INJUNCTIONS-POWER OF A COURT TO MODIFY A FINAL PERMANENT, INJUNCTION

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INJUNCTIONS—POWER OF A COURT TO MODIFY A FINAL PERMANENT INJUNCTION—A court which has issued a permanent injunction may, under certain conditions, open and modify or dissolve the injunction even though the decree in the original action has become final. This power is said to be justified by the continuing operation of the injunction, which regulates future conduct as well as determining the rights of the parties as of the date of rendition of the decree. The same

1 "Modify" and "modification" will be used here to apply both to a change in terms and to a complete dissolution. Cases on dissolution of temporary injunctions have frequently been cited as authority on modification of permanent injunctions, but they are obviously not in point.

2 1 Freeman, Judgments, § 253 (1925); 4 Torts Restatement, § 943, comment (e) (1939); United States v. Swift and Co., 286 U.S. 106, 52 S. Ct. 460 (1932); 86 A.L.R. 1180 (1930), 136 A.L.R. 770 (1944); Milk Wagon Drivers' Union v. Meadowmoor Dairies, 312 U.S. 287 at 298, 61 S. Ct. 552 (1941). There are early cases to the contrary but these seem to have fallen into discard: Bloss v. Tacke, 59 Mo. 174 (1875); Woffenden v. Woffenden, 1 Ariz. 328, 25 P. 666 (1876); People v. Gold Run Ditch and Mining Co., 66 Cal. 155, 4 P. 1150 (1884).

A decree is usually considered final when the term at which it was issued has expired and the time for appeal has passed. Bronson v. Schulten, 104 U.S. 410 (1881). Some courts apply the historic principle of Chancery practice that the common-law term rules do not apply to equity, and in these jurisdictions finality would be determined solely by the expiration of the time for appeal and rehearing, Ladner v. Siegel, 298 Pa. 487, 148 A. 699 (1930), or by enrollment or equivalent procedure, Hudson Trust Co. v. Boyd, 80 N.J. Eq. 267, 84 A. 715 (1912).

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proposition can be restated by saying that injunctions are issued to protect existing rights, but provide no immunity against modification of those rights because of later changes in the applicable law or the essential facts.

It should be recalled that almost all judicial proceedings may be attacked at any time for such reasons as fraud, mistake, or duress. Equity decrees, furthermore, are subject to revision by bill of review or bill in the nature of a bill of review in extraordinary situations. These equitable remedies have a long and confused history, and their limits under modern practice are highly uncertain. However, recent cases have defined grounds for modification and vacation of permanent injunctions entirely apart from the bill of review and bill in the nature of a bill of review.

A. The Continuing Power of the Court over Injunctive Decrees

After an injunction has been issued, the court's control over the case and the parties does not come to a complete end. If the defendant violates the terms of the injunction he may be punished criminally for contempt, and damages which the plaintiff sustains because of the violation may be recovered in a civil contempt proceeding. It has been held that these civil contempt proceedings are a part of the principal suit rather than being separate proceedings, and that formal service of process is not necessary to initiate a contempt action because the court re-


5 Two situations were recognized in which bill of review could be had. The bill could be brought without leave of the court for "error apparent" in the original decree, and with leave of the court for "new matter" or newly discovered evidence. 1 WHITEHOUSE, EQUITY PRACTICE, §§ 143-146 (1915); 3 MOORE, FEDERAL PRACTICE 3264 (1938); 59 HARV. L. REV. 957 (1946). Doctrines of modification necessarily had to be developed without the aid of the bill of review, first, because of holdings that "newly discovered evidence" was held to be only such evidence as was in existence at the time of the original decree, and did not include subsequent changes in conditions; and, second, because of rulings that changes in law subsequent to the granting of the original decree did not constitute "error apparent." Scotten v. Littlefield, 235 U.S. 407, 35 S. Ct. 125 (1914); Franz v. City of Philadelphia, 333 Pa. 220, 3 A. (2d) 917 (1939), 59 HARV. L. REV. 957 (1946).

6 Note 4, supra.

tains the jurisdiction which it obtained on the commencement of the original equity suit. Under this doctrine a case in which an injunction has been granted remains before the court to some extent so long as the injunction continues in force.

