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Power of a Court of Equity to Ascertain and Award Permanent Damages in Lieu of Injunction

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guishing the *Green* case from the *Nelkin* case, the court states in the latter: "No claim under the Factors' Act was made in that case. Defendant asserted full title and benefit of his bargain on the theory that the agent under his contract with the principal had complete authority to sell and pass title. That was the only issue on the trial. Concededly the defendant was claiming in privity with the agent." [35] The court implies, therefore, that if the claim under the Factors' Act had been made, the case might have been differently decided.

In the writer's opinion, the application of the statutory principle was not waived by the inadvertence of the defendant in not claiming under it. Is the Factors' Act a substantive rule of law, of which the courts may take cognizance when it applies to the facts presented, or is it a rule of law such as that contained in the Statute of Frauds, which must be affirmatively pleaded in order to affect the rights of the parties? [36] In the case of the latter, the defense has been held to be a personal one which may be waived by the defendant, and unless he sets up the statute and relies on it by some proper pleading he impliedly waives the defense.[37] Generally, substantive law is considered to be that part of the law which creates, defines, and regulates rights as opposed to adjective or remedial law, which prescribes the method of enforcing rights or obtaining redress for their invasion.[38] The rule under the Factors' Act would by its nature seem to come within the former classification.

The fact that the court did not invoke the rule of law contained in the Factors' Act is not sufficient, however, to lay it open to criticism. It is not mandatory upon the courts to instruct the parties as to the theory upon which to present their case. Generally, the theory upon which a case is tried in the court below is adhered to on appeal.[39] Where the interests of public policy are not subserved by acting otherwise, it is not mandatory upon the court to invoke rights for the parties which they themselves have inadvertently overlooked.

PAULINE KAPLAN.

POWER OF A COURT OF EQUITY TO ASCERTAIN AND AWARD PERMANENT DAMAGES IN LIEU OF INJUNCTION.

The Court of Appeals, in the case of *Cox* v. *N. Y. Central R. R. Co.*,[1] which was decided in the latter part of 1934, *created* a rule of law, the importance of which cannot be too greatly stressed.

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[35] Nelkin v. Provident Loan Society of N. Y., *supra* note 2.
[36] 25 R. C. L. 742.
[37] *Ibid.*
[38] Mix v. Board of Commissioners of Nez Perce County, 18 Idaho 695, 112 Pac. 215 (1910).
[39] 2 R. C. L. 79.

[1] 265 N. Y. 411, 193 N. E. 251 (1934).

The plaintiff in that suit owned certain unimproved property in the county of Bronx, adjacent to the right of way of the defendant Railroad Company. Although it was possible to reach the plaintiff's lands by devious routes, the principal and most convenient roads were two public streets which crossed the tracks of the defendant by means of bridges, the supports for which were built upon the aforesaid right of way. The public and the plaintiff had for many years enjoyed concurrent easements in the bridges. The defendant, under claim of a conveyance to it by the city of New York, in order to make possible certain improvements in its roadbed, removed the bridges. They did this without acquiring the plaintiff's rights therein, and without compensating him in any way.

The plaintiff brought this suit for an unconditional mandatory injunction to compel the defendant to replace the bridges, and he asked for damages to the time of trial. The court refused the injunction, ascertained the value of the plaintiff's easements, awarded a money judgment to the plaintiff for that amount plus his past damages, and decreed that the entry of the judgment *ipso facto* extinguished the plaintiff's interests.

It is needless to state the far-reaching effect of this conclusion. It is the first time, so far as we have discovered, that the Supreme Court without a jury, in this type of case, has ascertained and awarded permanent damages, and declared that the plaintiff no longer had any interests to protect. The rules of law applicable to this case are not the same as those applying to ordinary causes in equity where the plaintiff seeks injunctive relief. The class into which the present suit falls is one which equity itself has made by declaring that such suits are, in practical effect, condemnation proceedings.[2] It is well, therefore, to make this distinction at the outset, in order to avoid confusion with the large body of cases which *seem* to be analogous, but which are not.

