Michigan Law Review

Volume 25 | Issue 2

1926

CURIOSITIES OF THE LAW-MANDATORY INJUNCTIONS IN THE DOUBLE NEGATIVE

NOTE AND COMMENT

CURIOSITIES OF THE LAW—MANDATORY INJUNCTIONS IN THE DOUBLE NEGATIVE.—The ridiculous practice of framing mandatory injunctions in the double negative seems to have originated in the famous case of *Lane v. Newdigate*.[1] The bill was filed by a tenant of a water power mill against his landlord, who owned other lands upon the mill stream, to enforce covenants in the lease, praying specifically that defendant be decreed to remove certain locks which he had erected and restore certain gates and canals which he had destroyed or failed to keep in repair. The case came before Lord Eldon on a motion for a temporary injunction, which was heard *ex parte*.[2] His Lordship is reported to have at first "expressed a difficulty, whether it is according to the practice of the court to decree or order repairs to be done," but upon further consideration, said, "I think I can direct it in terms which will have

[1] 10 Ves. 192.

[2] It is so stated in Blakemore v. Glamorganshire Canal, 1 M & K 154, 183, though this does not appear in the original report.

that effect." The order which he pronounced required the repairs to be made but was couched in a series of double negatives which made it very difficult to understand.[3] It would be a gem of judicial obfuscation if it had not become commonplace.[4]

One asks why such an absurd form was adopted. So far as concerns the notions actuating Lord Eldon, this becomes an inquiry as to the nature of the "difficulty" which he felt and which he thought he was obviating by this means. The only clue to be found in the report is in the sentence quoted above. It indicates that he was concerned, not by the practical difficulty, real or supposed, of enforcing such duties, but by the decisions which seemed to lay down a rule of practice precluding such decrees or orders.[5] If that is so, his order may be looked upon as a beneficent fiction, obviating an unsound rule of law by judicial make believe. It does not, however, do great credit to his lordship, for the decisions did not establish any such rule of law as was supposed, and, even if they did, fiction is not equity's characteristic method or its best method of avoiding bad law. Justice Holmes showed himself a better chancellor than Lord Eldon when he disposed of these cases by saying, "The question is practical rather than a matter of precedent."[6]

A different explanation is suggested in *Blakemore v. Glamorganshire Canal Co.*[7] It is there asserted that the function of an interlocutory injunction, granted without a full examination of the merits of the cause, is to preserve the *status quo,* pending a hearing, and that such an order, especially when granted *ex parte,* should not require affirmative action. Lord Eldon was criticized for doing indirectly what he could not do directly.[8] If this was the "difficulty" in his mind, it again appears that his method was legal fiction, where better chancellors have said that the supposed rule is not an absolute rule but merely a doctrine of caution.[9] Furthermore, this explanation of *Lane v. Newdigate* wholly fails to explain the use of the double negative in decrees granted at final hearing, which likewise became standard practice. Was this a merely mechanical copying of forms or did the profession acquire a morbid taste for obscurity?

Yet another explanation of this form of decree is suggested by the learned

[3]Stripped of some of its verbiage, the order ran in this wise,—that defendant be restrained from impairing plaintiff's enjoyment of the demised premises by continuing to keep the canals out of good repair, etc., etc.

[4]It is impossible to define the cases in which the form is used but it seems only to be in vogue where relatively complicated action is required. Affirmative orders of the simpler sort, such as those requiring the execution of conveyances or the cancellation of instruments, have always been put in plain English.

[5]That this was Lord Eldon's idea is confirmed by the reporter's note which refers to cases of this type. The note, however, shows that the cases did not establish the supposed rule. Compare the Georgia practice, where the Code says, "An injunction can only restrain; it cannot compel a party to perform an act." Goodrich v. Georgia R. R. Co., 115 Ga. 340; Georgia R. R. Co. v. Georgia-Alabama Power Co., 152 Ga. 172.

[6]Jones v. Parker, 163 Mass. 564, 40 N. E. 1044.

[7]1 M & K 154, 183.

[8]See also Audenried v. P. & R Ry. Co., 68 Pa. 370, 377, and EDEN, INJUNCTIONS, 1st Am. ed. 218.

[9]Hepburn v. Lordan, 2 Hem. & M. 345; Von Joel v. Hornsey, L. R. (1885) 2 Ch. 774; Toledo Ry. Co. v. Pennsylvania Co., 54 Fed. 730; Pennsylvania Ry. Co. v. Kelley, 77 N. J. Eq. 129, 75 Atl. 758; Whiteman v. Fuel Gas Co., 139 Pa. 492, 20 Atl. 1062.

author of the article on "Contempt," in Halsbury's Laws of England.[10] By the practice formerly obtaining in England, a plaintiff who complained of a violation of a negative decree was required to proceed by motion, with notice, and obtain an order of commitment before the defendant could be imprisoned, whereas plaintiff with an affirmative decree (for conveyance of land, the common case) could have defendant attached in the first instance, the judicial hearing to follow. The more complicated the action required, the greater the opportunity for misunderstanding and doubt as to the fact of violation and the greater the danger of oppression in the summary attachment. The double negative in such cases entailed the show cause practice. Again we have a "benevolent" fiction. Furthermore, we do not find that this curious little wrinkle in contempt practice ever obtained in this country. Therefore, if this be the explanation of the double negative, we Yankees have been guilty of following precedent with peculiar blindness.

Though the double negative still flourishes, light is breaking, and if, in this revolt, we are again following the British,[11] we are following intelligently.

E. N. D.

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[10] 7 Halsbury's Laws, Part II, 312, note.

[11] Bidwell v. Holden, 63 L. T. Rep. (N. S.) 104; Jackson v. Normanby Brick Co., L. R. [1899] 1 Ch. 438. The earliest revolt in this country appears to be Keys v. Alligood, 178 N. C. 16, 100 S. E. 113.