Equity courts may experiment with remedies. A court may provide in its decree that control is to be retained and may use processes of trial and error in search for an adequate remedy. This continuing jurisdiction for the purpose of giving effective relief has many applications. The original decree may be totally inadequate for the protection of the plaintiff's rights, and if so it may be made more stringent. If a defendant persists in conduct of the same general sort as that prohibited by an earlier injunction, but not clearly within the prohibitions of the decree, the court may grant a supplemental injunction extending the force of the original order to cover the new transgressions. One cannot be held in contempt of a decree which is so indefinite that he cannot reasonably ascertain the commands of the court, but if a defendant is discharged for this reason the decree may be clarified so as to protect the rights of the plaintiff. A party who is in doubt about his rights and duties under an injunction may apply for construction


9 See American Steel Foundries v. Tri-City Council, 257 U.S. 184 at 206, 42 S. Ct. 72 (1921); Adams v. Local 400, 124 Wash. 564, 215 P. 19 (1923).

10 In Holloway v. Peoples' Water Co., 100 Kan. 414, 167 P. 265 (1917), an injunction directing defendant to use due care lest plaintiff's land be flooded was modified so as to impose an absolute prohibition on defendant against flooding when the floods continued but no negligence could be shown. Compare Chrysler Corp. v. United States, 316 U.S. 556, 62 S. Ct. 1146 (1942).


13 In Evans v. Stinchcomb, 180 Md. 482, 25 A. (2d) 444 (1942), the original decree enjoined defendant from planting oysters so as to interfere with plaintiff, and in a contempt action this wording was held too indefinite. The decree was then modified so as to specify the areas within which oysters could not be planted. Compare Uservo, Inc. v. Selking, 217 Ind. 567, 28 N.E. (2d) 61 (1940).
or modification.\(^{14}\) Inadvertent errors in framing have been corrected on application.\(^{18}\)

The continuation of injunction actions before the courts carries with it other powers in addition to the power to enforce and the power to mold further relief as necessary. The court necessarily has the power to interpret its decree, and what is to all intents and purposes a modification may be effected by means of interpretation.\(^{16}\) The court may mitigate its decree by declining to punish for contempt or by inflicting merely nominal punishment.\(^{17}\) Moreover, express modifications may be decreed, as is shown by many recent cases. This power does not depend on express reservation of control,\(^{18}\) although a reservation may permit greater discretion.\(^{18}\)

\(^{14}\) Patten v. Miller, 190 Ga. 152, 8 S.E. (2d) 786 (1940). But in Ladner v. Siegel, 294 Pa. 368, 144 A. 274 (1928), defendant was denied a declaratory judgment defining his rights.

\(^{15}\) In Golden v. Superior Court, 31 Cal. App. 734, 161 P. 758 (1916), the dispute in the original case was as to whether defendant was owner or pledgee, and an injunction was granted prohibiting any sale whatsoever by him. This injunction was modified so as to allow defendant the power of sale of a pledgee.

\(^{16}\) Sullivan v. Jones & Laughlin Steel Co., 222 Pa. 72, 70 A. 775 (1908); De Florez v. Raynolds, (C.C. N.Y. 1880) 8 F. 434; Tosh v. West Kentucky Coal Co., (C.C.A. 6th, 1918) 252 F. 44, involving the application of a labor injunction to a subsequent dispute over a different subject after the settlement of the original suit; Ex parte Myers, 246 Ala. 460, 21 S. (2d) 113 (1945), in which an injunction was held not to apply to a situation apparently within its terms but not contemplated by the parties or the court at the original hearing and causing no harm to plaintiff.

\(^{17}\) In National Labor Relations Board v. Federal Bearings Co., (C.C.A. 2d, 1940) 109 F. (2d) 945, employees ordered to be rehired were discovered by defendant to be ex-convicts after the order had issued. In Radio Corporation of America v. Cable Radio Tube Corporation, (C.C.A. 2d, 1931) 66 F. (2d) 778, the court held that a patent injunction was suspended during a period for which plaintiff licensed defendant to manufacture the patented article.

