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RELIEF BY INJUNCTION AGAINST INTERFERENCE WITH CONTRACT

Brooke Tibbs*

CONTRACT rights are at times subject to interference by third parties. When such interference is wrongful, the injured party may generally obtain adequate relief by money damages in an action at law. But if continued injury would be irreparable, if pecuniary loss would be impossible of accurate computation, under certain circumstances the injured party may obtain equitable relief. Such relief may be afforded by injunction against continuance of interference with the contract and its subject matter. The case of E. L. Husting Company vs. Coca Cola Company was an action of this nature. It was in litigation from June, 1923 to February, 1932, and is reported in 194 Wis. 311, 216 N.W. 833; _ Wis._, 237 N.W. 85; 76 L. Ed. (U.S.) 410.

THE FACTS IN THE CASE

Coca Cola syrup, the product of a secret formula, was first made about 1886 in Atlanta, Georgia. The name Coca Cola as applied to the syrup and drink is registered as a trade mark and its validity judicially established. In 1905 by mesne conveyances, the Western Company acquired the exclusive rights to bottle and sell bottled Coca Cola in the State of Wisconsin. In 1910 by contract with the Western Company, the Husting Company acquired the exclusive rights in Milwaukee County. This contract and a similar renewal contract in 1917 were for no definite term. The legal effect of such contracts has been passed upon by the Federal Court in Coca Cola Bottling Company vs. Coca Cola Company, 269 Fed. 796, wherein the court said that they effected a conveyance of trade and property rights, and were not terminable at will.

From 1910 to 1920, the Husting Company was exclusive distributor of bottled Coca Cola in Milwaukee County. On December 31, 1919, the Western Company refused to further supply syrup to the Husting Company, claiming the contract terminated by failure to sell the gallonage required. From then on and through the course of the litigation, the Husting Company received no syrup from the Western Company; and, except for a small amount in 1920, no bottled Coca Cola was sold in Milwaukee County during the next three years. In 1923 the Wisconsin and Milwaukee Companies were organized and received contracts from the Western Company as licensee and sub-

* Member of Milwaukee Bar.
licensee respectively. From then on and through the course of the litigation, those companies bottled and sold bottled Coca Cola in Milwaukee County.

In June, 1923, immediately after the invasion of its territory, the Hustiging Company brought this action to enjoin tortious interference by the defendant companies. The Wisconsin, Milwaukee and Coca Cola Companies were made defendants as third party tort-feasors interfering with contract rights, and the Western Company was a named defendant, both as joint tort-feasor and as defaulting contract party. The Western Company, a foreign corporation, located in Chicago, was not within the jurisdiction, could not be served with process and at no time formally appeared in the action.

The action was instituted in the Circuit Court of Milwaukee County in 1923. By supplemental answer and plea in abatement, the three appearing defendants, Wisconsin Company, Milwaukee Company, and Coca Cola Company, raised objection to the court's proceeding to hear the cause in the absence of the Western Company. In 1926 the Circuit Court sustained defendants' objection and dismissed the action. On appeal to the Wisconsin Supreme Court in 1927 the order for dismissal was reversed; the absence of the Western Company was held not fatal to plaintiff's cause (194 Wis. 311, 216 N.W. 833). The action was remanded for trial on the issues, and specifically for finding on the question of breach of contract by the Western Company. Trial was had before the Circuit Court in 1930; that court, without expressly finding on the fact issue as to breach of contract, dismissed the action, principally on the ground of laches. In 1931 on appeal to the Wisconsin Supreme Court, that court reversed the trial court, ordering judgment against the Wisconsin and Milwaukee Companies in accord with the prayer of the complaint; the fact issue as to breach of contract was found in plaintiff's favor, and defense of laches held unsound (237 N.W. 85). On motion for rehearing, defendants contended that the state court's decision constituted a violation of the Federal "due process" clause. The Wisconsin Supreme Court held this contention to be without merit, and denied the motion. Petition for writ of certiorari was filed in the United States Supreme Court, defendants renewing their contention as to violation of the due process clause. In February, 1932, the petition for writ of certiorari was denied by the United States Supreme Court.

