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INJUNCTION AGAINST CONTINUED TRESPASSES

The recent case of *Hentline v. Miller*¹ raises the problem of the right to an injunction against continuing trespasses.² Because of the great variety of principles applied by the courts, it is difficult to state definite rules governing this relief. The trend of the decisions appears to be toward greater leniency in granting the injunction, with a corresponding relaxation of the strict requirements once imposed. The modern tendency is to recognize that a remedy which prevents a wrong is better than one which merely attempts to give compensation for the injury after it has occurred.³ Consequently a landowner need no longer be content with damages after his rights have been invaded, but is entitled to an injunction against a threatened continuing trespass.⁴ Some states, however, seem loathe to depart from the older view, and other states, after apparently falling in line with the modern trend, have reaffirmed their original position.

Historically the jurisdiction of equity to prevent trespasses to land is an extension of its jurisdiction to prevent waste. In the case of waste, since the remedy existed to protect the interests of the reversioner or remainderman from injury by the tenant, privity of estate had to be established. And because privity was there required, courts also thought it necessary in early trespass cases. But since there was no basis in reason for this requirement, it soon became established that, in order to enjoin a trespass, privity need not be shown.⁵

Often in suits to enjoin continuing trespasses, before the court will pass on the merits, it must dispose of a preliminary question in respect to the plaintiff's title. The fact that the plaintiff's title is in dispute was originally thought to be a matter which went to the jurisdiction of the court, but it would now seem to be well settled that it goes rather to the exercise of that jurisdiction. If the title is disputed equity generally will not enjoin such trespasses,

¹ 185 S. E. 852 (W. Va. 1936).

² For annotations on the general problem, see Notes (1924) 32 A. L. R. 463, (1934) 92 A. L. R. 578.

³ POMEROY, EQUITY JURISPRUDENCE (4th ed. 1919) 3243.

⁴ *West Virginia Pulp & Paper Co. v. Cheat Mountain Club*, 212 Fed. 373, 129 C. C. A. 49 (1914); *McMorrin Milling Co. v. Pere Marquette Ry. Co.*, 210 Mich. 381, 178 N. W. 274 (1920).

⁵ *Lowndes v. Bettie*, 33 L. J. Ch. 451, 3 New Reports 409 (1864); *Moore v. Halliday*, 43 Ore. 243, 72 Pac. 801 (1903).

but leaves the determination of title to the courts of law.⁶ This rule, however, is subject to exception and limitation. As title is in question in the majority of these suits, the court need not find absolute title in the complainant.⁷ And if the threatened injury is irreparable, a temporary restraining order will be granted.⁸ Like relief may also be granted pending suit to try title, whether the suit has been, or is about to be brought.⁹ Since absolute title is not a prerequisite to a temporary restraining order, lawful and peaceable possession,¹⁰ or possession under *prima facie* title,¹¹ or constructive possession,¹² is usually sufficient.¹³ Rapid strides have been made by some of the more liberal courts in extending the equitable remedy to include the determination of title.¹⁴

Even though title to the property involved is not in dispute, the principles which control the granting of injunctions against continued trespasses are often vague. Originally the courts refused to enjoin continuing trespasses on the ground that the legal remedy was adequate, and a minority of courts still follow this

⁶ Woodstock Operating Corp. v. Quinn, 201 Ala. 681, 79 So. 253 (1918); Watson v. Ferrell, 34 W. Va. 406, 12 S. E. 724 (1890); Schoonover v. Bright, 24 W. Va. 698 (1884); Lazzell v. Garlow, 44 W. Va. 466, 30 S. E. 171 (1898); Freer v. Davis, 52 W. Va. 1, 43 S. E. 164 (1903).

⁷ Baldwin v. Fisher, 110 Minn. 186, 124 N. W. 1094 (1910); Electro Metallurgical Co. v. Montgomery, 70 W. Va. 754, 74 S. E. 994 (1911); Pardee & Curtin Lumber Co. v. Odell, 71 W. Va. 206, 76 S. E. 343 (1912). See also Lake Shore & M. S. Ry. Co. v. Felton, 103 Fed. 227, 43 C. C. A. 189 (1900), that equity will interfere to prevent multiplicity, even though the complainant has not established his right by a judgment at law.