\(^{18}\) Ladner v. Siegel, 298 Pa. 487, 148 A. 699 (1930), 68 A.L.R. 1180 (1930); Santa Rita Oil Co. v. State Board of Equalization, 112 Mont. 359, 116 P. (2d) 1012 (1941), 136 A.L.R. 782 (1942). Sometimes an appellate court will order words of retention inserted. Minnesota Rate Cases, 230 U.S. 352, 33 S. Ct. 729 (1913); Glenn v. Field Packing Co., 290 U.S. 177, 54 S. Ct. 138 (1933); West Texas Utilities Co. v. City of Spur, (C.C.A. 5th, 1930) 38 F. (2d) 466. This practice is recommended in 4 Torts Restatement, § 943 (e) (1939), in a case in which modification is possible. Other courts have declined to order words retaining jurisdiction inserted on the ground that they are surplusage. Ward v. Prospect Manor Association, 188 Wis. 534, 206 N.W. 856 (1926); Seaboard Rendering Co. v. Conlon, 152 Fla. 723, 12 S. (2d) 882 (1943); Wise v. Potomac National Bank, 393 Ill. 357, 65 N.E. (2d) 767 (1946).

\(^{19}\) The effect of words of retention is rendered somewhat doubtful by the decision in United States v. Swift and Co., 286 U.S. 106, 52 S. Ct. 460 (1932), in which the modification ordered by the lower court was reversed despite the presence of words retaining jurisdiction and a sharp dispute as to the facts by the Justices of the Supreme Court. A consent decree was involved.
Numerous forms of procedure have been permitted by the courts in modification cases. The procedure used depends to some extent on whether the court considers a petition for modification a part of the original suit or a separate proceeding. Some courts have ordered modification on bill of review, or bill in the nature of a bill of review, and these presuppose the reopening of a final decree. If the modification is granted on original bill then there is a collateral attack, which is normally allowed only in extraordinary situations and when the court has no further power over the original proceeding. If the original suit is thought of as still pending a motion or an application for stay in proceedings could be used for modification. There seems to be no agreement on a single, standard procedure.

It is settled that a defendant who is charged with contempt cannot set up the propriety of modification as a defense, and cannot ask for modification until he has purged himself of the contempt.

In some cases it has been held that a final injunction which has been decreed pursuant to the mandate of an appellate court cannot be reviewed without the consent of the higher court, but there is other authority to the effect that the court from which an injunction actually issues can entertain proceedings for modification.

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20 In Reed v. Beczkiewicz, 215 Ind. 365 at 387, 18 N.E. (2d) 789 (1939) there is a suggestion that the case continues before the court only for purposes of enforcement. The very existence of a power of modification, however, suggests that the case remains pending for other purposes than this.

21 As in Terry v. Commercial Bank, 92 U.S. 454 (1875); Sawyer v. Davis, 136 Mass. 239 (1884). A bill of review for “new matter” can be filed only with leave of the court. Note 5, supra.

22 In International Railway Co. v. Davidson, (D.C.N.Y. 1945) 65 F. Supp. 58, the court stated that bill in the nature of a bill of review was the historic procedure and that an equivalent procedure was available under the Federal Rules.

23 Original bill was used in Kelley v. Earle, 325 Pa. 337, 190 A. 140 (1937); American Press Association v. United States, (C.C.A. 7th, 1917) 245 F. 91; McGuinn v. City of High Point, 219 N.C. 56, 13 S.E. (2d) 48 (1941).

24 As in Wetmore v. Law, 34 Barb. (N.Y.) 515 (1860); People v. Bank of Mendocino, 133 Cal. 107, 65 P. 124 (1901). The advantage of a procedure predicated on the assumption that the original case is still pending before the court is that formal service might not be required. Note 8, supra.

25 As in Spann v. Spann, 2 Hill Eq. (S.C.) 152 (1835); Scudder v. Kilfoil, 57 N.J. Eq. 171, 40 A. 602 (1898).


The balance of this comment concerns two classes of cases in which modifications have been ordered: (1) those in which the applicable law has changed; and (2) those in which there has been such a change in the conditions attendant upon the issuance of the injunction that modification is appropriate.

B. Change in Law

1. Legislation and administrative regulations. One of the clearest cases for modification of an equity injunction arises when the defendant can show subsequent legislative authority permitting the conduct forbidden him by the court. In one type of case an act is passed declaring that the practices enjoined are no longer illegal. In another the act is special, conferring authority on a particular person which was previously wanting. The legislative authority might come from a referendum. Similar situations arise when the defendant can show as a basis for modification a valid administrative order, the grant of a franchise, or eminent domain. If public or corporate action is enjoined because of errors in procedure the defects can be corrected and modification secured.