The question for consideration is this: Did the Court, sitting as an equity tribunal without a jury, trammel upon the constitutional rights of the plaintiff, or was their decision a valid exercise of the discretion vested in them? Attention is thus drawn to the Constitution of New York State (1846), Article I, Section 7, as amended at the general election on November 4, 1913,[3] about which more will be said.

[2] The present case—Cox v. City of N. Y. and N. Y. Central R. R. Co., *supra* note 1—the court says: "So in this state, an action like the present is in practical effect a substitute for condemnation proceedings"; American Bank Note Co. v. N. Y. El. R. R. Co., 129 N. Y. 252, 270, 29 N. E. 302 (1891); O'Reilly v. N. Y. El. R. R. Co., 148 N. Y. 347, 357, 42 N. E. 1063 (1896).

[3] Laws of N. Y. (1913) 2491 (amendments to constitution). This section provides the methods for ascertaining the value of property rights, in making compensation in condemnation proceedings. Prior to the instant amendment it provided for two methods: (1) by a jury, and (2) by not less than three commissioners appointed by a court of record, as shall be prescribed by law. The amendment of 1913 added another method: (3) by the Supreme Court, *with or without a jury*, but not by a referee. (Since that time a fourth method was added, but is not material here.)

It is necessary, in order to understand the problem, to point out the general powers of the Supreme Court, as far as its equity jurisdiction is concerned, and to see how its power differs in regard to this particular class of cases. The cases falling within this class are those in which the defendant, who is sought to be enjoined, is one which has the power to condemn the property interests involved.

Equity has always had the power, in suits where the plaintiff was seeking injunctive relief, besides granting such injunction, to ascertain and award damages for injuries received to the time of trial, as incidental to the main relief sought.[4] These cases were those in which the damages awarded were for injuries received up to the time of trial, and equity granted such monetary relief on the ground that, having the parties before it, it could retain the suit to give full relief and to make it unnecessary for either party to resort to another tribunal.[5] As has been well said by Lord Nottingham in an old English case—that when a court of chancery has once gained possession of a cause, if it can determine the whole matter, it will not be the handmaid of other courts, "nor beget a suit to be ended elsewhere." [6]

There is another group of cases in which the court denied the injunction sought, as inequitable and unjust, and where an award of damages would adequately compensate the injured party. In such instances the court fixed the sum as *past and future* damages and offered the defendant the alternative of paying the same or accepting the injunction.[7] But these were suits to abate a nuisance, for waste, or for trespass. Gale *On Easements* [8] states the rule for this type of cases—

> "Where a legal right has been established the plaintiff is *prima facie* entitled to an injunction. And in cases of con-

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[4] 10 R. C. L. 371—"Thus on granting an injunction for * * * any cause, a court of equity may, when necessary to do complete justice between the parties, ascertain and award damages, as incidental to the main relief sought"; Taylor v. Fla. E. C. R. Co., 54 Fla. 635, 45 So. 574 (1907); January v. January, 7 T. B. Mon. (Ky.) 532, 18 Am. Dec. 211 (1828); Lynch v. M. E. R. Co., 129 N. Y. 274, 29 N. E. 315 (1891); Price v. Oakfield, 87 Wis. 536, 58 N. W. 1039 (1894).

[5] Lynch v. M. E. R. Co., *supra* note 4.

[6] Parker v. Doe, 2 Ch. Cases 201.

