

Chapter 32

Injunctions

Chapter 32

NOTES OF DECISIONS

The provisional remedy of injunction is a procedural matter entirely within the control of the legislature. *Heitkemper v. Cent. Labor Council*, (1921) 99 Or 1, 192 P 765.

32.010

NOTES OF DECISIONS

A preliminary injunction should not anticipate the ultimate decision of the question of rights involved but should merely preserve the status quo until a hearing on the merits is held. *Helm v. Gilroy*, (1891) 20 Or 517, 26 P 851; *Livesley v. Johnston*, (1904) 45 Or 30, 76 P 13; *American Life Ins. Co. v. Ferguson*, (1913) 66 Or 417, 134 P 1029.

When a party to an injunction doubts its significance or extent, he is not to disobey it with a view to test it in this particular, but he should apply to the court for a modification or for instructions. *Wells, Fargo & Co. v. Ore. R.R. & Nav. Co.*, (1884) 9 Sawy 601, 19 Fed 20.

A preliminary injunction does not ordinarily partake of the nature of a final judgment or decree to such an extent as to warrant an appeal therefrom but a refusal of an injunction coupled with final relief on the merits may be final. *Helm v. Gilroy*, (1891) 20 Or 517, 26 P 851.

Grant or refusal of a preliminary injunction rests largely in discretion of the court. *Id.*

An interlocutory injunction operates in personam. *Gobbi v. Dileo*, (1911) 58 Or 14, 111 P 49, 113 P 57, 34 LRA(NS) 951.

An interlocutory injunction does not determine the merits of the case or the rights of the parties, and does not change the possession of real or personal property, the title to which is in dispute. *Id.*

A preliminary injunction is destroyed by a decree dismissing the suit, notwithstanding an appeal by plaintiff therefrom. *Dimick v. Latourette*, (1914) 72 Or 231, 143 P 896.

This discretion is not an arbitrary one and it must be exercised in accordance with the principles of equity and good conscience. *Coopey v. Keady*, (1916) 81 Or 218, 139 P 108.

Objective certainty is desirable in framing an injunctive decree. *State Sanitary Authority v. Pac. Meat Co.*, (1961) 226 Or 494, 360 P2d 634.

The complainant is entitled to no greater relief than was demanded in the complaint. *Id.*

The taking of an appeal from the decree granting an injunction and the giving of supersedeas bond did not render defendant immune from obedience while the appeal was pending, or from prosecution for contempt for a violation. *Treadgold v. Willard*, (1916) 81 Or 658, 668, 160 P 803.

FURTHER CITATIONS: *Nelson v. Smith*, (1937) 157 Or 292, 69 P2d 1072; *American Smelting & R. Co. v. Bunker Hill & Sullivan Min. & Concentrating Co.*, (1918) 248 Fed 172; *Atkinson v. Bernard, Inc.*, (1960) 223 Or 624, 355 P2d 229; *Diercks v. Hodgdon*, (1964) 237 Or 186, 390 P2d 935.

ATTY. GEN. OPINIONS: As to the right of a court to require a specific act, 1930-32, p 527.

LAW REVIEW CITATIONS: 1 EL 84.

32.020

NOTES OF DECISIONS

1. In general
2. The undertaking

1. In general

It is imperative that an undertaking be required before allowing an injunction pendente lite. *Henderson v. Tillamook Hotel Co.*, (1915) 76 Or 379, 148 P 57, 149 P 473; *Nelson v. Smith*, (1937) 157 Or 292, 320, 69 P2d 1072.

Injunction may issue after commencement of suit and before service of summons. *Breese v. Bramwell*, (1921) 102 Or 76, 201 P 729; *Forte v. Page*, (1943) 172 Or 645, 143 P2d 669.

The dissolution of an injunction is a technical breach of the injunction bond and the defendant may recover nominal damages. *Stone v. Cason*, (1854) 1 Or 100.

An undertaking for costs and disbursements and damages limited to a stated sum does not limit the costs and disbursements to that sum. *Officer v. Morrison*, (1909) 54 Or 459, 102 P 792.

