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SHOULD SECURITY BE REQUIRED AS A PRE-CONDITION TO PROVISIONAL INJUNCTIVE RELIEF?

DAN B. DOBBS†

I. INTRODUCTION

The plaintiff who seeks a temporary restraining order or a preliminary injunction may be denied these remedies unless he posts a bond or other security. This study is concerned with a narrow set of questions: Should security be mandatory, or should the trial judge have discretion to dispense with it? Alternatively, should security be required in some cases, left to the trial judge's discretion in others, and perhaps even forbidden in still others?

The present law under the federal rule and many state statutes is unclear and should be clarified by statutory amendment. This study proposes to set out, in the four succeeding parts, some basic information about the nature and purposes of provisional injunctive relief and the bond requirement, a summary of the present statutes and case law on whether the bond is mandatory or permissive, and finally, a suggested statutory amendment to clarify that law.

II. THE NATURE AND PURPOSE OF PROVISIONAL INJUNCTIVE RELIEF AND OF THE SECURITY REQUIREMENT

A. *Provisional Injunctive Relief and the Bond*

Courts having equity powers are almost uniformly authorized to grant provisional injunctive relief in two forms. One form is often called a preliminary injunction.¹ This is an injunctive order issued only after the defendant is notified and has had at least a limited opportunity to defend himself. It is provisional, however, rather than final since the notice given to the defendant is likely to have been short and his opportunity to defend himself limited. Thus it is quite possible that, when the trial judge hears the fully developed case at the final

† Professor of Law, University of North Carolina. Mr. H. Buckmaster Coyne, Jr. provided substantial and helpful assistance in researching and writing this article, for which many thanks are due. This article was completed more than a year before publication. It has not been possible to guarantee the current authority of every citation.

1. This is the terminology of the Federal Rules of Civil Procedure, rule 65. Other terms used by courts to refer to this kind of injunction are "temporary injunction," and "interlocutory injunction." The federal rule terminology is used here throughout.

or "permanent" hearing, he will find in the defendant's favor, even though at the preliminary hearing his view was entirely otherwise.

The second form of provisional relief in the injunctive mode is often called a temporary restraining order or TRO.² This order is issued, even without a hearing for the defendant, on the plaintiff's representation that matters are so urgent that he will lose irreparably if the court does not act before notice is given to the defendant. The TRO is not binding upon the defendant until he has notice that it has been issued, but it may be validly issued in the first place without giving the defendant the hearing that is normally a due process necessity.

These forms of provisional injunctive relief are extreme, and they are meant to be because they are reserved, at least in theory, for extreme needs. Because these remedies are extreme and because they operate to affect rights without a full hearing, courts have long sought to put protective limits on this kind of relief. One way of doing this has been to withhold such relief altogether unless the plaintiff can show urgent need.³ Another way of doing it has been to require of the plaintiff a bond or other security to protect the defendant in the event the provisional injunctive relief turns out, on a more careful investigation, to have been wrongly issued.⁴

A simple example of this practice occurs when the plaintiff seeks a preliminary injunction against a nuisance, for instance, against the operator of a quarry, contending that the blasting at the quarry should be enjoined. If the judge decides to issue a preliminary injunction, he would ordinarily require the plaintiff to post a bond by which the plaintiff and his sureties undertake to pay the defendant damages if the injunction proves to have been improper after a full-scale hearing and if it also proves to have damaged the defendant. The amount of the bond is also specified by the judge, usually after some discussion, formal or informal, with the defendant's counsel. In a case of this sort, a final, full-scale hearing may occur within a few days. If the judge decides that the preliminary injunction was wrongly issued, he will dissolve it. At this point the defendant can claim for damages on the bond. For example, he might claim damages for idled machinery or loss of work time, and if he proved such damages with reasonable cer-

2. This is the terminology of the federal rules. See note 1 *supra*. Almost all courts use this term or simply "restraining order," or the term "ex parte injunction."

3. For a brief survey of the various expressions of this policy see D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 2.10 (1973) [hereinafter cited as DOBBS].

4. The statutes are collected and cited in Appendix I.

tainty, he would be entitled to recover such sums.⁵

B. *The Purposes of the Bond Requirement*

The purposes of the bond requirement have not always been agreed upon or even stated. Bonds and other security devices based upon suretyship were widely used in common-law proceedings from a very early day,⁶ though the bond requirements in America are imposed or permitted primarily under statutory regulation.

Bonds are commonly required by statutes whenever a plaintiff seeks a provisional remedy, whether at law or in equity. The plaintiff who seeks to recover personal property by way of replevin or claim and delivery must post a bond before he is given his pre-judgment relief.⁷ So must the plaintiff who seeks attachment⁸ or garnishment⁹ before trial. A similar pattern is followed in civil law countries.¹⁰

This pattern of statutes suggests that one purpose in requiring a security as a condition to provisional relief is the fear that provisional

5. *E.g.*, J.A. Tobin Constr. Co. v. Holtzman, 207 Kan. 525, 485 P.2d 1276 (1971).

6. The common law "pledge" was what we call a surety; even the Anglo-Saxon law had a name for him, *borh*. F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 185 n.2 (2d ed. 1936). The early replevin action was always brought against a distrainer; see DOBBS § 4.2. And from the earliest times the plaintiff suing the distrainer must give "gage and pledge"—that is, a surety's bond. F. POLLOCK & F. MAITLAND, *supra* at 577.

7. *E.g.*, N.C. GEN. STAT. § 1-475 (1969) (replevin or "claim and delivery").

8. *E.g.*, *id.* § 1-440.10 (1969) (attachment before judgment).

9. *E.g.*, *id.* § 1-440.10 (1969) (attachment bond); *id.* § 1-440.21 (1969) (garnishment, a species of attachment).

10. The German Federal Code of Civil Procedure applies to trials in the German States as well. The rules for provisional remedies such as attachment also govern the grant of injunction. An undertaking and bond are specifically provided for, in some cases mandatory, in others not, in § 921 of that code. There is strict liability for all damages under § 945. My colleague and friend, Doctor Gunter Roth, Privatdozent of Law, University of Wurzburg, West Germany, has interpreted these sections for me, though any errors are mine, not his.

The French system of procedure also recognizes and uses provisional remedies analogous to our attachments, garnishments and preliminary injunctions, and likewise exacts a bond from the claimant on some occasions. See P. HERZOG, *CIVIL PROCEDURE IN FRANCE* 235-39 (Smit ed. 1967).

The English practice must be read in the light of the fact that the English award of "costs" includes, as the American award does not, attorney's fees. See Goodhart, *Costs*, 38 *YALE L.J.* 849 (1929). Thus one element of damages covered by the injunction bond is routinely awarded as costs in the English system. Nevertheless, the English practice is to require an undertaking from the plaintiff who seeks an interlocutory injunction. See *Smith v. Day*, 21 Ch. D. 421 (C.A. 1882); *Ushers Brewery Ltd. v. P.S. King & Co. (Finance) Ltd.*, [1971] 2 All E.R. 468 (Ch.). The statement in a standard English legal encyclopedia is that the undertaking should always be required, with perhaps very rare exceptions. See 21 *HALSBURY'S LAWS OF ENGLAND, Injunction* § 887 (3d ed. Simonds ed. 1957).

relief, necessarily given after an attenuated hearing or none at all, is especially prone to error.¹¹ It is one thing to say that, in ordinary trials, the winning party must still pay his own attorney's fees and must even absorb the losses he may have had due to an erroneous trial court decision.¹² But it is entirely something else to say that he must risk such losses without so much as a reasonable opportunity to develop the facts or the legal argumentation in the case. Perhaps one purpose of the injunction bond, then, is simply to recompense the defendant who has been subjected to a process of law that does not meet the kind of standards ordinarily adopted.

A second policy or purpose of the injunction bond may be more direct: it may be required as a means of guaranteeing that the provisional relief is sought only by those in genuine need of such relief and reasonably confident of the outcome. In other words, its purpose may be more or less frankly to discourage too easy an access to the judicial process in those cases where that process does not involve a full trial of the issues. Not only does access to provisional relief risk harm to the defendant, it also risks enormous pressures that often are not generated when a full trial and hearing are held. The defendant enjoined on a few hours' notice to cease a nuisance may be subjected to enormous losses that could readily be avoided if he were merely subjected to the normal suit for injunction with the usual notice and a full opportunity to defend. By the same token, the plaintiff with even color of a complaint is likely to be well aware of the pressure he can generate by a claim for preliminary injunction. He may be tempted by tactics, if not by need, to pursue such a remedy unless he is discouraged. The bond, if required in a substantial sum, may operate to deter frivolous claims for provisional relief.

11. I will first say a few words as to the history and meaning of this kind of undertaking. It was invented by Lord Justice *Knight-Bruce* when Vice-Chancellor, and was originally inserted only in *ex parte* orders for injunctions. . . . By degrees the practice was extended to all cases of interlocutory injunction. The reason for this extension was, that though when the application was disposed of upon notice, there was not the same opportunity for concealment or misrepresentation [by the plaintiff], still, owing to the shortness of time allowed, it was often difficult for the Defendant to get up his case properly, and as the evidence was taken by affidavit, and generally without cross-examination, it was impossible to be certain on which side the truth lay.

Jessel, M.R. in *Smith v. Day*, 21 Ch. D. 421, 424 (C.A. 1882).

12. Note, *Interlocutory Injunctions and the Injunction Bond*, 73 HARV. L. REV. 333 (1959) suggests there may be some inconsistency between the usual rule that each party bears his own costs and the use of the injunction bond to achieve an opposite result in the case of provisional relief. Surely, however, the balance may lie in favor of free access to judicial hearings when there is a full scale trial, but in favor of full protection to the defendant when there is not such a trial.

C. *Problems of the Bond Requirement*

Though there are good reasons for requiring a bond of the provisional relief plaintiff, there are also reasons against any such requirement. In the first place, the bond costs money, and the legal order should not require the expenditure of money without some pretty good reason to believe that something worth the cost is being purchased and that there is no cheaper or better way of purchasing it. In the second place, there is a risk that access to courts will be obstructed for some legitimate litigants, either because they cannot afford the bond premium, or because they cannot find a surety willing to go their bonds, or because they are reluctant to risk an extraordinary liability to protect their rights. Since the judicial system is intended to resolve disputes and since most disputants have no acceptable alternative resources for disputes resolution, any rule that deters access to the courts must be justified with care or be discarded. In addition, early judicial decision in many economic disputes may tend to prevent dissipation of economic resources and any rule that prevents such access may tend to permit a certain amount of hidden economic waste.¹³

D. *Assessing the Bond Requirement: the Unknowns*

Since there are sound arguments for and against requiring a bond, the legal system might rationally take any one of a number of different positions. It might require the bond in all cases; it might require the bond in some specified cases and dispense with it in others; it might leave the whole matter to the trial judge's discretion; or it might even forbid the use of bonds as a condition to provisional relief. Combinations and variations are quite possible. For example, bonds might be underwritten by the state in all cases or those in which the plaintiff is unable to obtain a bond from commercial sources.

Solutions to the questions raised above will be suggested, but not without qualms, because there are a number of uncertainties. One

13. A simple example: Builder plans a building on Blackacre. Neighbor believes it violates the zoning laws and will constitute a common law nuisance. If Neighbor intends a suit for injunction, early determination may save money, no matter who is legally correct or who wins. If the building is built and must later be destroyed or structurally changed to comply with zoning laws, the economic waste is obvious and could have been avoided by quick access to courts. If the building, though in violation of zoning ordinances, is allowed to stand because of this waste factor and because early relief was not sought, the building may cause other economic loss in the form of diminished property values for neighboring property. If it is assumed that the building is proper in all respects, quick access to the courts to determine this fact will mean that the builder may proceed with construction without either costly delay or needless risk. We do not know how much this delay costs in the aggregate.

uncertainty is in the facts. The arguments against the bond requirement are potent indeed—but only if people are truly obstructed in their access to the courts. However, no one knows whether claimants are obstructed or not. This suggests that what is first needed is not analysis but empirical study. This study makes no such attempt for two reasons. First, it seems better to obtain a thought-out solution as soon as possible and adapt or change that solution if and when a suitable empirical study can be obtained. In other words, people with today's problems ought not to have to await ultimate inquiries. And secondly, the effect of a bond requirement on access to courts is apt to change with shifts in the economy, the type of litigation in progress, the kind of overall financial aid given to litigants, and other cultural factors that could not be identified. One may therefore feel skeptical: an empirical study may reveal clearly the effect of the bond requirement on last year's litigants without helping forecast at all its effect on next year's. The net result is that, though there are immense unknowns, it seems better to proceed in an orderly way toward a clear legislative solution, with a willingness to be instructed by the data when and if it should ever be collected.

The unknowns, however, are not all factual. Whether security should be required from the provisional relief plaintiff probably depends on resolution of a number of other legal questions. For example, is liability on the bond absolute, or does it accrue only if the plaintiff acted rashly or in bad faith? Is liability triggered as soon as the provisional relief is set aside or when the permanent injunction is denied? Is the plaintiff personally liable beyond the sum named in the bond, or does the bond set the limits of the plaintiff's liability as well as the liability of his surety? What elements of damage may be considered in assessing liability on the bond? May third persons sue on the bond if they suffer from the provisional relief? And so on. Attitudes about the bond requirement may well be much conditioned by the legal rules established in answer to questions like these. In considering whether a bond or other security should be mandatory, then, some discussion of other problems of the bond requirement is necessary.

III. THE PRESENT LAW: IS THE SECURITY REQUIREMENT MANDATORY OR PERMISSIVE?

A. *Summary of Statutory Patterns*

Except for Massachusetts,¹⁴ all states make some statutory (or

14. See note 21 and accompanying text *infra*.

rule) provision for an injunction bond.¹⁵ Historically most of them seem to have been derived, ultimately, from either the federal rule or its statutory predecessors,¹⁶ or from the New York Code of 1848.¹⁷ The language of the federal rule is that “[n]o restraining order or preliminary injunction shall issue except upon the giving of security. . . .”¹⁸ The New York Code language was that “the judge shall require a written undertaking on the part of the plaintiff”¹⁹ to provide for damages if the court finally decided that the plaintiff was not entitled to the injunction.

Both these statutory patterns sound entirely mandatory, but this may prove to be misleading. At least twelve states have statutes which seem to leave the matter of security to the trial judge’s discretion, with or without statutory guidelines.²⁰ Massachusetts reaches this result by judicial decision.²¹ A good many statutes imply this by simply providing that the judge “may” require security instead of saying that he “shall” do so.²² Still others insert a specific proviso permitting the judge to dispense with security for any good cause shown.²³ Two states relieve the plaintiff of any obligation to post a bond when he is “unable”²⁴ to post one or when the bond would impose “extraordinary hardship.”²⁵ In addition to these dozen states, a number of statutes make the bond discretionary in special situations rather than mandatory, for example, in divorce actions.²⁶ On the other hand, within this group of “discretionary” states, the bond may be mandatory in special

15. Appendix I.

16. See Appendix II for the statutory history of the Federal Statute.

17. See Appendix III for the wording of the New York rule and the development of the former North Carolina statute from it.

18. FED. R. CIV. P. 65(c).

19. New York Code of Procedure, ch. 379, § 195, [1848] Laws of New York 534.

20. Connecticut; Florida; Georgia; Illinois; Kansas; Massachusetts; Michigan; Montana; New Hampshire; New Mexico; Rhode Island; Vermont; see Appendix I.

21. *Damaskos v. Board of Appeal*, 359 Mass. 59, 267 N.E.2d 897 (1971); *Weinberg v. Goldstein*, 241 Mass. 259, 135 N.E. 126 (1922); *American Circular Loom Co. v. Wilson*, 198 Mass. 182, 84 N.E. 133 (1908).

22. Georgia (“may”); Illinois (“in judge’s discretion”); Kansas (“may”); Michigan (“may”); New Hampshire (“ordinarily shall, and in any case may”); Rhode Island (“may”); see Appendix I.

23. Connecticut; New Mexico; Vermont; see Appendix I.

24. Florida (“unable to give bond”); see Appendix I.

25. Maryland (“extraordinary hardship”); see Appendix I. The Maryland statute is apparently a mandatory one, with this extraordinary hardship exception, and is difficult to classify. I have not included it in the permissive group because the statute provides only that “In a case of extraordinary hardship the requirement of surety on the bond . . . may be dispensed with . . .” Apparently an undertaking by the plaintiff is still required under this rule. Md. R.P. BB75(b).

26. WIS. STAT. § 268.06 (1957).

situations, for example, under a local version of the Norris-LaGuardia Act for labor injunctions.²⁷

As will be indicated later, the "federal-rule type" provision has some special ambiguities. Apart from states having that provision, about fifteen states have statutes that contain language of a clearly mandatory sort, though it must be cautioned that the purely textual analysis does not always reveal history of the statute or aberrant interpretations of it.²⁸ Some of these statutes have simply carried forward the old New York Code with a verbal change here and there to make the requirement more clearly imperative. The California Code, for example, has changed the New York language—"the judge shall require"—to "the court or judge must require" with whatever special gain in emphasis that may carry.²⁹ Other states in this group are complete departures from both the basic historical patterns and sometimes simply state that the injunction "shall not be operative" until the bond is given.³⁰ Another provision is that the clerk of court must exact the bond, a rule that raises the possibility of the clerk's own liability on his performance bond if he fails to comply with the rule.³¹ Still other statutes seem mandatory because they require a bond in fairly stringent language, then provide for a specific exception to the requirement, leaving what is perhaps the implication that bond is mandatory unless the exception is shown to exist.³² Other statutes in this group are difficult to describe without undue detail, but in general they seem, purely as a matter of textual analysis, to be mandatory.³³

27. MASS. ANN. LAWS, ch. 214, § 9A (1955).

28. Arkansas, Iowa, Louisiana, Maryland, Mississippi, Missouri, Nebraska, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, Virginia, West Virginia, Wisconsin; see Appendix I. As a matter of linguistic interpretation, Missouri and Mississippi seem arguably outside this category, though cases from those jurisdictions bear out the classification as mandatory.

29. CAL. CIV. PRO. CODE § 529 (West 1954).

30. Arkansas ("before the injunction shall become effectual"); Nebraska ("No injunction . . . shall operate until" bond posted); Ohio (no interlocutory order "is operative until" bond); Oklahoma ("no injunction shall operate until" bond); Virginia (injunction "shall not take effect" until bond posted); West Virginia (like Virginia); see Appendix I.

31. ARK. STAT. ANN. § 32-207 (1962). The Mississippi rule states specifically that the clerk will be liable on his bond for damages if he issues the injunction without taking the bond. MISS. CODE ANN. §§ 11-13-3, -5 (1972).

32. MD. R.P. BB75(b)1 permits the judge to dispense with bond only on a showing of "extraordinary hardship." Wisconsin provides that in divorce cases, the injunction plaintiff "may" be required to post security, and that in other cases he "shall" be required to do so.

33. *E.g.*, IOWA R. CIV. P. 327 provides that the judge "must require that before the writ issues, a bond be filed," and then permits the judge to specify a penalty "which shall be one hundred twenty-five per cent of the probable liability to be incurred . . ."

About half the states have provided for an injunction bond in mandatory terms but leave the amount of the bond up to the judge. This provision is often some variant of the federal rule 65(c), which states that no provisional injunctive order shall issue "except upon the giving of security . . . in such sum as the court deems proper." If this is taken as mandatory, it will be clear that the overwhelming majority of statutory provisions in America mandate a bond as a condition to provisional injunctive relief, at least on their face. But this kind of statute, unlike some mentioned earlier, contains one obvious textual ambiguity; it provides that the bond be set in the amount the judge "deems proper." Is this to be interpreted as an invitation to the judge to use his discretion in setting the amount of the bond, rather than as a command to require a bond he "deems proper" in the light of prospective damages? If it is an invitation to discretion, does that not warrant the belief that he may dispense with the bond altogether or require a purely nominal bond?

Obviously this statute requires interpretation. Actually almost all the statutes could be interpreted to mean something other than what their texts, taken alone, appear to say, and the statutory summary here cannot be taken as conclusive in particular states. The "federal-rule type" provision is especially ambiguous and especially important, however, and judicial interpretation of it is worth an examination.

B. Interpretation of the Federal-Rule Type Provisions

1. *The Federal Interpretation.* The federal rule is derived, without substantial change, from the Clayton Act of 1914.³⁴ Before the Clayton Act was passed, federal statutes referring to the injunction bond clearly provided for discretion in the trial judge.³⁵ The shift from the discretionary language of those statutes to the apparently mandatory language of the Clayton Act is itself fair evidence that the bond was intended to be mandatory. At any rate, the first cases decided under the 1914 statute seemed to assume that there was no room for discretion and that the bond was required.³⁶

This seems rather clearly to negate any implication that might be found in the federal rules that the judge may "deem proper" any amount of security, including a zero amount. Though less clear, similar views may be taken about the statutes in Louisiana, Mississippi (reading sections 11-13-3 and 11-13-5 together), Missouri, Oregon and Texas; see Appendix I.

34. Ch. 323, § 18, 38 Stat. 738 (1914); see Appendix II.

35. Act of June 1, 1872, ch. 255, § 7, 17 Stat. 197; Act of March 3, 1911, ch. 231, § 263, 36 Stat. 1162; see *Western Union Tel. Co. v. United States & Mexican Trust Co.*, 221 F. 545 (8th Cir. 1915) (applying the pre-Clayton Act law).

36. *Robinson v. Benbow*, 298 F. 561 (4th Cir. 1924), made the statement that no

For forty years, between 1914 and 1954, there was very little litigation on this matter in the courts of appeals. During this period courts recognized two situations in which the statute (or later the rule) had no application. One was the case in which a federal court had acquired jurisdiction over property in litigation. It was held that in such a case, the court could issue a preliminary injunction without a bond in order to protect the court's jurisdiction by protecting the property.³⁷ The other exception was even milder: a court could control its calendar and to that end could stay its own hand, at least within reasonable limits, without any bond.³⁸

By 1954 four of the courts of appeals seem to have concluded, or assumed, that the bond requirement was entirely mandatory aside from the exceptions mentioned, though in each case there was some degree of ambiguity about the matter.³⁹ In 1954, however, the Sixth Circuit in *Urbain v. Knapp Brothers Manufacturing Co.*⁴⁰ held flatly that the whole matter of requiring a bond under rule 65(c) was discretionary

restraining order should have been issued without demanding a bond "required by the express terms of the Clayton Act . . ." *Id.* at 572. See also *Monroe Gaslight & Fuel Co. v. Michigan Pub. Util. Comm'n*, 292 F. 139 (D. Mich. 1923) which says "the court on its own motion should require such bond, unless the defendant waives it." *Id.* at 153.

37. *Magidson v. Duggan*, 180 F.2d 473 (8th Cir.), *cert. denied*, 339 U.S. 965 (1950); *Swift v. Black Panther Oil & Gas Co.*, 244 F. 20, 29-30 (8th Cir. 1917). Where the court has no control over the property, such efforts to protect jurisdiction stand on a different footing and a bond may be required. *Ferguson v. Bucks County Farms, Inc.*, 280 F.2d 739 (3d Cir. 1960).

38. *United States v. Onan*, 190 F.2d 1, 7 (8th Cir.), *cert. denied*, 342 U.S. 869 (1951). After explaining the decision on the grounds suggested in the text, the court added that no damage could result to the enjoined party. This might be thought to carry with it some implication that there is discretion to dispense with the bond where no damages seem likely, but such an interpretation seems strained to this writer.

39. *Third Circuit*: *Hopkins v. Wallin*, 179 F.2d 136 (3d Cir. 1949). "There was no bond deposited prior to the granting of the order, which is likewise made a condition precedent." *Id.* at 137. This sounds mandatory. The court added that "[s]uch defects cannot be cured here since each requires the exercise of discretion by the Trial Court." *Id.* This second sentence might refer to the trial court's discretion as to amount. If so, this would fit with the statement that the bond was a "condition precedent." At any rate, *Ferguson v. Bucks County Farms, Inc.*, 280 F.2d 739 (3d Cir. 1960) seems to be premised on the idea that a bond is mandatory under rule 65. *Fourth Circuit*: *Robinson v. Benbow*, 298 F. 561 (4th Cir. 1924), *quoted note 36 supra*. *Seventh Circuit*: *Chatz v. Freeman*, 204 F.2d 764 (7th Cir. 1953). The court there concluded that the bankruptcy act did not, on the facts at hand, exclude the operation of rule 65; it then reversed the trial court for failure to comply with the bond requirement of rule 65. *Eighth Circuit*: An early decision of this circuit, *Swift v. Black Panther Oil & Gas Co.*, 244 F. 20 (8th Cir. 1917), recognized an exception to the bond requirement, but apparently this and other decisions of the Eighth Circuit have proceeded on the theory that the bond was mandatory apart from the rather narrow exceptions recognized. See cases cited in notes 37 & 38 *supra*. Of the four circuits listed in this note, the Eighth seems the least certain.

