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PRELIMINARY MANDATORY INJUNCTION; CHANGE OF STATUS OF THE PARTIES. As a general rule a court of equity will not, by preliminary injunction, change the status of the parties or restore to one claimant property in the possession of another. In *Pokegama Lumber Co.* v. *Klamath River Lumber & Imp. Co.*, 86 Fed. 528, the United States Circuit Court (Dist. of Cal.), the facts and necessities of the case were decided to warrant the exercise of such a jurisdiction. The respondents, on April 7, 1897, had leased to one Lindley, to whose rights complainant succeeded, a large and valuable lumbering plant, consisting of pine lands, logging railway and equipments, rights of way, saw mill, etc. The railway was about nine miles long and connected with a log chute by which the logs were discharged into the Klamath River some twenty-four miles above the mill. By the February following nearly 15,000,000 feet of logs had been cut, the greater part of which were either

near the railway or alongside of it ready to be loaded; about 4,500,000 feet were in the river and 1,000,000 feet were in the booms connected with the mill. In preparing the logs and equiping various portions of the plant the complainant had spent more than $70,000. The bill avered that complainant was in complete readiness for the sawing season which had then begun when the respondent, by its president, two of its directors and agents had violently entered the mill during the night and driven out the night watchman and blocked up the mill so as to prevent the use of it, or the taking of logs from the boom, and with six or eight men armed with rifles and shot guns held possession thereof and excluded complainant and his agents. No notice had previously been given by the respondents to the complainant of its failure to perform any of the conditions of the lease nor had any attempt been made to secure peaceful possession of the property. The bill declared that the season for floating logs down the river would be shorter than usual and would expire about June 1st; that logs already cut and not hauled to the mill in the then logging season would depreciate fifty per cent., and if not secured within the season following would be a total loss; that the said saw mill was the only available one to which logs could be delivered and that respondent was wholly insolvent and unable to respond to damages. Upon the filing of the bill an order was issued requiring the respondent to show cause why an injunction *pendente lite* should not be granted, and upon the complainant giving a bond the respondent, its officers, attorneys, agents and servants were restrained in the meantime from in any manner interfering with or impeding the complainant, its attorneys, agents or employes in occupying, conducting, managing or carrying on all the property mentioned in the lease.

It was contended that the injunction, although preventative in in form, was mandatory in its effect, its execution resulting in a change in the status of the parties, and that the court had no right to issue such an order, except at the hearing of the cause. After reviewing the facts, however, the court said that it was clear that the asserted right to possession which respondent sought to maintain could not be recognized as anything more than a mere trespass and interruption of the prior possession of the complainant. Among other authorities the court quotes with approval *Mining Co.* v. *Water Co.*, 1 Sawy. 685; High on Inj., § 356; Beech on Inj., § 1392; Bisp. Eq., § 400, and 3 Pom. Eq. Jur., § 1359. The latter author observes that preliminary mandatory injunctions have been granted more freely by the English courts than the American, and that it has been said in some American decisions that they should never be granted.

While it is admittedly the purpose of a temporary injunction to preserve the property in controversy from disturbance until the rights of the contesting parties can be fully considered, yet if such redress may only be prohibitive the very injury which it is sought to prevent would be upheld. In such cases, in the absence of other adequ te remedy, the court will require that the property be re-

stored to the status immediately preceding the commencement of the injury. The right, however, should be clear and certain, and the injury must be of a character which "upon just and equitable grounds ought to be prevented." As is said by Mr. Bispham, in his book on equity, "There would seem to be no good reason why, in a proper case, a mandatory injunction should not issue upon preliminary hearing. Gross violations of right may occur in the shortest possible time, and a few hours of wrong doing may result in the creation of an intolerable injury which, if prolonged, might soon become irreparable. In such cases the interposition of the strong arm of the Chancellor ought to be most swift; and if immediate relief could not, in a proper case, be restorative as well as prohibitory, no adequate redress would, in many cases, be given." The facts presented should also show that the plaintiff has acted promptly upon his knowledge of the defendant's proceeding.

One of the earliest cases in which the remedy was allowed was, *Lane* v. *Newdigate*, 10 Ves. 192; where a preliminary injunction was granted restraining the defendant from impeding the plaintiff in the navigation of a canal "by continuing to keep the canal banks and works out of repair, by diverting the water or by continuing the removal of the stop-gate." Lord Eldon stated that the intended effect of the order was to compel the defendant to restore the stop-gate and repair the banks.

