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EDITORIAL NOTES

ISSUANCE OF PROCESS AS CONDITION PRECEDENT TO GRANTING PRELIMINARY INJUNCTION

There is a difference of opinion in this state as to whether a preliminary injunction may properly be granted before the issuance of process. The controversy does not arise out of any question as to giving notice to the defendant. Those who insist that process must issue first do not contend that it must be served before the injunction is granted. Even if it were served, it would give no notice to the defendant that the plaintiff intended to apply for a preliminary injunction. If such notice is required by the court, it is given through the medium of the notice prescribed by the statute, which is independent of and in addition to service of process. Insistence that process must issue before the injunction

is granted is based solely on the contention that a suit must be pending before the injunction is granted, and the assumption that a suit can not be instituted except through the issuance of process. The arguments adduced to support this contention are based on supposed necessities imposed by the mechanics of procedure and on what is assumed to be the implied intent of the statutes.

A preliminary injunction operates interlocutorily. It is a mere temporary aid to the prosecution of a suit seeking some form of final relief. In this respect, it is analogous to an attachment proceeding, as such proceeding prevails in this state, and to the appointment of a special receiver. Hence it is supposed that, until the institution of a suit by the issuance of process, there is nothing to aid by the granting of an interlocutory injunction and, presumably, the court has no jurisdiction to grant such a form of interlocutory relief.

It is contended that to grant the injunction without the issuance of process would deprive the defendant of an opportunity to recover costs, in the event that the proceeding should be abandoned or dismissed before the issuance of process. This contention is based on the supposition that costs can be adjudicated only in a suit regularly instituted and pending for purposes of final relief, a situation which can arise only through issuance of process or appearance by the defendant. It is supposed that the mere granting of the injunction does not institute a proceeding in which costs may be adjudicated.

Finally, it is contended that the injunction statutes,[1] by referring to "a case" which is assumed to be pending, impliedly contemplate that a case must be pending as a suit regularly instituted by the issuance of process before an injunction may be granted.

In spite of these arguments, so far as the writer has been able to inquire, it seems to have been the familiar and normal practice, in this state and in other states, to postpone the filing of the precipe and the issuing of process until the preliminary injunction has been granted. The procedure with which the writer was familiar when engaged in practice was to file the precipe and have process issued at the time when the granted injunction order was presented to the clerk, so that the injunction order and the process might be served on the defendant at the

[1] W. VA. REV. CODE (1931) c. 53, art. 5, §§ 8, 11.

same time. Such seems to be the practice sanctioned generally by the reported cases and the texts in this country.

> "Interlocutory injunctions are usually granted on the bill alone, before issuing process to the defendant, the allegations of the bill being properly verified and the court being satisfied of their truth."[2]

Professor Minor explains that under the equity practice the first step in instituting a suit is the filing of the bill. He then explains that this practice was changed in Virginia by the statute which has been construed as providing that a suit is instituted by the issuance of process, but makes the following statement for the purpose of indicating that the statute does not apply where application is made for a preliminary injunction.

> "Where, however, an *injunction* is sought, the bill, with an affidavit annexed verifying its allegations, must be presented to the proper court or judge in the first instance, and if an injunction is awarded, a writ of *subpoena* or summons is then issued, upon which the order for the injunction is endorsed."[3]

So far as the writer has been able to determine, the question has been noticed in only three West Virginia decisions. In each of these cases, the practice of granting the injunction before issuance of process was approved, either by way of decision or by way of dictum.

In *Cooper v. Bennett*,[4] the question for decision was whether depositions taken before issuance of process and before the bill had been filed could be read on a final hearing of the cause on the merits. Holding that the depositions could not be so read, because taken before the suit was *regularly* pending on issuance of process, the court nevertheless plainly approves the granting of the injunction prior to issuance of process.

> "The exceptions should have been sustained. Technically, there was no suit pending when the depositions were taken. No summons was issued, no bill had been filed and there had been no appearance. For the purposes of a preliminary injunction, affidavits may be filed in support of the allegations of the bill and depositions taken as these were might be treated as affidavits. But, offered here as the basis

[2] 2 HIGH ON INJUNCTIONS (4th ed. 1905) 1546.
[3] 4 MINOR, INSTITUTES (1879) 1116.
[4] 70 W. Va. 110, 73 S. E. 260 (1911).