40. 217 F.2d 810 (6th Cir. 1954), *cert. denied*, 349 U.S. 930 (1955).

with the trial judge. "The rule leaves it to the District Judge," the court said, "to order the giving of security *in such sum as the court considers proper*. [sic]. This would indicate plainly that the matter of requiring security in each case rests in the discretion of the District Judge."⁴¹ There was no other discussion of the point, by way of analysis, legislative history, or precedent, which, indeed, seems to have been wholly lacking.

The *Urbain* decision received support from the Second and Tenth Circuits.⁴² As of 1972, this put three circuits clearly in favor of the trial judge's discretion and opposed to any mandatory bond.⁴³ Against this group there is a group of three or possibly four circuits that appear to hold the opposite view and to favor a mandatory bond.⁴⁴ In this group, however, the decisions are not clear, and it would be relatively easy for a court in this group to defect. One other circuit apparently sidestepped the issue.⁴⁵

2. *State Statutes in the Federal Pattern.* About half the states have statutes in the federal pattern—not necessarily in the historical sense, but in the sense that they contain mandatory language in the first instance, then add that the amount of the bond is to be fixed in the trial judge's discretion.

Some of the state statutes are simply replicas of rule 65(c). But state courts have leaned quite a bit toward a stringent view of the bond requirement and there is some tendency among the states to hold that the language of rule 65(c) is mandatory.⁴⁶

Other state statutes, though in some respects similar to the federal pattern, contain wording that might be regarded as significantly different as, for instance, the California "must require" language,⁴⁷ which may be more clearly imperative than the federal "[n]o . . . injunction shall issue . . ." language. The same California statute provides that the bond may not exceed an amount to be specified by the trial judge. Language like this seems to imply that the judge has no discretion to

41. *Id.* at 815-16.

42. *Continental Oil Co. v. Frontier Ref. Co.*, 338 F.2d 780 (10th Cir. 1964); *Ferguson v. Tabah*, 288 F.2d 665 (2d Cir. 1961).

43. Cases cited notes 40 & 42 *supra*.

44. Cases cited note 39 *supra*.

45. *Orleans Parish School Bd. v. Bush*, 252 F.2d 253 (5th Cir.), *cert. denied*, 356 U.S. 969 (1958), apparently decided on the ground that the bond was waived by the defendant.

46. *E.g.*, *Bayham v. Funk*, 3 Ariz. App. 220, 413 P.2d 279 (1966) (under rule with identical language to rule 65(c)); *Intermountain Rural Elec. Ass'n v. District Court*, 160 Colo. 128, 414 P.2d 911 (1966) (same).

47. CAL. CIV. PRO. CODE § 529 (West 1954).

set the bond at zero, and in that respect might be thought to differ materially from the federal statute. At any rate, the California courts, have interpreted the statute to be mandatory for preliminary injunctions.⁴⁸ Some have even said that an injunction issued without the required bond is utterly void and may be disobeyed with impunity.⁴⁹ Thus though the state statute in question follows the general pattern of the federal rule, it is deemed mandatory either because of slight differences in wording or for other reasons.

The only thing that seems really clear in this picture is that nothing is really clear. The division amongst the circuits and the states, both in legislative provisions and judicial interpretations, reflects fundamental indecisiveness and uncertainty over the purposes and effects of the bond. It is probably time for serious decision-making on the problem.

3. *Statutory Construction in the Absence of Governing Precedent: the North Carolina Rule*

(a) *Interpretation by analysis of the statutory language.* The preferred beginning in statutory construction is to discover "the intent of the legislature,"⁵⁰ which is to be found, or at least sought, in the words of the statute or rule itself.⁵¹ Rule 65 as adopted in North Carolina provides that no provisional injunction "shall issue"⁵² without security. This sounds mandatory, but the rule provides none of the mechanisms one would expect of a mandatory rule. For instance, there is no provision that the injunction is void in the absence of security, no punishment or penalty prescribed for the parties or any judicial officer if the injunction is issued without bond, and no minimum amount prescribed. As already shown, this last point has been persuasive to some courts on the ground that the trial judge, not compelled to require a minimum bond, may require one in a nominal amount or none at all, if that is what, in the words of the rule, he "deems proper." Thus in form the rule is mandatory, but it is so readily permissive in operation that a mandatory intent is hard to ascribe to the drafter.

(b) *Interpretation based on federal decisions.* Where a state

48. *Biasca v. Superior Court*, 194 Cal. 366, 228 P. 862 (1924); *Griffin v. Lima*, 124 Cal. App. 2d 697, 269 P.2d 191 (1954).

49. *Oksner v. Superior Court*, 229 Cal. App. 2d 672, 40 Cal. Rptr. 621 (1964).

50. *Stevenson v. City of Durham*, 281 N.C. 300, 188 S.E.2d 281 (1972); *Person v. Garrett*, 280 N.C. 163, 184 S.E.2d 873 (1971).

51. *State ex rel. North Carolina Milk Comm'n v. National Food Stores, Inc.*, 270 N.C. 323, 332, 154 S.E.2d 548, 555 (1967).

52. N.C.R. Civ. P. 65(c).

adopts a statute or rule that originates in another jurisdiction, the decisional law of the originating jurisdiction is always "apposite" in interpreting the statute.⁵³ North Carolina adopted its present rule from the federal rules with changes not important here.⁵⁴ It is sometimes said that when a state adopts a statute from another jurisdiction, any decisions of the originating jurisdiction are presumably adopted along with the statute itself.⁵⁵ This has no application in the case of North Carolina's adoption of rule 65 since the federal decisions are in conflict, either in direct holdings or in assumptions,⁵⁶ and the legislature of North Carolina cannot be presumed to have adopted either line of decision to the exclusion of the other.⁵⁷ Though some states have adopted the federal statute and then interpreted it to mandate a bond as precondition to provisional injunctive relief,⁵⁸ it could hardly be thought that the North Carolina legislature was adopting these decisions. They could hardly weigh more than any other persuasive, but non-binding, authority. Existing decisional law, then, does not clearly guide interpretation of the North Carolina rule here.

(c) *Interpretation in the light of earlier statutes.* When the words of a statute are not themselves clear, it is sometimes helpful to examine earlier statutory provisions dealing with the same subject. If an old statute is changed, it is usually a fair inference that a change in meaning was intended.⁵⁹ Here again the clues are contradictory.

The North Carolina rule has, of course, a federal history behind it. As already noticed, that history is a history of a shift from a permissive wording in the pre-1914 statute⁶⁰ to the mandatory wording enacted in the Clayton Act⁶¹ and carried forward to the federal rule and to the North Carolina rule. On this history taken alone, the inference is permissible, if not pressing, that the requirement of security was intended to be mandatory.

53. *Mangum v. Surles*, 281 N.C. 91, 97, 187 S.E.2d 697, 701 (1972) (interpreting rule 15(b) on this basis).

54. N.C.R. Civ. P. 65(c). In addition to the wording of federal rule 65(c), the North Carolina statute includes an immunity from the bond requirement in suits between spouses to enjoin interference, etc. in the course of separation or divorce. The statute also incorporates the wording of federal rule 65.1.

55. See *Ashley v. Brown*, 198 N.C. 369, 151 S.E. 725 (1930) (statute adopted from Massachusetts); *Ledford v. Western Union Tel. Co.*, 179 N.C. 63, 101 S.E. 533 (1919) (statute adopted from New York).

56. See text accompanying notes 39-44 *supra*.

57. See authorities cited note 55 *supra*.

58. See authorities cited note 46 *supra*.

59. *Childers v. Parker's, Inc.*, 274 N.C. 256, 162 S.E.2d 481 (1968).

60. Note 35 and accompanying text *supra*.

61. Note 34 and accompanying text *supra*.

But if the shift from a discretionary bond to a mandatory one is clear in the federal history taken alone, the reverse may be true in North Carolina history. Before the adoption of rule 65, the North Carolina statute provided that "[u]pon granting a restraining order or an order for an injunction, the judge shall require as a condition precedent to the issuing thereof that the clerk shall take from the plaintiff a written undertaking"⁶² Though there is no minimum amount specified in the earlier statute, it did provide that *some* amount of security was "to be specified by the judge," and it further used the stringent words "the judge shall require as a condition precedent." The practice under this statute was a little more flexible than the words might suggest. Although the bond was in some sense mandatory, an injunction issued without a bond was not deemed void but only irregular,⁶³ and a party enjoined without the benefit of security posted for his benefit could still be held in contempt if he disobeyed the order.⁶⁴ The shift from the old statute to the new rule could be a shift in the direction of a more discretionary approach to the question of security. Thus, whether we look at the mandatory words of the old statute or the permissive practice under it, the present rule seems discretionary—or at least more so than the older statute.

This leaves conflicting signals on the matter. The federal history suggests a shift to a mandatory bond, but the North Carolina history suggests a shift to a more discretionary approach. It is monotonous but true that no clear interpretation is possible from all this.

(d) *Interpretation in the light of other existing statutes.* Two other provisional remedies in North Carolina require bonds or other security. The statute dealing with attachment before judgment—which

62. Former N.C. GEN. STAT. § 1-496, first codified with this numbering in 1943. In substance it was originally enacted in 1868 as § 192, N.C. CODE OF CIVIL PROCEDURE; see Appendix III.

63. *McKay v. Chapin*, 120 N.C. 159, 26 S.E. 701 (1897); *Sledge v. Blum*, 63 N.C. 374 (1869) (dictum).

64. *Young v. Rollings*, 90 N.C. 125 (1884). The court required a direct attack here by way of a motion to dissolve the injunction issued without security. As to attacks on validity of injunctive orders in the contempt proceeding itself, see Rendleman, *More on Void Orders*, 7 GA. L. REV. 246 (1973).

The mandatory nature of the bond requirement was even further eroded by cases which allowed the plaintiff to remove the irregularity by posting the bond at any time prior to a decision vacating or dissolving the injunction. *McKay v. Chapin*, 120 N.C. 159, 26 S.E. 701 (1897); *Miller v. Parker*, 73 N.C. 58 (1875) (dictum). The net effect of these decisions was that an injunction granted without the mandatory bond was binding on the party enjoined unless he was granted a motion to dissolve, and even if the defendant did so move apparently he could be defeated if the plaintiff cured by posting bond prior to a ruling on that motion.

also applies to garnishment—provides in part: “The amount of the bond shall be such as may be fixed by the court issuing the order of attachment and shall be such as may be deemed necessary by the court in order to afford reasonable protection to the defendant, but shall not be less than two hundred dollars. . . .”⁶⁵ Likewise, the claim and delivery statute makes clear that a bond is mandatory as a condition to obtaining possession of the property. Since that statute provides for a bond double the amount of the property value,⁶⁶ there is no room for the argument that the amount of the security can be reduced to a nominal sum or to zero.

These provisions make it reasonably clear that the legislature, when minded to do so, knows perfectly well how to prescribe a mandatory bond. For this reason, the legislature’s failure to do so in rule 65 suggests that no minimum was intended. But even this conclusion is far from sure, since the legislature adopted rule 65 from the federal rules and obviously intended to maintain as much uniformity as possible with the federal version. Although the federal version was changed, the changes were particularly addressed to certain issues and claims that arise in state courts but are not ordinarily dealt with at all in federal cases. Two conflicting inferences arise: that the legislature knew how to prescribe a mandatory bond, but deliberately did not do so; or that the legislature simply tried to keep the rule as close to the federal as possible and that its omission to provide a parallel to the other provisional remedies was explained on that ground. Once again, we are confronted with uncertainty. It may be added that the *forma pauperis* statute does not seem to provide any clues, either, because it does not appear to cover the injunction bond.⁶⁷

C. Summary

The law in a number of states is clear, either from the statute itself or from existing judicial constructions of it. But the federal law is not clear, and neither is the law in those states that have “federal-rule type” provisions but have not given definitive interpretation to them. Amendments should be enacted to clarify the question but any such amendments must be made in light of the substantive issues and

65. N.C. GEN. STAT. § 1-440.10(1) (1969).

66. *Id.* § 1-475 (1969): “The plaintiff must give a written undertaking . . . executed by one or more sufficient sureties . . . to the effect that they are bound in double the value of the property”

67. *Id.* § 1-110 (1969).

policies to be effectuated—should the statute require a bond, or should it leave the matter to the trial judge, or should it distinguish among various cases, with a mandatory bond in some and a discretionary bond in others?

IV. SHOULD THE BOND BE MANDATORY?

A. *Some Factors of Importance*

1. *Defendant Access to Trial.* As indicated earlier, provisional injunctive relief carries with it potential for harm as well as good. When provisional injunctive relief issues at all, it issues without the kind of protections ordinarily deemed necessary for a due process trial. In addition, provisional injunctive relief creates special potential for private and public damage not present in either final injunctive relief or ordinary adjudications of debt, title, or right to possession. Two questions may be raised. What are the dangers of the kind of *ex parte* hearing held on a TRO claim or the attenuated hearing held on a preliminary injunction claim? And how does the requirement of a bond or other security bear on these dangers?

(a) *The problem of limited legal process and unfair result.* A fair trial is ordinarily thought to require notice and a hearing with a right to present evidence, cross-examine witnesses, and formulate arguments—in other words, a rational process for fact determination, on the one hand, and policy formulation on the other. When the trial process is restricted, the chances for honest error, for honest misjudgment, and for simple bias are enhanced substantially. Therefore, in most situations, the Constitution requires notice and an adversary hearing, or some good substitute.⁶⁸

The TRO issues without either notice or adversary hearing, and the preliminary injunction, though it issues with notice, provides only a limited time for the development of the defendant's case and usually only a limited hearing. Although some such procedure must exist to deal with truly urgent claims—and hence is probably constitutional⁶⁹

68. *Fuentes v. Shevin*, 407 U.S. 67 (1972).

69. Arguably, the TRO is constitutionally impermissible because, like the replevin in *Fuentes v. Shevin*, 407 U.S. 67 (1972), it involves judicial action without an adversary hearing. The differences in the *ex parte* action on replevin and that on TRO are important, however. First, the TRO does involve some hearing, though not an adversary one, while the traditional replevin process involved none at all. Secondly, the TRO involves assertion and proof of both emergency and inability to notify the defendant. Lastly, the TRO usually preserves, rather than disturbs, the status quo. If a court were to issue a mandatory TRO requiring a disturbance of the status quo, this might well be treated like the shift of possession of property in replevin and fall within the ban of

—the procedure is nevertheless inherently dangerous and likely to produce error.

One method of coping with the dangers presented by attenuated hearings has been to lay down standards that forbid provisional injunctive relief unless the plaintiff shows both an irreparable injury and a fair likelihood that he will win at the ultimate hearing.⁷⁰ Thus, ideally, the judge will restrict relief to cases in which there are showings of true urgency and clear right. It might be thought that such standards would in themselves protect against error or abuse that might otherwise occur because of the minimal or nonexistent hearing, but that does not seem to be the case.

In the first place, when the relief is sought *ex parte*, there is no guarantee that the judge will be alerted to the special standards. Even if he invokes them himself, there is no defendant present to argue their interpretation in the particular case, much less to present facts that would contradict the plaintiff's claim of irreparable injury. Still less is it likely that any facts adduced by the plaintiff will indicate the defendant's position on the merits. What the judge sees is literally one-sided: an urgent need by the plaintiff. This monocular vision denies the judge perspective and the urgency denies him the time for reflection. In such cases, the irreparable injury standard can hardly substitute for facts and legal argumentation.

The preliminary injunction is not so harsh, for there the defendant does have notice and an opportunity, however minimal, to defend his interests. But not too much comfort should be drawn from this. In a "federal-rule type" practice, a preliminary injunction can be routinely heard after only a five day notice of the defendant, and even that short notice can be further shortened by the judge in particular cases.⁷¹ Such notice is no doubt sufficient in a good many cases, but in others it may leave the defendant's attorney with an impossible task. He must understand the plaintiff's case, develop his own proof and legal

Fuentes. Short of that, however, I believe the TRO to be immune from a *Fuentes* type attack, and I proceed on that basis in this article.

70. *E.g.*, *Gulf & W. Indus., Inc. v. Great Atl. & Pac. Tea Co.*, 476 F.2d 687 (2d Cir. 1973) (preliminary injunction against consummation of tender offer; if it were carried out, unraveling would be impossible). Emphasis varies and the requirement that the plaintiff must demonstrate probability of success is not always stated or followed. In addition, the reviewing court may emphasize the chancellor's discretion rather than the restrictions placed upon him by these standards. *E.g.*, *In re Albright*, 278 N.C. 664, 180 S.E.2d 798 (1971).

71. Rule 65, regulating injunction practice, does not make this provision, but rule 6 sets out a general five-day rule on motions "unless a different period is fixed . . . by order of the court." FED. R. CIV. P. 6(d); N.C.R. CIV. P. 6(d).

argumentation, and arrange his schedule to attend a hearing. Very large firms specializing in the very matter before the court may be able to perform such tasks, but most lawyers would have a great deal of difficulty in doing so, even in relatively simple cases. There will be no time for the discovery process, and even the exact nature of the plaintiff's assertions may be unclear at this stage of the case. Once in court, the defendant may find it quite difficult to match up his own hastily assembled proof with the claims of the plaintiff. At least in one court, the defendant may even be denied an opportunity to present oral testimony on disputed facts.⁷² The judge himself cannot reasonably be expected to master and apply the underlying substantive law in many instances. (One recent preliminary injunction issued on the basis of claims grounded both in federal anti-trust laws and federal securities laws as applied to a complex economic relationship between two very large corporations.)⁷³ In some cases the judge may even deny the parties an opportunity to make legal argument.⁷⁴

A good example of the difficulties with the process can be seen in *Marshall Durbin Farms, Inc. v. National Farmers Organization, Inc.*⁷⁵ where the plaintiffs, a group of broiler processors, alleged that the defendant was engaged in various violations of the anti-trust laws. The plaintiffs demanded a preliminary injunction, and the hearing was set for June 25. Some of the defendants were served as late as June 19. At the hearing the plaintiffs introduced a total of seventy-seven affidavits, sixty-eight of which the defendants had not seen before. The defendant put on oral testimony, after which the trial judge announced that the hearing would necessarily terminate at 4:30 that afternoon. The judge then divided the remaining time between the parties. At the conclusion of the testimony the injunction was granted. The case was so extreme in its practical denial of an opportunity for hearing that the appellate court reversed. Nevertheless, the case is a good illustration of the sorts of pressure brought to bear on both defendant and judge.

Apart from difficulties of this sort, the thought process of decision-making may itself be in jeopardy in provisional relief cases. An inter-

72. *San Francisco-Oakland Newspaper Guild v. Kennedy*, 412 F.2d 541 (9th Cir. 1969); C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2949 (1973).

73. *Gulf & W. Indus., Inc. v. Great Atl. & Pac. Tea Co.*, 476 F.2d 687 (2d Cir. 1973).

74. C. WRIGHT & A. MILLER, *supra* note 72. Such cases would arise when the judge deems the legal rules clear, but that judgment itself is made in an error-prone situation.

75. 446 F.2d 353 (5th Cir. 1971).

esting study of decision-making processes conducted by a group of lawyers and psychologists⁷⁶ indicates that a decision maker, such as judge, is likely to reach different decisions as the evidence proceeds. If this is so—and common sense seems to confirm it—there are indeed dangers in an attenuated hearing. Once again, the standards limiting the grant of provisional injunctive relief to cases of “irreparable injury” are not self-executing. When a full adversary hearing is not available to develop facts and viewpoints, the very process in issue denies the judge perspective, information and reflection on “irreparable injury” just as it denies him perspective, information and reflection on the substantive merits. It is one thing to say that defendants must risk the consequences of an unfair decision; it is quite another to say that defendants must risk unfair decisions under a process that almost guarantees that unfairness.

(b) *The problem of excessive consequences.* The injunctive power has a potential for directly affecting people that hardly has an equal. The injunction commands personal conduct, positive or negative, and does not merely adjudicate rights and liabilities. This in itself offers potential for harm considerably broader than the potential usually implicit in a money judgment or a title adjudication. More than that, the injunctive order must be obeyed on pain of contempt punishment, a sanction not even remotely possible when the money judgment goes unpaid.⁷⁷ Nor is this all. While the money judgment may be appealed and execution of it stayed or even foiled by exemptions, the injunction must be obeyed as long as it is outstanding. If the defendant disobeys it, he is open to criminal contempt charges, even if the original injunction is later proven erroneous.⁷⁸ These extreme consequences may be acceptable alone or in combination with the special problems of the attenuated hearing, but they do pose dangers in fair administration of justice.

(c) *The problem of judicial power without rational adjudication.* Judges are immune from the claims of mistreated litigants.⁷⁹

76. Thibaut, Walker & Lind, *Adversary Presentation and Bias in Legal Decision-making*, 86 HARV. L. REV. 386 (1972).

77. See DOBBS §§ 1.3, 2.9; Dobbs, *Contempt of Court*, 56 CORNELL L. REV. 183 (1971).

78. Walker v. City of Birmingham, 388 U.S. 307 (1967); see Rendelman, *supra* note 64, for a careful analysis of the rule, with criticism. See also Dobbs, *The Validation of Void Judgments* (pts. I-II), 53 VA. L. REV. 1003, 1241 (1967).

79. Pierson v. Ray, 386 U.S. 547 (1967), “This immunity applies even when the judge is accused of acting maliciously and corruptly, and it is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest

They are likewise immune, at least practically speaking, from direct responsibility through the electoral process; even in systems where judges are subject to election, the elective process can seldom respond to matters so undramatic as judicial work. These immunities put judges in a position to exercise power without corresponding responsibility, a position troubling to the American instinct in general and the legal instinct in particular.

Nevertheless, judicial power has been used, on the whole, without abuse. It has been acceptable in a nation always concerned with the limits of official power because two important restraints are placed upon the judge that are not placed upon the executive or the legislative official. First, the judge is subject to appellate review, and he must act with this knowledge. He must make decisions on the basis of evidence and law or he will be reversed. Not only does this operate as an ultimate protection to the parties, it no doubt operates on the judge himself and affects his initial decision-making and trial conduct.

A second constraint may be more important. In most cases the judge acts only after he has followed the most rational of the public processes—a full trial. Issues are sifted and shaped without pressure from interest groups. Facts are developed. There are opportunities at several stages for formulation of legal policy based upon diverse viewpoints. Elaborate procedures have been enforced to guarantee the parties and the judge full access to information and a complete opportunity to understand the case and reflect upon it. Working in this adjudicatory model, the judge is constrained by a web of professional training and habitual practice.⁸⁰ These webs may be unseen; but they are nonetheless effective and important.

These restraints upon a judge's use of power largely disappear when provisional injunctive relief is sought. Appeals here are sometimes not even possible.⁸¹ When they are legally possible, they are often impractical because the injunction has in effect made matters

it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences." *Id.* at 554; *Gillikin v. United States Fidelity & Guar. Co.*, 254 N.C. 247, 118 S.E.2d 606 (1961) (similar).

80. *Handler & Klein, The Defense of Privilege in Defamation Suits against Government Executive Officials*, 74 HARV. L. REV. 44, 54 (1960), considering restraint upon the judge's list, in addition to the effects of appellate review, the possibility of disqualifying a judge in advance and "the very formality and decorum of judicial proceedings"—both elements likely to disappear in the case of provisional injunctive relief.

81. In the federal courts, an order granting or denying a TRO is not appealable, *Lowe v. Warden & Comm'r of Holman Prison Unit*, 450 F.2d 9 (5th Cir. 1971), though a preliminary injunction is, *Belknap v. Leary*, 427 F.2d 496 (2d Cir. 1970).

moot before appeal can be perfected.⁸² In any event, the injunction is ordinarily not stayed on appeal in the way an ordinary money judgment may be stayed.⁸³ Thus, for a period at least, the injunction can operate without appellate review; when that review arrives, it may terminate future effects of the injunction but not its past effects. A very large number of provisional injunctive orders are therefore outside the realm of effective appellate review. To that extent, the role of the trial judge in such cases is quite a bit different from his role in an ordinary trial and the constraint upon him is considerably diminished.

More important, the constraint of professional practice developed in a full trial disappears in the provisional injunction case. Procedure in provisional relief cases, far from providing a rational process for development of, and reflection upon, law and fact, forces immediate decisions without the light of fact or the delineation of policy. This procedure invites the judge to leave the adjudicatory role and accept a role of command instead. Whether the invitation to command conduct by injunction in itself puts the judge into a role at odds with the adjudicatory process is speculative, but when the rational and orderly procedures for fact-finding and for understanding of legal policy have been dropped, the judge acquires a power for arbitrariness not present in the usual adjudication. This is not to suggest that judges are arbitrary or authoritarian by nature any more than others. It is to suggest that in the American system, power without restraint is unacceptable, even when that power is used with benevolent motives. It is possible that, in particular cases, the judge will be deeply aware of these dangers and will react by refusing the provisional relief. But as already indicated, the judge is given a one-eyed view of the matter, and what he sees is urgency and harm to the plaintiff. We could hardly count on busy judges in such cases to perceive in their own actions misuse of power or a threat to rational adjudication.

