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Equity - Sales - Injunction

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838. That the enforcement, by the sheriff, of a judgment in a legal action is unreasonable and often impossible is shown by the two cases above cited. (Hahl vs. Sugo, and Hirschberg vs. Flusser.) A sheriff is guilty of trespass if in removing the invading portion of a wall or foundation he invades by a hair line the property of the defendant. "The proceeding is as delicate and impracticable as the taking of the pound of flesh. The responsibility of removing the wall should, in justice, be left to the party who built it, and this the remedy of mandatory injunction does." Fisher vs. Goodman, *supra.* Therefore, ejectment is inadequate. Trespass, on the other hand, gives immediate relief in damages, but that relief is not final, and a continuing trespass is merely the source of a multiplicity of actions.

Since both of these possibly remedies are easily proved inadequate, the court holds that equity must give relief, and decrees that the order overruling the demurrer shall be affirmed.

DOROTHY N. KORTHAL.

EQUITY—SALES—INJUNCTION. E. L. Hustings Co. vs. Coca Cola Co. et al., 237 N.W. 85 (Wis.). The named defendants in this action were the Coca Cola Co., Western Coca Cola Botting Co., Wisconsin Coca Cola Bottling Co., and Milwaukee Coca Cola Bottling Co. In a previous action brought by the Hustings Co. against the Western Coca Cola Bottling Co., the Hustings Co. was defeated, and their attempts to include the Western Co. in this suit were unsuccessful. There was only a contractual relation between the named defendants, with the exception of the Wisconsin and Milwaukee Coca Cola Bottling companies. The Milwaukee Co. is a subsidiary of the Wisconsin Co.

This suit was brought by the E. L. Hustings Co., a Wisconsin corporation, against the defendants in equity, to enjoin the defendants from an unlawful interference with plaintiff's rights acquired under a contract between the plaintiff and the defendant Western Coca Cola Bottling Co., whereby the plaintiff was given exclusive right to purchase Coca Cola syrup for bottling purposes, to bottle and sell bottled Coca Cola, and to use the trade-mark, trade name, labels, etc. in Milwaukee County. The contract stated among other things, that the Hustings Co. was to use a minimum of 2,000 gallons of syrup per year, that they should sell no ther product that was a substitute for Coca Cola, and that they should vigorously push the sale of Coca Cola, and that if they failed to push the sales, the Western Coca Cola Bottling Co. would terminate the contract. There were two contracts, the second a renewal of the original contract. At no time during the existence of

either contract did the Hustings Co. use 2,000 gallons of syrup per year. However, the Western Coca Cola Bottling Co. raised no objections to the amount of syrup the Hustings Co. was using, and during the War asked the Hustings Co. to curtail the sale of Coca Cola and raised the price of the syrup, because of the scarcity of sugar. During the month of October, 1919, nine years from the time the original agreement was made, the Western Coca Cola Bottling Co. wrote the Hustings Co. that at no time had they used the specified amount of syrup and that it did not seem to them that they were pushing the sale of Coca Cola sufficiently. In December of that year, the Western Coca Cola Bottling Co. notified Hustings Co. that they wished to terminate the contract. Hustings Co. replied that they would stand on their rights under the contract, and on learning that the Western Coca Cola Bottling Co. had appointed the Milwaukee Coca Cola Bottling Co. as their successors in the Milwaukee territory, wrote the Milwaukee Co. and told them of their contract with the Western Coca Cola Bottling Co., and stated that they would take steps against any encroachment of their rights under the contract. However, the Milwaukee Co. continued to bottle and sell Coca Cola. In 1922 Hustings Co. sold about 200 cases of what was called "Hustings Coca Cola." The reason Hustings Co. gave for this, was that it was an attempt on their part to mitigate the damages suffered by the termination of the contract by the Western Coca Cola Bottling Co. This product was a substitute for genuine Coca Cola and contrary to the terms of the contract, and defendants contend that this prohibited the plaintiff from recovery in a court of equity, as they were unable to come into court with clean hands.

The contract gave the plaintiff the right to sell a unique and highly advertised product. Upon the breach of the contract by the Western Co. it seems that no legal remedy would be adequate to redress the wrong to plaintiff. Plaintiff could not replace itself in the market because of the character of the goods and manner of its vending, and damage to plaintiff would be difficult to ascertain. Butterick Publishing Co. vs. Rose, 141 Wis. 553, N.W. 647. The proper remedy appears to be in a court of equity, which would enjoin the Western Co. from selling to the Wisconsin Co., providing this constituted a breach of contract. (157 N.Y. 60, 43 L.R.A. 844; 136 N.W. 1113, 119 N.E. 573; 300 S.W. 1108, 22 Fed. Cas., p. 220, No. 12904.)

In the Northern Wisconsin Co-operative Tobacco Pool vs. Bekkedal, 182 Wis. 571, 197 N.W. 936, 946, it was held that one who maliciously induces another to breach a contract with a third person is liable to such third person for the damages resulting from the breach. Where the situation is such that the legal remedy of damages is for

any reason inadequate, equity will enjoin such interference by a third party. The court, however, further said, "If a member should voluntarily sever his relations with the pool, by breaching his contract, and withdrawing his membership therein, and placing his tobacco for sale upon the market, no reason is perceived why appellants should be denied the privilege of buying his crop," and the injunction granted in that case was modified in keeping with that idea.

However, that case does not govern in this instance, as in the opinion of the court the Wisconsin Co. aided the Western Co. in the breach complained of, as due to the continuing character of the contract, there was an inducement of the breach by the Wisconsin Co. Up to the time the Western Co. attempted to sell syrup to the Wisconsin Co. it had not violated its negative covenant. As to this part of the contract, there was little doubt, at least as far as the court was concerned, but what the breach was induced by the Wisconsin Co., the only kind of breach probably with reference to which the plaintiff could obtain equitable relief.

As long as the Western Co. failed to object to Hustings Co. not selling the required quantity of product for a number of years, they could not take advantage of the default after terminating the old contract and making the new one. Furthermore, after requesting that sales be curtailed, the seller could not object to the agents not pushing the sales.

The plaintiff's idea of making a substitute for Coca Cola to mitigate the damages, was not proper, but in view of the fact that plaintiff did not manufacture the substitute until after the breach by the Western Co., it did not make the plaintiff come into court with unclean hands. 3 Williston, Contracts, p. 2615, 155 N.Y. 466; 82 Mich. 661.

From this case it appears that if one voluntarily breaches his contract, it is permissible for others to deal with him and purchase goods which it would be illegal for them to purchase if the contract was in full force and effect, but if a third party induces such breach, he is liable either for damages or to an action in equity to enjoin him from further dealings.

ARNO J. MILLER.

INSURANCE—PARTIES—JOINDER. The proposition that a plaintiff cannot proceed directly against an Insurance Company under a liability policy prohibiting action against such insurance company until the plaintiff has obtained a judgment against the insured is borne out by the recent case of Fulleylove v. Holmes, et al., 237 N.W. (Wis.). This