[7] Galway v. M. E. R. Co., 128 N. Y. 132, 28 N. E. 479 (1891); Pappenheim v. M. E. R. Co., 128 N. Y. 436, 28 N. E. 518 (1891); Amerman v. Deane, 132 N. Y. 355, 30 N. E. 741 (1892); McClure v. Leaycroft, 183 N. Y. 36, 75 N. E. 961 (1904); Forstman v. Joray Holding Corp., 244 N. Y. 22, 154 N. E. 652 (1926); Haber v. Paramount Ice Corp., 239 App. Div. 324, 267 N. Y. Supp. 349 (2d Dept. 1933); Goldbacher v. Eggers, 38 Misc. 36, 76 N. Y. Supp. 88 (1902), *aff'd*, 82 App. Div. 637, 84 N. Y. Supp. 1127 (1st Dept. 1903), 179 N. Y. 551, 71 N. E. 1131 (1904); Raymond v. Transit Dev. Co., 65 Misc. 70, 119 N. Y. Supp. 655 (1908), *aff'd*, 134 App. Div. 981, 119 N. Y. Supp. 955 (2d Dept. 1909); Robb v. Rubel Brothers, 107 Misc. 33, 176 N. Y. Supp. 462 (1919).

[8] GALE ON EASEMENTS (9th ed. 1916) 531.

> tinuing actionable nuisance the jurisdiction to award damages ought only to be exercised under very exceptional circumstances. Damages may be given in substitution for an injunction where the following requirements exist, *viz:*—where the injury to the plaintiff's legal right is small, is capable of being estimated in money, can be adequately compensated by a small money payment, and where the case is one in which it would be oppressive to the defendant to grant an injunction."

Although the usual remedy in equity is a decree requiring a defendant to do or refrain from doing a certain thing, and although a party generally has the right to a trial by jury of the facts upon which a money judgment is based, the courts of equity have, from early times, retained the above classes of cases and have fixed the damages without a jury, as incidental to the main relief sought.[9]

The Supreme Court of New York State, therefore, inherited, and still retains, this jurisdiction, by virtue of that provision in the constitution of 1846 which vested in it all the powers of law and equity existing prior thereto,[10] except those which were expressly destroyed or inhibited by that same constitution. This brings us to the last group of cases in which lies the instant suit.

As has been stated above, the courts of equity, in laying down the principles by which to govern this class of cases, have stated frequently that in effect the suit was a substitute for a condemnation proceeding.[11] This is the point of departure, because the constitution provides certain particular rights for the benefit of property owners in condemnation proceedings. The constitution of 1846, which gave the Supreme Court the wide powers above referred to, expressly excepted the methods of fixing the value of property rights in condemnation proceedings, and declared that such owners had the absolute and undeniable right[12] to have the value of their property determined (1) by a jury, and (2) by not less than three commissioners appointed by a court of record.[13]

The reason why the courts have declared these cases to be substitutes for condemnation proceedings is apparent. A defendant having the power to condemn property for its lawful purposes, upon being enjoined from interfering with the property rights of the plaintiff, would undoubtedly exercise its right by condemning such rights. The injunction, then, would be a vain decree, because the

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[9] Lee v. Alston, 1 Ves. 78; Gorth v. Cotton, 1 Vesey Sr. 528; Armstrong v. Gilchrist, 2 Johns. Cas. 424 (N. Y. 1801); Watson v. Hunter, 5 Johns. Ch. 169 (N. Y. 1821).

[10] CONST. OF N. Y. (1846) art. VI, §§1 *et seq.*

[11] American Bank Note Co. v. N. Y. El. R. R. Co., O'Reilly v. N. Y. El. R. R. Co., both *supra* note 2; the instant case, Cox v. N. Y. C. R. R. Co., *supra* note 1; Sperb v. M. E. R. Co., 137 N. Y. 155, 32 N. E. 1050 (1893).

[12] Ascher v. South Shore Traction Co., 144 App. Div. 234, 128 N. Y. Supp. 1044 (2d Dept. 1911).