> of a final decree, they are insufficient. *Hager* v. *Melton,* 66 W. Va. 62. For the purposes of a preliminary injunction, a notice and presentation of the bill to the judge or court are sufficient, but they cannot be substituted for the summons or appearance and the filing of a bill, in the acquisition of an ordinary decree. For such a decree, or final relief, a bill must be matured and proceeded with regularly, even though the relief desired is only an injunction by way of final decree or the perpetuation of a provisional injunction. We know of no statutory or other authority for the taking of depositions before the formal commencement of a suit. 'The cause must have been set for hearing before the depositions are taken, and the person to be affected by them must be then a party to the suit.' Barton's Ch. Pr., p. 785. The rule thus stated may be too strict, and it may be, and probably is, permissible to take depositions after the filing of the bill; but there must necessarily be a pending suit within the meaning of the law relating to regular proceedings. A preliminary injunction is an extraordinary proceeding in which the statute dispenses with some things indispensable in regular proceedings. Section 3 of chapter 133 of the Code, relied upon here to sustain the depositions, applies to provisional injunctions only."

In *Lampe v. Locke,*[5] the court, by way of dictum, referring to the time when application for a preliminary injunction may be made, says:

> "It could have been made upon presentation of the bill before filing and before process."

Cooper v. Bennett is cited and quoted with approval.

The third case, *Owens v. Evans,*[6] it is believed, actually adjudicates the question. It will be noted that in this case the injunction was granted, before issuance of process, by two judges of the Supreme Court of Appeals, after it had been refused by a circuit judge. The injunction was granted July 20, 1926. Notice to dissolve was given prior to July 27, 1926, but was not "pressed" until November 4, 1926, when a motion to "dismiss" was made, on the ground that no process had been issued. Process was issued on the following day, November 5, returnable to December Rules. Hearing of the motion to "dismiss" was had on November 13 and the motion was sustained on November 20, the circuit court entering an "order emphasizing therein that a precipe had not been issued in the cause 'at the time said motion to dismiss said cause and injunction was made.' " This order was

[5] 89 W. Va. 138, 149 S. E. 889 (1921).
[6] 104 W. Va. 102, 139 S. E. 476 (1927).

reversed by the Supreme Court, on the ground that the motion to dismiss should have been treated as a motion to speed the cause (which the plaintiff promptly had done by having process issued on the following day), the court holding that "No proper showing was made by the defendant for a dissolution of the injunction or dismissal of the bill." On the other hand, if the judges of the Supreme Court had no jurisdiction to grant a preliminary injunction except in a case "regularly" pending upon process issued, then the case (proceeding, or whatever it should have been called) should have been dismissed, because there would have been no cause pending which the plaintiff could have speeded; or at the most, the obligation resting upon the plaintiff would have been to *institute* a suit rather to *speed* one. Very evidently, the court recognized, as it did in *Cooper v. Bennett,* quoted above,[7] that a suit was pending for the purpose of entertaining a preliminary injunction, although not for the purpose of granting final relief, at the time when the motion was made.

The few decisions which the writer has found reported in other states are in accord with the views expressed by the West Virginia court.[8] Objections based on failure to issue process, if sustained at all, are sustained on the ground that the plaintiff has failed to speed his cause, and not on the ground that the court lacked jurisdiction to grant the injunction.

It is believed that the view that an injunction can not be granted until process has been issued is based on the unnecessary assumptions (1) that a suit can be considered as *instituted* and *pending* for purposes of preliminary relief only when it has been instituted and is pending in such a way that final relief may be granted; (2) that a suit can be instituted only in one way — by the issuance of process; and (3) that, since the preliminary injunction is merely in aid of final relief, something to be aided must be created before the aid can properly be invoked. It is believed that a proper analysis of the considerations upon which these assumptions may be based is sufficient to refute them.

A consideration that may help to give rise to the first assumption is the fact that other forms of interlocutory relief can be granted only when a suit for final relief has been regularly insti-

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[7] *Supra* n. 4.