This chapter is applicable to the Supreme Court when it exercises its power to issue a temporary injunction, and it should allow the writ only on the filing of the undertaking. *Livesley v. Krebs Hop Co.*, (1910) 57 Or 352, 97 P 718, 107 P 460, 112 P 1.

A bond for injunction which restrains a defendant from cutting, removing or disposing of wood on land in his possession, does not cover a loss of timber sustained by the removal thereof by strangers pending the suit. *Gobbi v. Dileo*, (1911) 58 Or 14, 111 P 49, 113 P 57, 34 LRA(NS) 951.

If there was no issuance or service of an injunction order, defendant on obtaining a dissolution of the injunction could not recover on the bond any damages sustained. *Id.*

An injunction without a bond conformable to statute is wholly void and disobedience is not a contempt. *State v. LaFollette*, (1921) 100 Or 1, 196 P 412.

A bond which recites that the injunction has been granted, creates liability from issuance and service of the injunction order. *Id.*

The dismissal of an injunction suit by agreement of the parties, entered into without consent of the sureties does not create a liability against the sureties on an injunction bond. *Janssen v. Shown*, (1931) 53 F2d 608.

2. The undertaking

If the injunction is wrongful, attorney's fees expended in procuring the dissolution are legitimate items of damage, even where paid on an unsuccessful motion to dissolve. *Olds v. Cary*, (1886) 13 Or 362, 10 P 786; *Reed v. Brandenburg*, (1914) 72 Or 435, 143 P 989.

In an action for wrongful injunction, the remedy is at

law either on the bond or in case for tort. *Ruble v. Coyote Gold & Silver Min. Co.*, (1881) 10 Or 39.

In the absence of malice and want of probable cause, a person injured by an improperly issued preliminary injunction is limited to his remedy upon the undertaking. *Id.*

Where the injunction was only ancillary to the principle suit, reasonable counsel fees for obtaining its dissolution are recoverable as part of the damages; but where the injunction is the sole relief sought by the suit, no such item is allowable unless the party can show that it was put to extra expense on account thereof. *Olds v. Cary*, (1886) 13 Or 362, 10 P 786.

In an action upon an undertaking, a complaint should allege that the injunction was wrongful or without sufficient cause, but that defect is waived by answering to the merits. *Id.*

A bond, in accordance with this section, covers not only the damages until the injunction is made permanent but all damages up to the time of dismissal by the Supreme Court. *Moore v. Lachmund*, (1911) 59 Or 565, 117 P 1123, Ann Cas 1913C, 1272.

An injunction bond running to several parties will still be liable to one party individually where that party acquired the interests of all the rest. *Id.*

Where the order of injunction was dismissed, the trouble given to the plaintiff, the time and money expended by him in procuring vacation, and the injury to his business were legitimate items of damage. *Reed v. Brandenburg*, (1914) 72 Or 435, 143 P 989.

In an action on an injunction bond, plaintiff must identify the goods he refrained from selling as those mentioned in the injunction order. *Id.*

No undertaking is necessary in obtaining a permanent injunction. *Kern v. Gentner*, (1945) 176 Or 479, 159 P 2d 190.

FURTHER CITATIONS: *Warren Constr. Co. v. Grant*, (1931) 137 Or 410, 299 P 686, 2 P2d 1118.

32.030

NOTES OF DECISIONS

The Supreme Court has the power to issue temporary injunctions, upon the filing of an undertaking, to exercise its appellate jurisdiction. *Livesley v. Krebs Hop Co.*, (1910) 57 Or 352, 97 P 718, 107 P 460, 112 P 1.

Service is dispensed with where defendant appeared and contested the granting of the order, though he was not personally present when it was actually entered. *Reed v. Brandenburg*, (1914) 72 Or 435, 143 P 989.

32.040

NOTES OF DECISIONS

1. In general
2. Discretion of the court
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21. Waste
22. Appeal

1. In general

The issuance of a restraining order is a judicial act. *State v. Jacobs*, (1884) 11 Or 314, 8 P 332.

