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DAMAGES - INJUNCTION BOND - ATTORNEY'S FEES AS DAMAGES

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DAMAGES — INJUNCTION BOND — ATTORNEY'S FEES AS DAMAGES — Frequently, when a litigant seeks to establish rights with respect to particular property, it is possible for the opposing party so to act with respect to the property involved, while litigation is pending, as to deprive the plaintiff of the substantial benefit of his remedy should he prevail. Consequently, on prima facie showing of right, courts of equity will grant a temporary injunction to "freeze" the situation until the rights of the parties are finally determined.[1] Since the temporary injunction is issued without a final determination of the rights of the

[1] 1 HIGH, INJUNCTIONS, §§ 4, 5, 7, 8, 13 (1905).

parties, the enjoined party is deprived of dominion over the subject matter before it is finally decided that dominion is not rightfully his. Therefore, should he ultimately prevail in the action, he is deprived of whatever benefits he might have gained through the exercise of his rights in connection with the subject matter during the interim between the issuance of the temporary injunction and the final hearing.[2] Courts of equity, recognizing this source of hardship, have required as a condition precedent to the issuance of a temporary injunction that the plaintiff execute a bond conditioned on payment of all damages the defendant might sustain by reason of the temporary injunction, should it be finally determined that such injunction ought not to have been issued.[3] In an action on the injunction bond, it is obvious that such injuries as are occasioned by defendant's being deprived of dominion over the property are compensable.[4] However, a more difficult problem is put to the court when it must decide whether attorney fees incurred for procuring dissolution of the temporary injunction are similarly within the condition of the bond. It is with this latter problem that this comment is concerned.[5]

I.

The United States Supreme Court early decided in the case of *Oelrichs v. Spain*[6] that such fees could not be recovered. After pointing

[2] Of course the enjoined party has the remedy of damages for malicious prosecution. Weinberg v. Goldstein, 241 Mass. 259, 135 N. E. 126 (1922); Newark Coal Co. v. Upson, 40 Ohio St. 17 (1833). The difficulty of proving the elements of this cause of action make it of doubtful value. Occasionally other forms of action could be utilized to compensate for injuries flowing from the restraint imposed, as for instance where exercise of dominion over property of another by means of an injunction amounts to a conversion of the property, Anderson v. Wilson, (Tex. Civ. App. 1918) 204 S. W. 784; or where the obtaining of an injunction amounts to a breach of contract, Tutwiler v. Burns, 160 Ala. 386, 49 So. 455 (1909).

[3] City of Yonkers v. Federal Sugar Refining Co., 221 N. Y. 206, 116 N. E. 998 (1917). A bond is now required by statute in most jurisdictions. See, for instance, Minn. Stat. (Mason, 1927), § 9388; Pa. Stat. Ann. (Purdon, 1931), tit. 12, § 2071. In some states the requirement of a bond is discretionary with the court. See, for example, Ill. Ann. Stat. (Smith Hurd, 1936), c. 69, § 9; Conn. Gen. Stat. (1930), § 5899.

[4] 2 HIGH, INJUNCTIONS, § 1673 (1905).

[5] An analogous problem arises when the obligee of an attachment or replevin bond seeks to recover attorney fees. However, the courts handle these cases in the same way in which they deal with the right of an obligee on an injunction bond, and the cases seem to be used interchangeably as authority. For cases dealing with the recovery in situations involving attachment bonds, see annotations in 25 A. L. R. 579 (1923) and 71 A. L. R. 1467 at 1485 (1931). For cases involving replevin bonds, see annotation in 30 L. R. A. (N. S.) 367 (1911).