A doctrine of automatic vacation has been advanced to cover cases

29 Sawyer v. Davis, 136 Mass. 239 (1884), in which a statute permitted the ringing of a factory bell at certain times after the defendant had been forbidden by injunction to ring the bell; Western Union Telegraph Co. v. International Brotherhood of Electrical Workers, (C.C.A. 7th, 1943) 133 F. (2d) 955, in which a labor injunction was modified so as to conform to the Norris-La Guardia Act; Bartholomew v. Town of Harwinton, 33 Conn. 408 (1866); Avon Township v. Detroit United Railway, 211 Mich. 34, 177 N.W. 953 (1920); Hodges v. Snyder, 45 S.D. 149, 186 N.W. 867 (1922), affirmed, 261 U.S. 600, 43 S.Ct. 435 (1923).


34 Weaver v. Mississippi and Rum River Boom Company, 30 Minn. 477, 16 N.W. 269 (1883); Watson v. Metropolitan Electric Railway Co., 57 N.Y. Super. 364, 8 N.Y.S. 533 (1890); Southern California Railway v. Southern Pacific Railway Co., (Cal. 1895) 43 P. 1123.

in which defendant can show precise authority legalizing the enjoined acts. Defendants have thereby been enabled to set up the curative authority as a defense when called to answer for contempt of the original decree. The problem involved is not too serious if the authority is clear and unequivocal. The court might find, however, that the curative measures are unconstitutional, in excess of powers, or otherwise invalid. If so the question is whether "reasonable reliance" by the defendant is a defense to contempt charges, and it is apparent that the defendant undertakes a serious risk if he violates the terms of an injunction without applying to the court for modification.

2. Change in judicial decisions. A court of last resort may reverse a standing line of decisions, with the result that injunctions may exist forbidding particular defendants to engage in conduct which according to the latest judicial authority is perfectly legal. The case for modification is as clear here as when the basis is an act of the legislature, and modifications have been freely permitted.

The leading case is Pennsylvania v. Wheeling-Belmont Bridge Co., 18 How. (59 U.S.) 421 (1855), involving express legislative authority to build a bridge. Other cases in which definite curative authority was held to justify violation of the terms of the injunction are Newton Rubber Works v. De Las Casas, 198 Mass. 156, 84 N.E. 119 (1908) and Avon Township v. Detroit United Railway, 211 Mich. 34, 177 N.W. 953 (1920). Compare Minegar v. Minneapolis Fire Department Relief Association, 126 Minn. 332, 148 N.W. 279 (1914), in which defendant was held not guilty of contempt for failing to make pension payments ordered by the court, after the legislature had declared that persons in the class of plaintiff were not entitled to the benefits. Early cases denying the principle of automatic vacation are Williamson v. Carnan, 1 Gill & Johnson (Md.) 184 (1826) and Muller v. Henry, (C.C. Cal. 1879) 17 Fed. Cas. No. 9916. See also note 16, supra, for cases in which the decree was construed so as to relieve defendants of the burdens of an injunction even though apparently guilty of violation. Some cases suggest that injunction may virtually expire when the rights protected no longer need protection, even though the injunction purports to be "perpetual." De Florez v. Raynolds, (C.C. N.Y. 1880) 8 F. 434; People v. Bank of Mendocino, 133 Cal. 107, 65 P. 124 (1901). Automatic vacation may also be effected to the extent that plaintiff licenses defendant to conduct operations contrary to the terms of the injunction. See note 49, infra.

In Carr v. District Court, 147 Iowa 663 at 676, 126 N.W. 791 (1910), it was suggested that such reasonable reliance might be a defense even though the authority relied on should be ineffective. In Muller v. Henry, (C.C. Cal. 1879) 17 Fed. Cas. No. 9916, the court indicated that any risk as to the validity of the authority would be on the defendant.

