2d 420 (1939).

16. Sims v. Stuart, 291 Fed. 707 (S.D.N.Y. 1922) (injunction denied); Cleaning & Dyeing Plant Owners Ass'n. v. Sterling Cleaners & Dyers, 278 Ill. App. 70 (1934) (injunction denied) (attempt to stop price war by injunction).

17. Texas Pipeline Co. v. Burton Drilling Co., 54 S.W.2d 190 (Tex. Civ. App. 1932) (injunction granted; where status quo is a condition of action and a condition of rest will inflict irreparable injury); *see* Moss Industries v. Irving Metals Co., 140 N.J. Eq. 484, 55 A.2d 30, 32 (injunction denied) (injunction will be granted where right to relief is clear and certain).

18. 15 U.S.C. §1, 2 (1946).

19. 15 U.S.C. §26 (1946).

20. Minnesota v. Northern Securities Co., 194 U.S. 48 (1904).

21. Elder v. Barnes, 219 N.C. 411, 14 S.E.2d 249 (1941) (clear a ditch draining plaintiff's property); O'Donnell v. Lehigh Nev. Coal Co., 342 Pa. 369, 188 Atl. 348 (1936) (replace part of a railroad siding).

22. Pacific Gamble Robinson Co. v. Minneapolis & St. L. Ry. Co., 83 F. Supp.

which anyone has been ordered, by an interlocutory decree, to purchase either intangible personal property or services. The lack of precedent coupled with the caution with which most courts grant interlocutory mandatory injunctions would seem to render this case questionable as authority for future decisions.

ROBERT N. OPLAND

INTERNAL REVENUE — NATURE AND EXTENT OF TAXING POWER—POWER TO TAX AND REGULATE—Defendants were convicted for failure to pay a gamblers' occupational tax imposed by an act of Congress.[1] The act levied a special tax of $50 per year on every person engaged in receiving wagers for or on behalf of any person liable to a tax on wagers. In addition the act required every person subject to the tax to register with the appropriate Collector of Internal Revenue and in connection with his registration to furnish certain information specified in the act. Defendants challenged the validity of the act contending that it was not designed as a revenue measure but that its true purpose was to obtain information concerning gambling activities and thereby assist the states in enforcing the criminal law against gamblers. On appeal it was *held* that the judiciary is without power to scrutinize the motives and purposes of the legislative branch of the government, and since the government was in fact deriving an income from the tax, it was a valid exercise of Congress' power to tax. *United States v. Robinson*, 107 F. Supp. 38 (E.D. Mich. 1952).

The power to tax granted Congress by the Constitution is extremely broad.[2] This power is not restricted by either the Fifth[3] or Tenth Amendment.[4] It is not outside the ambit of Congressional power to levy taxes which possess some incidental regulatory, suppressive or restrictive effect.[5] Nor is a primarily regulatory statute which in fact raises revenue invalid so long as the act falls within the scope of powers delegated to Congress.[6] But where the primary purpose of the act, obviously hidden under the cloak of the taxing power, has infringed upon the residual powers of the states, the decisions have not been in complete accord. A recent Supreme Court decision upheld an act of Congress in which the

860 (D. Minn. 1949) (defendant ordered to furnish refrigerator cars); Marks v. Golden Horn Realty Co., 92 N.Y.S.2d 92 (1949) (provide doorman service).

1. 26 U.S.C. §3290.

2. U.S. Const. Art. 1, §8; *see* License Tax Cases, 5 Wall. 462, 471 (U.S. 1866) taxing power limited only by rule of apportionment of direct taxes, rule of uniformity of indirect taxes, and prohibition against export taxes).

3. Brushaber v. Union Pac. R.R., 240 U.S. 1, 24 (1915); *see* Magnano Co. v. Hamilton, 282 U.S. 40, 44 (1934) (upheld state oleomargerine tax).

4. Fernandez v. Wiener, 326 U.S. 340, 362 (1945) (upheld federal estate tax); *see* United States v. Darby, 312 U.S. 100, 123 (1940).

5. Fernandez v. Wiener, 326 U.S. 340, 362 (1945) "Undoubtedly every tax which lays its burdens on some and not others may have an incidental regulatory effect."; Sonzinsky v. United States, 300 U.S. 506, 513 (1937) "An act of Congress which on its face purports to be an exercise of the taxing power is not any the less so because the tax is burdensome or tends to restrict or suppress the thing taxed."; Veazie Bank v. Fenno, 8 Wall. 533 (U.S. 1869).

6. Sunshine Coal Co. v. Adkins, 310 U.S. 381, 393 (1940) (power of taxation used as a sanction for exercise of commerce power); Head Money Cases, 112 U.S. 580, 596 (1884) (tax not void because used as expedient regulation of commerce); *see* Child Labor Tax Case, 259 U.S. 20, 38 (1922).