

The Preliminary Injunction--Curtailment of Powers of Courts of Equity by Section 882 of Civil Practice Act

Charles Veit

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

Recommended Citation

Veit, Charles (1931) "The Preliminary Injunction--Curtailment of Powers of Courts of Equity by Section 882 of Civil Practice Act," *St. John's Law Review*: Vol. 6 : No. 1 , Article 38.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol6/iss1/38>

This Recent Development in New York Law is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact lasalar@stjohns.edu.

CURRENT LEGISLATION

Editor—WILLIAM J. CAHILL

THE PRELIMINARY INJUNCTION—CURTAILMENT OF POWERS OF COURTS OF EQUITY BY SECTION 882 OF CIVIL PRACTICE ACT.

Section 882 of the Civil Practice Act prior to the September, 1930 amendment provided that a Judge or Court, in a proper case, might grant an injunction *ex parte*. By the September, 1930 amendment, the application for a preliminary injunction may be granted only upon notice.¹ The reaction to ill-considered *ex parte* injunctions in labor disputes induced the Legislature to amend Section 882 of the Act as indicated.

Collateral events show that labor has effected an abridgment of equity power to the prejudice of other classes. It is difficult to find a law that does not work harm upon someone. Legislation is sustained despite the hardship to the few, in view of the benefit to the greater number. Under this recent amendment, the process seems to have been reversed, and the good of the majority is stifled for the benefit of a few. Labor is not the only element of society which has an interest in the injunction.

The preliminary injunction, aimed primarily at the dishonest debtor, belongs to all. "The office of a preliminary injunction is to preserve the *status quo*, until upon final hearing, the Court may grant final relief."² If notice is given, its effectiveness is destroyed. Upon the service of notice of application for a preliminary injunction, the opposing party can destroy the *status quo* by removing the subject matter of the litigation beyond the jurisdiction of the Court.³ The defendant might negotiate commercial paper,⁴ or transfer title, thus making the judgment, when obtained, unenforceable. Story, *J.*, points out that the function of the court of equity is preventative more often than restorative.⁵ Certainly, the September, 1930 legislative amendment to the Civil Practice Act is clearly retrogressive in character.

Let us consider whether the Legislature acted within its authority when it passed the amendment. Finch, *J.*, who wrote the dissenting opinion in *Hunt v. Stirone*,⁶ concurred in by Merrell, *J.*, set forth the proposition that the interim injunction is the creature of statute, that since the Legislature created the remedy, it may modify or abolish it. In support of this conclusion, *Bachman v.*

¹ *Hunt v. Stirone*, 232 App. Div. 262, 249 N. Y. Supp. 591 (1st Dept. 1930).

² *Toledo v. Pennsylvania*, 54 Fed. 730 (N. D. Ohio, 1893).

³ *Wolf v. Altman*, 196 App. Div. 549, 187 N. Y. Supp. 902 (1st Dept. 1921).

⁴ *Ibid.*

⁵ STORY, EQUITY JURISPRUDENCE (1835) §1182.

⁶ *Supra* note 1.

Harrington is cited.⁷ The question before the Court in that case was, whether the defendant should be punished for contempt of Court. As the jurisdiction of the Supreme Court was not in issue, the citation of this case for the proposition that a court of equity has no inherent power to grant the interlocutory injunction, and that such authority must be found in the Code of Civil Procedure, is misleading. Judge Cullen, who spoke for the court, must have realized that when he stated, "While the code authorizes this injunction in certain cases, still it is doubtless within the power of the court of equity, in a proper case to issue mandatory injunctions and the code should not be so strictly construed as to deny that power in any case."⁸ Even if this dicta has any force, it is clearly limited by the writer.

It would seem that the Legislature exceeded its authority in enacting the provision of the Civil Practice Act referred to. The amended Section 882 is *not merely a change in procedure but it is a curtailment* of the power of the court of equity. Judge Learned, in referring to sections of the Code of Civil Procedure that were reenacted in the Civil Practice Act relative to injunctions, said: "The Code is a Code of practice not designed to introduce new principles of jurisprudence."⁹ Looking back, then, in the settled rules of equity, we find that while final injunctions are matters of right, preliminary injunctions are matters of discretion.