Thus the self-limitation of judges cannot furnish the whole answer to such problems. The rules for self-limitation are themselves

82. I list some possibilities for illustration: (1) Defendant is prohibited from involvement of some sort in a specified occasion—from speaking or attending a rally, reporting a pending case or voting in a specific board meeting. The occasion is over before normal or expedited appeal processes make review possible. (2) Defendant is required to do something positive before appeal is possible—to sell gasoline to an independent dealer even though supplies are short and this will necessarily affect competitive structure, or to release names or files to the public even though this will forever destroy any privacy that might be properly claimed.

83. DOBBS § 2.10; C. WRIGHT & A. MILLER, *supra* note 72, at § 2904.

distorted when the opportunity for fact-finding and reflection is attenuated. There are reasons, then, to seek limitations that not only act on the judge, but also narrow the entry to the process itself.

(d) *The role of the injunction bond.* The plaintiff who is required to post a bond as a condition to provisional injunctive relief is subjected to a potential for personal liability since the surety on the bond, if forced to pay off, will claim over against the plaintiff himself.⁸⁴ This ultimate potential for liability, if uncertain or unlikely, will have little effect in discouraging resort to the extraordinary process. If, however, the bond is mandatory and if the liability is triggered by any misuse of the process, the plaintiff who subjects the defendant to special risks of attenuated hearings will have to be confident enough of his case to accept some risks of his own. The premium costs on the bond are low. They should not stand in the way of relief and probably seldom do so. The threat of *potential liability*, however, may serve to screen out unwarranted claims and at the same time to protect defendants whose rights have been dismembered without a full hearing. This may be desirable. Against this position it may be argued that any screen will screen out the good claims as well as the bad and that so far as it inhibits access of the poor to courts, it is unconstitutional. That point is considered next.

2. Plaintiff Access to Trial

(a) *How access is inhibited.* Where a bond is required as a condition to provisional relief, access to the judicial process may be inhibited in one of several ways.

First, a plaintiff may be inhibited by the bond-premium cost. Though this is not likely to represent a large sum of money—premiums run only about twenty dollars a year per one thousand dollars⁸⁵—it may be too large for the indigent plaintiff who nevertheless has a legitimate claim to provisional relief.

Second, a plaintiff may be inhibited by the threat of ultimate liability on the bond rather than by its premium cost. There are no "sure things" in law suits, and even a plaintiff confident of the justice of his case may well hesitate to protect a right worth five thousand dollars if he must risk a ten thousand dollar bond.

84. See, on the general obligation of the principal to reimburse the surety, RESTATEMENT OF SECURITY § 104 (1941).

85. Letter from the Surety Association of America (Lorenz K. Weiglein, Assistant Secretary) to Dan B. Dobbs, March 12, 1973.

Third, a plaintiff may be inhibited by non-economic factors: he may not be able to obtain a bondsman within the time period needed. The underwriter who is asked to post the plaintiff's injunction bond does not attempt to judge the likelihood that the plaintiff will win or lose. He attempts to judge the likelihood that the plaintiff could and would pay the damages covered by the bond.⁸⁶ That being so, the underwriter must accept the plaintiff on a guess about his financial standing and his position in the community; the fact that the plaintiff can afford the premium is not good enough to assure him that the underwriter will go his bond.⁸⁷ Indeed, some lawyers have asserted in casual conversation that bondsmen often refuse to provide a bond for the plaintiff with an unpopular cause. Whether this occurs often is uncertain, but on the basis of underwriting principles, it is hardly surprising to find that it does occur on occasion.

(b) *Legal responses to access inhibitions.* It is not necessary at this point to evaluate solutions to the access problem, but it is desirable to recognize that a wide range of legal response to the problem is possible and that not all forms of inhibition call for the same response.

For instance, one obvious response to any inhibition on access to courts is to abolish the bond requirement, but this is not a response equally adapted to all three forms of inhibition. In the third case (plaintiff unable to obtain a bondsman), it may seem entirely unfair to prevent a person from reaching the court simply because his cause is unpopular or his financial standing is unascertained by the bondsman. If he has the premium and is willing to risk ultimate liability on the bond, he should have his chance at the remedies provided by law. But this can be achieved without abolishing the bond requirement. One solution would be to provide a kind of "assigned risk" pool. Alternatively, the state could readily provide a bonding fund for those who cannot obtain ordinary commercial sureties. The kind of obstacle to courts represented here, then, does not call for elimination of the injunction bond, though it may call for some other legal change.

The second kind of inhibition (the threat of ultimate liability) may call for a quite different legal reaction. Here the plaintiff is reluctant to post a bond not because of its premium cost but because of the ulti-

86. Thus underwriters are advised to assume that the injunction may be held to have issued improperly and to estimate losses at the total amount of the bond and nothing less. L. MACKALL, *PRINCIPLES OF SURETY UNDERWRITING* 199-200 (5th ed. 1940).

87. See *id.* at 14-22 discussing the need to estimate the principal's honesty and financial ability, with the idea that a principal of character and financial substance would fulfill his obligation and save the bondsman harmless.

mate liability it threatens. In general the American judicial system has proceeded on the theory that no potential litigant should be discouraged from resort to courts since the alternative modes of dispute settlement are often unacceptable. At one time, courts were even reluctant to permit peaceful settlement of disputes by arbitration.⁸⁸ They remain reluctant to impose liabilities upon those who resort to the judicial process even when that resort is malicious.⁸⁹ They are likewise reluctant to charge the loser with any substantial cost of the trial.⁹⁰ This principle of free access is sound. Nevertheless, the provisional relief case raises issues quite different from those in the cases just mentioned. The provisional relief plaintiff requests relief that may prove costly to the defendant while at the same time he asks the court to proceed without listening fully to the defendant's side of the story. Before the system subjects itself and the defendant to risks of unfair adjudication, it is appropriate to ask the plaintiff to accept some risks himself. The plaintiff who risks nothing but premium costs need have little concern for the defendant's rights to a hearing. There may be special cases in which risks to the defendant are so small that a bond need not be required. In general, however, the inhibition resulting from fear of ultimate liability is desirable rather than undesirable for the party who asks the court to subject a defendant to its orders without hearing the defendant's side of the case.

The inhibition that raises the most complex problem is the one resulting from poverty—the case of the plaintiff who cannot afford the bond. This kind of problem raises issues of constitutional dimension and requires additional attention.

(c) *The bond cost and the poor person's access to provisional relief—the constitutional question.*

(i) *The Boddie Rule and the "Basic Right" Test.* It is clear that a poor person charged with crime must be given affirmative economic assistance when this is necessary to secure him a fair trial. For

88. DOBBS § 12.27.

89. See Byrd, *Malicious Prosecution in North Carolina*, 47 N.C.L. REV. 285 (1969). A similar problem occurs where the theory is that misuse of the legal process has resulted in "duress." See DOBBS § 10.2.

90. Thus the losing party is ordinarily not taxed with the winner's reasonable attorneys' fees. See DOBBS § 3.8. There may be a number of more complex reasons for such rules; for example, the possibility that settlement might be discouraged; Mause, *Winner Takes All: A Re-Examination of the Indemnity System*, 55 IOWA L. REV. 26 (1969), and the possibility that client payment of the fee is an important reinforcement of the adversary system; Lind, Thibaut & Walker, *Discovery and Presentation of Evidence in Adversary and Nonadversary Proceeding*, 71 MICH. L. REV. 1129 (1973).

example, the state must provide him a transcript for appeal in some instances⁹¹ and must provide him counsel if he cannot secure his own.⁹²

When poor litigants deal with courts in civil cases, two poverty-related claims might be asserted. First, the state must not discriminate against the poor. Secondly, the state must furnish "due process" in the form of access to the courts, even if this requires affirmative assistance to the poor litigant.

The equal protection claim is relatively easy here. The state may not discriminate against the poor litigant by imposing conditions upon him it does not impose upon others, at least in the absence of a compelling reason. For example, the state cannot impose a double bond upon tenants appealing summary eviction cases when no such requirement is imposed in any other appeals.⁹³ On the other hand, some discrimination may be acceptable, if it does not deny access altogether. In *Cohen v. Beneficial Industrial Loan Corp.*,⁹⁴ the Court upheld a state statute that required a bond of the plaintiff in a stockholder's derivative action where he held a small amount of stock, but did not require such a bond where he was a larger stockholder. Since the bond was intended to discourage strike suits, which were likely to come primarily from those holding nominal amounts of stock, the statute was thought to be sound against attacks on both equal protection and due process grounds. One supposes that a bond to protect all provisional relief defendants and required of all provisional relief plaintiffs would withstand a similar equal protection attack.

Does the state, however, owe a poor litigant, as a part of due process, an opportunity to litigate an affirmative civil action so that the state might be obliged to furnish costs or fees if the litigant could not afford to sue otherwise? In *Boddie v. Connecticut*⁹⁵ it was held, under circumstances present there, that the state would be required to pay or waive certain court costs for an indigent civil plaintiff. The underlying suit was a divorce action brought by a welfare recipient who could not

91. *Gardner v. California*, 393 U.S. 367 (1969); *Griffin v. Illinois*, 351 U.S. 12 (1956).

92. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

93. *Lindsey v. Normet*, 405 U.S. 56 (1972). In this case the state imposed a double bond requirement as a condition to appeal, but only in one class of cases—tenant appeals from summary eviction cases. The bond was automatically forfeited if the tenant lost on appeal, without regard to whether or not it matched the landlord's damages. Furthermore, the bond was in addition to the normal appeal bond. The Court held that this was a discrimination against the poor without adequate justification. *Id.* at 79.

94. 337 U.S. 541 (1949).

95. 401 U.S. 371 (1971).

provide the required advance deposit for court costs. The Court, on the basis of the due process clause, imposed upon the state the burden of paying or guaranteeing court costs in such a situation.

The holding, however, was a narrow one. The *Boddie* rule applies only where three conditions co-exist. First, the underlying substantive claim in the litigation must involve an issue or value that is somehow considered basic in our society. In *Boddie* this was "the basic position of the marriage relationship in this society's hierarchy of values."⁹⁶ Second, the state must exercise a "monopoly" on the means of redress. In *Boddie* this occurred because one cannot dissolve marriage by agreement; resort to the state's courts is the only means of relief. Third, there must be no countervailing justification for imposing costs that prohibit relief for the poor. In *Boddie* the use of costs to prevent frivolous litigation or to aid in finances was deemed an insufficient countervailing reason for denying access to the courts for the poor. When these conditions co-exist, it is a denial of due process to apply a cost statute to an indigent plaintiff, even though the statute may be valid as to all others.

In a more recent decision, *United States v. Kras*,⁹⁷ an indigent asked permission to petition for bankruptcy without paying the statutory fees amounting to about fifty dollars. The Court held the statute requiring fees of the bankrupt was constitutional and no fee waiver was required. *Boddie* was distinguished on the ground that bankruptcy was not one of those fundamental values in society like the marital relationship involved in *Boddie* and on the further ground that the bankruptcy proceeding was not the only means of redress since the bankrupt could bargain with creditors for reduction of his liability in a way that the wife in *Boddie* could not bargain for divorce. These views were applied in another recent case to uphold the validity of an appeal fee.⁹⁸

Whether the views taken in *Kras* were implicit in *Boddie* or whether *Kras* represents a retreat, it is clear that the holding in *Boddie* is not to be taken as a broad and general principle. In the light of *Kras*, it is unlikely that the state would be required to finance bond costs for an indigent who sought a preliminary injunction against a nuisance, for example, since a nuisance claim would almost certainly be deemed to involve something less than a fundamental right. Neverthe-

96. *Id.* at 374.

97. 409 U.S. 434 (1973).

98. *Ortwein v. Schwab*, 410 U.S. 656 (1973).

less, the result might be different if the plaintiff asserted a right considered "basic."

Suppose, for example, an indigent sues to enjoin official interference with a proposed, allegedly legal, Labor Day rally. The underlying right of free speech asserted in such a case is undoubtedly "basic" in the sense the Court has had in mind. It may well be, then, that *Boddie* rather than *Kras* would apply in such a case and that the state would be required to dispense with any bond requirement when an indigent sought provisional relief to protect free speech interests. Even in such a free speech case, *Boddie* may not require this assistance to the indigent, either because he has other means of redress or because the state has "countervailing justifications" for the bond requirement that do not exist or fees charged.

(ii) *Other means of vindication.* In a formal sense, the plaintiff seeking provisional injunctive relief always has other means of redress. If he is denied a preliminary injunction for failure to post a bond, he still has a claim for damages in the overwhelming majority of cases. In the free speech hypothetical, for example, he might have a claim under civil rights statutes against officials who interfered with his rights⁹⁹ or, if a federal official is involved, he might have an action directly under the Constitution.¹⁰⁰ In either case, the plaintiff might recover substantial, not merely nominal, damages.¹⁰¹ Since only a remedy is denied him for want of a bond and not the right itself, he almost always has other means of redress that will not require an injunction bond. The question is whether the other means of redress are good enough.

Arguably even a wholly theoretical kind of "other means" is enough to deny the indigent economic assistance under the *Boddie* rule. In *Kras* the majority of the Court found that the indigent debtor seeking to petition for bankruptcy had other means of redress because he could negotiate with his creditors. Since the debtor could not pay a fifty dollar fee, even in installments, it is difficult to believe the debtor had any bargaining power with creditors. *Kras* seems to suggest that the Court is not concerned with the relative adequacy or practicability of the "other means of redress" in the particular case, so long as some other means is available in theory. This in turn would support the no-

99. See *Monroe v. Pape*, 365 U.S. 167 (1961).

100. *Bivins v. Six Unknown Named Agents*, 403 U.S. 388 (1971); see *Dellinger, Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532 (1972).

101. See *DOBBS* § 7.3.

tion that the plaintiff who is unable to post a bond could be denied injunctive relief and left to redress his speech rights by a damage suit.

One might well hesitate to rely on such an interpretation in drafting a statute for at least two reasons. First, any such interpretation permits officials to exchange a damage suit payment (or even merely an unpaid judgment) for a basic constitutional right. It is very doubtful whether the Court would hold that the government could buy the power to suspend the Constitution. Secondly, the free speech element is not merely a protection for the speaker but for the public interests as well. It is a means by which the listener may obtain information and ideas. That being so, one cannot really expect that a damages claim would be deemed sufficient to justify prior restraint of speech: no matter how much damages might satisfy the speaker, such a route would undermine one of the purposes of the first amendment by depriving the listener as well as the speaker of a right of "fundamental importance."

Thus the damage suit might afford adequate redress in an ordinary nuisance case, but may not afford adequate redress in a free speech case. It may well be that *Boddie* requires special assistance to the indigent who seeks provisional injunctive relief if he asserts constitutional rights, or at least if he asserts first amendment rights. There is certainly a possibility that the Court would so hold.

(iii) *Countervailing justifications*. Are there, however, countervailing justifications for the injunction bond that do not exist for, say, the cost deposit required in Ms. Boddie's divorce action? Here again, the answer may be fairly clear where the underlying right asserted is not itself a "basic" constitutional right. If a TRO is granted to enjoin a nuisance and no bond is posted, the indigent plaintiff may have an extortionate hold on the defendant: the plaintiff will have nothing to lose, but much to bargain with, while the defendant may have everything to lose and nothing to bargain with. He may be forced to inordinate lengths to protect his business or fulfill his obligations to third persons. His access to courts may be wholly denied in practical effect, if no bond is posted, since he may be forced to act before a full hearing can be afforded.¹⁰² In cases of this sort, it is easy to see that the bond re-

102. Professor Rendleman documents one such case in his article, *Legal Anatomy of an Air Pollution Emergency*, 2 ENVIRONMENTAL AFFAIRS 90 (1972). There a large group of manufacturing plants were placed under a TRO to stop emission of particulates during the "Birmingham air crisis." The TRO was issued without notice at 1:45 in the morning and—it turned out—on the basis of emission figures two years old. When a hearing was held, the crisis was past and the facts came out, with the result that the

quirement is not only justified but operates to protect the very same right in the defendant that is asserted by the plaintiff—access to the judicial process.

Nor can it be argued that the bond cost could be picked up by the state. The bonding company bonds those from whom it expects it can get recoupment of any loss. It is not insuring the legal propriety of the plaintiff's case; it only guarantees the plaintiff's pocketbook.¹⁰³ Naturally enough it cannot do that with an indigent plaintiff. The state, of course, could provide its own guarantee. But it is surely doubtful whether the state is required to enter the insurance business to guarantee both parties' access to a fair trial. Furthermore, it is desirable to discourage the harassing plaintiff by insisting that he risk something himself if he forces risks upon defendants, and for this reason some form of risk should be placed upon the plaintiff seeking provisional relief.

Thus countervailing justifications for a mandatory bond exist in a great many cases. If the plaintiff asserts a free speech claim in a provisional injunction case, however, the countervailing justifications may not be so easy to identify. Suppose a case in which a bookseller sues to enjoin official interference with the sale of magazines and books alleged to be obscene. The interest he asserts is undoubtedly the kind the Court has considered basic, since it is a first amendment interest. Here the countervailing justifications for the bond are not so clear as those just mentioned in the nuisance case. The "official" defendant seldom has a personal or economic interest in the case of this sort, and unlike the businessman in the nuisance case he is not likely to suffer damage. Nor is the absence of a bond likely to create a *de facto* denial of this defendant's access to the court. If the bond requirement can be judged on a case by case basis, there seems little justification for a bond that keeps the plaintiff out of court in this kind of case.

But judgment on a case by case basis is itself problematical since provisional injunctions always involve cases in which the judge must act without full facts, full briefing, or full reflection. In addition, not every case in which free speech elements are asserted would warrant a waiver of the bond. For example, it is possible to imagine cases in which first amendment interests could be asserted on both sides. Suppose a plaintiff has attended a meeting of a controversial group on the

TRO was dissolved and the complaint dismissed. But the TRO, though of short duration, was of final and irreversible effect. *See id.* at 107.

103. *See* note 86 *supra*.

campus of State College. Security officers of the college have made a video tape of the meeting—supposedly private—and have handed the tape over to several television stations, including the college's, for showing on the evening news. The plaintiff seeks a TRO to restrain a showing on the ground—whether ultimately sound or not—that a showing will invade his privacy and associational rights under the first amendment as incorporated in the fourteenth.¹⁰⁴ The defendant—were it present to assert its interests—would also claim a free speech right to publish without prior restraint. A case of this kind is unlike the sheriff-censor case: the defendants here are likely to be damaged. To be sure, the amount of damages will be difficult to prove, but this is all the more reason to discourage suit in the absence of a bond. The upshot of all this is that not all free speech cases will necessarily call for the same treatment on the bond problem.

Nor are all "official defendant" cases alike. In the sheriff-censor case there appear to be no economic damages that might be suffered by the sheriff if the plaintiff were ultimately to lose the case. But suppose a case in which the plaintiffs, picketers, are repeatedly arrested by police when they appear at a grocery store protesting the sale of non-union lettuce. The picketers sue the police to enjoin the arrests, obtain a TRO, and return to the store to discourage patrons from entering. In this case the formal parties do not involve the storekeeper, who has a clear economic interest at stake. Though the picketers assert a free speech privilege (communication through picketing), and though the defendant is an official not personally likely to have damages, this is again a case in which countervailing justification would exist for requiring a bond. The free speech claim may turn out to be unjustified, as where it turns out that the pickets are engaged in mass picketing, violence, or secondary boycott.¹⁰⁵ Damages are likely to result. The justifications for a bond requirement are approximately the same as those in the nuisance case.

Thus in some free speech cases there are countervailing justifications for a bond that do not exist in others. The only question is whether a system can be devised to distinguish the two. One could well despair of writing a statute that would do so adequately. That leaves only the possibility that the judge could do so on a case by case

104. See *N.A.A.C.P. v. Alabama*, 357 U.S. 449 (1958). See also *Sullivan v. Murphy*, 478 F.2d 938 (D.C. Cir. 1973) (order against disclosure of arrest records).

105. Cf. *C. Comella, Inc. v. United Farm Workers*, 33 Ohio App. 2d 61, 292 N.E.2d 647 (1972) (secondary boycott, distinguishing *NLRB v. Fruit & Vegetable Packers*, 377 U.S. 58 (1964)).

basis. This seems unsound, given the fact that the defendant's viewpoint, evidence, and legal position are not available to the judge when he makes this decision. Although the plaintiff's underlying right is important, so is the defendant's underlying right to a fair trial. The judge, hearing an inadequate presentation, is in no position to balance these fundamental rights.

For these reasons, an unvarying bond requirement is reasonably justified, not because it meets ideals of carefully drawn academic distinctions, but because the alternatives, administered by human hands, are likely to be as bad or worse.

(d) *Legislative policy and the forma pauperis statutes.* The constitutional power to impose a mandatory bond requirement, if that power indeed exists, is not necessarily dispositive of the problem since the legislature is free to provide added protections for poor persons even if the Constitution does not require those protections.

Legislatures have in fact done very little by way of providing access to courts for poor persons. Aside from whatever legal aid may be available in civil cases, there are forma pauperis statutes in about half the states. Mostly these provide for a waiver of court costs in certain cases, but they are quite limited in coverage.¹⁰⁶ The North Carolina statute is unusually liberal in authorizing appointment of counsel for a poor person.¹⁰⁷ However, the statute permits waiver of a cost deposit or cost bond but does not on its face authorize waiver of the injunction bond.¹⁰⁸ Apparently this would be the result in most states.

Existing law, then, makes no special provision for waiver of the injunction bond in the case of poor persons. Whether it should do so, and just how if so, is a question that can be addressed in stating the final proposal for legislation.

3. *The Extent of the Plaintiff's Liability*

(a) *Overriding limits on liability.* If there are high premium charges for injunction bonds, or if the ultimate liability is extensive or onerous, strong arguments could be mounted in favor of a purely discretionary bond. On the other hand, if liabilities are moderate or

106. See L. SILVERSTEIN, PUBLIC PROVISION FOR COSTS AND EXPENSES OF CIVIL LITIGATION (American Bar Foundation 1966); Silverstein, *Waiver of Court Costs and Appointment of Counsel for Poor Persons in Civil Cases*, 2 VALPARAISO U.L. REV. 21 (1967).

107. N.C. GEN. STAT. § 1-110 (Supp. 1973).

108. *Id.* § 1-109 (Supp. 1973).

light, a mandatory bond may seem more desirable. As already indicated, the bond premiums themselves are moderate.¹⁰⁹ Ultimate liability on the bond has also been moderate. Indeed, courts have often failed to secure compensation for the innocent defendant in these cases. The cautious reluctance to compensate has been reflected in the measures of damages on the bond and, perhaps more importantly, in several overriding legal and practical limitations which will be mentioned here.

First, the bond is not automatically forfeited when the injunction plaintiff is ultimately proved wrong. It is not, in other words, a liquidated damages bond,¹¹⁰ and the injured defendant, if he is to recover more than nominal damages,¹¹¹ must prove such actual losses as he can. It is possible to provide a liquidated damages type bond, either by judicial rule¹¹² or by legislation,¹¹³ but the practice is overwhelmingly to the contrary. In many cases the injunction defendant has losses not readily measurable in money, and he cannot prove his damages with requisite certainty. The result of the usual practice is that the security provided by the bond is wholly illusory.

Second, the penalty named in the bond is the limit of liability, both for the surety and for the injunction plaintiff himself¹¹⁴ in all but a scattering of states.¹¹⁵ Indeed, the statutes commonly do not pro-

109. See note 85 and accompanying text *supra*.

110. See Note, 73 HARV. L. REV., *supra* note 12, at 344.

111. See note 126 *infra*.

112. In *Renaud Sales Co. v. Davis*, 104 F.2d 683 (1st Cir. 1939), the trial judge ordered a bond under which the plaintiff would, if he ultimately lost, pay the defendant "as liquidating damages the sum of \$2,000 and such further sum up to \$4,000 as should be adequately proved to be the costs and damages of the defendant." *Id.* at 684. The plaintiff ultimately lost because of unclean hands and the appellate court upheld the liquidated damages provisions of the bond.

113. TEX. R. CIV. P. 684 (injunctions against the state).

114. *J.A. Tobin Constr. Co. v. Holtzman*, 207 Kan. 525, 485 P.2d 1276 (1971); *McAden v. Watkins*, 191 N.C. 105, 131 S.E. 375 (1926); *Nansemond Timber Co. v. Rountree*, 122 N.C. 45, 29 S.E. 61 (1898). Implications to the contrary must be examined with care. In *Burnett v. Nicholson*, 79 N.C. 548 (1878) the court seems to imply that the defendant might recover from the plaintiff personally even in the absence of a bond, but during the period in which this case was decided the court was requiring the defendant to show malice and want of probable cause to recover against the plaintiff; hence the elements of malicious prosecution were met and the implication would not carry over to the modern practice where such elements are not necessary to establish the claim.