Ladner v. Siegel, 298 Pa. 487, 148 A. 699 (1930), in which the Supreme Court of Pennsylvania had altered its concept of nuisance; Santa Rita Oil Co. v. State Board of Equalization, 112 Mont. 359, 116 P. (2d) 1012 (1941), ordering modification after the Supreme Court of the United States made broad changes in the doctrines of tax immunity of lessees of federal lands; Sontag Chain Stores v. Superior Court, 18 Cal. (2d) 92, 113 P. (2d) 689 (1941), in which a labor injunction was modified after the Supreme Court of the United States gave increased protection to the constitutional right of peaceful picketing. There are early federal cases in which
In another type of case a defendant against whom an injunction is sought either fails to appeal from an adverse decision or else submits to a consent decree. Later, and in a separate case, a higher court hands down a decision indicating that the injunction was granted in error. Mere error will not suffice to allow reopening of a settled proceeding, and a defendant who fails to appeal will not be able to secure a reversal after the time for appeal and rehearing has expired. These rules, in general, apply to injunctions as well as to other proceedings. A relitigation will usually not be permitted for error alone, and such error does not serve to excuse a contempt. Yet there is an incongruity in perpetuating a restraint not warranted by law, and a showing of error in the original decree may strengthen a petition for modification.

C. Modification because of Changed Factual Conditions

It is possible that a court will grant modification of an injunction if the defendant can show that its continued enforcement will be inequitable because of a change in essential facts subsequent to the rendition of the decree. The problem here is the kind of showing to be required of the defendant before modification will be permitted, and the reliance which plaintiffs and their privies can place on an injunction which on its face purports to be final and permanent.

Federal courts applying state law have refused to modify decrees even though the state supreme court had handed down a decision subsequent to the decree indicating a different view of the state law from that adopted by the federal court. City of Frankfort v. Deposit Bank of Frankfort, (C.C.A. 6th, 1903) 124 F. 18; 59 Harv. L. Rev. 957 (1946).

40 In Lehman Co. v. Appleton Toy and Furniture Co., (C.C.A. 7th, 1945) 148 F. (2d) 988, and National Popsicle Corp. v. Hughes, (D.C. Cal. 1940) 32 F. Supp. 397, injunctions against patent infringement were not modified even though the patents involved were later declared invalid by higher courts in suits against different defendants.
48 In Coca-Cola Company v. Standard Bottling Co., (D.C. Colo. 1942) 50 F. Supp. 201, affirmed, (C.C.A. 10th, 1943) 138 F. (2d) 788, consent decree was modified because of holdings of many courts that plaintiff could not protect "cola" as a trade name. The situation here seems to parallel that in the cases cited in note 40, supra, on patents later held invalid; but the significant difference is apparently that a large number of manufacturers were producing "cola" drinks while no such wide use was made of the patent rights later held to be invalid. In Jackson Grain Co. v. Lee, 139 Fla. 93, 190 S. 464 (1939), same case, 150 Fla. 232, 7 S. (2d) 143 (1942), the court held that error in an injunction against the collection of a tax could be corrected when discovered in spite of failure to exhaust remedies of appeal, because of the importance of the public interest involved; but a contrary conclusion was reached in Pacific Telephone and Telegraph Co. v. Henneford, 199 Wash. 462, 92 P. (2d) 214 (1939).
In some cases the defendant can show a definite change in fact. Injunctions enforcing restrictions on the use of land may be modified if conditions in the vicinity so change that the purpose of the restrictions can no longer be carried out. An injunction against the enforcement of public utility rates prescribed by a regulatory commission, on the ground that the rates are confiscatory, is necessarily based on facts which are likely to change; and modification is in order if it can be shown that the rate schedule is no longer confiscatory. A combination of two printing companies was enjoined under the Sherman Act, but the injunction was modified several years later when one of the companies became insolvent and the other appeared to be the only prospective purchaser. An injunction protecting homestead rights will be modified when the property covered ceases to be used for a homestead, and a prohibitory injunction against a business facility on the ground that it is a "nuisance per se" can be lifted if technological developments make it possible to carry on the business in an unobjectionable way. The plaintiff and defendant also might so adjust their property interests that an injunction has no further purpose.