To issue an injunction which must necessarily destroy property is against the policy of a court of equity. *Linn County v. Calapooia Lbr. Co.*, (1912) 61 Or 98, 121 P 4.

The issuance of an injunction should be restricted to the protection of property and to prevent wrongs for which no adequate remedy is provided by law. *Moreland Theatres Corp. v. Portland Moving Picture Mach. Operators' Protective Union*, (1932) 140 Or 35, 12 P2d 333.

2. Discretion of the court

The enjoining of a subsequent appropriator of water to prevent the diminution of the supply to the first claimant is discretionary. *Mann v. Parker*, (1906) 48 Or 321, 86 P 598.

Where the plaintiff can show no injury from the acts complained of, an injunction will not be issued. *Id.*

3. Public welfare and convenience

Where the enjoining of a particular act might seriously affect the public, the injunction is usually denied. *Booth-Kelly Lbr. Co. v. Eugene*, (1913) 67 Or 381, 384, 136 P 29.

Injunction was granted against use of a sewer across plaintiff's land notwithstanding public inconvenience, when it was constructed without consent, without plaintiff's knowledge, without condemnation and compensation and after plaintiff voiced his disapproval to the city. *Fraser v. Portland*, (1916) 81 Or 92, 158 P 514.

4. Temporary or permanent injunction

If the legal title to land involved is in issue and the equitable jurisdiction is challenged, the injunction will not be made perpetual until the legal title is settled. *Norton v. Elwert*, (1895) 29 Or 583, 41 P 926. *But see Bishop v. Baisley*, (1916) 28 Or 119, 41 P 936.

If the plaintiff presents a prima facie possessory title that is not seriously disputed, equity will settle the entire controversy without waiting for the proceedings at law. *Bishop v. Baisley*, (1916) 28 Or 119, 41 P 936.

An injunction to prevent a repetition of the trespass was properly made perpetual upon a showing that irreparable damage would otherwise result. *Mathews v. Chambers Power Co.*, (1916) 81 Or 251, 159 P 564.

5. Mandatory injunction

A state or a municipal corporation may maintain a suit for a mandatory injunction to compel the removal of obstructions from public streets, independent of a criminal statute. *Bernard v. Willamette Box & Lbr. Co.*, (1913) 64 Or 223, 129 P 1039.

A judgment creditor is not entitled to mandatory injunction to compel the debtor to apply to the debt a distributive share in a decedent's estate, where it is not shown that execution against the share would fail to satisfy the debt. *Malagamba v. McLean*, (1918) 89 Or 302, 161 P 560, 173 P 1175, 1177.

Mandatory injunctions should be issued only in extreme cases where the right to such relief is clear. *State v. Mart*, (1931) 135 Or 603, 283 P 23, 295 P 459.

6. Sufficiency of the pleadings

Where a motion for injunction is submitted on complaint and answer and the answer denies all the equities of the

bill, the injunction should not be granted. *Wellman v. Harker*, (1870) 3 Or 253.

If a complaint alleges enough to constitute a cause of action to restrain timber cutting as a trespass or the commission of waste, defective allegations for statutory damages will be treated as surplusage. *Roots v. Boring Junc. Lbr. Co.*, (1907) 50 Or 298, 92 P 811, 94 P 182.

An allegation of irreparable injury without a recital of any facts indicating a probability thereof is a mere conclusion of law and, therefore, not sufficient. *Stewart v. Erpelding*, (1915) 76 Or 309, 148 P 1129.

Complaint was not sufficient in an action to enjoin sale of land upon execution where the only allegation as to trespass was predicated upon the writ of execution in the county clerk's office. *Barnes v. Esch*, (1917) 87 Or 1, 169 P 512.