[6] 15 Wall. (82 U. S.) 211 (1872). This was followed by a line of cases in the federal courts. Sullivan v. Cartier, 77 C. C. A. (9th) 448, 147 F. 222 (1906); Lindeberg v. Howard, 77 C. C. A. (9th) 23, 146 F. 467 (1906); Covington County, Alabama v. Stevens, 167 C. C. A. (5th) 498, 256 F. 328 (1919).

out that in other actions such as covenant, debt, and assumpsit, expenditures for legal services are not awarded as damages, and that with respect to *expensa litis* the litigants are customarily on a footing of equality, the court proceeded to bolster its position by stating:

> "There is no fixed standard by which the *honorarium* can be measured. Some counsel demand much more than others. . . . More counsel may be employed than are necessary. When both client and counsel know that fees are to be paid by the other party there is danger of abuse. A reference to a master, or an issue to a jury, might be necessary to ascertain the proper amount, and this grafted litigation might possibly be more animated and protracted than that in the original cause. It would be an office of some delicacy on the part of the court to scale down the charges, as might sometimes be necessary."[7]

The same attitude was thereafter taken by a few state courts,[8] which bolstered their result by construction of the word "damages" in the bond or in the statute requiring bond. One construction frequently made is that the function of the bond is to compensate for the cessation of legal rights pending the litigation whereby the enjoined party's dominion over the property is suspended. If, by reason of this deprivation of use, the restrained person suffers loss, the bond is his source of indemnification, but attorney fees are regarded as beyond the scope of such bond.[9]

The large majority of states, however, refuse to follow the federal

[7] Oelrichs v. Spain, 15 Wall. (82 U. S.) 211 at 231 (1872).

[8] Oliphant v. Mansfield & Co., 36 Ark. 191 (1880); Barrett v. Bowers, 87 Me. 185, 32 A. 871 (1895); Wood v. State, 66 Md. 61, 5 A. 476 (1886); Midgett v. Vann, 158 N. C. 128, 73 S. E. 801 (1912); Sensenig v. Parry, 113 Pa. St. 115, 5 A. 11 (1886); Kemp v. Miller, 166 Va. 661, 187 S. E. 99 (1936); Crowley v. Robinson, (Tenn. Ch. App. 1898) 46 S. W. 461; Galveston, H. & S. A. Ry. v. Ware, 74 Tex. 47, 11 S. W. 918 (1889); Carpenter v. First Nat. Bank of Sour Lake, (Tex. Civ. App. 1908) 114 S. W. 904.

[9] Wisecarver v. Wisecarver, 97 Va. 452 at 455, 34 S. E. 56 (1899): "We are of opinion that the word 'damages' as used in this statute was not intended to cover an allowance for counsel fees. . . . The statute did not contemplate a recovery on account of those personal expenses such as every litigant is subjected to who is brought into court by his adversary . . . but only such damages as flow directly from being stopped in the exercise of the right enjoined." Cf. Jones v. Rountree, 11 Ga. App. 181 at 184, 74 S. E. 1096 (1912): "Attorney's fees are generally not included in the term 'damages.' . . . in order for attorney's fees to be recovered by way of damages, it is necessary for the parties to use language clearly indicating that they had the payment of such fees in contemplation when such contract was made." This argument was adopted in a later federal case. See In re Farmers' Union Mercantile Co., (D. C. S. C. 1928) 26 F. (2d) 102.

rule,[10] and if the litigation terminates with the determination that the temporary injunction was wrongfully issued,[11] the obligee of the bond is granted a reasonable[12] allowance for necessary counsel fees he has become obligated to pay[13] for procuring a dissolution of the temporary injunction. These courts, while recognizing that in the ordinary suit where no temporary injunction is involved each party must bear his own costs of litigation, distinguish the situation under present discussion principally on two grounds. One reason advanced for the majority view is that the payment of his adversary's counsel fees is regarded somewhat in the nature of a penalty imposed on the plaintiff for having resorted to the summary remedy of the temporary injunction, thereby restricting the defendant in the use of his property and compelling him to employ legal aid to rid himself of the wrongfully imposed restraint. There exists a feeling that an indiscriminate resort to such summary and bridling relief should be discouraged. The Florida court[14] typically expressed this sentiment when it asserted,

> "It seems just and right that when a party asks the interposition of the power of the courts, in advance of a trial on the merits of the cause, to deprive the defendant of some right or privilege