[8] Jones v. Magill, 1 Bland 177 (Md. 1825); Lee v. Cargill, 10 N. J. Eq. 331 (1855); Allman v. United Brotherhood of Carpenters and Joiners of America, 79 N. J. Eq. 150, 81 Atl. 116 (1911), *aff'd* in 79 N. J. Eq. 641, 83 Atl. 1118.

tuted, as in the case of an attachment or the appointment of a special receiver. It must be noted, however, that statutes[9] expressly provide that a suit must be pending at the time when these forms of preliminary relief are granted. Hence in such cases there is no possibility of instituting a suit *for any purpose* merely by granting the preliminary relief. It has been argued that two sections in the injunction statutes[10] prescribe a similar condition precedent to the granting of an injunction. The most that can be claimed for this argument is that, if these sections prescribe such a requirement, they do so merely by way of implication, and it is believed that the implication is not warranted. It is assuming too much to assume that, when the word "case" in section 8 and the words "a case is pending" in section 11 are used, the reference is to a case pending on issuance of process. The object of section 8 is to provide for verification of the plaintiff's equity and to prescribe the terms of notice. The purpose of the phrase, "No injunction shall be awarded in vacation nor in court, in a case not ready for hearing", is to fix the time period within which verification and notice are prescribed. So far as the statute is concerned, the "case" mentioned therein may be one pending on issuance of process, or it may be one which comes into being simultaneously with the mere granting of the injunction. In order to reach the conclusion that the word "case" refers to a suit already pending on issuance of process, it is necessary to assume that a case can be started in no other way, and thus to beg the whole question. The whole of section 11, dealing with motions to dissolve, where the words "case is pending" are used, applies only after an injunction has been granted, and, therefore, may refer to a case pending on a preliminary injunction, whether or not process has been issued. Considering the objects and the general purport of these sections, it is quite likely that the legislature never intended to attach any definite — much less, a

[9] REV. CODE (1931) c. 38, art. 7, § 1; c. 53, art. 6, § 1.

[10] "No injunction shall be awarded in vacation nor in court, in a case not ready for hearing, unless the court or judge be satisfied by affidavit or otherwise of the plaintiff's equity; and any court or judge may require that reasonable notice shall be given to the adverse party, or his attorney at law or in fact, of the time and place of moving for it, before the injunction is awarded, if in the opinion of the court or judge it be proper that such notice should be given." REV. CODE (1931) c. 53, art. 5, § 8.

"The judge of any court in which a case is pending wherein an injunction is awarded may, in vacation, dissolve such injunction, after reasonable notice to the adverse party. His order for dissolution shall be directed to the clerk of such court, who shall record the same in the order book." REV. CODE (1931) c. 53, art. 5, § 11.

technical — meaning to the word "case" as used therein. Such a conclusion would seem to be warranted by the fact that, in the cases of an attachment and the appointment of a special receiver, the legislature, in order to convey its intent, deemed it necessary to provide specifically that no such relief should be granted except in a suit already pending. If the intention had been to impose a similar condition to granting an injunction, it would not seem that the matter would have been left to implication. The statutes likely are silent on the matter because they were drafted with a consciousness of a well established existing equity practice which was intended to control the situation. Wherefore, it is submitted that the logical conclusion should be that a case may be pending in different ways for different purposes, as is noted in *Cooper v. Bennett*,[11] and that, for purposes of jurisdiction, it is immaterial whether it pends first for purposes of preliminary relief or for purposes of final relief.

The second assumption, that a suit can be instituted only by issuance of process, is clearly unwarranted and perhaps arises from observation of the fact that such is the usual and normal method, under the statute,[12] of starting a suit. Under the regular equity practice, the filing of the bill is the first step in the institution of a suit. The primary object of the statute is to define the form and requisites of process and its issuance, *if used* to commence a suit, there being no mandate that process *must be used* for such a purpose. If any extraordinary situation dispenses with process, or requires that the suit should be instituted in any other way, there is nothing in the statute that prohibits such a procedure. Wherefore, as indicated by Professor Minor,[13] the statute should not apply where application is made for a preliminary injunction, although process or waiver of process will be necessary for final relief. Another instance where process is not necessary to institute a suit is where the defendant voluntarily submits himself to the jurisdiction of the court by a general appearance, and thus waives process. Still another instance where the statute in question does not apply is where a nonresident is proceeded against by an order of publication. While an order of

[11] *Supra* n. 4.

[12] "The process to commence a suit shall be a writ commanding the officer to whom it is directed to summon the defendant to answer the bill or declaration. It shall be issued on the order of the plaintiff, his attorney or agent, and shall not, after it is issued, be altered, nor any blank therein filled up, except by the clerk." REV. CODE (1931) c. 56, art. 3, § 4.