7. Rights of plaintiff

An individual taxpayer may sue to enjoin the illegal diversion of public funds or property where it appears that the result of such diversion will be to increase the rate of taxation to all taxpayers. **Collusion between judge and county commissioners in paying out funds**, *Carman v. Woodruff*, (1882) 10 Or 133; **spending money in execution of void law**, *White v. Commissioners of Multnomah County*, (1886) 13 Or 317, 10 P 484; **payments by county clerk in excess of constitutional amount**, *Wormington v. Pierce*, (1892) 22 Or 606, 30 P 450; **funds spent contra to constitutional provisions not an increase of tax burden**, *Sherman v. Bellows*, (1893) 24 Or 553, 34 P 549; **abuse of discretion by common council in purchasing buildings**, *Avery v. Job*, (1894) 25 Or 512, 36 P 293; **expenditure of public funds for an asylum not detrimental to taxpayer**, *State v. Lord*, (1896) 28 Or 498, 43 P 471; **restrain illegal payments to sheriff**, *Brownfield v. Houser*, (1897) 30 Or 534, 49 P 843; **void contract between county commissioners and a third person in an effort to collect delinquent taxes**, *Burness v. Multnomah County*, (1900) 37 Or 460, 60 P 1005.

A private individual cannot have public officers enjoined from using public funds unless his personal, civil or property rights are being invaded. *Sherman v. Bellows*, (1893) 24 Or 553, 34 P 549; *State v. Pennoyer*, (1894) 26 Or 205, 37 P 906, 41 P 1104, 25 LRA 862; *State v. Lord*, (1896) 28 Or 498, 507, 43 P 471, 31 LRA 473.

If funds have already been misapplied and are gone, the proper party to complain is the injured corporation or the state, either in its own name or on the relation of some proper person. *Brownfield v. Houser*, (1897) 30 Or 534, 49 P 843; *Sears v. James*, (1905) 47 Or 50, 82 P 14.

The state in its sovereign capacity may sue to enjoin the payment of money from the state treasury on a warrant issued in pursuance of an Act claimed to be in violation of the Oregon Constitution, without showing any injury other than that public funds are about to be misapplied. *State v. Metschan*, (1898) 32 Or 372, 383, 46 P 791, 53 P 1071, 41 LRA 692.

Equitable as well as legal estates may be protected by injunction. *Watts v. Spencer*, (1908) 51 Or 262, 94 P 39.

A taxpayer alleging no special injury may not enjoin the calling of a local election, though the election threatened to be held could not be legally held. *Bellarts v. Cleeton*, (1913) 65 Or 269, 132 P 961.

The right of the state to enjoin a nuisance may be delegated to and exercised by a city or other power specially named for that purpose. *Smith v. Silvertown*, (1914) 71 Or 379, 386, 142 P 609.

Prior possession of the premises constitutes prima facie evidence and affords sufficient strength of the plaintiff's title to entitle him to injunction against a mere trespasser. *Camp Carson Min. Co. v. Stephenson*, (1917) 84 Or 690, 165 P 351.

Sale of stock to satisfy an illegal assessment may be

enjoined at suit of a pledgee of the stock. *First Nat. Bank v. Multnomah State Bank*, (1918) 87 Or 423, 170 P 534.

8. Parties

(1) **Joinder**. Joint suit may be brought by owners of different parcels of land to restrain waste on the parcels leased as a whole. *Elliott v. Bloyd*, (1902) 40 Or 326, 67 P 202.

Where all the plaintiffs in an action to enjoin the collection of an assessment for improvements had the same common ground for relief, there was no improper joinder of parties plaintiff. *Dyer v. City of Bandon*, (1914) 68 Or 406, 136 P 652.

(2) **Necessary**. In an action to enjoin the committing of waste, the person from whom the defendant received his interests is not a necessary party. *Roots v. Boring Junc. Lbr. Co.*, (1907) 50 Or 298, 92 P 811, 94 P 182.

Stockholders of a ditch company are not restrained from interfering with a water right where they were not made parties to the action. *Old Mill Ditch & Irr. Co. v. Breeding*, (1913) 65 Or 581, 133 P 89.

9. Substantial necessity of injunction

An injunction will not be granted when the evidence is conflicting and the right doubtful. *Tongue v. Gaston*, (1882) 10 Or 328; *Pacific Tel. Co. v. Salem*, (1907) 49 Or 110, 89 P 145.

The insolvency of the defendant is not sufficient of itself to invoke the jurisdiction of a court of equity. *Parker v. Furlong*, (1900) 37 Or 248, 62 P 490; *Stewart v. Erpelding*, (1915) 76 Or 309, 148 P 1129.