CONTINUING CONTRACT RIGHTS

One issue of law was presented by reason of the fact that the Wisconsin and Milwaukee Companies were not in existence and did not pretend to take over the territory until 1923, more than three years
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after the Western Company had first breached the contract. The defendants contended that they could not be guilty of a tort of wrongful interference in 1923, since the contract had already been broken and repudiated by the Western Company in 1920. The Wisconsin Supreme Court, both in 1927 and in 1931, disposed of this contention on two grounds: First: Plaintiff's rights under the contract were continuing. The breach by the Western Company in 1920, in refusing to furnish syrup to the Husting Company did not terminate such contract. The contract was still in force in 1923, at which time the Wisconsin and Milwaukee Companies were guilty of wrongful interference by assisting the Western Company in continuing the breach. Second: As to the covenant in the contract not to furnish syrup to third parties, the Western Company committed no breach until 1923 — at which time the defendant companies were active parties in assisting in the violation. It was pointed out that the relief sought by plaintiff in this action was primarily to restrain violation of the named covenant. It was accordingly held that the answering defendants were parties to the tort of unlawful contract interference.

Some contracts are continuing in nature. Others are terminated on one party's breach or repudiation. The quality of continuance seems to depend upon the innocent party's right to equity enforcement of the contract, either by specific performance (affirmative) or injunction (negative). Assuming that the contract is one of such continuing nature, the innocent party may sue the other contracting party in law or equity. He may likewise sue an interfering third party in law or equity. But in either event it is incumbent upon plaintiff to establish his basic right, the continuance of the contract. And since the quality of continuance depends upon rights in equity, defendant third party tort-feasor may avail himself of equity defenses—even though the action be one at law. Adequacy of law remedy, laches, lack of clean hands might be pleaded and proved affirmatively, tending to negate continuance of the contract, and hence to negate the basis of the alleged tort.

MALICE AS KNOWLEDGE

Another issue was presented by reason of the fact that the Wisconsin and Milwaukee Companies contended that their invasion of the territory was in good faith; that, although they had knowledge of the Husting Company claims, they had obtained legal advice to the effect that such claims were unsound. Accordingly they contended that any interference with plaintiff's rights was not "malicious." Plaintiff contended that "malicious" as used in describing the tort, "malicious interference" with contract rights, meant no more than "with knowledge"; that when defendants acted with knowledge, they
acted at their peril; that ignorance of legal effect, or advice by attor- 
ney, or absence of ill-will were immaterial. Justice Wickhem in his 
decision in 1930 upheld plaintiff’s contention, citing McLennan vs. 
Church, 163 Wis. 411.

It may be noted that in referring to the tort herein discussed, Jus-
tice Eschweiler terms it “maliciously aiding * * * continued unlawful 
violation (of a contract) * * * knowing of the existence of such con-
tract and of a good faith claim * * * thereunder” (194 Wis. 311, 318); 
and Justice Wickhem terms it “unjustified interference with the con-
tractual relationship” (237 N.W. 85, 89). The word “malicious” is 
used in Campbell v. Gates, 236 N.Y. 457, cited in Justice Wickhem’s 
opinion. Numerous cases refer to “malicious inducement of breach of 
contract” as typical of the tort of interference. The varying phrase-
ology used in the decisions tends to confound the basic elements of the 
tort therein discussed; but by a careful examination, such decisions 
and language may be reconciled.

It would seem that the cases involving unlawful interference with 
contract right fall into two classes, depending upon which of two types 
of contract is involved. And it is submitted that the quality of “malice” 
required to render an act of interference tortious, likewise varies with 
the type of contract involved.

First: Where the contract is one not enforceable in equity, one 
which a party may repudiate and effectually terminate, the other party 
is left to law damages. In such case the third party’s knowledge of the 
contract’s existence does not of itself render interference with the con-
tract unlawful. Such interference is tortious only when accompanied 
by fraud or by malice in the sense of ill-will. It is submitted that the 
“malicious inducement” cases involve this type of contract and this 
type of “malice.”

Second: Where the contract is one which equity will protect, either 
by specific performance or negative injunction, the contract continues 
in force regardless of wrongful attempted termination. Continuing 
rights exist and it is tortious for a third party to interfere with knowl-
dge of those rights. So far as the word “malice” is used with refer-
ence to this type of case, it means no more than “with knowledge.” The 
instant case is one of this type.