115. As of 1959, the *Harvard Law Review* listed four states on the basis of then existing authority: Illinois, Louisiana, Texas and Vermont. Note, 73 HARV. L. REV., *supra* note 12, at 347. I have not attempted to make a detailed determination of current status of this view, but it does appear to me that Vermont's adoption of what is basically a federal rule approach may change its rule on this issue; see VT. R. CIV. P. 65(c). A recent federal decision, not under rule 65 but under a slightly different provision of the Norris-La Guardia Act, has held that the plaintiff is liable beyond the bond penalty,

vide for a separate undertaking by the plaintiff himself, and his own undertaking to pay damages must be implied from the bond or from the statute requiring a bond. Hence it has been easy to conclude that his liability is limited by the sum named in the bond. It seems arguable that, even if this rule is correct, a different rule should be applied where, in spite of the statutory requirement, no bond is posted at all. In other words, the plaintiff who ignores the bond requirement could still be personally liable for the defendant's damages resulting from improper injunction. There is little evidence of any such distinction in the cases. The usual statement is that the plaintiff's liability is on the undertaking he gives and that he is not liable at all unless he gives one.¹¹⁶ There are a couple of qualifications. If the plaintiff obtains something of value by reason of the provisional order, he must restore it when it later appears that it belongs to the defendant, and this rule of restitution applies regardless of bond limits.¹¹⁷ There is also the possibility that the plaintiff's conduct in procuring the order constitutes an independent tort, and if so, he may be liable for the tort whether a bond is posted or not and without regard to the limit of any bond that is in fact posted.¹¹⁸ The tort ordinarily involved would be the tort of malicious prosecution, or possibly abuse of process, and it would require proof that the plaintiff acted with actual malice and without probable cause.¹¹⁹ Such cases do occur, but they are rare, and for our purposes, the possibility of an independent tort action can be almost wholly discounted. The result is that if no bond is posted, no one is liable at all. If a bond is posted, the limit of liability is the amount set in the bond, and this limit protects the plaintiff personally as well as his sureties.

Third, judges have repeatedly set the bond penalty too low or have

though the surety is not. *United States Steel Corp. v. UMW*, 456 F.2d 483 (3d Cir. 1973).

116. *Benz v. Compania Naviera Hidalgo, S.A.*, 205 F.2d 944, 947 (9th Cir. 1953). In *Russell v. Farley*, 105 U.S. 433 (1882), the Court said: "Where no bond or undertaking has been required, it is clear the court has no power to award damages sustained by either party in consequence of the litigation . . ." *Id.* at 437. There are decisions, although few, that may assume the plaintiff's personal liability in the absence of a bond. See *L. & R. Ins. Agency, Inc. v. McPhail*, 92 Ill. App. 2d 107, 235 N.E.2d 153 (1968).

117. See text accompanying notes 191-97 *infra*.

118. *Shute v. Shute*, 180 N.C. 386, 104 S.E. 764 (1920) (\$500 bond would limit bond recovery, but if plaintiff can establish malice and want of probable cause he might recover actual damages of almost \$5,000, plus attorneys' fees not recoverable on the bond, plus punitive damages).

119. *Local 775, IBEW v. Country Club East, Inc.*, 283 N.C. 1, 194 S.E.2d 848 (1973); *Shute v. Shute*, 180 N.C. 386, 104 S.E. 764 (1920); *Byrd*, *supra* note 89; *Annot.*, 150 A.L.R. 897, 904 (1944).

not required one at all.¹²⁰ Though of course this is not always so, in a noticeable percentage of the cases the defendant, having won the injunction suit, establishes damages in excess of the bond.¹²¹ Even if damages measures fully compensate him in theory, he must thus go uncompensated in practice. The defendant is entitled to ask for a higher bond, and perhaps he is entitled to present testimony as to the proper amount, but these rights may also prove illusory, or at least inadequate. In the first place, the defendant is not heard at all on TRO, and the judge must set the penalty of the bond wholly on the basis of the plaintiff's suggestions and his own guesses. The crucial issues may be determined on this bond, and if so the defendant will never have the opportunity to seek a higher penalty.¹²² In the second place, it is very difficult to present proof as to a proper amount. Not only are the defendant's interests likely to be difficult to measure in dollars, but the final effect of the injunction may not be perceived for a long period. It is difficult to believe that the defendant will have much scope for getting the bond penalty raised at late stages in the case when he is apt to have the most information about his probable damages. It is hard to imagine that the defendant is likely to succeed in such a maneuver in the hour immediately before the final trial, for example. In the third place, the defendant will probably have only a limited time in which to present his case, and he may be forced to use that time presenting the merits rather than evidence on the bond penalty.¹²³ The low bond penalty not only fails to discourage needless suits—and hasty ones—but it fails to protect the injured defendant.

Fourth, there is no indication that courts would be willing to impose liability for non-economic harms in the way they do in many actions at law. For instance such claims as those for false imprisonment, invasion of privacy, denial of the right to vote, malicious prosecution, as well as statutory civil rights, claims have all been the basis for substantial damages awards even though no economic loss is shown, though

120. *E.g.*, Tenth Ward Road Dist. No. 11 v. Texas & Pac. Ry., 12 F.2d 245 (5th Cir. 1926) (railroad enjoined collection of road taxes, by the time taxes were ultimately collected, building prices had increased by \$26,000, local government recovers nothing since there was no bond).

121. *Broome v. Hattiesburg Bldg. & Trades Council*, 206 So. 2d 184 (Miss. 1967) (\$1500 bond, \$6,500 damages); *McAden v. Watkins*, 191 N.C. 105, 131 S.E. 375 (1926) (\$500 bond, \$1,175 damages); *Nansemond Timber Co. v. Rountree*, 122 N.C. 45, 29 S.E. 61 (1898). The result is magnified when no bond at all is posted as in *Benz v. Compania Naviera Hidalgo, S.A.*, 205 F.2d 944 (9th Cir. 1953).

122. *See Broome v. Hattiesburg Bldg. & Trades Council*, 206 So. 2d 184 (Miss. 1967).

123. *See* discussion in text accompanying note 75 *supra*.

there are local variations.¹²⁴ Yet if the preliminary injunction deprives the defendant of some analogous right, recovery is always based on and limited to economic losses¹²⁵ or at least losses based on property.¹²⁶

Fifth, a few cases have supported a rule that gives the trial judge discretion to refuse an award of damages even where a bond has been posted and even where losses are clearly established. The discretion rule arose before the bond was required by statute and was applied in a case where the injunction, though erroneous in extent, was at least partly correct.¹²⁷ It has been doubted whether such a rule should obtain since the passage of bond statutes,¹²⁸ but there is recent support for it.¹²⁹ Where such a rule is applied, the defendant has lost something he was entitled to keep, and he has lost it in litigation without the normal procedural protections. Nevertheless, he is left to those losses on the basis of "equitable discretion." In short, there is no inclination in the courts to award immoderate recoveries to the injured defendant, much less to award exorbitant ones.

(b) *Damages measures and items of recovery.* (i) *General damages.* Courts¹³⁰ and, in some states, statutes¹³¹ sometimes speak of measuring damages on the injunction bond by an equitable standard. But in practice this does not seem to result in measures of damages different from those used in other cases. Courts usually permit recovery

124. DOBBS § 7.3.

125. See *UMW v. Arkansas Oak Flooring Co.*, 238 La. 108, 113 So. 2d 899 (1959) (wrongful injunction against picketing, recovery based on attorneys' fees and similar costs); *Broome v. Hattiesburg Bldg. & Trade Council*, 207 So. 2d 184 (Miss. 1967) (preliminary injunction against picketing, injunction improper as matter of law).

126. *Weierhauser v. Cole*, 132 Iowa 14, 109 N.W. 301 (1906), allowed a recovery of damages where the injunction had enabled the defendant to exercise wrongful dominion over the highway bordering plaintiff's house, more or less equivalent to permitting nominal damages in a trespass case.

127. *Russell v. Farley*, 105 U.S. 433 (1881).

128. See Note, 73 HARV. L. REV., *supra* note 12, at 342. *Russell v. Farley*, 105 U.S. 433 (1881), took note that the discretion rule applied where there was no statute requiring a bond.

129. *Page Communications Eng'rs, Inc. v. Froehlike*, 475 F.2d 994 (D.C. Cir. 1973). Discretion should be distinguished from a rule that forbids recovery of damages in all cases of a certain class. In *Wissman v. Goucher*, 150 Tex. 326, 240 S.W.2d 278 (1951), *A* obtained an injunction against *B*'s breach of contract. The contract was one for which *A* has paid consideration but its restrictive covenants were overbroad, with the result that the contract was unenforceable as against public policy. The injunction was therefore dissolved, but the court refused damages on the ground that no damages should be given where the injunction only compelled compliance with a promise for which consideration had been paid.

130. *E.g.*, *State ex rel. Shatzer v. Freeport Coal Co.*, 145 W. Va. 343, 115 S.E.2d 164 (1960).

131. ILL. ANN. STAT. ch. 69, § 12 (Smith-Hurd Supp. 1973) speaks of "such damages as the nature of the case may require, and to equity appertain."

of nominal damages if no others are proven,¹³² general damages roughly of the kind permitted in an analogous tort or contract damages case, and special damages.¹³³ As in other actions,¹³⁴ special damages are recoverable only if they are proven with reasonable certainty and only if they are deemed "proximate"¹³⁵ results of the provisional injunctive order. General damages may in some instances be measured more cautiously than in tort or contract cases—as in the case of non-economic harms—but otherwise are quite similar.

In many instances analogies from the law of tort or contract damages furnish obvious guides. If the injunctive order wrongly deprives the defendant of possession of land or chattels, the rental value during the period in which he was deprived of use is an appropriate measure of damages.¹³⁶ Since this is an item of general damages, there is no need to show actual specific loss of tenants, or even that the property would have been rented in the absence of the injunction.¹³⁷ This is exactly the rule ordinarily used in cases of dispossession of realty or chattels by a tortfeasor,¹³⁸ who, incidentally, may be just as innocent of wrongdoing as the provisional injunction plaintiff.¹³⁹

If the injunction has the effect of permitting physical damage or

132. *E.g.*, Union Springs Tel. Co. v. Green, 47 Ala. App. 427, 255 So. 2d 896 (1971). Statutory language of course may preclude nominal damages.

133. *E.g.*, J.A. Tobin Constr. Co. v. Holtzman, 207 Kan. 525, 485 P.2d 1276 (1971) (loss of profits resulting from the injunction).

134. *See generally* DOBBS §§ 3.2, .3.

135. *State ex rel. Stout v. Rogers*, 132 W. Va. 548, 52 S.E.2d 678 (1949) (remote, conjectural damages excluded).

136. *See J.A. Tobin Constr. Co. v. Holtzman*, 207 Kan. 525, 485 P.2d 1276 (1971) (rental value of equipment idled by injunction); *De Camp v. Bullard*, 159 N.Y. 450, 54 N.E. 26 (1899) (use value of stream for floating logs); *State ex rel. Shatzer v. Freeport Coal Co.*, 145 W. Va. 343, 115 S.E.2d 164 (1960) (rental value of equipment idled by injunction).

137. If the defendant attempts to prove that the injunction caused him to lose a specific tenant, he is attempting to prove special damages. In such a case recovery will be denied unless he proves with adequate certainty that the injunction caused loss of the tenant. *State ex rel. Stout v. Rogers*, 132 W. Va. 548, 52 S.E.2d 678 (1949). In such a case he should show rental value of the land on the general rental market as a measure of the possessory rights he has lost.

138. *See* DOBBS §§ 5.8 (land), .11 (chattels).

139. The tort of conversion does not require bad motive or evil intent and neither does the tort of trespass to land. For example, the mistaken improver, who builds on A's land in the belief that it is his own, is liable to A for rental value of the land. DOBBS § 5.8. One can convert personalty in a number of honest ways, for example, by honest misdelivery to the wrong person. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 15 (4th ed. 1971). In suits for replevin, and by the modern view, in suits for conversion, the true owner may recover use value of the converted article. *See* DOBBS § 5.11. Thus no distinction should be made between a tort claim of this sort and the injunction bond claim causing similar harm, and none is in fact made in the cases I have observed.

destruction to the property of the defendant, the measure ordinarily mentioned is the diminished value of the property.¹⁴⁰ No doubt in an appropriate case, the defendant could repair the property and charge reasonable repair costs instead.¹⁴¹

Not all provisional injunctive orders deal directly with tangible property. One kind of order that appears in some of the cases is the order restraining the defendant from working for plaintiff's competitor in alleged violation of a covenant. Either the covenant or the injunction or both is frequently overbroad in such cases and is overturned when a hearing is held. The defendant has in such cases often lost either wages or an opportunity to make profit. Subject to the rule requiring him to minimize damages, he is entitled to recover lost wages or loss of earning capacity.¹⁴²

A number of cases involve provisional injunctive orders against the sale of property that stands as security for a debt. Typically the defendant has loaned money to *T* and has taken a mortgage or deed of trust. *T* has defaulted and defendant is about to sell the property to pay *T*'s debt. However, plaintiff claims some interest in, or lien on, the property and obtains a TRO to prevent the sale. When the TRO is dissolved and defendant proceeds to conduct the sale, and if the price pays the debt due him, he will have no damages. If the property has diminished in value while the TRO was in effect, the delayed sale may be insufficient to pay *T*'s debt to defendant. In that case, the diminished value of the security, so far as it reduces defendant's collection from the sale, measures defendant's claim on the bond.¹⁴³ Here

140. See *Nansemond Timber Co. v. Rountree*, 122 N.C. 45, 29 S.E. 61 (1898) (removal of timber by plaintiff during injunction, timber value recoverable); *Du Bose v. Bultman*, 215 S.C. 468, 56 S.E.2d 95 (1949).

141. If the analogy to tort damages is accepted, this would seem to follow. See *DOBBS* § 5.1.

142. See *Josephson v. Fremont Indus., Inc.*, 282 Minn. 51, 163 N.W.2d 297 (1968). For the difference between "lost wages" and loss of earning capacity see *DOBBS* § 8.1.

143. [T]he measure of the damages which are recoverable by the creditor . . . is ordinarily the depreciation, if any, in the value of the property conveyed by the mortgage or deed of trust, as security for the debt, from the date of the issuance of the injunction to the date of its dissolution. The only interest which the creditor has in the property is its preservation as security for his debt If, notwithstanding the injunction, the creditor collects his debt, interest and costs, by the sale of the property, after the dissolution of the injunction or otherwise, he sustains no damages

Gruber v. Ewbanks, 199 N.C. 335, 339, 154 S.E. 318, 321 (1930). Some cases state more broadly that the measure of damages is the "diminution in the value of the security during the period of restraint," *Glens Falls Ins. Co. v. First Nat'l Bank*, 83 Nev. 196, 201, 427 P.2d 1, 4 (1967). But I take it that this broader formulation is not meant to cover more than the defendant-creditor's losses and would have no application to the situation in which, though the security was impaired during the injunctive period, it remained sufficient to pay the debt, interest and costs.

again, the recovery does not exceed the actual economic loss and is in line with what one would expect in a tort action brought for impairing security.¹⁴⁴

A difficult problem can arise if the provisional injunctive order prevents consummation of a contract so that the injunction defendant is denied the fruits of his bargain. Suppose *A* contracts to sell a building to *B* for 200,000 dollars. On the date for closing, the building has a market value of 175,000 dollars. *A*'s bargain is worth 25,000 dollars, and if *B* breaches his contract to purchase, he will be liable in that sum. This will be true whether or not *B* acts in bad faith. It will be true whether or not the building diminished in value after the contract was made. These are the general rules in contract actions.¹⁴⁵ Suppose now that *C*, a tenant in the building, obtains a TRO forbidding the proposed sale. This makes the sale impossible or otherwise excuses *B*'s performance. The TRO, on hearing, is dissolved, but by this time *B*'s performance is excused and *A* has lost his sale. The value of his building has not diminished—it is still worth the same 175,000 dollars it was worth when the TRO was issued. However, *A* has lost his expectancy or bargain with *B*. What is *C*'s liability on the bond?

Two analogies come to mind. One analogy compares the injunction plaintiff in this situation to a contract breaker who causes loss of *A*'s bargain. If this comparison is made, it is clear that the injunction plaintiff would be liable on our facts for 25,000 dollars—*A*'s loss of bargain.¹⁴⁶ The other analogy compares the injunction plaintiff to one who induces another to breach *A*'s contract. This is a tort if it is done with intent and without a privilege.¹⁴⁷ If this comparison is made, it is again clear that the injunction plaintiff would be liable for 25,000 dollars as the loss of *A*'s bargain, since that is the measure of damages against a breach inducer.¹⁴⁸ Neither analogy is entirely satisfactory.¹⁴⁹

144. See *Knudsen v. Hill*, 227 Cal. App. 2d 639, 38 Cal. Rptr. 859 (1964) (valuation of note). It is possible to provide a rule allowing greater recovery by treating the security instrument as saleable property itself. One could allow diminished value of that instrument without regard to the question whether final sale was made and whether it was sufficient to pay the debt. But if this might be done in a damage suit, it does not seem to be contemplated in the bond actions.

145. See *DOBBS* § 12.1.

146. *Id.*

147. See *W. PROSSER*, *supra* note 139, at § 129.

148. *DOBBS* § 6.4.

149. The first is not because the injunction plaintiff is not himself in the contractual relation. The second is not because, though the injunction plaintiff is an intentional destroyer of the contract obligation in the legal sense that he knows the obligation will be destroyed by his act; see *Garratt v. Dailey*, 46 Wash. 2d 197, 279 P.2d 1091 (1955), he is undoubtedly privileged, in the absence of malice, to defend his self-interest by

On the other hand, it is clear that the injunction defendant in our case has lost a bargain of 25,000 dollars, and to the extent that the bond recovery is aimed at full compensation, this should ordinarily be the amount of recovery.

A Florida case on quite similar facts, however, called for a different measure of damages.¹⁵⁰ In that case the trial court attempted to give the injunction defendant his expectancy by deducting the assumed value of the building from the contract price.¹⁵¹ The appellate court, however, held that the proper measure of damages was the amount by which the property diminished in value during the term of the provisional injunction or the delay period.¹⁵² The court relied on two cases for this rule, but neither case involved a specific, existing resale contract, and consequently neither could have considered the possibility of allowing an expectancy type recovery.

If the Florida decision is applied to a contract like that in our example, it will mean that, though the landowner-defendant has lost 25,000 dollars expected "profit" as a result of the improper injunction, he will recover nothing at all unless his building has—fortuitously enough—diminished in value. If it *does* diminish in value during the term of the injunction, that diminished value, of course, is not likely to coincide with the amount lost on the bargain.

On the other hand, if the Florida decision is applied to a contract in which the landowner stood to lose money, there may be a readily understandable reason for the rule. Suppose the landowner-defendant had contracted to sell his 175,000 dollar building for 160,000 dollars. A completed transfer would cause him a net loss of 15,000 dollars. He is lucky if the injunction prevents a sale and excuses his obligation to the purchaser, and he certainly has no general damages. But, once the contract liability is discharged, it is possible to feel that the land-

bringing suit. Any distinction based on the fact that in the case I have posed, the injunction plaintiff has destroyed *B*'s obligation but has not induced a technical breach should be discounted.

150. *Global Contact Lens, Inc. v. Knight*, 254 So. 2d 807 (Fla. Ct. App. 1971), *cert. denied*, 260 So. 2d 520 (Fla. 1972).

151. The trial court erred in computing the value of the building because it based its computation on the "book value" of the property, that is on original cost less depreciation, rather than on fair market value. But the appellate court rejected the expectancy test *in toto*, not merely the trial court's computation of value.

152. Cases mention two different measures. One is the difference between the value of the property on the date of the injunction and the date of its final sale, *see Kolin v. Leitch*, 351 Ill. App. 66, 113 N.E.2d 806 (1953). The other is the difference between the value of the property on the date of the injunction and the date the injunction is dissolved, *see Josephson v. Fremont Indus., Inc.*, 282 Minn. 51, 163 N.W.2d 297 (1968).

owner is entitled to have existing value in his hands equal to the value he had when the provisional injunction was issued. Thus if, during the injunction period, the value of the building falls from 175,000 dollars to 170,000 dollars, the Florida court would apparently award the landowner-defendant a 5,000 dollar recovery on the bond. There was evidence in the case that the contract was indeed a losing contract. It is therefore possible to interpret the rule as a rule addressed to losing contracts, not a rule addressed to profitable ones.

How does this decision stack up with liabilities for similar damages where no bond is required? First, if the Florida rule applies to profitable as well as unprofitable contracts, it gives the injunction defendant, for most cases, a vastly smaller recovery than he would obtain in breach of contract cases and one smaller than his actual damages. Second, the Florida rule, as applied to unprofitable contracts, gives the defendant nothing at all unless the building value has diminished during the injunction term. If it has diminished, the rule goes on to say that the damages are not to be offset by the collateral savings from non-performance. This version of the rule operates a good deal like some ordinary rules in contract or tort suits. For example, the breaching party to a contract is often held liable for more than the contract price, and the non-breaching party is put in a better position than if there had been full performance on both sides. This occurs in exactly the kind of situation supposed here—a losing contract on the part of the non-breaching party. The non-breaching party is allowed to recover the true value of what he has given, even though this exceeds the contract price.¹⁵³ In theory, this is because the breaching party has received that value, but quite often this is more theoretical than real.¹⁵⁴ Thus courts have often achieved the result that will be achieved under the Florida rule—a recovery beyond actual loss. Courts have also said that the victim of a tort may recover his damages without any deduction for any collateral benefits he receives from the tort.¹⁵⁵ It would be possible in our case to see the loss as diminished property value and the savings from non-performance as a collateral benefit. This may not be a good rule, but it is not wholly at odds with judicial practice in cases not involving bonds.

153. See DOBBS § 12.24.

154. Often the cost to the non-breaching party is taken as the measure of the worth received by the breaching party. This in fact is inaccurate and the breaching party is thus often held for "value" he did not get. See *id.* § 12.24; Childres & Garamella, *The Law of Restitution and the Reliance Interest in Contract*, 64 Nw. U.L. REV. 433 (1969).

155. See RESTATEMENT OF TORTS § 920 (1939); DOBBS § 3.6.

This survey of general damages, though it does not pretend to be exhaustive, gives a strong impression of caution on the part of judges in assessing liability on the injunction bond. There seems no basis for fear that a mandatory bond would produce excessive liability, if the standard is just compensation for loss.

(ii) *Special damages.* (A) *Generally.* In most of the bond cases, the significant award is the award for special rather than general damages, most commonly the award for attorneys' fees. Special damages are those not based on a general model of expected loss like diminished property value or loss of bargain under a contract. They are items of particular expense proven particularly in the case before the court. More exacting proof is often demanded when special damages are sought, and actual, realized loss must be established.¹⁵⁶ When special damages are sought, the claimant must prove the damages with reasonable certainty and must convince the court that they are not too remote or approximate.¹⁵⁷ He must also show that any expenses incurred and claimed as damages were reasonable.¹⁵⁸

Among the kinds of special damages that have been successfully claimed when proof is adequate are: loss of profits,¹⁵⁹ increased construction costs where construction was delayed by the injunction,¹⁶⁰ and various costs of the preliminary litigation.¹⁶¹ All of these costs, if allowable at all, are allowable in addition to the general damages already mentioned.

(B) *Avoidable consequences.* The rule that one must minimize his damages applies to claims made on injunction bonds. Two rather special situations arise in these cases. One involves a provisional order that is made by a court having no jurisdiction. If there is no jurisdiction, the order could be disobeyed with impunity, at least if one could be sure that the bootstrap principle would not apply.¹⁶² It could therefore be argued that a defendant subjected to such an order should minimize his damages by disobeying it, and plaintiffs have in fact made just

156. See *Dobbs* § 3.2.

157. See *State ex rel. Stout v. Rogers*, 132 W. Va. 548, 52 S.E.2d 678 (1949).

158. See *Union Springs Tel. Co. v. Green*, 47 Ala. App. 427, 255 So. 2d 896 (1971).

159. See *J.A. Tobin Constr. Co. v. Holtzman*, 207 Kan. 525, 485 P.2d 1276 (1971); cf. *Kelly v. Schorzman*, 3 Wash. App. 908, 478 P.2d 769 (1970) (under special statute).

160. See *Jesse French Piano & Organ Co. v. Forbes*, 134 Ala. 302, 32 So. 678 (1902); *City of Elkhart v. Smith*, 135 Ind. App. 108, 191 N.E.2d 522 (1963).

161. Expenses of the trial on the permanent injunction are not a result of the provisional orders in the case and are not recoverable, see *Gruber v. Ewbanks*, 199 N.C. 335, 154 S.E. 318 (1930); *Midgett v. Vann*, 158 N.C. 128, 73 S.E. 801 (1912).