[13] *Supra* n. 3.

publication is process, it is not a "writ commanding" an officer, as provided in the statute under discussion. Wherefore, it was thought by some members of the bar, until otherwise decided by the Supreme Court,[14] that no order of publication could be entered until a suit had first been started by issuance of process. This topic should not be concluded without the observation that those who insist that process must be issued as a condition precedent to granting an injunction so insist solely on the supposition that issuance of process is necessary in order to have a suit pending for any purpose. No question of notice to the defendant is involved. As has already been noted, neither issuance nor service of the process would give him any notice of the application for or granting of an injunction.

The third assumption, that there is nothing to aid by a preliminary injunction until a suit is pending for purposes of final relief, and therefore that it can not properly be granted until after issuance of process, is believed to be wholly technical. While it is true that the only justification for granting a preliminary injunction is that it may serve as an aid in the granting of final relief, it does not follow that the first step taken in the procedure must be one normally leading to final relief. Whether the injunction is granted before or after issuance of process, it must be granted on the good faith of the plaintiff as to his intentions with reference to seeking final relief. Mere issuance of the process presents no form of relief which the injunction may then aid. The granting of the injunction itself has given the plaintiff the only relief he can have (except such incidental matters as *lis pendens* and stopping of the running of the statute of limitations) until a hearing on the merits of the cause. Even after process is issued, the plaintiff may dismiss his suit without asking for final relief. If the court does not lack jurisdiction to grant the injunction for some of the reasons hereinbefore mentioned, there is no reason why the injunction may not be granted for the purpose of aiding final relief to be granted upon a subsequent issuing of process. If the plaintiff abuses the privilege, the defendant has his remedy. He may move for a dismissal, as in any other case where the plaintiff fails to speed his cause.[15] The objection that the defendant would not be entitled to a decree for his costs in such a situation it is believed is untenable. Assuming that costs can be adjudicated only in a

[14] Augir v. Warder, 74 W. Va. 103, 81 S. E. 708 (1914).
[15] See Owens v. Evans, *supra* n. 6, and the cases cited *supra* n. 8.

pending suit, and that any substantial costs shall have accrued to the defendant, it does not necessarily follow that the suit must be pending on issuance of process. Surely, if the court has jurisdiction to grant the injunction, to entertain a motion to dissolve, to entertain a motion to speed the cause, as in *Owens v. Evans*,[16] and to enter an order of dismissal, it must have jurisdiction to enter a decree for costs against the plaintiff if the bill is dismissed for failure to have process issued. In fact, the Code contains a section[17] which would seem expressly to authorize an adjudication of costs in such a case.

In conclusion, it may be said that in many cases it should make little or no difference to the plaintiff whether or not he should be required to have process issued before applying for an injunction. Such a requirement, since it would consume such a small space of time, would perhaps rarely deprive him of the opportunity to make application for the injunction within a sufficient time. However, unless other reasons than those which are purely formal and technical can be urged why the requirement should prevail, it is believed that there are sufficient practical reasons why it should not be imposed. In some cases, the plaintiff might be deprived of an opportunity to apply for the injunction if compelled to conform to the requirement.[18] In many cases, if the preliminary injunction is refused, the situation is such that there is no final relief which the plaintiff can seek, and he would have no use for a suit pending on issuance of process. In such an event, the plaintiff would be put to useless trouble and subjected to the payment of costs, without any corresponding benefit to the defendant, since the defendant at that stage of the procedure would have incurred no obligation and made no expenditure that could be taxed as costs. It would seem that the ideal practice would be, as is established in some states,[19] to grant the injunction before issuance of process, but to require the filing of the precipe and the issuing of process before the injunction order is delivered to the officer for service, in which event, of course, the process and the injunction order should be served at the same time.

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[16] *Supra* n. 6.

[17] REV. CODE (1931) c. 59, art. 2, § 4.

[18] In England, where issuing of process is generally required before an injunction is granted, exceptions are made in cases of urgency. "An injunction will not in general be granted, except after a writ of summons has issued. In an urgent case, however, an injunction may be granted before a writ of summons has issued." KERR ON INJUNCTIONS (6th ed. 1927) 629.

[19] See cases cited *supra* n. 8.