48 Seaboard Rendering Co. v. Conlon, 152 Fla. 723, 12 S. (2d) 882 (1943).
49 In theory it would seem that the parties to a suit could not make arrangements among themselves modifying the force of an injunction, because the injunction is an order of the court and violation is an affront to the court which is punishable as a criminal contempt. United States v. United Mine Workers of America, (U.S. 1947) 67 S. Ct. 677. It seems settled, however, that plaintiff might grant a license to defendant which would allow defendant to act in contravention of the decree and defendant will not be punished for contempt because the injunction is suspended to the extent of the license. Radio Corporation of America v. Cable Radio Tube Corp., (C.C.A. 2d, 1933) 66 F. (2d) 778; Lewis Invisible Stitch Mach. Co. v. Popper, (C.C.A. 2d, 1941) 118 F. (2d) 191. In Steinfur Patents Corp. v. Sterling Fur Dyers, (D.C. N.Y. 1941) 40 F. (2d) 790, the court refused to decree modification to the extent permitted by the license, holding that the license stayed the force of the injunction automatically. See note 36, supra. In Scudder v. Kilfoil, 57 N.J. Eq. 171, 40 A. 602 (1898), the court held that the defendant lost no rights by granting a license except those surrendered by the terms of the license, and that in other respects the injunction remained in full force and effect. Other examples of the way in which the conduct of the parties can effect a modification are cases in which punishment for contempt is refused because of plaintiff's laches in bringing the facts to the attention of the court as in American Crayon Co. v. Prang Co., (D.C. Del. 1931) 51 F. (2d) 737, and cases in which plaintiff loses his right to an injunction against violation of a negative covenant contained in a contract with defendant because he himself is guilty of breach of contract, on which see Barnett Foundry Co. v. Iron Works Co., 85 N.J. Eq. 359, 96 A. 490 (1915); Oregon Growers' Cooperative v. Lentz, 107 Ore. 561,
In a recent New York case the defendant had been permanently enjoined from dealing in securities except as a salesman for an authorized dealer. The proceeding was brought by the Attorney General under the Martin Act,50 which authorizes this sort of relief against persons guilty of fraudulent dealings. In 1946 defendant petitioned the court for dissolution of the injunction, setting up as justification an excellent personal record during the nine years the injunction had been in force. The state argued that the petition was not in order because the time for appeal and rehearing had passed, but the court declared that it had the power to order a modification if good cause were shown. In the opinion it was emphasized that the original decree had been entered only after full hearing, that the defendant could no longer question the correctness of the original order, and that modification would be ordered only for strong and compelling reasons. The matter was accordingly referred to an official referee for findings and recommendations.51

A similar problem was presented in the cases arising out of the Chicago Milk Wagon Drivers’ dispute. The Supreme Court of Illinois affirmed an injunction restraining union activities directed against a dairy which had no dispute with its own employees but which sold milk to non-union distributors, and enlarged the decree of the lower court so as to forbid peaceful picketing on the ground that such a restriction was necessary to protect the plaintiffs against violence.52 The Supreme Court of the United States affirmed,53 holding that the state court could constitutionally enjoin even peaceful picketing if the court reason-

212 P. 811 (1923). Enforcement of injunctions will usually follow only if plaintiff makes a complaint, unless defendant is guilty of conduct which could be called a direct affront to the dignity of the court.

It is conceivable that there might be a substitution of parties even after an injunction decree has become final. Suppose plaintiff secures an injunction against defendant’s violation of restrictive building covenants and then plaintiff sells his interest in all land concerned to a third person. Plaintiff can no longer enforce the injunction in civil contempt proceedings because he has no further interest to protect, and it is doubtful that the court would seek to enforce it on its own initiative. The purchaser might not be able to get a separate injunction unless a threat against him personally could be shown, and even so he might be at a disadvantage if required to relitigate the entire controversy. If the injunction suit is still pending before the court, however, the purchaser might apply to have himself substituted as party plaintiff. See 135 A.L.R. 325 at 358 (1941) and 149 A.L.R. 829 (1944) as to parties entitled to be substituted and stages in proceedings at which substitution has been permitted.

ably determined that such restraint was necessary in order to control violence. The court asserted, however, that the injunction could be modified and that inasmuch as the right of free speech could not be forfeited because of a record of past violence the Illinois courts would be compelled by the Supreme Court of the United States to grant modification if a proper case therefor were presented.\textsuperscript{54}