162. See *Dobbs*, *supra* note 78.

such an argument. Courts, however, have usually said that the defendant is under no obligation to risk a contempt charge, and he is free to comply with the order and claim damages on the bond, even if it turns out in the end to be void¹⁶³—put otherwise, even if the court was without jurisdiction to enforce the bond based on that order.¹⁶⁴

A second situation somewhat peculiar to claims on the injunction bond arises when the exact scope of the injunctive order is uncertain. The amount of damage the defendant suffers from an erroneous order may depend on how he interprets the order. In an Indiana case, a plaintiff procured a provisional injunction against a former employee, enjoining compliance with a covenant not to compete. The covenant by its terms was limited to a six-month period, but the injunctive order specified no time limit. The hearing on the permanent injunction was not held until after the six-month period had expired. The defendant asked for damages based upon the over-extensive injunction, but the court refused to permit this recovery, saying that defendant could have sought clarification or modification had he desired.¹⁶⁵ In other words on the facts, it was deemed reasonable for the defendant to seek clarification rather than undergo additional damages. The question no doubt turns on the factual peculiarities of each case. Once the issue has been litigated to the stage of a provisional injunction, it is not always reasonable to expect the defendant to seek modification, nor would it be desirable repeatedly to re-litigate at the preliminary stage of proceedings. Thus in some cases the injunction defendant can recover his damages even though they might have been avoided had he sought and obtained a modification of the provisional order.¹⁶⁶

Where the cases depart from the orthodox avoidable-consequences analysis, they seem to favor the injunction plaintiff rather than the injunction defendant—a departure that itself seems orthodox in the injunction bond cases. For instance a North Carolina case¹⁶⁷ involved an injunction against removal of certain timber. The defendant obeyed the injunction until it could be dissolved, and as a result of his obedience, his teams were idled. He asserted a claim for damages based upon the cost of feeding the teams thus idled. The usual rule puts the bur-

163. See *Mason v. United States Fidelity and Guar. Co.*, 60 Cal. App. 2d 587, 141 P.2d 475 (1943).

164. *Broome v. Hattiesburg Bldg. & Trades Council*, 206 So. 2d 184 (Miss. 1967).

165. *Montgomery v. Lincoln Laboratories, Inc.*, 138 Ind. App. 356, 209 N.E.2d 273 (1965).

166. *Du Bose v. Bultman*, 215 S.C. 468, 56 S.E.2d 95 (1949).

167. *Nansemond Timber Co. v. Rountree*, 122 N.C. 45, 29 S.E. 61 (1898).

den of proof upon the person against whom damages are claimed to show that damages could have been avoided. Nevertheless, the court here denied any recovery for feeding the animals on the ground that the injunction defendant had failed to show he could not have avoided such losses—a reversal of the usual burden. Perhaps the decision is justified on other grounds,¹⁶⁸ but it does seem to reflect a predilection, so commonly found in the cases, for protecting the injunction plaintiff no matter how damaging the provisional injunction might have been to the defendant.

(C) *Attorney's Fees.* The backbone of special damages awards in most instances is the award of the attorney's fee. Most courts have sustained such awards under governing statutes.¹⁶⁹ Some of the courts limit such fee recoveries to fees earned in procuring a dissolution of the TRO or the preliminary injunction since the statute and the bond are intended to protect against improvident provisional relief, not against the main suit.¹⁷⁰ Other courts have taken a more liberal position and have said that, at least when the attorney seeks dissolution of a provisional order but is forced to defend the main action because the dissolution was improperly denied, the additional fees incurred on the main action are attributable to the improvident provisional relief and can be awarded.¹⁷¹

Even in such courts, however, the governing rule or statute may be interpreted to limit the recovery of attorneys' fees so that the aggrieved defendant is still not made whole. The Field Code language on injunction bonds was that the bond covered such damages as might be sustained "by reason of the [provisional] injunction, if the court shall finally decide that the plaintiff was not entitled thereto."¹⁷² This

168. The award of damages based upon timber losses, if made on the basis of gross income from lost timber sales during the injunction period, would have included income, some of which ordinarily would go to feed the animals. Hence, any additional recovery for feed might have duplicated existing awards.

169. Annot., 164 A.L.R. 1088 (1946).

170. *E.g.*, *Mason v. United States Fidelity & Guar. Co.*, 60 Cal. App. 2d 587, 141 P.2d 475 (1943) (but where TRO work was necessarily interwoven with merits, trial judge must set fee as best he can); *UMW v. Arkansas Oak Flooring Co.*, 238 La. 108, 113 So. 2d 899 (1959).

171. The distinction between that case and this is that in this case the defendant did appear and oppose the continuance of the [provisional] injunction. The court, however, continued the injunction. There was thus imposed upon the defendant the obligation of trying the action To such a trial he was forced by the order of the court continuing the injunction, and the necessary expenses incurred by him in this procuring relief from the restraint contained in the injunction order were properly damages caused by the granting of the injunction.

Youngs v. McDonald, 56 App. Div. 14, —, 67 N.Y.S. 375, 378 (1900).

172. New York Code of Procedure, ch. 379, § 195, [1848] Laws of New York 534.

language by its terms eliminates damages, including attorneys' fees, incurred *before* the provisional order is issued or even in defending against the issuance of that order. Thus the fee earned in the initial hearing may be denied though the fee earned in an effort to dissolve the preliminary injunction after it has issued is granted.¹⁷³ This approach of course does not make the defendant whole. It is no doubt justified in states like New York¹⁷⁴ and California¹⁷⁵ where the old Field Code language is retained so that damages must be incurred "by reason of the injunction." But the federal rule language, now in force in a good many states, is rather different. Rule 65 drops the "by reason of" language and substitutes "for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." The language of this provision is open to the construction that any damages incurred may be recovered, including those incurred in trying to prevent the provisional order in the first place. At least one court, without taking note of the language shift from the Field Code to the federal rule, has said that the recovery would still be limited to fees incurred after the first injunction was issued even though the federal rule had been adopted.¹⁷⁶

In states permitting recovery of attorneys' fees on the bond, the aggrieved defendant usually has some, though not complete, relief. In a handful of jurisdictions, the aggrieved defendant gets no relief at all under the heading of attorneys' fees. The rule against recovery of attorneys' fees on the bond was adopted by the United States Supreme Court in 1872 in *Oelrichs v. Spain*¹⁷⁷ at a time when there was no rule or statute requiring a bond at all.¹⁷⁸ The reasoning of the court was based upon the general rule that attorneys' fees are not recoverable items of damages, and the Court made no distinction between ordinary cases and provisional relief cases where bonds had been posted. In any event the holding had nothing to do with statutory bonds. Nevertheless, a series of federal court decisions followed this rule, taking no

173. "The services of counsel that were employed by him to resist the motion were rendered by virtue of the order to show cause why the injunction should not be granted, and not by reason of the injunction." *Curtiss v. Bachman*, 110 Cal. 433, 439, 42 P. 910, 912 (1895); *accord*, *Youngs v. McDonald*, 56 App. Div. 14, 67 N.Y.S. 375 (1900).

174. N.Y. CIV. PRAC. LAW § 6312(b) (McKinney 1963).

175. CAL. CIV. PRO. CODE § 529 (West 1954).

176. *Artistic Hairdressers, Inc. v. Levy*, 87 Nev. 313, 486 P.2d 482 (1971) (dictum).

177. 82 U.S. (15 Wall.) 211 (1872).

178. The first general federal bond statute appears to have been enacted in Act of June 1, 1872, ch: 255, § 7, 17 Stat. 197.

notice that statutes had been enacted since *Oelrichs*.¹⁷⁹ This series of cases, though they are only a handful in number and though they almost wholly ignore statutory changes, have been treated as "the federal rule." It has yet to be decided whether enactment of what is now rule 65 will affect the recovery of attorneys' fees or not.

In the meantime, *Oelrichs* influenced a number of state courts. Texas,¹⁸⁰ Tennessee,¹⁸¹ Maryland,¹⁸² and Virginia¹⁸³ adopted a rule against recovery of attorneys' fees on the injunction bond. Independently of *Oelrichs*, Maine,¹⁸⁴ Pennsylvania,¹⁸⁵ and North Carolina¹⁸⁶ also ruled against recovery of such fees. The first two states seem to have done so partly out of hostility to attorneys' fees recoveries generally. North Carolina seems to have done so mainly because, at the time the decision was made, a statute provided a flat fee for attorneys in all cases and to have awarded an additional fee would have been to duplicate recoveries.¹⁸⁷ The statute in question has long since been repealed,¹⁸⁸ but the rule against an award of attorneys' fees though

179. *Tullock v. Mulvane*, 184 U.S. 497 (1902), was decided after the 1872 statute was enacted, but it made no mention of the statute. In 1914, the basis of present rule 65 was enacted as part of the Clayton Act, ch. 323, §§ 16-18, 38 Stat. 737-38 (1914). The decisions since that time have been lower court decisions and, with an exception noted below, take no notice of the effect of the statute. *International Ladies' Garment Workers Union v. Donnelly Garment Co.*, 147 F.2d 246 (8th Cir. 1945); *Heiser v. Woodruff*, 128 F.2d 178 (10th Cir. 1942); *Covington County v. Stevens*, 256 F. 328 (5th Cir. 1919); *In re Farmers' Union Mercantile Co.*, 26 F.2d 102 (E.D.S.C. 1928); *Duke Power Co. v. Greenwood County*, 25 F. Supp. 419 (W.D.S.C. 1938).

In *Salvage Process Corp. v. Acme Tank Cleaning Process Corp.*, 104 F.2d 105 (2d Cir. 1939) the panel headed by Judge Swan followed the "federal rule," based on *Oelrichs*, taking note of the statutory change, but saying that the statutory language would be interpreted in the same way that the language of the bond had been interpreted in *Oelrichs*. This overlooked the Supreme Court's own statement in *Russell v. Farley*, 105 U.S. 433 (1881), that different results might be obtained on injunction bonds where they were entered into pursuant to statutes. In 1972 the Third Circuit, in a closely reasoned opinion, suggested that *Oelrichs* had been misinterpreted (on slightly different grounds than those mentioned here) and questioned its authority. *United States Steel Corp. v. UMW*, 456 F.2d 483 (3d Cir.), *cert. denied*, 408 U.S. 923 (1972).

180. *Galveston, H. & S.A. Ry. v. Ware*, 74 Tex. 47, 11 S.W. 918 (1889).

181. *Stringfield v. Hirsch*, 94 Tenn. 425, 29 S.W. 609 (1895).

182. *Wood v. State*, 66 Md. 61, 5 A. 476 (1886).

183. *Wisecarver v. Wisecarver*, 97 Va. 452, 34 S.E. 56 (1899).

184. *Barrett v. Bowers*, 87 Me. 185, 32 A. 871 (1895).

185. *Sensenig v. Parry*, 113 Pa. 115, 5 A. 11 (1886).

186. *Hyman v. Devereux*, 65 N.C. 588 (1871).

187. The 1868 Code of Civil Procedure provided for typical cost recoveries—such items as official fees—but also added a set of fixed charges graduated according to the legal work done and length of trial. These were obviously intended for partial compensation of the attorneys. See, e.g., N.C. CODE OF CIVIL PROCEDURE §§ 279(2), (7).

188. Ch. 139, § 16, [1871] N.C. Sess. Laws 203, repealed the entire scheme. N.C. GEN. STAT. § 7A-305 (Supp. 1973) provides for uniform costs not including these fees.

founded on the statute, has come to have a life of its own.¹⁸⁹

Thus the one-time rule in federal courts, in Texas, and in a group of six Eastern Seaboard states, has been opposed to a recovery of any attorneys' fees on the bond. On the other hand, the effect of statutory changes in both the federal system and in the states, has not yet been clearly adjudicated, and it is conceivable that some or all of these jurisdictions might, under the aegis of a new statute, reach a different result.¹⁹⁰

(c) *Restitution recoveries.* (i) *General rule.* (A) *Recovery of plaintiff's gains.* Where the plaintiff recovers something from the defendant in a judicial procedure, but it is later determined in the same proceeding that the first judgment or decree was erroneous, the plaintiff must return the benefits he gained by the erroneous decree. This restitutionary claim is based upon gains to the plaintiff, not upon losses to the defendant, though of course the gains on one side may well match the losses on the other. The principle of restitution applies to all kinds of cases, not merely to injunction or provisional remedy cases. If the plaintiff has gained something that belongs—in law or equity—to the defendant, he must restore it.¹⁹¹ For example, if the plaintiff sues at law in ejectment to recover Blackacre, he may gain possession by the judgment of the trial court. Yet on appeal, if this judgment is reversed, the plaintiff will be obliged to make restitution of Blackacre to the defendant, not because the plaintiff is a wrongdoer, but because he has something that belongs to the defendant.

(B) *Effect of bond limits; permanent injunctions.* Since the principle of restitution is to force disgorgement of unjustly held gains, restitution is not dependent upon an injunction bond. It applies to permanent injunctions later reversed as well as to provisional orders. In addition, if there is a bond, the bond's limits do not furnish limits of the plaintiff's liability. In other words, it may be appropriate in cases where the plaintiff has gained nothing to limit his liability for the defendant's losses to the amount of the bond. But where the plaintiff

Only limited fees are provided for by general statutes under N.C. GEN. STAT. §§ 6-21.1, .2 (1969).

189. *Midgett v. Vann*, 158 N.C. 128, 73 S.E. 801 (1912). Although the old compensation system had been repealed in 1871, the court found the repeal of the statute to be grounds for denying fee recovery, whereas the existence of the statute had been the basis for the rule in the first place. *Hyman v. Devereux*, 65 N.C. 588 (1871).

190. *Cf. Artistic Hairdressers, Inc. v. Levy*, 87 Nev. 313, 486 P.2d 482 (1971) where Nevada, though it adopted federal rule 65, refused to follow the federal case law on the attorneys' fees issue.

191. RESTATEMENT OF RESTITUTION § 74 (1937).

has gained something to which he is not entitled, he is obliged to disgorge that "something" without regard to the bond limits.¹⁹²

(C) *Scope.* Perhaps the most frequent application of this rule in injunction cases occurs in rate-making cases. The pattern is this: a rate or tariff is set by an administrative agency limiting the amount a regulated industry can charge for its service—for example, limiting a railroad's charges for shipping certain goods. The railroads obtain an injunction against enforcement of the limit and, because of the injunction, are permitted to collect the older and more favorable rates. After final hearings, it is determined that the regulation is valid so that it is now apparent that the railroads collected overcharges. With a variety of regulated industries, it is held that the overcharges must be refunded, in the absence of some contrary equity or some reason to leave the matter to administrative regulation.¹⁹³

The principle, of course, is not limited to such facts. For example, in one case, the plaintiff was able to obtain an injunction that had the effect of forcing the defendant to pay the plaintiff royalties for the use of certain machines. Though the defendant could have used no machines at all, business practicality forced it to use some machines, and the injunction forced it to use those of the plaintiff if it used any at all. When it turned out that the injunction was erroneous, the defendant was allowed to recover the royalties so paid.¹⁹⁴

The benefits gained by the plaintiff need not be tangible nor repayable in kind. In *Bedell Co. v. Harris*,¹⁹⁵ the plaintiff secured a preliminary injunction that allowed him to keep possession of Blackacre against the claims of defendant, his landlord. The injunction was ultimately dissolved, and of course the plaintiff was obliged to restore Blackacre to the landlord. But he was also obliged to pay for the value of Blackacre's use. This is also regarded as restitution. The injunction plaintiff got the value of the use of the property, and the defendant was deprived of that value. So long as we measure "value" in these cases objectively, by the rental market, we can see that the plaintiff's gains and the defendant's losses are coincident. It is conceivable, however, that a particular plaintiff might profit in some unusual way so that his personal gains are not reflected by rental value.

192. *Arkadelphia Milling Co. v. St. Louis Sw. Ry.*, 249 U.S. 134 (1919).

193. *See id.*; *Middlewest Motor Freight Bureau v. United States*, 433 F.2d 212 (8th Cir. 1970).

194. *See Hartford-Empire Co. v. Shawkee Mfg. Co.*, 163 F.2d 474 (3d Cir. 1947).

195. 228 App. Div. 529, 240 N.Y.S. 550 (1930).

Likewise, a particular defendant might have special needs for the property and losses from its dispossession that would not be reflected in mere rental value. There may be special cases where such *subjective* measures of damages or restitution would be warranted, but in general the value of the use of property¹⁹⁶ or money¹⁹⁷ is measured objectively, by the market, not by the special value to the particular parties. That being so, the use value recovery can ordinarily be treated as a simple restitution recovery, and hence not limited by the bond limits.

(ii) *Limits.* (A) *Recognizable benefits and legal policy.* The rule permitting restitution without regard to bond limits is subject to careful limits. In the first place, it may be reiterated that damages to the defendant are not the same as gains to the plaintiff. If there is no bond, the defendant cannot collect any *damages* at all, except so far as his damages may coincide with gains to the plaintiff. In *Tenth Ward Road District No. 22 v. Texas & Pacific Railway*,¹⁹⁸ a railroad obtained a provisional injunction against the collection of taxes that would have gone to secure a bond issue for roadbuilding. When the injunction was issued, all the building plans collapsed for want of financing. Later the injunction was dissolved because the taxes were held constitutional, but by the time the new arrangements could be made for the project, prices had increased by \$26,000. Since there was no bond up, the local taxing unit sought to recover "restitution" from the railroad. It was apparent that, though the local unit was damaged, the railroads had no monetary gains resulting from the injunction.¹⁹⁹ Thus there could be no recovery at all.

Actually in the *Tenth Ward* case there was one kind of gain: the railroad gained the opportunity to litigate in circumstances favorable to itself. Sometimes opportunities are themselves items of gain, or at least form an element of value in a gain, where the opportunity is bought and sold.²⁰⁰ But if so, it would be unwise to force "restitution" of the

196. See, e.g., DOBBS §§ 5.8, .9.

197. Interest, as such, is always objectively measured; this is what distinguishes it from profits, which might vary according to the individual using the money. See generally *id.* § 3.5.

198. 12 F.2d 245 (5th Cir. 1926).

199. No doubt the interest saved by the railroads by not having to pay immediate taxes could properly be treated as a restitution item, but it does not seem to have been claimed here.

200. Similarly, if an employer is forced to pay restitution based on the reasonable value of a salesman's time, even though the salesman was never able to sell anything, it can only be said that the employer was paying for an opportunity, not a tangible benefit. See DOBBS § 13.3. Even such items as rental value are objective manifestations of a supposed opportunity to profit. All these things are bought and sold and have an established market value.

value of the opportunity to litigate, even if that value could be measured. Perhaps this can be generalized more broadly: restitution here ought to be limited to "balance sheet" restitution, increases in the values in the hands of the plaintiff as a result of the provisional order. Though the cases have not expressed the idea in these terms, they seem to be consistent with it, and in any event show no signs of using restitution theory as a fictional base for an award of damages beyond the bond limits.

(B) *Coincidence of defendant's loss with plaintiff's gain.* There is a general, if often vague, notion in the field of restitution generally that restitution is usually to be granted only when the gains on one side coincide with losses on the other.²⁰¹ This is a somewhat treacherous idea because it depends very much upon assumptions about appropriate measures of restitution. In the case of the tenant who was allowed to remain in possession of Blackacre after his term expired, it was said that the landlord's loss and the tenant's gain were equal, because one gained and one lost the "rental value" of the premises during the period of the erroneous injunction. But the adoption of such an objective or "general" measure of gain and loss is a method of saying that we ignore special gains of the plaintiff or special losses of the defendant. In other words, the gain on one side is equal to the loss on the other simply because we adopt a *measure* of gain and loss that makes them equal, not because they are equal on the parties' respective balance sheets. Thus if the restitution claimant uses a general measure of damages and matches that with a general measure of restitution, the coincidence of gain and loss can be found readily. Only if the restitution claimant seeks *special* restitution (analogous to special damages) will he have to establish the coincidence of his own loss and his adversary's profit or gain.

This caution out of the way, it may be said that several major cases have been interpreted as establishing the coincidence rule in these injunction cases: the injunction defendant may recover in excess of the bond only to the extent that he shows his loss coincides with the plaintiff's gain.²⁰² Subject to the caution already given, the proposition seems entirely correct if we imagine a windfall gain situation in which the injunction permits the plaintiff to make profits of 10,000 dollars,

201. RESTATEMENT OF RESTITUTION § 1, comment *e* at 14-15 (1937).

202. See *Greenwood County v. Duke Power Co.*, 107 F.2d 484 (4th Cir. 1939), *cert. denied*, 309 U.S. 667 (1940); *United Motors Serv., Inc. v. Tropic-Aire, Inc.*, 57 F.2d 479 (8th Cir. 1932).

but costs the defendant only 500 dollars to comply with. For instance, *A* obtains an injunction against *B* to prevent *B*'s breach of a contract. Compliance with the injunctive order may cost *B* very little, but may yield a great profit to *A* because of other business arrangements he has. A number of variations can readily be imagined. If it turns out that the injunctive order was erroneous (because, for example, there was no valid contract between *A* and *B*) *B* undoubtedly ought to recover his damages—his cost of compliance with the order, and any other element of loss. But it seems to serve no purpose to say that *B* may also recover the 10,000 dollars profits *A* was able to make because he had *B*'s performance. Unless *A* is a wrongdoer and obtained the injunctive order in bad faith, the only apparent purpose would be to give *B* a windfall gain or to deter *A* from seeking injunctive relief. Though the bond rules normally intend to force persons like *A* to pay for the harm their premature claims cause, there is no reason to impose added liability. Actually, the circumstances are rather happy ones when we have such gains. The economic waste that would have been incurred if no injunction issued is avoided (*A* made a profit that would otherwise be lost) and *B*'s damages can easily be paid. Though in the end the injunction proved erroneous, it served to maximize the total economic condition of the community rather than to cause loss, and there is no reason to take the gain from one innocent person and give it to another. In addition, the gain does not result solely from injunction. It is true that the profits here, by hypothesis, would have been lost if the injunction had not issued. Yet when the profits are saved, their source lies in part in *A*'s skill, management, and operation of his business. To *B*, the 10,000 dollars would be a windfall; to *A* it would be, in part, a result of his enterprise.

The cases are not clear, but—subject to the caution already given—they would probably deny any restitution not coincident with the loss of the injunction defendant, and this seems entirely correct.

(C) *Derivation and direct derivation of gains from losses.* Although there is no point in forcing "restitution" of the plaintiff's gains where there are no damages to the defendant, it does not follow that restitution should be denied merely because the gains of the plaintiff are not *directly* traceable to the losses of the defendant.

In the example given above, *A* enjoined breach of a contract by *B* and was thus enabled to profit 10,000 dollars. *B*, on the other hand, was damaged only 500 dollars. Suppose that this damage resulted because *B* retained an attorney to defend the preliminary injunction suit

and to get it dissolved, and that the sum mentioned was the fee of the attorney. It cannot be said that *B*'s payment of the attorney's fee is in any way identifiable with the profit made by *A*. *A* would have obtained the injunction even if the defense attorney had not been hired. Thus we have a loss on one side (the 500 dollars) and a gain on the other (the 10,000 dollars profit), but while they are *coincident* to the extent of 500 dollars, they are not *causally related* or *identifiable* with one another. Suppose on these facts that *A* has not posted a bond or that the bond is inadequate. Can *B* recover 500 dollars? Since there is coincidence of gain and loss to the extent of 500 dollars, the coincidence requirement is met sufficiently to permit recovery. The only issue is whether the gain to *A* must not only be coincident with but also causally related to the loss by *B*—that is, somehow derived from *B*'s loss and not merely derived from the injunctive order itself.

As a matter of sound legal policy there seems no reason to require identification of gains and losses. If, as the result of an erroneous injunctive order, the defendant really has provable damages and the plaintiff really has provable gains, why should not the plaintiff be obliged to make restitution out of his gains, up to the extent of the defendant's actual damages? This would not seem to place an undue inhibition upon access to courts since the plaintiff would still have profited by his appeal to judicial authority. There seems no reason to insist upon the bond limit on recovery in such a case.

The decisions are ambiguous and cloudy, but they may suggest an answer different from the one just given. They may suggest not only that restitution will be denied unless the plaintiff's gains are traceable to and identifiable with the defendant's losses, but also that the gains must be *directly* traceable. In *Greenwood County v. Duke Power Co.*,²⁰³ a South Carolina county borrowed money to erect a power plant. Allegedly it had contracts with certain customers for the sale of power. Duke, a would-be competitor, obtained injunctive orders forbidding erection of the plant. After several years' litigation, these orders were dissolved. Duke had put up no bond, and its only liability therefore would be to make restitution of any gains it had received as a result of the injunctive orders. The county alleged that there had indeed been gains: Duke, it said, had profited some \$250,000 by reason of sales to customers who had contracted to buy from the county, and who presumably would have bought from the county had Duke not ob-

203. 107 F.2d 484 (4th Cir. 1939).

tained the erroneous injunction. By the same token, the county was unable to sell power to those customers.

On this statement of the situation, it appears that Duke had gained and the plaintiff had lost the same thing—certain identifiable purchases by certain identifiable customers. Yet restitution was denied. At least two interpretations might be made of the jurists' language. First, the county had not proved losses adequately, because the amount it would have profited from the sales might well have been different from the amount Duke would and did profit; the coincidence of gain and loss was therefore not proved, at least not as to the amount. Secondly, Duke profited, but its profits, though coincident with some of the county's losses, and to some extent traceable to those losses, did not result *directly* from those losses, but instead came indirectly, by sales to the county's would-be customers. Another case, on which the *Greenwood* court relied, seems to have this second interpretation more clearly in mind.²⁰⁴

The second interpretation seems to represent a three-fold rule: *first*, gains by one party must coincide with losses by the other; *second*, the gains must not only be traceable to the losses, but *third*, they must be directly traceable. If this is the correct interpretation of the decisions, it must be said that they are extremely cautious. If there is no need to identify gain and loss with one another, there should certainly be no need to show a direct passage of benefit from the hands of the injunction defendant to the injunction plaintiff. If the benefit is real and measurable with reasonable certainty and the loss is real and measurable with reasonable certainty, and the injunction was indeed an erroneous one, the victim of that injunction should be permitted to recover. It is difficult to be sure of the interpretation of these cases; but it is clear that they embrace no reckless tendency to impose liabilities upon the injunction plaintiff. If anything they seem to show that even local governments can be seriously harmed by injunctive orders where no bonds are posted.