Irreparable damages are such as are repeated or continuing or estimable only by conjecture without any standard. *Bernard v. Willamette Lbr. Co.*, (1913) 64 Or 223, 129 P 1039; *Phipps v. Rogue R. Valley Canal Co.*, (1916) 80 Or 175, 156 P 794.

The insolvency of the defendants need not be alleged in a suit to obtain an injunction where the acts complained of constitute irreparable injury. *Waskey v. McNaught*, (1908) 163 Fed 929.

The drastic remedy of injunction will not be granted to protect water rights unless the appropriation, application and use of the water for the purposes in issue are clearly shown. *Bowen v. Spaulding*, (1912) 63 Or 392, 128 P 37.

An injunction cannot be invoked to decide an academic question. *Bellarts v. Cleeton*, (1913) 65 Or 269, 132 P 961.

An allegation that all defendants except a corporation are insolvent admits that it is solvent and is able to respond in damages. *Miller v. Laneda*, (1915) 75 Or 349, 146 P 1090.

10. Appellate court

The Supreme Court cannot by injunction protect property rights or enjoin acts that might result in damage to litigant. *Livesley v. Krebs Hop Co.*, (1910) 57 Or 352, 97 P 718, 107 P 460, 112 P 1; *Kellaher v. Portland*, (1911) 57 Or 575, 110 P 492, 112 P 1076.

In a case in the appellate court in which a provisional injunction is proper, this section is equally as applicable as in cases in the circuit court. *Livesley v. Krebs Hop Co.*, (1910) 57 Or 352, 97 P 718, 107 P 460, 112 P 1.

Suit to foreclose a mortgage will not be enjoined by the Supreme Court pending an appeal from a decree dismissing a suit to cancel the note and mortgage on the ground of fraud. *Hunt v. Hunt*, (1913) 67 Or 178, 132 P 958, 134 P 1180.

The circuit court of one county by comity will not enjoin execution of a judgment of another, without a showing of gravest urgency. *Hume v. Rice*, (1917) 86 Or 93, 167 P 578.

11. Actions and suits enjoicable

Courts will not interfere to enjoin the passage of a bill on the grounds that the measure is unconstitutional. *Kad-*

derly v. City of Portland, (1903) 44 Or 118, 74 P 710, 75 P 222.

Enactment of improper or unenforceable ordinances is not enjoined if the city council is acting within its powers. *Id.*

When an agent or attorney pays a sum of money to a third person upon a showing of proper title, such third person cannot enjoin an action at law by a principal against the agent or attorney for the money. *Moss Mercantile Co. v. First Nat. Bank*, (1905) 47 Or 361, 82 P 8.

An attorney is not entitled to enjoin dismissal of a proceeding in which he has a contingent interest, even though the intended dismissal is collusive and in fraud. *Jackson v. Stearns*, (1906) 48 Or 25, 84 P 798, 5 LRA(NS) 390.

An accommodation maker of a note is not entitled to injunction against enforcement where he may pay it and collect from the estate of the party accommodated. *White v. Savage*, (1906) 48 Or 604, 87 P 1040.

An award based on fraud or perjury will be set aside in equity and its enforcement permanently enjoined. *Fire Assn. v. Allesina*, (1907) 49 Or 316, 89 P 960.

An injunction against litigation does not interfere with the jurisdiction of the court but operates on the parties, preventing them from taking further proceedings. *Alderman v. Tillamook County*, (1907) 50 Or 48, 91 P 298.

In case of collusion between defendant probate judge and a creditor to unlawfully remove plaintiff as administratrix, a contest and appeal from the order of removal is not such an adequate remedy as to bar the enjoining of vexatious and unjust litigation. *Id.*

An action of forcible entry and detainer will not be enjoined where the defendant alleged that the landlord agreed orally to extend the lease for a year, because this alleged extension can be pleaded as a legal defense. *Donart v. Stewart*, (1912) 61 Or 396, 122 P 763.