⁸ Camp v. Conner, 205 Ala. 468, 38 So. 578 (1921); Deane v. Turner, 113 Va. 236, 74 S. E. 165 (1912).

⁹ West Virginia Development Co. v. Preston County Development Co., 76 W. Va. 492, 85 S. E. 688 (1915); Barth v. Shepherd, 80 W. Va. 218, 92 S. E. 317 (1917); Gamble v. Kennedy, 80 W. Va. 694, 93 S. E. 807 (1917); McDonald v. Boggs, 97 W. Va. 201, 124 S. E. 680 (1924); United Fuel Gas Co. v. Hays Oil & Gas Co., 107 W. Va. 255, 148 S. E. 76 (1929).

¹⁰ Heaton v. Wireman, 74 Neb. 817, 105 N. W. 634 (1905).

¹¹ Pittsburgh, S. & W. R. Co. v. Fiske, 123 Fed. 760, 60 C. C. A. 621 (1903); Kellogg v. King, 114 Cal. 373, 46 Pac. 166 (1896). But see Cumbee v. Ritter, 123 Va. 448, 96 S. E. 747 (1918).

¹² Dunker v. Field & Tule Club, 6 Cal. App. 524, 92 Pac. 502 (1907); Hobbart-Lee Tie Co. v. Stone, 135 Mo. App. 438, 117 S. W. 604 (1909).

¹³ In Stroup v. Chalcraft, 52 Ill. App. 608 (1893), and Cragg v. Levinson, 238 Ill. 69, 87 N. E. 121 (1908), 21 L. R. A. (N.S.) 417 (1909) it was held that where complainant's title is admitted by demurrer, an injunction will be granted in order to avoid multiplicity. But see CLEPHANE, EQUITY PLEADING (1926) 227, to the effect that a demurrer does not admit facts stated in the bill except for the purpose of deciding the demurrer.

¹⁴ O'Brien v. Murphy, 189 Mass. 353, 75 N. E. 700 (1905); Cullen v. Ksiazkiewicz, 154 Mich. 627, 118 N. W. 496 (1908). See also Nelson Theatre Co. v. Nelson, 216 Mass. 30, 102 N. E. 926 (1913); McMorran Milling Co. v. Pere Marquette Ry. Co., 210 Mich. 381, 178 N. W. 274 (1920).

view.¹⁵ But others soon held that an injunction would issue unless the legal remedy was actually full and adequate,¹⁶ or unless the legal remedy was as practical and efficient as that of equity.¹⁷ A few courts in reaching this result were aided by existing statutes.¹⁸

The inadequacy of the legal remedy for a continuing trespass is of course the proper basis for equity jurisdiction. The courts have found that the remedy at law is inadequate either (1) because the machinery of the law courts is not adapted to deal with a continuing trespass in one suit, thus necessitating a multiplicity of actions at law, or (2) because the injury is of an irreparable nature, or (3) because the defendant is insolvent.¹⁹

However, it is now widely recognized that the first ground is the correct one and that equity acts to prevent a multiplicity of suits at law.²⁰ The injunction will be granted upon this ground even though the legal remedy is fully adequate for each of the acts of the continuing trespass.²¹ A like result is reached where the continuing trespass consists of the acts of several persons.²² And although other bases for granting the injunction are often present, the doctrine of the prevention of a multiplicity of suits is alone sufficient.

But some courts require that irreparable injury be threatened before the injunction will be granted.²³ However, several jurisdictions have by their interpretation of irreparable injury, so

¹⁵ *Gates v. Johnson Lumber Co.*, 172 Mass. 495, 52 N. E. 736 (1899); *Worthington v. Moon*, 53 N. J. Eq. 46, 30 Atl. 251 (1894); *Lazzell v. Garlow*, 44 W. Va. 466, 30 S. E. 171 (1898). However, it will be noted that the greater number of these minority decisions are older decisions. See Note (1924) 32 A. L. E. 482.