(d) *Cumulating restitution and damages.* Rule 65 requires a bond for "costs and damages," but says nothing about restitution. If the term "damages" is taken literally, the surety's liability would be limited to the losses suffered by the injunction defendant and the surety would not be liable for restitution based upon gains to the injunction plaintiff in the absence of a bond provision to the contrary. However,

204, *United Motors Serv., Inc. v. Tropic-Aire, Inc.*, 57 F.2d 479 (8th Cir. 1932).

the surety is not excused for this reason from liability for damages as such, even though those damages to the defendant may be matched by gains to the plaintiff. Suppose for example the plaintiff posts a bond in the sum of 5,000 dollars and obtains an injunction later determined to be erroneous. Suppose the plaintiff has gained and the defendant has lost 10,000 dollars as a result of the injunction, but that the plaintiff is not able to make restitution of more than 5,000 dollars. In such a case the defendant could claim 5,000 dollars in damages against the surety, since he has losses in excess of that amount. He could claim the balance due from the plaintiff as restitution, since the plaintiff indeed has gains exceeding the claim.²⁰⁵ As to the surety, the claim is no less a "damages" claim merely because as against the plaintiff it is also one for restitution; as to the plaintiff, the claim is no less a restitution claim merely because it is matched by damages to the defendant.

There seems no reason not to cumulate damages and restitution against the plaintiff individually so long as the cumulative recovery does not exceed the defendant's actual loss. For example, suppose a provisional order requires the defendant to turn over 10,000 dollars in royalties to the plaintiff, and that the defendant incurs attorneys' fees of 5,000 dollars in seeking dissolution of the order. Suppose the bond is only for 5,000 dollars. It seems reasonable to allow the defendant, when the order is dissolved, to recover 5,000 dollars from the surety as damages and 10,000 dollars from the plaintiff as restitution. The total recovery in such a case exceeds the gains of the plaintiff, but it does not exceed the total of gains plus the bond. Since liability for restitution is independent of the bond in the first place, this seems correct.

(e) *The problem of the partially erroneous injunctive order.* Sometimes an injunction is partially erroneous and partially correct. For instance, a chancellor might temporarily enjoin cutting of timber claimed by the plaintiff. There is a good chance, if the dispute between the parties is a boundary dispute, that the defendant was properly enjoined as to some portions of the land, but improperly enjoined as to others. In this kind of situation state courts have usually said that damages are to be assessed upon dissolution of the injunctive order.²⁰⁶ Of course there is damage only insofar as the order is erroneous. A

205. This was allowed in *Arkadelphia Milling Co. v. St. Louis Sw. Ry.*, 249 U.S. 134 (1919).

206. See *Davis v. Champion Fibre Co.*, 175 N.C. 25, 94 S.E. 671 (1917); *Clem v. Hunz*, 132 Wash. 14, 231 P. 7 (1924); *Annot.*, 40 A.L.R. 990 (1926).

Supreme Court decision, antedating the bond statutes and rule 65, held that in such a situation the chancellor might refuse, in his discretion, to grant damages.²⁰⁷ Whether such a decision is still sound after the advent of rule 65 is in doubt. In any event a number of state courts proceed to award damages. The argument against this is that where the plaintiff was at least partially correct, he should not stand liable for damages, even though the damages are limited to harm caused by the incorrect portion of the order. But if someone must bear the loss caused by a hastily heard petition—and *someone* must—why should it not be borne by the person who institutes that petition? Perhaps the answer ought to be different if the defendant acts in bad faith or if he can avoid injury, but otherwise it would seem that the courts have been correct in assessing damages for partially erroneous orders. In other words, liability here is no indication of undue liberality in assessing injunction damages.

(f) *Liability to third persons.* Injunctive orders have considerable capacity for affecting large numbers of people who are not parties to the litigation. Broadly speaking there are two patterns. First, there is the third person who is bound by the injunctive order, even though he is not named as a party. There are not many such cases, but there are some: one is bound who is in privity with those enjoined, or who acts as agent for those enjoined, or who aids or abets those enjoined.²⁰⁸ An aider or abetter may be bound by the injunction even though he has reasons for acting quite independent of any desire to aid the injunction defendant in violating the injunction. Clearly enough, a third person who obeys a provisional injunctive order may be harmed in just the same way that the injunctive defendant may be harmed. For instance, if an employer is enjoined from selling frigits, on the ground that they infringe a trade-mark, the employer's salesman cannot sell the frigits, either. If he is selling on commission, he will be damaged by an erroneous injunction.

Second, a third person may *not* be bound by the injunctive order, but he may be affected in practical ways to his detriment. There are a number of cases, for example, in which government disbursements have been enjoined, and the result is that contractors or borrowers or others dealing with the government may suffer considerable damage.²⁰⁹ In

207. *Russell v. Farley*, 105 U.S. 433 (1882).

208. See *Dobbs, Contempt of Court*, 56 CORNELL L. REV. 183, 249-60 (1971).

209. A county contracted with the government to borrow money to build a power plant, but the government was enjoined from disbursing the loan and the county's project was delayed three years while litigation proceeded. *Greenwood County v. Duke Power*

such cases the government itself may suffer no harm at all, but its contractors, who are not always parties, may suffer overwhelming harm.

Presumably in many of these cases the third person can, if he is knowledgeable enough, intervene in the injunction suit and make himself a party. If he does that, he is presumably a beneficiary of any bond required of the plaintiff. But the third person cannot always intervene. He cannot do so at all in the case of *ex parte* orders. He may accrue signal damage before he is able to intervene even in the case of preliminary injunctions, and he may in any event fail to realize that becoming a party is significant on the issue of bond coverage.

The question thus arises whether the injunction plaintiff who posts a bond is liable and whether his surety is liable to third persons who are not parties in the action. The answer ordinarily depends on the rule or statute. The Missouri rule provides for a bond to indemnify both "the parties enjoined [and] any party interested in the subject matter of the controversy"—apparently meaning to protect both parties and third persons.²¹⁰ The original Field Code provision was narrower and spoke only of indemnity "to the party enjoined,"²¹¹ so that statutes modeled on that provision—California, for example²¹²—apparently afford no protection to third persons. The federal rule and its state counterparts provide only for indemnity for "costs and damages . . . incurred or suffered by any party"²¹³ with the seeming result that only parties, not third persons, are protected by the bond.

Of course rule 65 does not by its terms prevent the trial judge from ordering a more protective bond as a condition to the grant of relief if he sees fit. This has in fact been done in at least one case,²¹⁴ but such an action is extremely uncommon, and in the absence of such a special order, there seems to be no liability to third persons. Thus if the federal rule is taken literally, injury to third persons will routinely go uncompensated.

Co., 107 F.2d 484 (4th Cir. 1939), *cert. denied*, 309 U.S. 667 (1940). Alternatively, a contractor is awarded a valuable government contract, but is delayed in carrying it out, to great damage, because a competitor obtains an erroneous injunctive order. *Page Communications Eng'rs, Inc. v. Froehlke*, 475 F.2d 994 (D.C. Cir. 1973).

210. Mo. Cr. R. 92.09. The rule uses the term "party" in both clauses, but in the second clause it seems clear that it covers persons who are not enjoined and apparently, therefore, persons who are not "parties" to the suit.

211. New York Code of Procedure, ch. 379, § 195, [1848] Laws of New York 534.

212. CAL. CIV. PRO. CODE § 529 (West 1954).

213. FED. R. CIV. P. 65(c); *e.g.*, N.C.R. Civ. P. 65(c).

214. *United States Steel Corp. v. UMW*, 456 F.2d 483 (3d Cir.), *cert. denied*, 408 U.S. 923 (1972).

(g) *Extent of liability: conclusion.* The courts have been cautious rather than liberal about recoveries on injunction bonds—in some respects more cautious than seems warranted. In a number of cases no bond has been required and considerable damage to public or private interests has gone uncompensated. In others, the bond was entirely too small, with the result that, though some harm was compensated, much was not. The individual injunction plaintiff is not personally liable beyond the amount of the bond, except where he is guilty of bad faith or must make restitution of benefits received. On the whole such damages as are awarded are measured sparingly, and some courts still maintain that even proven damages may be denied in discretion.

So far as damages are a factor in determining whether the bond should be mandatory, the indication seems to be that a mandatory bond would hardly unleash a torrent of liability. Indeed, the indication is that either a bond ought to be mandatory or that personal liability beyond the bond limits ought to be imposed as a condition for extraordinary, often unfair, and often unneeded *ex parte* relief.

4. *The Basis of Liability.* (a) *Generally.* Granted that the injunction defendant has provable damages resulting from a provisional injunctive order, what are the substantive elements of his claim and the standards by which liability is established or denied?

Most jurisdictions employ one of two types of statutes. One, basically derived from the 1848 New York Code, provides for liability on the bond when "it is finally decided that the injunction ought not to have been issued," or that the "plaintiff was not entitled thereto."²¹⁵ The other basic statutory provision is the federal rule type. It provides for liability when it is shown that the defendant was "wrongfully enjoined or restrained."²¹⁶ A handful of states call for damages when the provisional order is "dissolved."²¹⁷

215. Arkansas, California, Kansas, Montana, Nebraska, New Hampshire, New York, North Dakota, Ohio, Oklahoma, South Carolina and South Dakota all appear to have similarly worded statutes in this respect. Oregon's statute speaks of damages "by reason of the injunction if the same be wrongful or without sufficient cause." Connecticut's statute speaks of liability where the "plaintiff . . . fails to prosecute the action to effect . . ." See Appendix I.

216. Alaska, Arizona, Colorado, Delaware, Florida, Georgia, Illinois, Indiana, Kentucky, Louisiana, Maine, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Rhode Island and Tennessee have this type of bond statute. Hawaii adopted a rule similar to the federal rule, but for some reason left out all of the language that might bear on the basis of liability, perhaps because the terms of the bond were left to the trial judge's discretion. See Appendix I.

217. Alabama, Mississippi, Missouri and Texas follow this pattern. See Appendix I.

None of these provisions, however, spells out the criteria by which liability is to be judged. Decisions have made it clear enough that bad faith is not required to establish liability, even under a "wrongfully enjoined" statute, though bad faith on the part of the plaintiff may establish grounds for a malicious prosecution action against him.²¹⁸ Most of the courts that have considered the topic seem agreed that there may also be liability when the plaintiff voluntarily dismisses his own suit,²¹⁹ but that there is no such liability when the dismissal results from an agreement of both parties.²²⁰ But beyond these rather elementary points, the standards for determining whether the injunction plaintiff is liable at all have received almost no clear statement.

The cases are not very clear about either the issues or the answers. Most discussions have been directed to the appropriate *timing* for assessing liability rather than to the appropriate standards for doing so. Perhaps the simplest way to approach the problem is to identify two basic possibilities, each of which may pose variations. One possibility is that liability on the bond is determined solely by the *ultimate* merits. Regardless how circumstances appeared when the provisional order was issued, the plaintiff would be liable if he lost in the ultimate decision on the merits, and he would be relieved of liability if he won. The other basic possibility is that liability is determined solely by preliminary merits. The plaintiff under this view would be liable if the preliminary injunction was erroneous on the basis of evidence adduced at the time, even if a final decision on the merits went in his favor; by the same token he would be relieved of liability if the preliminary order was correct as of the time it was issued, even though he ultimately lost. A combination of these rules is also possible, for instance, a rule that imposes liability if either preliminary error or ultimate error is demonstrated.

218. See Note, 73 HARV. L. REV., *supra* note 12, at 342. The cases most commonly say that, in the absence of a bond, bad faith on the plaintiff's part is necessary to establish liability, *e.g.*, Tenth Ward Rd. Dist. No. 11 v. Texas & Pac. Ry., 12 F.2d 245 (5th Cir. 1926). They likewise imply the same result where recovery is allowed without any mention of bad faith by the plaintiff. North Carolina originally adopted a different rule, but the statute was amended to accord with the textual statement above. See *Burnett v. Nicholson*, 79 N.C. 548 (1878); Act of March 3, 1893, ch. 251, [1893] N.C. Sess. Laws 206. There is some general authority, however, to the effect that the trial judge may at his discretion excuse liability where the plaintiff acts in good faith and other factors seem to warrant such excuse. See, *e.g.*, *Page Communications Eng'rs, Inc. v. Froehlike*, 475 F.2d 994 (D.C. Cir. 1973).

219. *E.g.*, *Nansemond Timber Co. v. Rountree*, 122 N.C. 45, 29 S.E. 61 (1898).

220. See *M. Blatt Co. v. Southwell*, 259 N.C. 468, 130 S.E.2d 859 (1963); *Large v. Steer*, 121 Pa. 30, 15 A. 490 (1888).

(b) *Propriety of relief on final hearing as controlling.* (i) *No liability if plaintiff prevails on final hearing.* It seems to be commonly assumed in the cases that if the injunction defendant loses on the merits on a final decision, he is not entitled to recover on the bond, even if the preliminary injunction was erroneous on the facts shown at the time it was issued.²²¹ For instance, in *Lawrence v. St. Louis-San Francisco Railway*,²²² a railroad obtained a provisional injunctive order against various officials of Oklahoma, the effect of which was to prohibit any state hearing on a proposed move by the railroad and to permit the railroad to proceed with its planned move. The matter had been pending, by the railroad's own pleadings, for ten years or so without any effort by the railroad to proceed, and the Supreme Court concluded that no irreparable injury to the railroad had been shown. For this reason it reversed that provisional injunction. Eventually, however, a permanent injunction was granted, so that the railroad's position on the merits was vindicated, even though it had been palpably wrong in seeking purely provisional relief. There was another appeal to the Supreme Court, which held that the trial court could in its discretion refuse to assess damages on the bond in the light of the ultimate decision on the merits.²²³

A North Carolina case seems to embody the same idea. In *Thompson v. McNair*²²⁴ the plaintiff sought and got a provisional injunction to preserve turpentine lands from defendant's alleged depredations while a legal action was pending to resolve the claims of the respective parties. The injunctive order was later dissolved because the

221. See *Powers v. Fidelity & Deposit Co.*, 42 Del. 577, 41 A.2d 830 (1945); *Rose v. Martin*, 308 Ky. 661, 215 S.W.2d 579 (1948). The cases are often decided, like these, on the ground that the claim on the bond is premature, even though the provisional injunction has been dissolved. The reasoning is that an appeal or other decision may still vindicate the injunction plaintiff, even though it has already been determined that preliminary relief was erroneous. It is possible to construe such cases as determining only a point about ripeness, but it seems more probable that they are based upon the view that the liability is determined by who wins on the ultimate merits.

222. 274 U.S. 588 (1927).

223. *Lawrence v. St. Louis-San Francisco Ry.*, 278 U.S. 228 (1929). This is not a decision that damages could not be awarded, but only that damages need not be awarded. Justice Brandeis said: "Although [the trial court] required the bond, and this court held that the interlocutory injunction had been improvidently issued, the District Court could, in its discretion, refuse to assess the damages until it should, after the final hearing, have determined whether the plaintiff was entitled to a permanent injunction It might then refuse to allow recovery of any damages, even if the permanent injunction should be denied." *Id.* at 233. For this last proposition the Court cited *Russell v. Farley*, 105 U.S. 433 (1881)—a case leaving damages assessment on bonds in certain circumstances to the trial judge's discretion.

224. 64 N.C. 448 (1870).

plaintiff had not shown that irreparable harm would result in its absence. At this point the defendant sought to recover on the bond for damages caused by the injunctive order. The Supreme Court of North Carolina, however, refused to permit recovery of damages, saying that the action at law must first determine the ultimate merits of the case. The reasoning very plainly indicated that the defendant could not recover merely because the provisional order was erroneously issued, unless it also turned out that the defendant's position was correct on the merits. Other cases are in accord.²²⁵

The variations on this basic position might be extensive. For instance in the *Lawrence* case the Supreme Court of the United States only went so far as to leave damages to the discretion of the trial court, but the North Carolina Supreme Court in *Thompson* seems to have laid down a rule of law rather than a rule of discretion. It is also possible to imagine that results might be different if the preliminary error were different or if the ultimate decision were on some procedural ground rather than on the substantive merits of the case. But the cases simply have not given the matter that much analysis.

(ii) *Liability if plaintiff does not prevail on final hearing.* It is probably the prevailing assumption—"rule" seems too strong a word for such inarticulate and unanalyzed ideas—that the plaintiff escapes liability if he ultimately wins, at least if he wins on the merits. The assumptions about the converse situation are not so clear. What if the plaintiff ultimately loses on the merits of the decision, but can demonstrate that the preliminary injunction was correct on the basis of facts and arguments presented to the trial judge when the preliminary injunction was issued? Although authority on this point is sparse, it would seem that liability should be imposed here. The very purpose of the bond is to require that the plaintiff assume the risk of paying damages he causes as the "price" he must pay to have the extraordinary privilege of provisional relief. The fact that the plaintiff's position seemed sound when it was presented on the *ex parte* or preliminary hearing is no basis for relieving him of liability, since the very risk that requires a bond is the risk of error because such hearings are attenuated and inadequate. To say that proof at the inadequate hearing, against which the bond is intended to protect, relieves of liability on the bond is merely to subvert the bond's purpose. Thus the few cases that seem to deal with this situation seem correct in assessing liability

225. *E.g.*, *Raleigh & W. Ry. v. Glendon & Gulf Mining & Mfg. Co.*, 117 N.C. 191, 23 S.E. 181 (1895).

to the plaintiff who loses on the ultimate merits, even when his proof warranted preliminary relief at the time it was awarded.²²⁶ But some courts apparently would retain the doctrine that damages may be denied in the trial judge's discretion even where a bond had been posted. In such courts the result may be to protect the plaintiff if he *wins* on the merits because the ultimate merits are controlling, while at the same time to protect him through discretion if he *loses* on the merits, on the ground that he had a good claim for provisional relief.²²⁷ Where this view is taken, the plaintiff is insulated from liability, and the defendant is left with the resulting ruins.

It is possible to mount reasonable arguments that the rules ought to be more protective to the defendant who is trapped into an attenuated trial on a preliminary injunction, and that he should recover not only when he wins on the ultimate merits, but also where, though he loses on the ultimate merits, he is erroneously subjected to a provisional order.

First, damages sustained in defending against an erroneous provisional order may reduce the funds the defendant has available for defending himself on the merits. Secondly, provisional relief may put the plaintiff in a better tactical position to sustain his position on final hearing. In the *Lawrence* case,²²⁸ the railroad, by procuring an erroneous interlocutory order was permitted to move its shipping facilities in spite of an Oklahoma regulatory order. The interlocutory injunction was reversed, but by that time the move had been completed at a cost of 150,000 dollars. The railroad's legal position on the final hearing would have to be weak indeed if a judge would feel compelled to force the railroad to move back its shipping facilities at a similar cost. Perhaps it is even more clear that a preliminary order may give the plaintiff a bargaining position to which he is not entitled. The employer who procures a preliminary injunction against a strike usually

226. See, e.g., *Atomic Oil Co. v. Bardahl Oil Co.*, 419 F.2d 1097 (10th Cir. 1970). The court said in part: "Judicial determination of the bonds' applicable condition must probe the merits of the right to injunctive relief and not merely the trial court's discretion in providing temporary protective security." *Id.* at 1102. In *Morse Taxi & Baggage Transfer v. Bel Harbour Village*, 242 So. 2d 177 (Fla. App. 1970), the provisional order was affirmed on appeal, but after full trial, it was dissolved and damages assessed. The court held that affirmance of the provisional order showed it was proper at the time, but that the test was the ultimate merits, not the merits as they appeared when the order was issued.

227. E.g., *Page Communications Eng'rs, Inc. v. Froehlike*, 475 F.2d 994 (D.C. Cir. 1973).

228. *Lawrence v. St. Louis-San Francisco Ry.*, 274 U.S. 588 (1927); see notes 200-01 *supra*.

breaks the strike. The strike broken, his interest in negotiation or even a final hearing on the merits, is apt to lag. What is preliminary relief *de jure* is final relief *de facto*.

In the third place, provisional relief should be discouraged. A plaintiff who seeks such relief can be viewed as seeking an extraordinary privilege the price of which is a guarantee that the privilege is indeed justified by the facts of the case.

In the fourth place, there might be additional justifications for awarding damages in special situations. For instance, a plaintiff might have a good substantive claim for which he ultimately recovers an award of damages. But this does not necessarily justify the injunctive remedy, even on a final judgment. The plaintiff who has a good slander claim has a good claim for the damages remedy but seldom if ever a good claim for an injunction.²²⁹ In such a case, the fact that the plaintiff prevails in the end in the sense that he obtains a damages award is not necessarily any justification for his use of the injunctive process at any stage.

But, as is generally the case, the courts have been cautious about awards on the injunction bond, and only a few cases suggest, even remotely, that the injunction plaintiff should be held for damages resulting from an erroneous interlocutory order where he has won on the ultimate merits.

A Third Circuit decision²³⁰ under the bond provisions of the Norris-LaGuardia Act²³¹ imposed several unusual liabilities upon plaintiffs who had obtained a preliminary injunction. The plaintiffs obtained a preliminary injunction that was reversed on first appeal because it was thought that the trial judge had afforded an inadequate opportunity to the parties to develop their positions in the case. On remand the preliminary injunction hearing was to be inaugurated *de novo*, but the parties, on the day of the hearing, entered into a stipulation that in effect dismissed the case. It is usually said that when the parties stipulate for dismissal, there is no final decision on the merits and the injunction plaintiff cannot be held liable on the bond.²³² Nevertheless

229. DOBBS § 7.2.

230. *United States Steel Corp. v. UMW*, 456 F.2d 483 (3d Cir.), *cert. denied*, 408 U.S. 923 (1972).

231. Norris-LaGuardia Act § 7, 29 U.S.C. § 107 (1970). This provision is similar to that in rule 65(c), but invokes liability for "any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction," and specifically includes attorney's fees.

232. *See* cases cited in note 220 *supra*.

the injunction plaintiffs were held liable. Since there was no final decision on the merits, nor anything equivalent thereto, the "wrongfulness" of the preliminary injunction must have been found in the procedural error of that injunction itself and not in any ultimate decision on the merits.

The decision, at least in context, does not seem incautious. The injunction plaintiffs probably got what they wanted—a broken strike and a position of advantage from which to bargain. If they indeed got such advantages by reason of an erroneous provisional order, it does not seem out of line to award damages caused by that error, even though we are unsure of the ultimate merits of the dispute.

Although there are a few other cases that might be interpreted as offering support for liability for injunctive orders,²³³ the overwhelming conclusion is that courts have not only been cautious in measuring damages and restitution to be awarded, but also have been cautious in recognizing that erroneous orders even call for damages.

B. Practical Problems in Structuring a Bond Statute

There are at least two requirements of a good statute making a bond mandatory. It must be clear in what sense the bond is mandated. And it must provide a satisfactory practical means of enforcing the requirement. If there is no satisfactory means of enforcement, it must be doubted whether the bond should be mandated at all.

1. The Enforcement Problem with Mandatory Bonds.

(a) *Meanings of "Mandatory."* There are several distinct senses in which one might say that a bond is a mandatory prerequisite to injunction.

First, a bond might be mandatory in the sense that the judge is told by the statute that he has no discretion to dispense with it (with

233. *Jesse French Piano & Organ Co. v. Forbes*, 134 Ala. 302, 32 So. 678 (1902) (under a "dissolution" type statute, recovery may be had when the provisional order is dissolved, notwithstanding the fact that an appeal is pending that might reinstate the order). *Weierhauser v. Cole*, 132 Iowa 14, 109 N.W. 301 (1906) is suggestive but no more. *P*, intending to construct a rural telephone line, began installing it along the highway in front of *D*'s house. *D* threatened to remove this obstruction, and *P* obtained a preliminary injunction. It was later determined that this was error and that *P* had no right to obstruct *D* in the absence of condemnation, after which a settlement was reached. *D* was allowed to recover nominal damages. Here *D* actually won on the merits, and the relevance to the present problem is that *D*'s position was purely technical, since *P* could have (and later did) achieve the right asserted by condemnation.

whatever exceptions might be provided). A statute like this would represent a change in the law in several federal circuits where it is held that the matter is within the trial judge's discretion. However, this change would not necessarily entail reversal on interlocutory appeal if a trial judge failed to require a bond. A bond might be mandatory in this sense and yet its absence be deemed unprejudicial. Enforcement of the bond requirement under this rule would be effective if the trial judge were aware of the rule in each case and followed it. Otherwise it would not be effective at all.