A grantor who has re-entered for breach of condition subsequent may have injunction to prevent sale of fixtures as personalty on attachment by the grantee's creditor. *Bay City Land Co. v. Craig*, (1914) 72 Or 31, 46, 143 P 911.

In granting reformation of a contract, the court enjoined further prosecution of an action at law. *Kroschel v. Martin-eau Hotels*, (1933) 142 Or 31, 18 P2d 818.

An injunction was properly granted prohibiting the plaintiff in an action at law from continuing individually where the cause of action was common to many parties and one suit could determine the rights of all. *Logan v. Equitable Trust Co.*, (1934) 145 Or 684, 29 P2d 511.

Where the threatened enforcement of a void ordinance affected the property rights of a party, the enforcement of the ordinance was enjoined. *Aluminum Utensil Co. v. City of No. Bend*, (1957) 210 Or 412, 311 P2d 464.

12. Breach of agreement

Where a contract stipulates for special, unique or extraordinary personal services and breach would not be compensated in damages at law, the court will apply a preventative injunction which will prevent the defendant from selling his services elsewhere during the contractual period. *Cort v. Lassard*, (1889) 18 Or 221, 22 P 1054.

The plaintiff must seek his remedy at law, not equity, when the agreement in question is harsh and onesided. *Miller v. Laneda*, (1915) 75 Or 349, 146 P 1090.

Breach of negative covenants and clauses in deeds restricting the use of real property may be enjoined, though such covenants in law do not constitute assignments or covenants running with the land. *Duester v. Alvin*, (1915) 74 Or 544, 145 P 660.

Where a newspaper route contract provided for arbitration on termination by either party and the carrier could obtain adequate redress by damages thereof, an injunction would not issue for a breach. *Harlow v. Oregonian Pub. Co.*, (1904) 45 Or 520, 78 P 737.

When a grantee took property subject to certain building restrictions for the benefit of the entire district, he was subject to a suit in equity by the other residents who took from the same grantor. *Duester v. Alvin*, (1915) 74 Or 544, 145 P 660.

Where distributor agreed to buy its complete requirement of milk from the association and distributor's future requirements were not ascertainable, an injunction was given to prevent breach by distributor. *Dairy Coop. Assn. v. Brandes Creamery*, (1934) 147 Or 488, 30 P2d 338.

13. Criminal prosecutions

Injunction may be granted against threatened prosecutions under color of void acts if property rights are thereby threatened. *Ideal Tea Co. v. Salem*, (1915) 77 Or 182, 150 P 852, Ann Cas 1917D, 684; *Chan Sing v. City of Astoria*, (1916) 79 Or 411, 155 P 378.

Multiplicity of criminal actions is not alone sufficient to authorize equity to grant an injunction in a cause in which relief could have been obtained at law. *Hall v. Dunn*, (1908) 52 Or 475, 97 P 811, 25 LRA(NS) 193.

The threatened prosecution of a criminal action will not usually be enjoined. *Sherod v. Aitchison*, (1914) 71 Or 446, 142 P 351, Ann Cas 1916C, 1151.

The mere invalidity of a statute or ordinance may ordinarily be interposed as a complete defense to the prosecution. *Id.*

Interference with an owner's easement is enjoined when the injury complained of is irreparable, the intermeddling is continuous or the remedy at law is inadequate. *Nicholas v. Title & Trust Co.*, (1916) 79 Or 226, 154 P 391, Ann Cas 1917A, 1149.

14. Eminent domain

Where payment of compensation for private property taken for public use has been made a condition precedent to the taking, an injunction may issue to prevent the property being used, or to require the use to be abated until compensation has been made. *Willamette Iron Works v. Ore. Ry. & Nav. Co.*, (1894) 26 Or 224, 37 P 1016, 46 Am St Rep 620, 29 LRA 88.

A railroad company has a right to enjoin the taking of part of its right of way for a county road, if that will irreparably injure the railroad company. *Oregon-Wash. R. R. & Nav. Co. v. Castner*, (1913) 66 Or 580, 583, 135 P 174.