In *Lacassange* v. *Chapuys*, 144 U. S. 119, 124, Mr. Justice Blatchford said, "The function of an injunction is to afford preventative relief, not to redress wrongs which have been committed already. An injunction will not be used to take property out of the possession of one party and put into that of another." The facts of that case, however, were as clearly not within the scope of the requirements for equitable relief as the facts of the California case were within the scope of such requirements. In view of the decision reported in 166 U. S. 548, *Ex parte Lennon*, it is not believed that the United States Supreme Court intended to commit itself to such a doctrine. In the latter case it was objected that the preliminary order was mandatory and therefore invalid, but Mr. Justice Brown said that a court of equity was not always limited to the restraint of a contemplated or threatened action, but may even require affirmative action, where the circumstances of the case demand it, and cited authorities in which the rule was unquestionably applied. The case of *Mining Co.* v. *Water Co.*, 1 Sawy. 685 (Judge Field), also distinctly upholds the right of a chancery court to take such a course where proper facts are presented.

NEGLIGENCE; EVIDENCE; "RES IPSA LOQUITUR;" ELECTRIC WIRES. An excellent illustration of the enlargement of the doctrine of *res ipsa loquitur* to suit the conditions of modern times is to be found in the case of *Snyder* v. *Wheeling Electric Co.*, 28 S. E. 733 (1898), decided by the Supreme Court of West Virginia. The defendant corporation, being engaged in the manufacture and sale

of electricity, maintained wires over the streets of Wheeling. One of these wires became broken and fell in the street, and plaintiff's intestate, having stepped upon it, was killed. Although no further evidence of negligence on the part of defendant was produced, judgment was rendered in favor of plaintiff, which was sustained on appeal.

The case decides that the mere fact that a heavily charged wire falls into a street, causing injury, raises a presumption of negligence on the part of the owner of the wire, which he must meet by satisfactory evidence of care in the erection and maintenance of the wire, etc. It is but an application of the rule of law expressed by Messrs. Shearman and Redfield in their work on Negligence, 5th Ed. § 59, that, "when a thing which causes injury is shown to be under the management of defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care." See *Scott* v. *London Dock Co.*, 3 H. & C. 596 (1865); *Seybold* v. *M. Y. & L. R. R.*, 95 N. Y. 562 (1884); *Tuttle* v. *Chicago R. R.*, 48 Iowa, 236 (1878); *Morris* v. *Strobel-Wilkin Co.*, 81 Hun. 1 (1894).

Although the doctrine of *res ipsa loquitur* is most frequently applied when there is a contract relation between the parties, such as that of passenger and carrier, yet that relation is not the only one which may lead to its existence. The more correct view is that the presumption of negligence arises wherever there is some *duty*, such as that of care, owing by defendant toward plaintiff. "Though the presumption is more frequently applied in such cases (those of contract relation), yet there is no foundation in authority or reason for such limitation, as the presumption originates from the nature of the act, not from the relation of the parties, and is indulged whenever, as a legitimate inference, the occurrence is such as, in the ordinary course of things, does not take place when proper care has been applied." *Snyder* v. *Electric Co.*, *supra.* This proposition does not seem to be accepted by the Supreme Court of of Pennsylvania in a case cited below.

That public policy requires the very highest degree of care to be exercised by those who maintain electric currents of high tension over the highways is established by abundant authority: *W. U. Tel. Co.* v. *State*, 33 Atl. (Md.) 763 (1894); *Haynes* v. *Gas Co.*, 114 N. C. 203 (1894); *Girandi* v. *Improvement Co.*, 107 Cal. 120 (1895); *Ennis* v. *Gray*, 87 Hun. 355 (1895); *Ark. Tel. Co.* v. *Rutteree*, 57 Ark. 429 (1893); *Nat. Tel. Co.* v. *Baker*, 2 Ch. 186 (1893); 2 Jaggard, Torts, 864. Therefore it follows, naturally, that when a wire breaks and the current injures a person lawfully on the highway, a sufficient relation between the parties is shown to justify the application of *res ipsa loquitur*, as in the following cases: *Denver Electric Co.* v. *Simpson*, 21 Colo. 371 (1895); *Larson* v. *Rwy.*, 56 Ill. App. 263 (1894); *Volkmar* v. *El. Rwy.*, 134 N. Y. 418 (1892); *Thomas* v. *W. U. Tel. Co.*, 100 Mass.