Second, a bond might be mandatory in the sense that it is error to issue an injunctive order until a bond has been provided by the plaintiff. Under this rule, the injunction issued without a bond would be reversed on interlocutory appeal if such an appeal is available and is taken.

Third, a bond might be mandatory in the sense that no injunctive order issued without a bond will be effective at all; such an order would be not only erroneous, but void. The defendant would be free to disobey the void order.

Fourth, a bond might be mandatory in the sense that some procedural impediment to issuance of the injunctive order literally prevents issuance without a bond. For instance, a bond might be made a prerequisite to any filing by the clerk and any service of process by the sheriff.

Fifth, a bond might be mandatory in the sense that where no bond is provided, some other form of liability is automatically invoked. For instance, the plaintiff might become personally liable, or the clerk might become liable on his own performance bond, if he accepted papers without the requisite bond.

(b) *Assessment of alternatives.* (i) *Directive to the judge and reversible error rules.* A bond statute that merely directs the judge to require a bond, even if it does not provide any sanctions, has *some* value because the judge who adverts to the statute will simply follow it and thus provide for the protection intended. Perhaps in rare cases he will ignore the requirement, against which possibility it would be desirable to add a statutory rule that a provisional order not backed by a bond is reversible. The chief problem with either the simple "directive" statute or the "reversible error" statute occurs when a TRO is issued. On the TRO, the absent defendant cannot request a bond, and the judge may not advert to the statute, or, if he does, he may set the amount of the bond far too low since he will not have heard the

defendant's side of the story. An appeal from the TRO may not be available at all in many instances, and as a practical matter, even when appeal is available, the defendant cannot hope to reverse the order before damage not covered by a bond has been done to him. The directory and reversible error rules, then, do not seem to provide sufficient protection to the defendant.

(ii) *The Voidness Rule.* An erroneous judgment or decree is not void or unenforceable. Such an order or judgment has *res judicata* effect and may not be collaterally attacked in a second proceeding. It must be attacked directly—as by an appeal—or not at all. Furthermore, in the case of an injunctive order, it must be obeyed until it is reversed or dissolved.²³⁴ In other words, a defendant who disobeys an injunctive order is in criminal contempt, and it is no defense to say that the order was erroneous.²³⁵

A void judgment or decree, on the other hand, imports no legal force at all. It may be attacked not only on appeal, but collaterally; in other words, it has no *res judicata* force. Furthermore, it may be disobeyed with impunity. A defendant who disobeys a void injunctive order, if cited for contempt, may successfully defend on the ground that the order was void.²³⁶

Some statutes seem to imply that provisional injunctive orders issued without a bond are not only erroneous but void, and some courts have clearly so held.²³⁷ Such a rule, if literally followed, would mean that any plaintiff who procured a provisional injunction without posting a bond would then be highly motivated to comply with the bond requirement, for his own protection. And if he failed to do so, the penalty to him would be protection for the defendant, who would then be freed of any compulsion to obey the injunction.

This sounds very much like a scheme that works well on paper because it postulates knowledge, rationality and simplicity but that

234. See *Board of Educ. v. York*, 429 F.2d 66 (10th Cir. 1970); Dobbs, *Trial Court Error as an Excess of Jurisdiction*, 43 TEXAS L. REV. 854 (1965).

235. See Rendleman, *supra* note 64.

236. *Id.* at 248.

237. In *Castleman v. State*, 94 Miss. 609, 47 So. 647 (1908), a restraining order was issued without bond and defendant violated it. He was charged with contempt, but the court held that in the absence of a bond the order was void and that the defendant could not be convicted for that reason. A number of cases have arisen in more ambiguous circumstances, for instance on a direct appeal of the order. Some of these cases say that the injunction issued without bond was void or of no legal effect, but since the issue arose directly, a statement that it was error would have sufficiently covered the case. *E.g.*, *Hall v. McLuckey*, 134 W. Va. 595, 60 S.E.2d 280 (1950).

works out hardly at all in practice because the postulated qualities are in short supply. The scheme will not work if the plaintiff (or his lawyer) is unaware of the bond requirement, or if he is unaware of the effect of having no bond. Nor will it work even if the plaintiff is fully aware of the legal rules if he thinks the defendant or his lawyer is not aware of them—a fairly high likelihood in the case of a TRO, where the defendant may be restrained before he can have an opportunity to consult with an attorney. Nor will it work if the plaintiff is uncertain of his case and fears liability on the bond, but obtains a provisional order enjoining the defendant in the mere hope that defendant will obey it.

On the defendant's side the scheme will not work if he is ignorant of the legal rules. Nor will it work even if he knows the rules, if there are complications or doubts about their application. Suppose for instance, a statute makes an injunctive order issued without a bond "absolutely void." It is still possible that some court will say the provision was inserted for the defendant's benefit and that the defendant may waive it.²³⁸ And it is always possible that the plaintiff could assert (honestly or otherwise) conduct amounting to a waiver by the defendant. Wise defendants in injunction cases will consider such possibilities, and if they contemplate disobedience of the order, they will consider the risk that, in spite of the "voidness" rules, they will nonetheless be held in contempt. Pragmatically speaking, they may be forced into compliance without the protection of a bond.

What seems likely is added litigation over collateral issues. For instance, must the defendant know that the bond was not posted before his compliance with the decree is excused? What conduct will amount to a waiver of the rule, if any? If he complies with a "void" order, has he any claim for damages against the plaintiff who posted no bond on the ground that failure to do so is in itself evidence of "malice"? Or if he complies with a "void" order is he the author of his own damages so that he has no claim at all? And so on.

Even if it seems like a good idea to call for a serious judicial order and then invite disobedience of it, the practicalities of the voidness rule do not recommend it very highly as a means of either protecting the defendant or forcing the plaintiff to claim such relief in extreme cases.

(iii) *Procedural guarantees of a bond and personal liability.* The protections of a bond may lie with a combination of procedures to

238. This happened in Oklahoma. In *Walbridge-Aldinger Co. v. City of Tulsa*, 107 Okla. 259, 233 P. 171 (1924), the Oklahoma court held that an injunctive order without

guarantee posting of a bond and a rule that imposes personal liability upon the plaintiff who fails to do so. Taken together these should maximize the protection to the defendant and at the same time maximize the deterrent to frivolous claims.

The basic mechanism for this approach is a rule that (1) the judge shall require a bond, (2) the clerk or the sheriff shall refuse any filing, service of process or other official action until a bond has been provided as approved by the judge, and (3) the plaintiff shall be personally liable for any actual damages to the defendant, including attorneys' fees in a reasonable amount, if no bond is provided.

Probably there can be no catch-all rule, and probably some cases escape this net. The judge called out in the middle of the night to issue an *ex parte* order may well overlook the requirement of a bond. The plaintiff who obtains such an order may himself notify the defendant of its existence, so that neither clerk nor sheriff have an opportunity to require a bond. But even if a case slips through all the procedural requirements, there remains the personal liability of the plaintiff himself. This may furnish additional motive to the plaintiff to offer up a bond, and in any event it provides a liability that does not now exist for wrongful injunction in the absence of a bond.

It is possible of course that the plaintiff will not have sufficient time to procure a bond if his legitimate interests are to be protected. This is true under any scheme for enforcement of a mandatory bond requirement, but it may be thought particularly hard to impose an unlimited personal liability upon the plaintiff without limit as a condition to the injunction. But it must be remembered that the plaintiff is personally liable to indemnify the surety on the bond. The bond limit is surely not intentionally set lower than the expected actual damages of the defendant, though it may happen inadvertently. Thus, except for the accident of a bond limit set entirely too low, the plaintiff in an injunction case will in any event be liable to pay the defendant's damages, and to remove the arbitrariness of the bond limit as a protection to the plaintiff does not seem harsh at all. If it is believed otherwise, however, it would be possible to permit the judge to authorize the plaintiff to limit his liability to an amount set by the judge, as if the plaintiff were his own surety.

a bond was void, and that the defendants were free to disregard it. Three months later, in *Allison v. Massey*, 108 Okla. 140, 235 P. 192 (1925), the same court said that the defendant could not even object on direct appeal when no bond was furnished because he had "waived" the bond requirement by treating the judgment as effective.

(c) *The Enforcement Problem: Conclusion.* It may well be that no mandatory bond requirement will work unless some minimum amount of penalty is set by statute. It may even be necessary to provide for liquidated damages in a minimum sum if the requirement is to be effective. But with these qualifications, it seems likely that a mandatory bond can be enforced in a practical manner if it is thought to be a desirable requirement in principle.

2. *Alternatives to a Fully Mandatory Scheme*

(a) *Identifying cases for special treatment:* Generally, the fully mandatory system is not satisfactory; neither is the discretionary system. Is there room for a system of security that mandates a bond in some instances but leaves it to the judge's discretion in others? Two kinds of cases may seem to warrant special treatment. One is the case in which no damage to the defendant is likely if the provisional order proves to be erroneous. The other is the case in which the plaintiff, because of poverty or unpopularity, cannot obtain the requisite security. In these two categories of cases relief from the bond requirement might well be sufficiently well defined to make relief practical. The question, then, is whether a statutory rule could be provided to eliminate the requirement in identified groups of cases.

(i) *No-damages cases.* (A) *The ad hoc approach.* A rule could be drawn requiring security except where the judge specifically finds that damages are not likely to result to the defendant if the injunction is erroneous. This is in fact merely a version of the discretionary approach that now exists, except that it narrows the range of judicial discretion. But it has all the defects of the discretionary system: it requires adjudication of an issue collateral to the merits at a point in litigation where there is already too little time for proof, argument and thoughtful decision-making. Furthermore, the judge's decision on this point is likely to be based on inadequate evidence—the very problem that makes us want the bond in the first place. The costs of this approach outweigh its benefits. The plaintiff, in the absence of poverty or similar circumstances, ought to take the risks and costs on this issue rather than burden the system with collateral and undependable adjudications.

(B) *Non-business cases.* Would it be possible, then, to identify groups of cases according to subject matter where damages are unlikely and to remove those cases from the mandate of a bond? Clearly the routine business and property cases, in which the plaintiff seeks to

enjoin pollution by a factory, or enjoin the merger of corporations or the use of trade symbols, are all likely to cause damage to the defendant if the injunction is erroneous. But what of the non-business plaintiff suing the non-business defendant—is this case, too, likely to result in harm? The answer is that it will at times result in harm, and prediction is not safe. For instance, imagine a neighborhood squabble in which one neighbor obtains an injunction against the unreasonable barking by the other neighbor's dog. Though the fight is entirely personal, the enjoined defendant may be forced to board his dog at a kennel until his right can be established—no mean expense. The “non-business” category is thus not a reliable basis for exemption from the bond requirement.

(C) *Civil rights cases.* One special kind of non-business case is the civil rights action, in some respects a favored action and one which there is very great reluctance to inhibit. But it has already been pointed out that a civil rights injunction may cause damage—possibly severe—to both parties and third persons. If picketers obtain a provisional injunction protecting their right to picket a grocer when in fact their picketing is illegal and not protected, their injunction may well cause a loss of business to the grocer.²³⁹ The same is true if the civil rights plaintiff asserts that the government must continue to disburse funds to him or to organizations from which he derives benefits: if his position is error, it is very likely indeed that that government will be damaged by the amount of funds paid out under the mandate of a provisional injunction.²⁴⁰

All civil rights cases are not like this, of course, but some are. It is therefore impossible to use the category “civil rights” as a test of one's responsibility to post a bond.

(D) *Attacks on statutes and administrative orders.* Injunction suits are often used as the means for attacking the validity of a statute or reviewing an administrative decision. When the administrator is enjoined from enforcing the statute or regulation or administrative decision, its validity comes into issue. On the face of it, such cases are often simply suits between a citizen and the government and damage does not seem terribly likely. However, damage in fact occurs in a number of these cases. In a case already mentioned in another con-

239. See *C. Comella, Inc. v. United Farm Workers*, 33 Ohio App. 2d 61, 292 N.E.2d 647 (1972) where the parties were reversed and the grocer sued to enjoin the picketers.

240. See *Glover v. McMurray*, 361 F. Supp. 235 (S.D.N.Y. 1973).

nection,²⁴¹ a railroad mounted an attack on a tax statute by enjoining collection of the taxes. By the time the suit could be disposed of and the taxes collected, the building costs to which the taxes applied had risen by 26,000 dollars. Injunctions against administrative decisions can and do work in the same way. For instance, if a zoning board grants a variance to *A* and objecting neighbors obtain an injunction to prevent *A* from using his land in accord with the variance, it is clear that *A* may have damages.²⁴² At best, his use of his land at its full capacity is delayed; building costs may increase as in the railroad case, or perhaps he may lose profits on whatever building he had planned to erect. Here again, there are no doubt cases in which one could enjoin administrative action without risking damage; but the category is not a sound basis for exemption from the bond requirement, simply because many of the cases can in fact create damages to the defendant.

(E) *Conclusion as to no-damage cases.* Though the purchase of a bond when it is in fact unnecessary is in one sense a waste of money, in another it is not. At the moderate cost for commercial bonds, it is far better economically to force a solvent plaintiff to pay the bond premium than it is to utilize the time of lawyers and judges in trying to prove that the bond is needless in particular cases. Since no reasonably workable category appears to permit a rule of thumb, it would be better to require security without regard to whether damages are thought likely or not. So long, at least, as the plaintiff does not assert an inability to post security, it does not seem unreasonable to put the risks of hasty decision-making on him.

(ii) *The poor plaintiff.* If it is not practical to eliminate the bond requirement for specified cases grouped by subject-matter, it is still possible to afford a special dispensation to those plaintiffs who, by reason of poverty or otherwise, simply cannot obtain sureties. Quite apart from the issue of open courts and the injustice of preventing enforcement of rights by such persons, suits of this sort often raise issues of public importance.

Even if the Constitution does not require a waiver of the bond for all poor plaintiffs, there are some cases with special appeal. In several cases plaintiffs have obtained mandatory preliminary injunctions to

241. Tenth Ward Rd. Dist. No. 11 v. Texas & Pac. Ry., 12 F.2d 245 (5th Cir. 1926); see text accompanying notes 198-99 *supra*.

242. The same is true if review and delay are obtained in a purely administrative appeal, in which case the same kind of bond protection is desirable and sometimes provided for by statute. See *Damaskos v. Board of Appeal*, 359 Mass. 59, 267 N.E.2d 897 (1971).

have their names put on the ballot in an election, even though they could not pay the regular filing fee. The assertion was that they had constitutional rights to present themselves as candidates in an election, provided they were otherwise qualified. The courts agreed and ordered their names placed on the ballot.²⁴³ Clearly an erroneous provisional order in such a case will result in damages. The elections board will probably have printing costs and perhaps extensive administrative expenses if the plaintiff's name must be ultimately removed from the ballot. Third parties—notably other candidates—may also incur damages as a result of an erroneous provisional order putting the plaintiff's name on the ballot. Nevertheless, it is particularly appropriate to permit this kind of plaintiff access to provisional orders without posting a bond if he cannot afford to do so. The special element here is not merely that he asserts a civil rights claim, but that his poverty is the very basis for his substantive law claim. What the law's substantive hand gives, its procedural hand should not take away. In other words the poverty that vests in him rights to begin with should not be the basis for denying enforcement of those rights. This is not to say that provisional relief in such a case is always warranted,²⁴⁴ but only to say that, if it is, the bond requirements should not prevent access to the remedy.

Similar to this is the case in which the plaintiff's poverty is not a necessary element to his substantive-law claim but is a necessary element in his right to a provisional remedy. In *Glover v. McMurray*,²⁴⁵ the plaintiffs were working people whose children were in day-care centers. The centers were subsidized by federal funds administered by a state agency. The state demanded certain items of information about the parents as a condition to further receipt of the funds. The parents and the day care centers objected that this was an unwarranted invasion of their privacy and refused to furnish the information. The state then threatened to cut off the funds. The plaintiffs sued to require the continued support, and obtained a provisional injunctive order to this end. The plaintiffs' claim, substantively, was that they had a right to a hearing before the funds were cut off and, additionally,

243. See *Brown v. Chote*, 411 U.S. 452 (1973); *Bullock v. Carter*, 405 U.S. 134 (1972).

244. Granted the substantive right, why should one who wants on the ballot wait until the last minute so as to require a provisional order rather than an orderly, fully developed trial? On the basis of this question it would be possible to refuse provisional relief and hence to eliminate the bond problem. It is difficult to escape the impression that the need for provisional relief can be avoided in many cases.

245. 361 F. Supp. 235 (S.D.N.Y. 1973).

that they had a right of privacy that would be invaded by the information requirement. Neither of these points turned on their financial status. But their right to provisional rather than final relief probably did. A wealthy person might simply transfer his child to another center or provide a governess or a baby-sitter. A poor person would be required to quit his or her job to stay with the child or to make other equally disruptive adjustments. At the very least, it can be said that preliminary relief was more plainly required because of the plaintiff's financial limitations.

How can the poor person's claim be identified by rule? Probably the answer is that it cannot be identified. If the judge in each case is left to identify the plaintiff as a poor person and excuse the bond only when such identification is made, some of the same objections that may be made to a purely discretionary system can be raised. However, in cases like those just mentioned, the judge will be compelled to examine the question of the plaintiff's financial status in any event, either on the substantive merits or on the issue of proper relief, so that the issue of poverty will not be collateral to the remainder of his inquiry, but, on the contrary, will bear directly upon it.

(b) *Special provisions where plaintiff is a poor person.*

(i) *Private sureties.* If a statute authorized the judge to dispense with the bond in suits brought by poor persons who could not afford bond costs or obtain sureties, what provisions could be made to protect the defendant injured by an improvident injunctive order and to insure at least minimal responsibility of the injunction plaintiff? Several possibilities exist.

The easiest response to the plaintiff who says he cannot afford a bond is to permit him to use private rather than commercial sureties. This is in fact possible under existing legislation and in some areas the private surety is used routinely to save bond costs. Poor persons will naturally have more difficulty in procuring suitable private sureties than will wealthy corporations, but particularly in cases where the poor person is engaged in a civil rights claim there are likely to be organizations and groups available to go bond in limited amounts. This is no panacea, but it is a practical alternative for a great many cases. The problem of bond costs for poor persons, in other words, may be resolved in many instances by this simple expedient.

(ii) *Bond charges as taxable costs.* The financial impact of the bond cost can be minimized by taxing the premium as an element of

costs in the case to be awarded to the plaintiff if he ultimately wins. As a consequence the defendant may, in some instances, wish to waive the bond or ask that it be set at a lower figure. Thus taxing the bond premium as an element of cost in the case will reduce the impact upon the plaintiff in cases where his claim turns out to be a valid one, and may encourage defendants to accept realistic bond limits.

(iii) *State managed funds.* The plaintiff who cannot afford the bond premium and the plaintiff who cannot obtain a corporate surety because of the unpopularity of his cause might be given access to the provisional injunction without a bond. The disadvantages of this are threefold. One is that the defendant would go unprotected and might suffer considerable losses if the injunction is erroneous. The second is that the judge might hesitate to grant a needed injunction because of the lack of protection to the defendant. There is very little of this attitude appearing in the cases—judges have seemed too little rather than too much concerned over protection for the defendant—but there are no doubt cases in which the bond does in fact encourage the judge to grant a needed order. The third disadvantage is that the plaintiff himself assumes no responsibility for the rather high risk of potential harm to the defendant if no bond is posted.

Two of these three objections can be remedied by the provision for a state-managed fund guaranteeing defendant's compensation in the event of an erroneous order given to a no bond plaintiff. Such a fund—generated, perhaps, by a cost item taxed in each suit filed—could not only protect the innocent defendant, but could encourage the trial judge to act where action is really needed but the potential for error or damages seems high. But the use of such a fund, while it would protect the defendant, would do nothing to force responsibility upon the plaintiff. If the plaintiff asks the defendant to risk losses because of an inadequate hearing, the plaintiff ought to bear at least minimal responsibility for those losses when they in fact occur, and a subsidy does not impose such responsibility upon the plaintiff.

In addition it may be said that the poor plaintiff is, in spite of immense civil rights activity in the courts, still a relatively rare plaintiff. Moderate bonds could be managed by the great majority of litigants, and the erection of a state managed fund is probably a public cost out of proportion to the need.

(c) *Personal liability apart from the bond.* The traditional rule is that the injunction plaintiff is not liable in the absence of a bond. Once he posts a bond he becomes liable up to the amount of the bond,

either directly to the injured defendant or indirectly to the surety who pays the defendant's damages. But there has been no middle ground in which the plaintiff is personally liable in the absence of a bond. Personal liability is not new, of course; it exists now when a bond is posted. And is avoided only when it is not.

Yet personal liability is an attractive solution for a great many cases where no bond is posted. In the first place, provision for it is simple. It does not require elaborate categorization of cases or the erection of a fund that requires management and taxation. It also tends to resolve some difficult problems. The railroad that enjoined a tax without posting a bond caused a local government many thousands of dollars of loss, but the railroad had no liability. A rule of personal liability of the plaintiff would have held the railroad liable for the harm it actually caused. Such a rule would compensate the defendant when the injunction proved erroneous, and it would also encourage the plaintiff to provide a bond for the purpose of limiting liability. Personal liability is also a good partial solution to the problem of the poor plaintiff. If there is personal liability for all who obtain a provisional order, the plaintiff who in fact is not so poor as he claims will be liable to the defendant for compensation when the injunction proves erroneous. He will, presumably, be deterred from making unnecessary provisional claims and likewise from claiming poverty that does not exist. If the plaintiff is in fact too poor to post a bond, it may be that personal liability will not aid the defendant at all. But even so, the threat of liability itself may be sufficient to deter a frivolous claim. And a provision for personal liability, combined with the possibility of private sureties, covers the great bulk of cases.

(d) *Liquidated damages and limited liability.* Several important practical questions remain concerning the upper and lower limits of liability. First, a minimum bond amount must be provided by statute if the mandatory bond is to be truly mandatory. It is the failure to make such a provision that led federal courts to conclude the bond could be dispensed with, since in the absence of a minimum sum it was thought that the court could set the bond at a nominal amount. Such provisions are not uncommon in the case of other provisional-order statutes. North Carolina, for example, requires a bond of 250 dollars in the case of attachments.²⁴⁶

An entirely separate question is whether a liquidated sum should be recoverable on the bond or against the plaintiff personally. Pro-

246. N.C. GEN. STAT. § 1-440.10 (1969).

vision could be made for two kinds of liquidated damages. One kind would simply forfeit the bond in toto as liquidated damages. The other kind would provide for a statutory sum to be used as liquidated damages in the event the injured defendant failed to prove greater losses. For instance, the 250 dollar minimum bond figure used in North Carolina attachment cases might furnish both a good floor here and also a reasonable liquidated figure that the defendant could recover in any case where the injunction proved to be erroneous. The advantages of such liquidated awards are considerable—there is a constant deterrent to misuse of the provisional procedure and there is a constant source of funds for the injured defendant who is unable to prove his losses. Such a liquidation, for example, could help offset the defendant's attorney's fees and help compensate for unprovable losses. The automatic feature of liquidated damages should also reduce time spent in litigating the damages issue after the injunction has proved erroneous.

If a minimum bond sum is set by statute and if liquidated damages are provided, there remains the question of fixing liability when no bond is posted. Liability in the liquidated sum should furnish a suitable minimum, and additional liability for all of the defendant's actual damages would be appropriate. An exception could be provided for the plaintiff who shows he is unable to post a bond. The plaintiff who posts a bond knows that his liability for damages cannot exceed the bond sum. If this rule is maintained a similar knowledge ought to be available to the poor person who cannot post a bond. Thus the injunction plaintiff who claims to be unable to provide a bond could be permitted to petition for an upper limit on his liability, analogous to the bond limit in other cases. If the limit is set higher than he is willing to risk, he can withdraw his claim. Though it may seem absurd to speak of liability limits for persons too poor to afford even a minimal bond premium, there are reasons for doing so: in the first place, not every one who claims to be poor is in fact poor; and in the second place, not everyone who is in fact poor remains so.

(e) *The ex parte claim.* By far the most dangerous form of provisional order is the TRO, where the defendant has no hearing at all. It would be possible to provide for mandatory bonds in all TRO cases—perhaps without the exception for poor persons—and leave the bond problem at the preliminary stage to the judge's discretion. After all, the argument would run, the defendant is present at the preliminary injunction stage, and he can argue for a bond or for a high amount

on the bond in that hearing. The judge can hardly be inadvertent at that stage, and the bond can be adjusted as may be needed. But the practicalities are that the preliminary stage itself may be too rushed to permit much development of collateral arguments about the bond. Neither party is involved with ultimate liabilities at that moment; each is involved instead with the immediate problems. Though adjustments in the bonds are appropriate at the preliminary stage, it seems impractical to force parties and the judge to consider bond issues at this point. An across-the-board rule for a minimum bond seems preferable, with discretion of the judge controlling only the amounts above the minimum.

(f) *The government injunction.* By statute in many states, various governmental units are excused from the requirement of a bond. It is probably neither feasible nor helpful to require a bond of a governmental unit. If the governmental unit is solvent, its credit need not be guaranteed, and to impose a bond requirement upon the government merely adds an extra cost.