¹⁶ *Moore v. Ferrell*, 1 Ga. 7 (1846).

¹⁷ *Deskins v. Rogers*, 72 Okla. 274, 180 Pac. 691 (1919); *Stotts v. Dichdel*, 70 Ore. 86, 139 Pac. 932 (1914).

¹⁸ *Wiggins & Johnson v. Williams*, 36 Fla. 637, 18 So. 859 (1895); *Cobb v. Atlantic Coast Line Ry. Co.*, 172 N. C. 58, 89 S. E. 807 (1916).

¹⁹ *McCLINTOCK, EQUITY* (1936) §§ 41, 45, 134.

²⁰ *Cityco Realty Co. v. Slaysman*, 160 Md. 357, 153 Atl. 278 (1930); *Kinsland v. Kinsland*, 188 N. C. 810, 125 S. E. 625 (1924). *Contra*: *Thorn v. Sweeney*, 12 Nev. 51 (1877); *Roebbling Son's Co. v. First National Bank*, 30 Fed. 744 (1887) holding that the acts of trespass must be by several persons in order to enjoin on the ground of prevention of multiplicity.

²¹ *Ellis v. Blue Mt. Forest Assoc.*, 69 N. H. 385, 41 Atl. 856 (1898), 42 L. L. E. 470 (1899); *Colliton v. Oxborough*, 86 Minn. 361, 90 N. W. 793 (1902). See also *Whittaker v. Stangvick*, 100 Minn. 386, 111 N. W. 295, 10 L. R. A. (N.S.) 921 (1907).

²² *Sequim Bay Canning Co. v. Bugge*, 49 Wash. 127, 94 Pac. 922 (1908); *Bolsa Land Co. v. Burdick*, 151 Cal. 254, 90 Pac. 532 (1907), 12 L. R. A. (N.S.) 275 (1908).

²³ *Randall v. Freed*, 154 Cal. 299, 97 Pac. 669 (1908); *Moore v. Halliday*, 43 Ore. 243, 72 Pac. 801 (1903).

widened the scope of the rule as to make it very nearly conform to the doctrine of multiplicity applied by the majority.²⁴ The rule that an injunction will not be granted unless there is a substantial injury, or conversely, that no injunction will be granted for a slight injury is also of minority application.²⁵ This rule approaches that of irreparable injury, but requires less serious damage.

Again some courts require in the case of a continuing trespass that the complainant show the insolvency of the defendant.²⁶ If the defendant is insolvent, the legal remedy, though theoretically, perfect, would be worthless. In some cases insolvency, though not decisive, has been an important factor in the determination of the complainant's right to an injunction.²⁷ But insolvency alone should be a sufficient basis for the injunction.²⁸ However, since the injunction may be granted either to prevent a multiplicity of suits, or because of irreparable injury, insolvency is generally held to be immaterial.²⁹

Further, an injunction is an especially appropriate remedy where it can be shown that the acts of continuing trespass will ripen into an easement. In this case no actual damage need be shown.³⁰ In Indiana, where the complainant was provided by statute with a means of interrupting the use without resort to equity, the court at first refused an injunction,³¹ but later held that regardless of the statutory remedy an injunction was proper.³²

²⁴ *Lloyd v. Catlin Coal Co.*, 210 Ill. 460, 71 N. E. 335 (1904); *Boston & Me. Ry. v. Hunt*, 210 Mass. 128, 96 N. E. 140 (1911).

²⁵ *United States Freehold Land & E. Co. v. Gallegos*, 89 Fed. 769, 32 C. C. A. 470 (1898); *Chesapeake Co. v. Mt. Vernon Co.*, 107 Md. 528, 68 Atl. 1046 (1908).

²⁶ *Alexander v. Hill*, 224 Ala. 671, 141 So. 638 (1932); *Cumbee v. Ritter*, 123 Va. 448, 96 S. E. 747 (1918).