It is hard to see just what change in conditions the Supreme Court had in mind when it declared that it might compel the Illinois courts to grant modification in the future. There is some authority to the effect that labor injunctions are limited to the immediate controversy out of which they arise and that new and independent disputes coming up after the original incident has been settled are not within their scope;\textsuperscript{56} but such a holding is more like a construction of the original decree than a modification. The Supreme Court must have thought that modification should be ordered as soon as the danger of violence ceased, and probably the only evidence of lessened danger would be the passing of a period of time without violent incidents. If this is so, the showing required of defendants in the MeadowmoRr case is very much like the allegation of the defendant in the Martin Act case.\textsuperscript{56}

Yet some restrictions must be imposed if equity decrees are to retain any attributes of finality under familiar doctrines of res judicata. In one of the first cases asserting an inherent power to modify, the decree of the lower court ordering modification was reversed on the ground that defendant was merely trying to relitigate the issues of the original action by setting up a frivolous claim of changed circumstances.\textsuperscript{57} A plaintiff in whose favor an injunction has been issued has the right to

\textsuperscript{54} Id. at 299.

\textsuperscript{56} See Tosh v. West Kentucky Coal Co., (C.C.A. 6th, 1918) 252 F. 44. The case had to do with a contempt action against non-parties, and the application of the principle parties was not within the scope of the decision. The language used by the court suggests, however, that an injunction against a strike is by its nature limited in scope. In Western Union Telegraph Co. v. International Brotherhood of Electrical Workers, (C.C.A. 7th, 1943) 133 F. (2d) 955, in which an injunction issued in a labor dispute nearly twenty years earlier was apparently considered still to be in force except to the extent that the Norris-LaGuardia Act required modification.

\textsuperscript{57} Lowe v. Prospect Hill Cemetery Association, 75 Neb. 85, 106 N.W. 429 (1905), rehearing, 75 Neb. 100, 108 N.W. 978 (1906).
have it continued, after it has become final, until a proper case for modification is presented. The principle of res judicata protects him to this extent. The Supreme Court of the United States has called for a “clear showing of grievous wrong evoked by new and unforeseen conditions.” A decree of a lower court adjudging modification will be examined closely on appeal, and there is obvious danger of reversal unless the record shows substantial ground for the decision. The continuing control of the court for purposes of modification is closely confined. Both in the Meadowmoor case and the Martin Act case, discussed above, there is great difficulty in showing tangible grounds for modification. In both of these cases the defendants are relegated to arguing that the passing of time without the abuses which caused the injunction to issue indicates that the danger of recurrence is slight.

These cases can be justified if we agree that a defendant is entitled to a modification when he can show, first, that an injunction places a severe burden on him, and, second, that the plaintiff is no longer entitled to injunctive relief under the conditions prevailing when modification is asked for.

If an injunction is of no substantial value to the plaintiff the defendant should be relieved of its burdens on a comparatively slight showing of hardship. Injunctions protecting “cola” as a trade-name of the Coca-Cola Company have been modified on the ground that introduction of numerous other “cola” drinks deprived the plaintiff of a sufficient interest in the name.

58 The original issues cannot be relitigated, and the defendant cannot secure modification merely by showing that the injunction would not have been issued under the conditions prevailing at the time when modification is sought. State ex. rel. Caplow v. Kirkwood, (Mo. 1938) 117 S.W. (2d) 652; Hempstead v. Meadville Theological School, 346 Pa. 276, 29 A. (2d) 509 (1943). If sound reasons remain to support the original decree, a change in some of the material circumstances will not suffice as a basis for modification. Degenhart v. Harford, 59 Ohio App. 552, 18 N.E. (2d) 990 (1938); Fleming v. Miller, (D.C. Minn. 1942) 47 F. Supp. 1004.

59 United States v. Swift and Co., 286 U.S. 106 at 119, 52 S. Ct. 460 (1932). The relevancy of this decision to the subject discussed here might be questioned because the case involved a consent decree, but the court in its opinion, pp. 114-115, stated that the power to modify was the same for all decrees whether entered by consent or not. On the power to modify consent decrees, see Coca-Cola Co. v. Standard Bottling Works, (C.C.A. 10th, 1943) 138 F. (2d) 788. Chrysler Corporation v. United States, 316 U.S. 556, 62 S. Ct. 1146 (1942); 17 Rocky Mt. L. Rev. 114 (1944).