This is not, however, to say that the governmental unit should not be liable from its own funds. Curiously, the North Carolina amendments to Rule 65(c) added two exemptions to the normal bond requirement. One covers the domestic relations case in which ancillary injunctive relief is also requested; the other covers the injunction sought by various governmental units. After exempting the named parties from a bond requirement, the statute states that the exemptions do not relieve the parties from liability for damages under the rule. The idea seems to be that the governmental unit that seeks provisional relief must be willing, like anyone else, to bear responsibility for damages incurred when the haste of provisional relief leads to erroneous results.

The solution is a good one and forms a good model for other cases—that is, the imposition of personal liability upon the applicant for provisional injunctive relief, quite apart from any bond he may or may not have posted.

C. *Conclusions and Recommendations*

The following conclusions and proposals for statutory change seem warranted from what has been said:

1. The provisional injunctive bond should be mandatory in some minimal amount, probably one thousand dollars.
2. The bond should provide for liquidated forfeiture in the event

of an erroneous provisional injunction in some small sum, probably 250 dollars.

3. Where no bond is posted, the plaintiff should be held personally liable for liquidated damages as a minimum or for all actual damages proven, at the defendant's option, except

4. Where the plaintiff is unable to procure a bond, the judge may set the limits of liability, at any figure above the minimum, that seems reasonably calculated to cover likely damages.

V. PROPOSED STATUTE

The statute proposed below attempts to reflect the recommendations above with a minimum change in structure and wording of the existing Rule 65. This is not because the existing structure and wording are particularly desirable. A number of changes might well be made both in substance and form, but it seems desirable to confine the efforts here to the matters encompassed in the study and the recommendations. The bracketed words are new. The others are identical except for a slight rearrangement in one case.

Rule 65. Injunctions.

. . . .
. . . .

(c) *Security [and liability of the applicant.]*

No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant²⁴⁷ for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. [The judge shall set the amount of the security in a sum he deems sufficient to cover probable damage in the event the injunction or restraint is wrongfully issued, but the amount shall not be less than \$1,000. The judge shall not dispense with the requirement of security except]

(1) no security shall be required of the State of North Carolina or of any county or municipality thereof, or any officer or agency thereof acting in an official capacity, but damages may be awarded against such party in accord with this rule;²⁴⁸

247. The phrase "in such sum as the court deems proper" is dropped here. The next sentence states the basis for fixing the bond.

248. This language is identical with the original. In the original it seems clearly to imply liability on the part of the state or official apart from the bond. Under the version here, the implication is even clearer because personal liability is clearer. This proposed version does not seem to change the implications of the statute.

(2) [no security shall be required] in suits between spouses relating to support, alimony, custody of children, separation, divorce from bed and board, and absolute divorce as a condition precedent to the issuing of a temporary restraining order or a preliminary injunction enjoining the other spouse²⁴⁹ from interfering with, threatening, or in any way molesting the plaintiff spouse during pendency of the suit, until further order of the court, but damages may be awarded against such party in accord with this rule;²⁵⁰

[(3) the judge may dispense with the security in his discretion when the applicant for a restraining order or a preliminary injunction shows that he is financially unable to obtain sureties, or that, if he is financially able to obtain sureties, one or more corporate sureties has in good faith refused to execute a bond in his behalf.]

[If a restraining order or preliminary injunction is obtained without posting security, the applicant who obtains the order or injunction is liable for damages in accord with the provisions of paragraph (e). If the judge dispenses with the security as provided in subparagraph (3) above, he may also limit the personal liability of the applicant to a sum he deems sufficient to cover probable damages to the other parties in the event the injunction or restraining order is erroneously issued, but in no event may he limit liability to any sum less than \$1,000.]

[If the applicant obtains an order or injunction on behalf of one who is not a party, and with that other's authority, express or implied, the other is liable for damages in accord with the rules in subsection (e).]

(e) *Awards on dissolution.* Any party wrongfully enjoined or restrained may recover, in the same proceeding, an award to be determined by the judge, or by a referee appointed by the judge, [including

[(1) actual damages not in excess of the limit of personal liability set by the judge or the limit of the security; or

[(2) liquidated damages in the sum of \$250.]

[Nothing herein shall prevent a recovery of damages based on malicious prosecution, abuse of process, or restitution without regard to the limits of the bond or the liability set by the judge.]

249. The original read "defendant spouse." The term "other spouse" has been substituted to eliminate any doubt whether the same rule applies when the defendant in the suit obtains the ancillary injunction.

250. Slight changes in the order of subparagraph (2) are introduced, purely for the purpose of keeping the rules stated therein in parallel structure with the other subparagraphs.

[(f) Any bond given with knowledge that it is intended to be submitted in compliance with this rule, or with any judicial order made pursuant to this rule, is deemed to cover the liabilities imposed by this rule and any additional liabilities that may be imposed by the judge in ordering a bond.]

Comment and Illustration

1. *Security requirement.* With exceptions to be discussed later, this proposal changes the present statute to make it clear that security is required in *all* applications for a TRO or preliminary injunction, to be furnished in a sum no less than \$1,000.

2. *Exceptions for the state and its agencies.* The present rule that the state and its agencies are not required to post security is retained.

3. *Marital disputes.* The present rule as affecting marital disputes does not require security and that rule is likewise maintained here.

4. *When security may be dispensed with.* Subparagraph (3) permits the judge to dispense with the requirement of security in certain narrowly defined situations, and even then he must exercise discretion. He is not authorized to dispense with security unless the applicant shows that he is financially unable to obtain sureties or that one or more corporate sureties has refused to execute a bond on his behalf. Thus the fact that relief will be delayed if he must obtain a surety, or that damages may be unlikely, are not grounds for dispensing with the security required by this rule. This is so because the judge's opportunity to get facts and make judgments about the likelihood of damages is necessarily limited, and the rule adopts the position that the applicant who wishes extraordinary relief must protect against the risks he creates, even if those risks are not all foreseeable at the time the application is made.

Illustration 1. *A* applies for a TRO to prevent the Sheriff from dispersing a political rally, which the Sheriff threatens to do the next morning. *A* contends that this violates his right of speech and assembly and asks for a TRO without posting security. He argues that (a) damages are not likely to the Sheriff and (b) that in any event he has not had time to find a surety. The judge is not authorized to dispense with the security requirement on either ground, but may accept a private surety or tangible property as adequate security.

5. *Exercise of discretion.* Once it is established that the applicant is unable to obtain security for the reasons specified, the judge is authorized to dispense with security, but he is not required to do so. Various factors may be considered at this stage. Although the fact that damages are not deemed likely to result is not a fact that warrants dispensing with security under this rule, it is a fact that may be considered once some other warrant exists for doing so. If the applicant is financially unable to post security, the judge may be influenced to dispense with security partly because damages to the defendant are unlikely. Another factor in the judge's discretion is the availability of alternative kinds of security. The applicant who cannot post a bond executed by a commercial surety may nevertheless find suitable, or at least partly suitable, private persons who would execute a bond, or he may be able to put up property. Another factor may arise in the kind of case that could be brought by any one of a large number of persons, some of whom may be able to post security while others are not. If an applicant for relief has been deliberately selected by a group because he is insolvent, the judge may wish to insist upon the normal security requirement. See Illustration 6, below.

6. *Applicant's liability.* If security is posted in accordance with this statute and whatever rules are imposed by the judge, the security itself is liable for damages and of course the applicant will be liable over to the surety. The applicant himself is liable and might be proceeded against if for any reason that is desirable. When security is posted in accordance with these rules, the applicant's liability remains, as it is now, limited to the amount of security.

When the applicant avoids posting security, he is liable without limit for damages caused by his wrongful order, unless he procures an order of the judge (a) dispensing with security for the reasons stated above and (b) limiting his liability to a stated amount. The limits of liability may not be reduced below \$1,000 in any event.

Illustration 2. *N* seeks a preliminary injunction against *D*'s further deposit of wastes in the Hoo River, claiming *D*'s wastes constitute a public nuisance and a violation of statutes. The judge requires a bond of \$1500 and *N* posts it. Thereafter the preliminary injunction issues. *D* sustains \$25,000 in damages as a result of the injunction, which ultimately proves wrongful because *D*'s wastes were not found to be polluting the river. *N* and his surety are jointly and severally liable, but only for \$1500, the amount of the security.

Illustration 3. Same facts except that the judge, on a finding that *N* is unable to obtain a surety, dispenses with the security requirement. He does not set any maximum for *N*'s personal liability, however. *N* is personally liable for \$25,000.

Illustration 4. Same facts except that the judge, on a finding that *N* is unable to obtain a surety, dispenses with the security requirement. He sets *N*'s maximum liability at \$3,000. *N* is liable for \$3,000.

As indicated in the text, there seems to be a tendency to set security (or, here, personal liability) far too low. These illustrations are thus realistic, but they are not intended to suggest that such a practice is a desirable one.

7. *Liability of others.* The proposed statute imposes a liability upon persons who are not themselves applying for an injunction, if the applicant applies on their behalf under implicit or explicit authority to do so. This provision is inserted to discourage persons from seeking out an insolvent to bring a claim for provisional relief, so as to defeat the purposes of the rules. However, there is no liability visited upon a third person merely because he benefits from the provisional order, unless he also authorizes application for it. The burden of proving authorization is, of course, on the party claiming damage.

Illustration 5. An environmental organization obtains a TRO to prevent the dumping of untreated wastes in the river. A downstream owner, *X*, benefits from this order because after the sewage is stopped, he is able to water his stock in the river and is not required to pump fresh water for them. The order is later found to be erroneous, because, although the wastes pollute the water, it is not regarded as sufficiently serious to constitute a nuisance. The applicant for the injunction is liable on the rules already stated, but *X* is not liable at all, since he has not authorized the application on his behalf, either tacitly or otherwise.

Illustration 6. *L*, the owner of an apartment house, wishes to obtain provisional relief against *B*, a builder who is about to erect a building next door, allegedly in violation of zoning regulations. To avoid posting security or incurring substantial liability, *L* induces *T*, a tenant, to bring suit and seek provisional relief, on the ground that *T* will have standing to sue and can avoid posting security or incurring any effective loss. *T* seeks provisional relief. If the judge is apprised of the above facts, he will probably refuse relief from the security requirement under the rules stated in Comment 5, *supra*.

Illustration 7. Same facts as Illustration 6, except that the judge does not know of *L*'s role. He dispenses with the requirement of security and sets *T*'s maximum liability at \$1,000. The preliminary injunction later proves to be wrongfully issued and *B* is damaged in the sum of \$3,000. *T* and *L* are jointly and severally liable for \$1,000, and, in addition, *L* is liable personally for the remaining \$2,000 in damages suffered by *B*. In other words, under this rule, *L* is not better off by reason of this effort to avoid the rules.

The present procedure contemplates that the damages, if any, will be awarded in the same proceeding on application by the injured party. This procedure is retained, but it has an added significance here, since a non-party can be held liable under the rules just stated. No particular procedure is specified here for bringing in the non-party, such as *L* in the illustrations above. There seems no need for special procedures; ordinary service of process, accompanied by a complaint or petition or written motion in the same case should be sufficient.

8. *Damages.* The basic rules of damages are not changed. However, subsection (e) does provide for recovery of a small liquidated sum at the option of the enjoined party. The theory is that there are always some damages, even if they are not provable. The rule used in federal and North Carolina courts that attorneys' fees are not recoverable items of damages in these cases is not changed, but the liquidated sum will no doubt assuage the effects of this rule without fundamentally changing it.

Where security is required, the old practice of limiting damages to the amount of required security is retained. However, there is now a \$1,000 minimum requirement on security or the personal liability substitute. Where security is not required, the applicant's personal liability is limited only by the actual damages proven, unless the judge sets in advance a maximum liability at the time he dispenses with the bond. It is not contemplated that the judge has discretion to set a maximum liability at a later stage, or to refuse to assess damages that are actually proven.

Subsection (e) also recognizes the existing law on the subject of recoveries independent of those under this rule. It does not attempt to limit the theories on which such independent recoveries can be had, but does explicitly recognize both tort and restitutionary grounds. There is no attempt here to spell out how a recovery under this rule should be credited to limit damages under a malicious prosecution recovery or vice versa. That is left to the courts to handle if and when

it arises. Presumably one who has paid a judgment under this rule, would be given credit for that payment if he were also held liable for malicious prosecution, to the extent that the elements of damages were identical.

9. *Additional liability.* Historically the chancellor could demand a bond, conditioned as he saw fit, as a prerequisite to any provisional relief he might give. The addition of statutes does not seem to have changed this power in the chancellor. Thus it is presumably true that he might impose conditions to relief that are not traditional under the rules. For example, the chancellor, if he has discretion to deny relief at all, might deny it unless a bond were posted in which attorneys' fees, as well as other items of damages, were covered. The present rule makes no provision about this but does collaterally recognize that such added conditions might be imposed in particular cases by providing in subsection (f) that the surety is liable under the rule if he knows the bond is given under the rule, and that he is liable for additional conditions imposed by the judge if he knows of them. This of course does not authorize the judge to impose any new or additional liabilities *after* the security is given. At the stage in which he is assessing damages, he must follow the traditional rules of damage measurement and the rules set out here unless his initial order is conditioned upon an undertaking for additional liabilities.

10. *Surety's liability.* This remains basically unchanged except that liquidated damages may be recovered under the new rule. Subsection (f) makes it clear that the surety's liability is not less than that imposed by this rule, or by the judge's order for a bond, if the surety knows the bond is given to comply with the rule or the order. This is the result in some courts now, but because of the older practice of judges to spell out individual bond conditions, it would be possible to hold, as some courts have, that the terms of the bond rather than the terms of the rule apply. Subsection (f) resolves this potential dispute by providing that the bond "covers" liabilities under the rule or the judge's order. It does not prevent the surety from undertaking added liabilities; it simply insists that the minimum is that contemplated by the rule and the judge's order.

Appendix I

American Injunction Bond Statutes

Note: This list includes the general statute where there is one, but it omits a citation of special statutes enacted in some states to cover specific kinds of injunctions. Usually, however, specific statutes can be found in the same portion of the statute books as the general sections here cited.

Federal	FED. R. CIV. P. 65(c).
Alabama	ALA. CODE tit. 7, § 1043 (1958).
Alaska	ALASKA R. CIV. P. 65(c).
Arizona	ARIZ. R. CIV. P. 65(e).
Arkansas	ARK. STAT. ANN. § 32-207 (1962).
California	CAL. CIV. PRO. CODE § 529 (West 1954).
Colorado	COLO. R. CIV. P. 65(c).
Connecticut	CONN. GEN. STAT. REV. § 52-472 (1958).
Delaware	DEL. CH. CT. CIV. R. 65(c).
Florida	FLA. R. CIV. P. 1.610(b).
Georgia	GA. CODE ANN. § 81A-165(c) (1972).
Hawaii	HAWAII R. CIV. P. 65(c).
Idaho	IDAHO CODE § 8-405 (Supp. 1973).
Illinois	ILL. ANN. STAT. ch. 69, §§ 8-9 (Smith-Hurd Supp. 1974).
Indiana	IND. R. CIV. P. 15.
Iowa	IOWA R. CIV. P. 327.
Kansas	KAN. STAT. ANN. § 60-903 (1964).
Kentucky	KY. R. CIV. P. 65.05.
Louisiana	LA. CODE CIV. PRO. ANN. art. 3610 (West 1961).
Maine	ME. R. CIV. P. 65(c).
Maryland	MD. R.P. BB75(a).
Massachusetts	No general statute.
Michigan	MICH. GEN. CT. R. 718.3.
Minnesota	MINN. R. CIV. APP. P. 65.03.
Mississippi	MISS. CODE ANN. § 11-13-5 (1972).
Missouri	MO. ANN. STAT. § 526.070 (1953).
Montana	MONT. REV. CODES ANN. § 93-4207 (1964).
Nebraska	NEB. REV. STAT. § 25-1067 (1964).
Nevada	NEV. R. CIV. P. 65(c).

New Hampshire	N.H. SUPER. CT. R. 249.
New Jersey	N.J. CIV. PRAC. R. 4:52-3.
New Mexico	N.M.R. CIV. P. 65, 66(c).
New York	N.Y. CIV. PRAC. LAW § 6312(b) (McKinney 1963).
North Carolina	N.C.R. CIV. P. 65(c).
North Dakota	N.D. CENT. CODE § 32-06-05 (1960).
Ohio	OHIO R. CIV. P. 65(c).
Oklahoma	OKLA. STAT. ANN. tit. 12, § 1392 (1961).
Oregon	ORE. REV. STAT. § 32.020 (1973).
Pennsylvania	PA. R. CIV. P. 1531.
Rhode Island	R.I.R. CIV. P. 65(c).
South Carolina	S.C. CODE ANN. § 10-2057 (1962).
South Dakota	S.D. COMPILED LAWS ANN. § 21-8-10 (1967).
Tennessee	TENN. R. CIV. P. 65.05.
Texas	TEX. R. CIV. P. 684.
Utah	UTAH R. CIV. P. 65A(c).
Vermont	VT. R. CIV. P. 65(c).
Virginia	VA. CODE § 8-623 (1957).
Washington	WASH. REV. CODE ANN. § 7.80.080 (1961).
West Virginia	W. VA. CODE § 53-5-9 (1966).
Wisconsin	WIS. STAT. § 268.06 (1957).
Wyoming	WYO. R. CIV. P. 65(c).

Appendix II

Development of Federal Statutes

1. The 1872 statute, Act of June 1, 1872, ch. 255, § 7, 17 Stat. 197.

Sec. 7. That whenever notice is given of a motion for an injunction out of a circuit or district court of the United States, the court or judge thereof may, if there appear to be danger of irreparable injury from delay, grant an order restraining the act sought to be enjoined until the decision upon the motion. Such order may be granted with or without security, in the discretion of the court or judge

With virtually no change this section was incorporated in the Revised Statutes of 1875 as § 718.

2. The Judiciary Act of 1911, ch. 231, § 263, 36 Stat. 1162.

Sec. 263. Whenever notice is given of a motion for an injunction out of a district court, the court or judge thereof may, if there

appears to be danger of irreparable injury from delay, grant an order restraining the act sought to be enjoined until the decision upon the motion; and such order may be granted with or without security, in the discretion of the court or judge.

This section was repealed in 1914 by § 17 of the Clayton Act, ch. 323, § 17, 38 Stat. 737 (1914).

3. The Clayton Act, ch. 323, §§ 16-18, 38 Stat. 737-38 (1914).

This statute provided the language that later became the basic language of the judicial code and of rule 65. Section 16 provided that any person could sue for injunctive relief "against threatened loss or damage by a violation of the antitrust laws . . . under the same conditions and principles as injunctive relief . . . is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted"

Section 17 required notice in the case of preliminary injunctions and restricted the grant of temporary restraining orders to cases of great clarity. It imposed procedural limits upon the grant of interlocutory relief and went on to repeal § 263 of the 1911 Judiciary Act.

Section 18 provided:

That, except as otherwise provided in section 16 of this Act, no restraining order or interlocutory order of injunction shall issue, except upon the giving of security by the applicant in such sum as the court or judge may deem proper, conditioned upon the payment of such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained thereby.

4. The Judicial Code of 1926, § 382, 44 Stat. 909.

This was a new official codification. It carried over the language of § 18 of the Clayton Act into the general provisions of the judicial code as section 382 of title 28 of the United States Code.

5. Rule 65, Federal Rules of Civil Procedure.

Rule 65 carried over almost the exact language of section 18 and added additional provisions, strengthening the distinction between the preliminary injunction and the TRO that had appeared in the 1911 statute. The basic provision, however, is identical to the Clayton Act and the 1926 Judicial Code. What little material there is generally available on the promulgation of the rules does not indicate extensive debate or reconsideration of rule 65 at all.

Appendix III

Development of North Carolina Statutes

1. New York Code of Procedure, ch. 379, § 195, [1848] Laws of New York 534.

§ 195. Where no provision is made by statute, as to security upon an injunction, the judge shall require a written undertaking, on the part of the plaintiff, with or without sureties, to the effect that the plaintiff will pay to the party enjoined, such damages, not exceeding an amount to be specified, as he may sustain by reason of the injunction, if the court shall finally decide that the plaintiff was not entitled thereto. The damages may be ascertained by a reference, or otherwise, as the court shall direct.

2. North Carolina Code of Civil Procedure of 1868, § 192.

§ 192. Security upon injunction. Damages.—Upon granting an order for an injunction, the Judge shall require as a condition precedent to the issuing thereof, that the clerk shall take from the plaintiff a written undertaking, with sufficient sureties to be justified before, and approved by the said clerk or by the Judge, in an amount to be fixed by the Judge, to the effect that the plaintiff will pay to the party enjoined, such damages, not exceeding an amount to be specified, as he may sustain by reason of the injunction, if the Court shall finally decide that the plaintiff was not entitled thereto. The damages may be ascertained by a reference, or otherwise, as the Judge shall direct.

3. The 1883 Code of North Carolina.

In 1883 the General Assembly enacted an entire code of law as a single statute. Act of Feb. 27, 1883, ch. 191, § 6, [1833] N.C. Sess. Laws 315. Most of it was based upon existing law as arranged by the codifiers and then simply enacted by the legislature. The bond requirement remained the same as it had been in 1868, with the exception of these changes:

(a) The section number became Section 341.

(b) The organization was changed so that it appeared in a chapter on *injunction*, rather than in a chapter on *provisional remedies*. This necessitated a minor addition to make the bond requirement apply “[u]pon granting a restraining order or an order for an injunction”

(c) A new clause was added at the end of the section so that the last sentence read, with the addition italicized:

“The damages may be ascertained by a reference or otherwise, as the judge shall direct, *and the decision of the court thereupon shall be conclusive as to the amount of damages upon all the persons who have an interest in the undertaking.*”

This last clause does not seem to have prior legislative basis, but, since the 1883 Code was officially enacted and was not merely a printing by an editor or revisor, this clause became law.

4. Act of March 3, 1893, ch. 251, [1893] N.C. Sess. Laws 206:

Section 1. That section three hundred and forty-one of The Code be amended by adding thereto the following: "Judgment dissolving the injunction shall carry with it judgment for such damages against the plaintiff and his sureties on said undertaking without the requirement of malice or want of probable cause in procuring the injunction."*

Section 2. That this act shall be in force from and after its ratification.

5. North Carolina General Statutes, sections 1-496 to -497 (repealed in ch. 954, § 4, [1967] N.C. Sess. Laws 1354.

[These statutes reflect the codification that was also reflected in the revisals and codes published between 1893 and the publication of the General Statutes. This codification merely integrates the 1893 amendment set forth in paragraph (3) above with slight changes in terminology and punctuation].

§ 1-496. Undertaking—Upon granting a restraining order or an order for an injunction, the judge shall require as a condition precedent to the issuing thereof that the clerk shall take from the plaintiff a written undertaking, with sufficient sureties, to be justified before, and approved by, the clerk or judge, in an amount to be fixed by the judge, to the effect that the plaintiff will pay to the party enjoined such damages, not exceeding an amount to be specified, as he sustains by reason of the injunction, if the court finally decides that the plaintiff was not entitled to it.

§ 1-497. Damages on dissolution—A judgment dissolving an injunction carries with it judgment for damages against the party procuring it and the sureties on his undertaking without the requirement of malice or want of probable cause in procuring the injunction, which damages may be ascertained by a reference or otherwise, as the judge directs, and the decision of the court is conclusive as to the amount of damages upon all the persons who have an interest in the undertaking.

6. N.C.R. Civ. P. 65.

(c) *Security*.—No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the judge deems proper, for the payment of such costs and damages as may be incurred or suffered by any party

* This statute was passed to reverse the holdings of the North Carolina Supreme Court to the effect that no action would lie on the bond unless the claimant could show that the plaintiff had acted maliciously and without probable cause in bringing the claim for provisional remedy. See *Burnett v. Nicholson*, 79 N.C. 548 (1878).

who is found to have been wrongfully enjoined or restrained. No such security shall be required of the State of North Carolina or of any county or municipality thereof, or any officer or agency thereof acting in an official capacity, but damages may be awarded against such party in accord with this rule. In suits between spouses relating to support, alimony, custody of children, separation, divorce from bed and board, and absolute divorce no such security shall be required of the plaintiff spouse as a condition precedent to the issuing of a temporary restraining order or preliminary injunction enjoining the defendant spouse from interfering with, threatening, or in any way molesting the plaintiff spouse during pendency of the suit, until further order of the court, but damages may be awarded against such party in accord with this rule.

A surety upon a bond or undertaking under this rule submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent upon whom any papers affecting his liability on the bond or undertaking may be served. His liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the persons giving the security and the sureties thereon if their addresses are known.

. . . .

(e) *Damages on dissolution.*—An order or judgment dissolving an injunction or restraining order may include an award of damages against the party procuring the injunction and the sureties on his undertaking without a showing of malice or want of probable cause in procuring the injunction. The damages may be determined by the judge, or he may direct that they be determined by a referee or jury.