[10] Jackson v. Millspaugh, 100 Ala. 285, 14 So. 44 (1893); Mason Dry Goods Co. v. Ackel, 30 Ariz. 7, 243 P. 606 (1926); Frahm v. Walton, 130 Cal. 396, 62 P. 618 (1900); Marks v. Columbia Yacht Club, 219 Ill. 417, 76 N. E. 582 (1905); Fountain v. West, 68 Iowa 380, 27 N. W. 264 (1886); Garden Plain Farmers' Elevator v. Kansas Wheat Growers Assn., 128 Kan. 218, 276 P. 799 (1929); Hinton v. Perry County, 84 Miss. 536, 36 So. 565 (1904); Alliance Trust Co. v. Stewart, 115 Mo. 236, 21 S. W. 793 (1893); Noble v. Arnold, 23 Ohio St. 264 (1872); McLennon v. Fenner, 19 S. D. 492, 104 N. W. 218 (1905); Steel v. Gordon, 14 Wash. 521, 45 P. 151 (1896); Littleton v. Burgess, 16 Wyo. 58, 91 P. 832 (1907).

[11] Where the dissolution of the temporary injunction is made on final hearing on the merits, it is prima facie evidence that the issuance was wrongful. Western Fruit & Candy Co. v. McFarland, 188 Iowa 204, 174 N. W. 57 (1919).

[12] That failure to allege and prove the reasonable value of the attorney fees is fatal. See Reece v. Northway, 58 Iowa 187, 12 N. W. 258 (1822).

[13] In California merely incurring an obligation to pay counsel fees is insufficient. They must have actually been paid. Willson v. McEvoy, 25 Cal. 169 (1864). Elsewhere the rule is otherwise, and liability for the payment of counsel fees, without actual payment, is adequate. Lambert v. Alcorn, 144 Ill. 313, 83 N. E. 53 (1893); Wittich v. O'Neal, 22 Fla. 592 (1886); Underhill v. Spencer, 25 Kan. 71 (1881); Berne v. Maxham, 82 Wash. 235, 144 P. 23 (1914).

[14] Wittich v. O'Neal, 22 Fla. 592 at 599 (1886). Cf. Buford v. Keokuck Northern Line Packet Co., 3 Mo. App. 159 at 172 (1876): "The principle upon which counsel-fees are allowed upon dissolution of an injunction . . . is based upon the fact that defendant has been compelled to employ aid in getting rid of an unjust restriction forced upon him by the act of the plaintiff. If there had been no temporary injunction, there would have been no restriction upon the defendants' enjoyment of their legal rights. . . . But the defendants could have gone on, from beginning to end, and even after, without deprivation or interruption of any privilege."

> claimed by him, even though temporarily, that if on investigation it is found that the plaintiff had no just right either in the law or the facts to justify him in asking and obtaining from the courts such a harsh and drastic exercise of its authority, that he should indemnify the defendant in the language of his bond for 'all damages he might sustain'. . . ."

In the second place, these courts which grant a recovery of counsel fees advance a reason which combines an element of judicial construction of the term "damages" with the factor of causal relationship. It is said that inasmuch as the bond is conditioned to pay all damages sustained by the enjoined party by reason of the wrongful issuance of the temporary injunction, fees for legal services are a proper subject of consideration in estimating the damages incurred, being as direct and immediate a loss as any other.[15]

2.

Digressing momentarily from the broader problem of the propriety of granting attorney fees in any event, an examination of the cases in those jurisdictions where a recovery of attorney fees for procuring dissolution of the injunction is permitted reveals a further difficulty when the temporary injunction is dismissed as an incident to the disposition of the case on its merits. Two situations have caused the courts special difficulty. One is where the temporary injunction is incidental or ancillary to the general relief sought by the plaintiff in the main action; the other is where a permanent injunction is the sole or principal relief sought in the main action. In the former situation nearly all the courts take the position that counsel fees expended for services in defense of the general suit on the merits are not recoverable.[16] But such fees as are earned by particular services directed to dissolution of the temporary injunction are recoverable. Thus, where the plaintiff in an action to recover certain drafts, alleged to have been wrongfully held by the defendant, obtained a temporary injunction restraining disposition of the drafts, and on a final hearing it was adjudged that defendant was actually owner of the drafts, the defendant could not, in a suit on the bond, recover his attorney fees expended for a general

[15] Bolling v. Tate, 65 Ala. 417 at 426 (1880): "it would seem that all necessary and proper expenses incurred to procure the dissolution, or to prevent its re-instatement . . . are the natural and proximate result of the wrongful suing out of the injunction, and are recoverable as damages."