60 Western Union Telegraph Co. v. International Brotherhood of Electrical Workers, (C.C.A. 7th, 1943) 133 F. (2d) 955, reversing an order dissolving a labor injunction issued nearly twenty years earlier on the ground that nothing in the record showed that the danger of violence had ceased to exist.

61 In People v. Bank of Mendocino, 133 Cal. 107, 65 P. 124 (1901), and International Railway Co. v. Davidson, (D.C. N.Y. 1945) 65 F. Supp. 58, the injunctions had become entirely unnecessary to protect the rights of the plaintiffs.

an injunction against a particular manufacturer's infringement of a patent which is later held invalid by a higher court in an independent case, for the effect of continuing the injunction would be to allow everybody in the world to make the article involved except the single defendant who failed to appeal.68

The ease with which modification will be permitted likewise varies with the importance of the activities of the defendant which are restrained. A defendant who had been enjoined from throwing stones onto his neighbor's land would have great difficulty with a claim that inasmuch as several years had passed without the throwing of stones the injunctive restraint should be dissolved.64 On the other hand, restrictions of freedom of speech, as in the Meadowmoor case,65 or interference with one's right to carry on his usual business, as in the Martin Act case,66 are such severe hindrances that a petition for modification should be received more favorably. The court is justified in ordering modification if it feels that the danger of violations is so lessened that further injunctive restraint is unnecessary. The injunctions in both of these cases go beyond the wrongful acts complained of. Fraudulent dealing in securities led to a prohibition of all sales,67 and a record of violence in a labor dispute resulted in the restriction of all picketing. Another case involving important rights is one in which the collection of a tax has been enjoined. The public taxing authorities should not be embarrassed by an injunction if the tax which has been enjoined is ultimately found to be valid, even though the injunctive decree has become final.68

63 A contrary conclusion was reached in National Popsicle Corp. v. Hughes, (D.C. Cal. 1940) 32 F. Supp. 397 and Lehman Co. v. Appleton Toy and Furniture Co., (C.C.A. 7th, 1945) 148 F. (2d) 988. The reason given was that modification would constitute reversal for mere error. If the injunction is allowed to remain in force, however, plaintiff receives a continuing benefit to which he is not entitled by law.

64 In Koppelman v. Sunset Wine Co., 180 Misc. 812, 44 N.Y.S. (2d) 225 (1943), modification of an injunction against certain sales of liquor by defendant was denied even though he was able to show wartime restrictions under federal authority which constituted good justification. Defendant failed to show, however, that he possessed a license permitting him to sell liquor lawfully.


66 People v. Riley, (N.Y. Sup. Ct. 1946) 64 N.Y.S. 348. Compare Ladner v. Siegel, 298 Pa. 487, 148 A. 699 (1930), in which defendant was prevented from operating a garage for the tenants of apartments which he owned.

67 The decision in People v. Riley, (N.Y. Sup. Ct. 1946) 64 N.Y.S. 348, could also be justified on the ground that the statutory injunction procedure is very much like a criminal prosecution, and that no other method had been provided for the grant of the pardon. See 45 HARV. L. REV. 1096 (1932) on statutory injunctions as a substitute for criminal proceedings.

68 Jackson Grain Co. v. Lee, 139 Fla. 93, 190 S. 464 (1939), same case 150 Fla. 232, 7 S. (2d) 143 (1942). See also Sheehan v. Osborne, (Cal. 1902) 69 P. 842.
A plaintiff should be protected in the enjoyment of his benefits under an injunction so long as he is entitled to them, but the principle of res judicata should not be applied mechanically to continue a restraint which works serious hardship on the defendant and which the plaintiff should not have standing in his favor under prevailing conditions. A strong showing may be required of the defendant, and the case may be reviewed more closely on appeal than is usual in equity proceedings, but a modification should be permitted whenever the balancing of the interests of the parties demonstrates that the injunctive restraints should no longer be applied. Though free use of the power to modify may jeopardize the finality of equity adjudications, still it is necessary that control be retained as to decrees which regulate conduct in the indefinite and unforeseeable future.

Charles B. Blackmar, S.Ed.

69 In United States v. Swift and Co., 286 U.S. 106, 52 S. Ct. 460 (1932) the Supreme Court split four to two on whether modification should have been granted on the facts presented. If such a conflict arose in an ordinary suit in equity the appellate court might be inclined to accept the findings of fact made by the trial court.