The Constitution affords the Legislature no authority for its change in Section 882. Our State Constitution provides: "The Supreme Court is to continue with general jurisdiction in law and equity, subject to such appellate jurisdiction of the Court of Appeals as is now or may hereafter be prescribed by law not inconsistent with this section."¹⁰ Cullen, *J.*, writing for the court in *Bachman v. Harrington*, subsequently referred to this section of the Constitution in the words of Daniel, *J.*, "The terms here are so comprehensive that they include cases of every description from the most complicated and important to the most simple and insignificant."¹¹ If the Legislature can limit the jurisdiction of the Supreme Court in one class of cases, it may do so as to any or all others, and completely abrogate the constitutional provisions.¹² "The Legislature cannot limit or abridge the general jurisdiction of the Supreme Court as conferred by the constitution."¹³

The duty of a court of equity has been to prevent irreparable injury. This has been done by the maintenance of the *status quo*

⁷ 184 N. Y. 458, 77 N. E. 657 (1906).

⁸ *Ibid.* at 483, 77 N. E. at 658.

⁹ *Van Veghten v. Howland*, 12 Abb. (N. S.) 46 (N. Y. 1872).

¹⁰ N. Y. State Const., art. 6, §1 (adopted Nov. 6, 1894).

¹¹ *People v. Luce*, 204 N. Y. 478, 97 N. E. 850 (1912), quoting the words of Daniel, *J.*, in *Hart v. Hatch*, 3 Hun 375 (1st Dept. 1875).

¹² *In re Stillwell*, 139 N. Y. 337, 34 N. E. 777 (1895).

¹³ *Ibid.* at 741, 34 N. E. at 778.

pending the termination of the litigation and such was effected by Section 882 of the Civil Practice Act prior to its amendment. If justice is to continue unimpeded, *ex parte* injunctions must be restored to the statute books by the repeal of the aforementioned amendment.

CHARLES VEIT.

DECEDENT ESTATE LAW—1931 AMENDMENTS—SOURCE OF INTESTATE SHARE ALLOWED AFTER-ACQUIRED SPOUSE OR ISSUE UNDER SECTION 35.—The doctrine of revocation of a will by the subsequent marriage and birth of children of the testator had its inception in the Roman Law.¹ Cicero tells us that there at all times exists a presumption that it was not the testator's intention in making his will to exclude from consideration the natural beneficiaries of his worldly goods. Therefore, when he died leaving a child born after the will unprovided for, the will should be revoked and the child awarded his legal share in the estate. To exclude children, under the rule as laid down by this decision, it was necessary expressly to disinherit them in the will.²

This theory, in substance, was followed by the majority of the countries adopting the civil law.³ In England, the ecclesiastical Courts limited it to cases in which there had occurred a marriage coupled with the birth of children subsequent to the making of a will disposing of the whole estate, applying the doctrine first to personal property only,⁴ and, after considerable controversy, to realty.⁵

The first New York case upon the subject, that of *Brush v. Wilkins*,⁶ decided in 1820, on the authority of the previous English decisions, ruled that mere marriage alone or the birth of children subsequent to the making of a will constituted no revocation; that in order in any event to effect such a result, there must be a subsequent marriage plus a child born of that union, such happenings raising only a presumption of revocation, which was not conclusive.

The Revised Statutes of 1830 created a distinction between children born after the will, and the subsequent marriage and birth of *issue* of the testator, with regard to revocation. One provision,⁷ later Section 26 of our Decedent Estate Law, declared that when a man executed a will and, thereafter, a child was born which sur-

¹ I DAVIDS, *NEW YORK LAW OF WILLS* (1923) p. 657, §294.

² *Brush v. Wilkins*, 4 Johns. Ch. 511 (N. Y. 1820), Kent. Chancellor, citing Cicero de Orat. 1.57.

³ *Sherry v. Lozier*, 1 Bradf. 450 (N. Y. 1851); *Matter of Rossignot*, 50 Misc. 231, 120 N. Y. Supp. 623 (1906).

⁴ *Lugg v. Lugg*, 1 Ld. Raym. 441, Salk. 592 (Eng. 1699).

⁵ *Christopher v. Christopher*, Dick. Rep. 445 (Eng. 1771).

⁶ *Supra* note 2.

⁷ R. S. pt. 2, c. 6, tit. 1, art. 3, §49 (1830).