²⁷ *Raleigh & W. R. Co. v. Glendon & G. Min. & Mfg. Co.*, 112 N. C. 661, 17 S. E. 77 (1893); *Miller v. Wills*, 95 Va. 337, 28 S. E. 337 (1897). The court in this case also placed emphasis on the fact that the defendant was a non-resident, but query if this should make any difference?

²⁸ *Slater v. Gunn*, 170 Mass. 509, 49 N. E. 1017 (1897) 41 L. R. A. 268 (1898); *Wilson v. Hill*, 46 N. J. Eq. 367, 19 Atl. 1097 (1890). The majority of decisions seems to be contra to the view that insolvency alone is a sufficient ground for granting the injunction. Supporting the minority see *Kerlin v. West*, 4 N. J. Eq. 449 (1844) that irreparable injury from continuing trespass may arise either from the nature of the injury itself or from the want of responsibility in the person committing it.

²⁹ *Lembeck v. Nye*, 47 Ohio St. 336, 24 N. E. 686 (1890); *Boston & M. Ry. Co. v. Sullivan*, 177 Mass. 230, 58 N. E. 689 (1900); *Pardee v. Camden Lumber Co.*, 70 W. Va. 68, 73 S. E. 82 (1911), 43 L. R. A. (n.s.) 262 (1913).

³⁰ *Szathmary v. Boston & Albany Ry.*, 214 Mass. 42, 100 N. E. 1107 (1913); *Way v. Fellows*, 91 Vt. 326, 100 Atl. 682 (1917).

³¹ *Hurt v. Hildebrandt*, 30 Ind. App. 415, 66 N. E. 173 (1903).

³² *Syracuse v. Weyrick*, 37 Ind. App. 56, 76 N. E. 559 (1905).

Courts may be influenced by other considerations in determining whether to issue the injunction. Where the continuing trespass is of such a nature that it is impossible to ascertain the extent of the injury that may result, the full damage not developing until some time later, an injunction will be granted.³³ Further, relief will be granted if the expense of the suits at law is shown to be higher than the damages that can be recovered.³⁴ And if the continuing trespass is a menace to public travel, it may be enjoined for that reason.³⁵

Where the reoccurrence of the acts of trespass is not reasonably to be expected, the legal damages are considered adequate, and the injunction denied.³⁶ There is no need for an injunction in any case of continuing trespass if the recovery of damages at law would suffice to prevent further trespasses.³⁷ It has also been held that it is not a matter of defense that the acts of trespass were of benefit to the complainant's property.³⁸

G. G. B.

³³ *Cumberland Telephone & Telegraph Co. v. Barnes*, 101 S. W. 301 (Ky. 1907); *Chesapeake Co. v. Mt. Vernon Co.*, 107 Md. 528, 68 Atl. 1046 (1908).

³⁴ *Evans v. Victor*, 204 Fed. 361, 122 C. C. A. 531 (1913); *Abel v. Flesher*, 296 Ill. 604, 130 N. E. 353 (1921); *Bent v. Barnes*, 72 W. Va. 161, 78 S. E. 374 (1913).

³⁵ *Atchinson, T. & S. F. Ry. v. Spaulding*, 69 Kan. 431, 77 Pac. 106 (1904), 66 L. R. A. 587 (1905); *Mobile & O. R. Co. v. Zimmern*, 206 Ala. 37, 89 So. 475 (1921).

³⁶ *Fidler v. Roberts*, 41 Fed. (2d) 305 (1930); *Oregon-Wash. R. & N. Co. v. Reed*, 87 Ore. 414, 170 Pac. 300 (1918). *Contra*: *Rhoades v. McNamara*, 135 Mich. 644, 98 N. W. 392 (1904).

³⁷ *Frink v. Stewart*, 94 N. C. 484 (1886).

³⁸ *Myers v. Kelly*, 83 N. J. Eq. 474, 91 Atl. 598 (1914).