Commencement of condemnation proceedings for an unauthorized purpose will not be enjoined where the want of authority could be set up in condemnation proceedings. *Landers v. Van Aukin*, (1915) 77 Or 479, 151 P 712.

15. Invalld judgments and executions

The owner of real property has a right to restrain sale thereof under a judgment against a third party. *Wilhelm v. Woodcock*, (1884) 11 Or 518, 5 P 202; *Lieblin v. Breyman Leather Co.*, (1916) 82 Or 22, 160 P 1167.

Mere inability of a party to perfect an appeal, because of the resignation of the justice of the peace immediately after the trial, is not enough standing alone to call for an injunction against enforcement of the judgment given in the justice court. *Galbraith v. Barnard*, (1891) 21 Or 67, 26 P 1110.

A suit will not lie to enjoin the sale of personal property under execution, unless the property possesses a special value to the judgment debtor alone. *Parsons v. Hartman*, (1894) 25 Or 547, 37 P 61, 42 Am St. Rep 803, 30 LRA 98.

Where an execution is irregularly issued or is being irregularly or oppressively levied, the proper remedy is not an injunction but a motion to quash. *Marks v. Stephens*, (1900) 38 Or 65, 63 P 824, 84 Am St Rep 750.

A sale upon execution will be enjoined in equity when it would constitute a cloud on the title of realty. *Townsend*

v. Chamberlain, (1916) 81 Or 163, 158 P 664, Ann Cas 1918C, 330.

Plaintiff, seeking to enjoin malicious abuse of execution pending appeal from the judgment, must prove a levy subsequent to the notice of appeal and an undertaking to supersede the judgment. *Hume v. Rice*, (1917) 86 Or 93, 167 P 578.

Where judgment was upon an unauthorized appearance, injunction may issue regardless of whether the attorney was responsible financially or acted by collusion. *Handley v. Jackson*, (1897) 31 Or 552, 50 P 915, 65 Am St Rep 839.

16. Nuisances

A private person must allege and prove that he has sustained some private, direct damage other than that suffered by the public. **River overflowing if dam was built**, *Esson v. Wattier*, (1893) 25 Or 7, 34 P 756; **fumes from city garbage dump**, *Wilson v. Portland*, (1936) 153 Or 679, 58 P2d 257; **sewage and factory waste in fishing area**, *Columbia R. Fishermen's Protective Union v. City of St. Helens*, (1939) 160 Or 654, 87 P2d 195.

When a public nuisance especially injures a person in a manner distinct from that suffered by the public, such person may sue in equity to restrain its continuance. *Duester v. Alvin*, (1915) 74 Or 544, 145 P 660; *Columbia R. Fishermen's Protective Union v. City of St. Helens*, (1939) 160 Or 654, 87 P2d 195.

Equity has concurrent jurisdiction over a continuing nuisance and may abate it by injunction without the injured party first obtaining a judgment at law as a condition precedent. *Bourne v. Wilson-Case Lbr. Co.*, (1911) 58 Or 48, 113 P 52, Ann Cas 1913A, 245.

The use of a building as a barn will be enjoined where it appears that it is located in a residential district and is a nuisance there. *Templeton v. Williams*, (1911) 59 Or 160, 116 P 1062, 35 LRA(NS) 468.

Injunction will not be issued to compel the removal of a dam not a nuisance per se which may cause slight overflows upon a highway, where it appears that at most it would not be necessary to entirely remove the dam. *Linn County v. Calapooia Lbr. Co.*, (1912) 61 Or 98, 121 P 4.

A private party cannot enjoin a public nuisance, unless his detriment is irreparable or not fully compensable in damages. *Bernard v. Willamette Box & Lbr. Co.*, (1913) 64 Or 223, 129 P 1039.

A purpresture may be enjoined not only when it becomes a public nuisance but also where a private party has sustained or will sustain a special injury by it. *Wessinger v. Mische*, (1914) 71 Or 239, 142 P 612.

The State Board of Health cannot enjoin a city from casting its sewage and drainage into a stream without evidence of use of the waters for domestic use or for livestock. *Smith v. Silverton*, (1914) 71 Or 379, 142 P 609.