In referring to the tort of interference with contract rights, the 
word “unjustified” is used in Husting v. Coca Cola, 237 N.W. 85, and 
the phrase “without just cause or excuse” is used in Campbell v. Gates, 
236 N.Y. 457. What would serve as “justification” for intentional inter-
ference is not made clear. It is suggested that there can be no justifica-
tion for intentional interference with contracts enforceable in equity, 
contracts of the second type above referred to.
Another issue was presented by reason of the fact that from 1920 to 1923 no legal action was instituted by plaintiff either in the State of Wisconsin or elsewhere, to enforce its rights or claims against the Western Company. It was undisputed that during that time the Western Company was a foreign corporation not licensed and not doing business in Wisconsin. Defendants contended that the Husting Company could and should have theretofore instituted legal proceeding to enforce its rights against the Western Company in either the State or Federal Court of Illinois; that its inaction in this respect constituted laches and a bar to the action. Although defendants admitted knowledge of the Husting Company's claims in 1923, the trial court took the position that failure to proceed against the Western Company during the preceding three years in effect forfeited the Husting Company's right to equity relief, to enforcement of the contract, and that plaintiff was relegated to law damages. The court in effect held that delay by the innocent party to proceed outside the state of its domicile to enforce equitable right against the defaulting party to the contract, constitutes laches and a bar to any equity relief. The question was referred to by the Wisconsin Supreme Court in its decision of 1927, wherein Justice Eschweiler stated "the plaintiff has the further option of determining the time and forum for any such proceedings against the Western Company * * *" (194 Wis. 311, 321). In the Wisconsin Supreme Court decision in 1931, it is pointed out that no occasion had arisen for invoking the equitable remedy of injunction until third party invasion of territory in 1923; but it is distinctly implied that the innocent party to a contract is not compelled to go into a foreign jurisdiction to obtain equity relief by specific performance.

As to the defense of laches based on the innocent party's failure to sue in a foreign jurisdiction, the case of Page Belting Co. v. F. H. Prince & Co. 91 Atl. 961 (N.H.) contains a pertinent quotation. It is there said,

"The delay referred to in the rule on the subject, consists of a failure to assert a right when one has power to do so. But in this case there has been no opportunity for these citizens of this state to assert their rights in the local forum until this time. It is true that they might have gone to New York and litigated the case against Coffin and Stanton there; but that is more than the law requires, certainly in ordinary cases."

It is suggested that the only "extraordinary" cases to which the general rule might not apply would be those in which the defaulting party actually changed position relying upon the innocent party's inaction, and where the innocent party knew of such reliance; and possibly those
cases in which, by reason of the situs of the subject matter, or the
domicile of the parties, the natural forum would be the foreign court.
That change in the circumstance of the parties would work such qual-
ification of the above rule, is suggested by Justice Wickhem in 237
N.W. 85, at page 90.

NON-JOINDER OF INTERESTED PARTY NOT JURISDICTIONAL

A further law issue was presented by reason of the fact that the
Western Company was not before the court. The Hustiging Company
was demanding an equity injunction against interference with the con-
tract between itself and the Western Company. It was undisputed that
the Western Company had repudiated that contract and claimed it to
be terminated.

Defendants contended that the issue as to continuance of the con-
tact could not be judicially passed upon without both contract parties
being before the court; that the Western Company was an indispen-
sable party to the litigation and that the court could not proceed to a
decree in its absence. This contention was made at the beginning and
interposed throughout the litigation. The plea in abatement, based upon
this theory, was overruled by the Wisconsin Supreme Court in 1927.
The theory was indirectly adopted by the trial court in 1930. That
court denied relief to plaintiff, but stated that it did not "presume
to determine what position the Milwaukee Company may be in when
and if plaintiff succeeds in compelling specific performance by the
Western Company." The Wisconsin Supreme Court in 1931 treated
its earlier decision in the case as having definitely determined the
question and having established that the Western Company was not
an indispensable party to the litigation.

Alleged error in this regard was the principal basis for defendants' 
petition for writ of certiorari in the Supreme Court of the United
States. Defendants contended that the decision of the State Supreme
Court was based upon a finding as to rights of an absent party; that,
as a result of that decision, petitioners were left defenseless if legal
action be brought against them by the Western Company on their
contracts with that company; and that the action of the State Court in
proceeding to an adjudication and to entry of injunctive decree in the
absence of the Western Company, constituted violation of the "due
process" clause of the Constitution, Sec. 1, Article XIV. The Hustiging
Company contended that, as decided by the Wisconsin Supreme Court
in 1927, the Western Company was not an indispensable party to the
litigation; that the action was one in tort and that the injured party
was not compelled to join all tort-feasors; and that it did not lie in the
mouth of the defendants to complain of hardships resulting from their
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own wrongful acts. The Husting Company further contended that the
"due process" clause only requires notice and opportunity for hearing;
that the joinder of parties is not jurisdictional but is a matter of prac-
tice or procedure to which the due process clause does not apply; and
that the absent party could not be injured as (by the court's own man-
date) it was not bound by the decree.

Defendants cited Federal Supreme Court decisions to the point that
the presence of interested parties is indispensable in granting of equita-
ble relief, referring to the equity rule as to joinder of parties. Defend-
ants contended that this rule was violated in the instant case, and that
such violation constituted lack of "due process." Plaintiff contended
that the cases cited were not in point, not being tort cases; and further
contended that in any event the equity rule was one of procedure and
not of jurisdiction, and hence that due process was not violated.