[13] CONST. OF N. Y. (1846) art. I, §7.

plaintiff would lose his property interests in any event and will receive instead the fair and reasonable value of them. But equity will not make a vain decree.[14]

In place of that, equity moulded its relief to suit the need therefor by ascertaining the value of the plaintiff's rights and offering to the defendant the alternative of paying to the plaintiff the sum set in extinguishment of his rights or accepting the injunction. The first and most important case in which this was done was *Henderson* v. *N. Y. Central R. R. Co.*[15] In that case the defendant railroad usurped the plaintiff's fee in the street and damaged his easements as an abutting owner, by laying a track and maintaining a railroad. The court awarded the plaintiff damages for past injuries and a further sum for the permanent damage, provided the plaintiff tendered a deed of his rights to the defendant; if the plaintiff did so the defendant was compelled to pay for the fee damage or be enjoined. The court's power in that case to grant such relief has been questioned by some,[16] but the decision has been followed in so many cases as to become unshakeable in our law.[17] In *Story* v. *N. Y. El. R. R. Co.*[18] the court followed the *Henderson* case, but there, instead of awarding damages, an injunction was granted, to be suspended for a reasonable time for the defendant to acquire the plaintiff's easements. In *Eggers* v. *Manhattan R. Co.*[19] the court, in awarding damages, expressly states that such relief was merely a matter of favor to the defendant and was in the discretion of the court. The cases hold that the measure of fee damages is the same as that in a condemnation proceeding.[20]

The court, however, has never attempted to ascertain and award

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[14] Saperstein v. Mechanics and Farmers Savings Bank, 228 N. Y. 257, 126 N. E. 708 (1920).

[15] 78 N. Y. 423 (1879). This case was the second appeal of a suit commenced in 1853 entitled Williams v. N. Y. C. R. R. Co., 16 N. Y. 97, and substantially followed and agreed with that earlier appeal.

[16] Note (1893) 20 L. R. A. 752. The writer there states that the subsequent cases have never attempted to justify the Henderson case. He also states that the Henderson case was not decided on American precedent, but drew its authorities from English cases, which in turn depended upon an English statute—Lord Cairn's Act, 21 and 22 Vict. (1858). This Act gave Chancery the power, where it already had the power to enjoin or to decree specific performance, to award damages, *in its discretion* either in addition to, or in substitution of, the injunction. The effect of the Henderson case, according to the note, was to incorporate Lord Cairn's Act into New York jurisprudence.

[17] Story v. N. Y. El. R. R. Co., 90 N. Y. 122 (1882); Glover v. Manhattan R. Co., 19 Jones & S. 1 (51 N. Y. Super. Ct. 1884); N. Y. Nat'l Exch. Bank v. M. E. R. Co., 21 Jones & S. 511 (53 N. Y. Super. Ct. 1886), *aff'd*, 108 N. Y. 660, 15 N. E. 445 (1886); Pappenheim v. M. E. R. Co., *supra* note 7; Eggers v. Manhattan R. Co., 27 Abb. N. C. 463 (N. Y. 1891); Bernheimer v. Manhattan R. Co., 26 Abb. N. C. 88 (N. Y. 1890).

[18] *Supra* note 17.

[19] *Supra* note 17.

[20] Bernheimer v. Manhattan R. Co., *supra* note 17; American Bank Note Co. v. N. Y. El. R. R. Co., *supra* note 2.

the permanent damages as of right, having before them at all times the constitutional limitation on their power so to do.[21] Indeed it has been stated many times that the Supreme Court, without a jury, had no power to force a plaintiff to accept such damages. In *Peck* v. *Schenectady*[22] it was said that the court could not compel an abutter who owns the fee in the street to accept damages assessed by it in lieu of an injunction sought by him to restrain the construction of a railroad in the street, since that would in effect deprive him of his right to have his compensation determined by one of the modes prescribed in the constitution. And in *Ascher* v. *South Shore Traction Co.*[23] it was said that the plaintiff, without his consent, could not be deprived of his constitutional right.