[16] Church v. Baker, 18 Colo. App. 369, 71 P. 888 (1903); Walker v. Pritchard, 135 Ill. 103, 25 N. E. 573 (1890); Robertson v. Smith, 129 Ind. 422, 28 N. E. 857 (1891); Trester v. Pike, 60 Neb. 510, 83 N. W. 676 (1900).

defense of the action.[17] Likewise, where plaintiff claimed possession of land and obtained a preliminary injunction restraining the defendant from evicting the plaintiff, and on final hearing the right to immediate possession was determined to be in the defendant, thus dissolving the preliminary injunction, it was held that the defendant could not recover his counsel fees.[18]

On the other hand, where the principal relief desired is a permanent injunction, the courts are in disagreement on the question whether attorney fees can be recovered when the temporary injunction is dissolved by a dismissal of the main action at a final hearing on the merits. Some of the courts allow recovery of all counsel fees on the basis that the services rendered in the defense of the suit are the same as those that would be rendered on a motion to dissolve the temporary injunction, and that the services are directed towards preventing the temporary injunction from becoming permanent, hence are a consequence of the issuance of the temporary writ.[19] Those jurisdictions which reach the contrary result do so on the grounds that the services rendered are not directed towards the dissolution of the temporary injunction but in defense of the main action for the permanent injunction, and that the costs of services would be the same whether or not a temporary injunction had issued.[20] In Kentucky a unique rule prevails—that where the injunction is merely in aid of the relief sought, attorney fees may be recovered; but where a permanent injunction is the relief sought attorney fees are not awarded in an action on the bond.[21]

3.

To return to the general problem here concerned, it is apparent that many of the arguments either in favor of granting attorney fees or in opposition thereto are easily answered, depending of course on

[17] Langworthy v. McKelvey, 25 Iowa 48 at 51 (1868): "In this case the prayer for the injunction was merely auxiliary or incidental to the relief sought in the principal matter in controversy. The dissolution of the injunction would not dispose of the case, for plaintiffs therein had equities which they could enforce, if successful, whatever the fate of their injunction. If they had commenced their action without asking an injunction, as they might, and had failed, there can be no pretense that defendants (the present plaintiffs) could have recovered compensation or damages for counsel fees in defending that action. . . . The bond was conditioned to pay damages sustained by reason of the issuing of the writ, not by reason of the bringing of the action."

[18] Mims v. Swindle, 124 Miss. 686, 87 So. 151 (1921).

[19] Swan v. Timmons, 81 Ind. 243 (1881); Loofborow v. Shaffer, 29 Kan. 415 (1883); Holloway v. Holloway, 103 Mo. 274, 15 S. W. 536 (1890).

[20] San Diego Water Co. v. Pacific Coast Steamship Co., 101 Cal. 216, 35 P. 651 (1894); Thurston v. Haskell, 81 Me. 303, 17 A. 73 (1889); Olds v. Cary, 13 Ore. 362, 10 P. 786 (1886).