156 (1868); *Aggla* v. *Rwy.*, 160 Mass. 351 (1894); *Snyder* v. *Electric Co.*, *supra.*

There is one case directly opposed to the above, *Kefner* v. *Traction Co.*, 183 Pa. 24 (1897). There the plaintiff was injured through the fright of his horse at the sparks emitted from a suddenly broken trolley wire. Although it was admitted that the proximate cause of plaintiff's injury was the breaking of the wire, the Supreme Court of Pennsylvania held that there was no presumption of negligence on the part of the company, and likened the case to that of *Gingst* v. *Rwy.*, 167 Pa. 438 (1895), where plaintiff was injured by her horse taking fright at the rapid approach of an electric car. It is submitted that the cases were not at all parallel, and that different rules of evidence should be applied to each, since in modern times traction companies are not bound to presume that the mere approach of their cars will cause horses to run away. A more reasonable statement of the rule to be applied in the case of broken wires is given by the Supreme Court of North Carolina, as follows, "Proof that there was a live wire, carrying a deadly current, down in the highway surely raised a presumption that some one had failed to do his duty to the public. When to this was added proof that the death carrying wire was put above the street by the defendant, and was its property, and under the management and control of its servants, and that by contact with that wire the deceased, having a right to be on the street, was killed, a complete *prima facie* case of negligence was made out, and the burden was cast on defendant to show that this live wire was in the street through no fault of its servants and agents:" *Haynes* v. *Raleigh Gas Co.*, 114 N. C. 203 (1894).

CARRIERS; CONNECTING LINES; LIABILITY OF FIRST CARRIER SELLING THROUGH TICKETS. In *Omaha & R. V. R. Co.* v. *Crow*, 74 N. W. 1066 (Apr. 21, 1898), the Supreme Court of Nebraska had to deal with the oft recurring question as to the liability of a carrier who sells tickets over connecting lines for injuries received by the passenger after having left the line of the first carrier. It was there held that the contract of carriage was a through contract, and the initial carrier was liable for the negligence of a connecting carrier through whose agency the contract for through transportation was being performed. There was no stipulation on the ticket to the effect that the selling carrier would be responsible for injuries occuring on its own line only. Such a condition is now usually attached to coupon tickets issued over several lines of railroad, and questions can very seldom arise regarding the liability of the various carriers, as such a stipulation would limit the liability of the first carrier: *Bethea* v. *R. R.*, 1 S. E. (S. Car.) 372 (1887); *Harris* v. *Howe*, 12 S. W. (Tex.) 224 (1889); *Kerigan* v. *R. R.*, 22 Pac. (Cal.) 677 (1890); S. C. 81 Cal. 248; *Peterson* v. *R. R.*, 45 N. W. (Iowa) 573 (1890); *Gulf, Etc., Ry. Co.* v. *Looney*, 19 S. W. (Tex.) 1039 (1892).

Although a carrier is not by law bound to carry passengers

beyond its own line, yet it may contract to do so, and in such a case it would be liable for the completion of the contract: *S. W. Ry.* v. *Blake*, 7 H. & N. 987 (1862); *Birkett* v. *Ry.*, 4 H. & N. 730 (1859); *Buxton* v. *Ry. L. R.*, 3 Q. B. 549 (1867); *Thomas* v. *Ry.*, L. R. 6 Q. B. 266 (1870); *Stetler* v. *Ry.*, 49 Wis. 609 (1880); *Ry.* v. *Peyton*, 106 Ill. 534 (1883). But whether the mere sale of a through ticket over connecting lines is sufficient to make the contract one for through carriage, is decided differently in different jurisdictions. The rule in England and some of the states is that the first carrier is liable: *Mytton* v. *Ry.*, 4 H. & N. 615 (1859); *Ry.* v. *Blake*, *supra*; *Ry.* v. *Collins*, 7 H. L. Cas. 194 (1856); *Kent* v. *Ry.*, L. R. 10 Q. B. 1 (1874); *Croft* v. *R. R.*, 1 McArthur (U. S.), 492 (1874); *Ry.* v. *Copeland*, 24 Ill. 337 (1860); *Majac* v. *Ry.*, 7 Allen (Mass.), 329 (1863); *Wilson* v. *R. R.*, 21 Gratt. (Va.) 654 (1872); *Weed* v. *R. R.*, 19 Wend. (N. Y.) 534 (1838); *Candee* v. *R. R.*, 21 Wis. 582 (1867); *Carter* v. *Peck*, 4 Sneed. (Tenn.) 203 (1856); *R. R.* v. *Combs*, 70 Ga. 533 (1883). But the doctrine which seems to be founded more in reason is that the first carrier is not liable in the absence of contract making it liable, and the mere sale of a ticket does not constitute such a contract: *R. R.* v. *Connell*, 112 Ill. 295 (1884); *Knight* v. *R. R.*, 56 Me. 235 (1868); *Furstenheim* v. *Ry.*, 9 Heisk. (Tenn.) 238 (1872); *Mosher* v. *Ry.*, 127 U. S. 390 (1880); *Hood* v. *R. R.*, 22 Conn. 1 (1852); *Young* v. *R. R.*, 115 Pa. 112 (1886); *Hartan* v. *Ry.*, 114 Mass. 44 (1873); *Sprague* v. *Smith*, 29 Vt. 421 (1854); *Kessler* v. *R. R.*, 61 N. Y. 538 (1875); *Lundy* v. *Ry.*, 66 Cal. 191 (1884); *Ry.* v. *Campbell*, 36 Ohio, 647 (1881).