The conditional injunction method, however, was not in violation of the constitution, Article I, Section 7, because although the court might fix the terms on which it will suspend the injunction, the property owner is under no obligation to accept those damages, but may demand their assessment in the manner prescribed.[24]

It is obvious, then, that the Supreme Court, if guided by the above principles in the instant case of *Cox* v. *N. Y. C. R. R. Co.*[25] exceeded its powers. And that brings our problem to the constitutional amendment referred to above.[26]

By that amendment the Supreme Court, in condemnation proceedings, was given the power, *with or without a jury,* to ascertain the compensation due the property owner. The question resolves itself, therefore, into this:—Does this amendment increase the power of equity to the extent necessary to sustain the instant case? Fortunately the answer is fairly apparent. In the *Matter of New York*[27] the court construed this provision and declared that in condemnation proceedings it is governed by the same rules as were applied by the Commissioners in condemnation prior to the adoption of the amendment to the constitution and the resulting legislation. The conclusion is almost inescapable that this amendment enlarged the powers of the Supreme Court until they are as full as those of the Commissioners. The case at hand still further construes this constitutional power, and declares that equity is no longer disabled from determining the value of the property to be condemned. This reasoning is consonant with the obvious intent of the framers of the amendment, which was to create a means by which the court could give full relief in an action where both parties were before the court. This being true we may say that equity now has the power which formerly it lacked, to fix

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[21] Galway v. M. E. R. Co., *supra* note 7.

[22] 67 App. Div. 359, 73 N. Y. Supp. 794 (3d Dept. 1901), *aff'd,* 170 N. Y. 298, 63 N. E. 357 (1901).

[23] 144 App. Div. 234, 128 N. Y. Supp. 1044 (2d Dept. 1911).

[24] Sponenburg v. Gloversville, 96 App. Div. 157, 89 N. Y. Supp. 19 (3d Dept. 1904).

[25] *Supra* note 1.

[26] *Supra* note 3.

[27] 197 App. Div. 431, 189 N. Y. Supp. 642 (1st Dept. 1921).

the value of property of a plaintiff, who has come into equity seeking a mandatory injunction against the defendant, where such defendant has the right to condemn such property.

The decision in the present case is a valid exercise of the powers of equity, and the plaintiff's constitutional rights have not been infringed upon.

J. CYRIL O'CONNOR.

SECURITY DEPOSITS UNDER LEASES.

In the case of *Senz, Inc.* v. *Hammer*[1] the tenant sought to recover a deposit under a lease, afer having removed from the premises pursuant to a ten-day notice, served upon him by the landlord, to pay or move. The lease contained a provision that a continued default in the payment of rent, for ten days after said notice was served, shall terminate the lease without any entry or further act on the part of the landlord. It was also provided that the foregoing provision is intended as a conditional limitation. The court held that where from the provisions of a lease, though obscure, an inference must be drawn that the parties contemplated a deposit as security for the performance of all the covenants, and that the landlord's agreement to repay it after the expiration of the lease was conditioned on the tenant's full performance, a removal of the tenant from the premises, and acceptance by the landlord of possession after a default by the tenant, does not warrant the recovery of the deposit by the tenant. Following the rulings of *International Publications* v. *Matchabelli*,[2] and *Hand* v. *Rifkin*,[3] the court held that, under such circumstances, the liability of the tenant survives the severance of the relationship of landlord and tenant.

The general question underlying these cases is, whether the termination of the lease destroys all obligations thereunder, or whether a proper covenant concerning the continued liability of the tenant survives the termination so as to allow the landlord to hold the deposit until such time when all the damages are ascertainable and to apply same in satisfaction of such damages.

The cases of *International Publications* v. *Matchabelli* and *Hand* v. *Rifkin* hold that the parties may contract for a continuing liability on the part of the tenant, beyond the termination of the lease. While these two cases refer to termination because of summary proceedings,[4] the principle is the same whether the termination occurs by

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[1] 265 N. Y. 344, 193 N. E. 168 (1934).
[2] 260 N. Y. 451, 184 N. E. 51 (1933).
[3] 263 N. Y. 416, 189 N. E. 476 (1934).
[4] Section 1434 of the New York Civil Practice Act expressly provides that the issuance of a warrant for the removal of a tenant cancels the lease