[21] Holt's Admr. v. Johnson, 247 Ky. 180, 56 S. W. (2d) 962 (1933); Holliday v. Sphar, 274 Ky. 556, 119 S. W. (2d) 656 (1938).

which result the court wishes to obtain. The rationale of the Supreme Court in *Oelrichs v. Spain*[22] is not particularly persuasive. It was there suggested that the practice of granting counsel fees might lead to abuse. Yet it would seem that this difficulty is overcome by limiting recovery to those fees which are necessary and reasonable. While the problem of determining what fees would be reasonable may prove difficult, it would seem no more insurmountable than the assessing of reasonable damages in any other case. The sum which would compensate a plaintiff in a personal injury action, as for instance for loss of limb, is far more difficult to ascertain than the sum that would be a reasonable fee for rendering legal services. And there is the additional consideration that the task of the jury in setting reasonable fees is measurably facilitated by the testimony of expert witnesses, such as other lawyers, as to what would constitute a reasonable fee in a particular case. The Supreme Court argued further that recovery of counsel fees should be denied because it would increase litigation. However, if by hypothesis the enjoined party is entitled to his attorney fees, the fact that the court must assume additional burdens would not appear a valid reason for denying that which rightfully belongs to the injured party.

On the other hand, the customary arguments for allowing attorney fees are equally unconvincing. The fact that the enjoined party has been deprived of dominion over his property by the temporary injunction should not be determinative. The bond will clearly cover any loss suffered by reason of such deprivation, and since the bond does compensate for the fettering of the property, the case where the temporary injunction is utilized is not distinguishable from the ordinary action wherein legal fees are traditionally unrecoverable. It is further argued that because of the harshness of the injunctive remedy, its use should be inhibited and unnecessary resort thereto deterred. The answer to such an argument is that the prospect of paying whatever damages are occasioned by the suspension of the enjoined party's legal rights would seem a substantial and sufficient deterrent to a promiscuous resort to the temporary injunction. If it be asserted that because the bond is conditioned to pay "all damages" incurred by the enjoined party by reason of the temporary injunction, the obligation therefore necessarily includes attorney fees, the retort proper is that such argument merely assumes the point in issue—the meaning of the phrase "all damages." The construction placed on the ambiguous term "damages" will depend on what the court conceives the purpose of the bond to be. If one begins with the hypothesis that the purpose of the bond is to include counsel fees, it is a relatively simple matter to grant recovery of such fees; but

[22] 15 Wall. (82 U. S.) 211 (1872).

conversely, if one begins with the hypothesis that the purpose of the bond is only to compensate for the restraint imposed, a construction of the word "damages" so as to exclude counsel fees can with equal facility be attained.

4.

Unlike the English practice, the traditional view in this country imposes on each suitor his own burden of litigation.[23] This approach is so long-standing that in the ordinary action a court has no choice but to deny the successful party any attorney fees. It is difficult to discern any valid basis upon which to distinguish the ordinary case from the one wherein a preliminary injunction has been obtained. Counsel fees, being necessary in both cases, would appear to be no more onerous in the injunction case. If there are baseless actions, there is no reason to believe they are more prevalent in the injunction cases. The only existing ground on which to distinguish the two types of cases is that the enjoined defendant may suffer loss through the restricted use of his property. But this is adequately attended to by the bond itself. The only remaining inference is that, notwithstanding the orthodox approach to recovery of attorney fees, when a court is confronted with an action on an injunction bond the presence in the bond of the loose term "damages" affords an occasion for construction, in which process opportunity for partial reconsideration of the whole problem is presented. If the court is of the opinion that a party who has been compelled to litigate to vindicate his rights should be compensated for the actual costs of that litigation, the occasion furnishes a chance to award attorney fees to the enjoined defendant. On the other hand, if the court is impressed with the arguments in favor of the traditional view that doubtful claims should be submitted to the courts and that proper litigation should be encouraged by dividing the hazards, rather than discouraged by threatening the prospective litigant with the entire costs of the contemplated contest in event he should lose, then the court will adhere to the accepted practice of interpreting the word "damages" so as to exclude the recovery of counsel fees. In view of the uncertainty of this law on this point, it would appear that, if the defendant desires attorney fees to be included in the sums recoverable on the bond, express stipulations therefor should be inserted in the bond itself.

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[23] As to recovery of attorney fees in the ordinary suit, see McCormick, "Counsel Fees and Other Expenses of Litigation as an Element of Damages," 15 MINN. L. REV. 619 (1931).