CORPORATIONS; KNOWLEDGE OF ENTRIES IN CORPORATE BOOKS. The interesting question of how far a corporation can be held to know what is in its own books received discussion in *Shepherd & Morse Lumber Co. v. Eldridge* (Supreme Judicial Court of Massachusetts), 51 N. E. 9, Bartlett, J. Plaintiff's employe had forged its indorsements on certain checks and had collected the same from the drawee. This action was against the drawer, who contended that plaintiff was guilty of laches in not sooner giving information of the forgery, notice of which it had had long since, either "imputed" from the knowledge of its dishonest employe, or actual, the facts showing the crime being evident in plaintiff's books of account, so as to have been discovered if an honest clerk had made the monthly trial balances, or if the treasurer of the company who had access to the books, had examined them. The court held that there was no "imputation of knowledge," and no duty on plaintiff's part to any one connected with the checks, requiring examination of its books of account, or the making of trial balances, and so "it is not to be chargeable with knowledge which it did not in fact have." This lack of any duty to a third person distinguishes the case, says the court, from *Dana* v. *Bank of the Republic*, 132 Mass. 156 (1882). The discussion amounts only to dictum, as the plaintiff

was found guilty of negligence on other grounds, but is noteworthy as touching a nice point. There are cases making a distinction between the knowledge of an employe of his own criminal act, of course beyond the scope of his employment, and the knowledge the same employe may have from books or documents, even those kept or executed by himself. In the latter case, an honest employe would have discovered the fraud, and under these circumstances some courts have charged the employer as though the knowledge were his. In *Kennedy* v. *Green*, 3 Myl. & Keen, 699, 722 (1834), plaintiff filed a bill to set aside a certain assignment of mortgage which her solicitor had induced her to make, telling her it was some other paper. This solicitor afterwards assigned his interest to defendant for value, acting as defendant's solicitor in the transaction. While defendant was not charged with the solicitor's knowledge of his own original fraud, he was charged with knowledge of whatever appeared on the face of the deed, sufficient to have led an honest solicitor (though not a layman) to discover the fraud. See, also, *August* v. *Bank*, 1 N. Y. Suppl. 139 (1888); *Bank* v. *Allen*, 100 Ala. 476 (1893). The Supreme Court of Pennsylvania has also recently considered this same question: *United Security Co.* v. *Central Nat'l Bank*, 185 Pa. 586, S. C., 42 W. N. C. 586. The referee's report, on similar facts to those above, held, "Of these entries . . . the plaintiff (corporation) must be taken to have had knowledge. . . . The knowledge of the entries possessed by Williams was knowledge obtained by him in the course of his agency. He was the person trusted by the corporation to know the contents of its own books. If he knew it and wrongfully concealed it, it does not relieve the plaintiff from the consequences of actual knowledge." This report was confirmed but the Supreme Court reversed the judgment, holding that "no agent who is acting in his own antagonistic interest, or has committed a fraud by which his principal is effected, *can be presumed to have disclosed* (italics ours) such fraud." The court's argument goes on the argument of "imputation of knowledge," which is by some considered an exploded fiction. The referee's report might have been affirmed on the rule that, between two equally innocent parties, he should suffer whose servant has committed the wrong; or on the doctrine applying with especial force in the case of a corporation, that the fund of the principal, which the agent is working to increase, should bear the loss due to the agent's acts in the scope of his employment. The posting and examination of the books was certainly an act in the scope of employment. To inquire whether, under the circumstances, the agent "can be presumed to have disclosed" the entries as a matter of reality, which is what is done when the item of "antagonistic interest" is brought in, is, to quote an expression of Mr. Keener, "treating a fiction as though it were a fact." The question should not be "Is the presumption in favor of actual communication by the agent?" but "On the facts is it just that the corporation bear the responsibility *as though* communication had been made?" But the authorities seem to have closed the particular question as to book entries.