It should be noted that "jurisdiction" is used above in the sense of
power of a court to act with regard to the parties before it. This true
meaning of jurisdiction is to be distinguished from its use in the looser
sense, i.e., the propriety or correctness of the court's action in exercise
of power. This distinction between jurisdiction in the sense of power,
and jurisdiction in the sense of propriety of exercise of power, is rec-
the court says (p. 670),

"So far as the contentions addressed themselves to the subject-
matter of jurisdiction, it is clear that they do not deny jurisdiction in
the sense of the fundamental absence of any and all right to take
cognizance of the cause, but are confined to jurisdiction in the sense of
the duty to rightfully decide subjects to which judicial power extends."

See likewise the following quotation from Board of Supervisors v.
Mineral Point R. R. Co., 24 Wis. 93, at 131,

"The absence of such persons (interested third parties) is not a
defect involving the jurisdiction or power of the court over the parties
who are present, or over the subject matter of the suit, so far as those
parties may be concerned."

And further, at page 132:

"*** in no case does the jurisdiction of the court over the sub-
ject matter and parties properly before it depend no can it be made to
depend, on the absence of other parties, however, the right of such
other parties may be complicated by the decree *** " "*** in all
cases it is matter of mere error and not of jurisdiction."

Jurisdiction in the sense of power to act seems to require service of
process upon the parties defendant. In the instant case the court clearly
had such jurisdiction. "Due process" as guaranteed by the Federal
Constitution in general requires notice and opportunity for hearing. In the instant case the answering defendants were clearly afforded these safeguards.

It is suggested that the requirements of jurisdiction and “due process” are essentially identical. Mere error by a state court decision is not subject to review by the Federal Appellate Court as violation of “due process.” In *American Express Co. v. Kentucky*, 273 U.S. 269, that court said (p 273),

“It is firmly established that a merely erroneous decision given by a State Court in the regular course of judicial proceedings, does not deprive the unsuccessful party of property without the due process of law.”

Only arbitrary or spoliatory acts in the exercise of power violate “due process.” In *Chicago Life Ins. Co. v. Cherry*, 244 U.S. 25, that court said (p. 30),

“* * * if the mistake is not so gross as to be impossible in a rational administration of justice, it is no more than the imperfection of man, not a denial of constitutional rights.”

To this extent only, i.e. as to irrational acts, do the requirements of due process seem to exceed those of jurisdiction.

The denial of petition for writ of certiorari by the United States Supreme Court was in accord with its earlier decision in the case of *Iron Cliffs Co. v. Negaunee Iron Co.*, 197 U.S. 463. In that case one Harvey, as lessor, had given a 99-year lease of certain lands to the Pioneer Iron Co. Plaintiffs claimed under Harvey, an alleged breach of the lease. Defendants claimed under assignment from the Pioneer Co. That company was not made a party to the action. The action was in equity praying injunction against occupation of the land by the defendants. An injunction was granted which was affirmed by the State Supreme Court. A writ of error was sued out to the Federal Supreme Court. Mr. Justice Day, in deciding the case said it was claimed that by

“proceeding to determine the case and render a decree without the presence of the Pioneer Iron Co. as a party defendant in the action, the said company and Mather, as a stockholder therein, were deprived of property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States” (p. 470). * * *

“But it is urged that notwithstanding the Pioneer Iron Co. is not a party to the record its rights are necessarily adjudged in the decision which affects the lease granted to it and under which the defendants in their answer claimed to act. But we cannot concede this proposition. It may be answered primarily that the Pioneer Co. cannot thus be denied its rights” (p. 272).
"The mere fact that the claim is made that the Pioneer Iron Co. will be concluded can have no effect upon it so long as it has not submitted its right to adjudication by voluntary proceedings on its part or been brought into court by proper process" (p. 473).

It was held that failure to make the Pioneer Co. a party did not give rise to a Federal question, and the writ of error was dismissed.

Conclusion

The proceedings in this cause emphasize the adaptation of courts to practical necessity, the sound application of law and equity rules to facts at hand. The decision tends to clarify the law as to the rights and duties of a party whose contract is interfered with; and the law as to power of an equity court to proceed in the absence of parties interested in the litigation. The decision is especially significant at this time. Recent legislative enactments and court rules have looked to summoning all parties before the court and to trying all issues at once. The instant case properly qualifies this policy, and the "due process" guarantee is held to be one of reason.