The statutory penalty for polluting a stream is not a bar to a suit for injunctive relief. *Columbia R. Fishermen's Protective Union v. City of St. Helens*, (1939) 160 Or 654, 87 P2d 195.

A private party is estopped to sue a municipality for damages for special injury arising out of a public nuisance having its origin in the operation of a recognized governmental function for the general public good, when the operation with its attendant nuisance existed prior to his acquisition of property in its vicinity, when the nuisance causing the injury was known or should have been known to him at the time he acquired his holding and when the nuisance was not thereafter augmented beyond what might have been reasonably anticipated by him at the time he made his acquisition. *St. Johns Shingle Co. v. Portland*, (1952) 195 Or 505, 246 P2d 554.

The state has the power to abate a public nuisance. *State Sanitary Authority v. Pac. Meat Co.*, (1961) 226 Or 494, 360 P2d 634.

The owner of a town lot suffered peculiar and special damages by the obstruction of part of a public street immediately in front of his premises preventing ingress and egress. *Bernard v. Willamette Box & Lbr. Co.*, (1913) 64 Or 223, 129 P 1039.

When water backed up on adjoining property because of a dam, an injunction was properly granted requiring the removal of that part of the dam causing the overflow. *Dragset v. Mason*, (1917) 84 Or 547, 164 P 376.

17. Official duties and acts

The executive is not subject to control by the courts in the execution of duties requiring the exercise of judgment or discretion, or in political or governmental matters pertaining to and affecting the welfare of the people. *State v. Lord*, (1896) 28 Or 498, 521, 43 P 471, 31 LRA 473.

Malfeasance in office does not justify equitable interference at the suit of a taxpayer. *Sears v. James*, (1905) 47 Or 50, 82 P 14.

Where public officers under mere color and claim of right are proceeding to impair either public or private rights, or when their proceeding will result in injury to private citizens without any corresponding benefit to the public, or when the aid of equity is necessary to prevent a multiplicity of suits, an injunction will be allowed against them. *Taylor Sands Fishing Co. v. State Land Bd.*, (1910) 56 Or 157, 162, 108 P 126.

Injunction will not lie to determine whether commissioners of incorporated ports rightfully hold such offices. *Bennett Trust Co. v. Sengstacken*, (1911) 58 Or 333, 351, 113 P 863.

Officers, constituting a board of commissioners for the sale of school and university lands, may be enjoined from an intended unlawful sale of tide lands already granted by the state. *Corvallis & E. R. Co. v. Benson*, (1912) 61 Or 359, 383, 121 P 418.

Enforcement of the Workmen's Compensation Act, even if unconstitutional, will not be enjoined at the suit of an injured servant where he could test the matter by bringing action either at common law or under the Employers' Liability Act. *Evanhoff v. State Ind. Acc. Comm.* (1915) 78 Or 503, 154 P 106.

The test of jurisdiction to enjoin acts of officers whose duties are of an executive or quasi judicial character is as to the nature of the specific act in question rather than as to the general functions and duties of the officer. *Caples v. McNaught*, (1934) 147 Or 72, 31 P2d 780.

Performance of an executive act or one involving the exercise of judgment on the part of the officer will not be enjoined except in case of a clear abuse of discretion. Id.

The proper remedy for obtaining reinstatement of a police force after wrongful discharge is by mandamus not injunction. *Moulton v. Logan*, (1937) 157 Or 406, 72 P2d 64.

18. Special assessments and taxes

To restrain the collection of a tax, the facts presented must disclose some recognized head of equity jurisdiction or illegality of the tax. *Oregon & Wash. Mtg. Sav. Bank v. Jordan*, (1888) 16 Or 113, 17 P 621; *Yamhill County v. Foster*, (1909) 53 Or 124, 99 P 286.

The plaintiff must have paid or tendered the amount which is admitted, or can be shown, to be legal, to authorize an injunction against collection of a tax. *Goodnough v. Powell*, (1893) 23 Or 525, 528, 32 P 396; *Cannon v. Hood R. Irr. Dist.*, (1916) 79 Or 71, 154 P 397.

Excessive valuation by an illegal method warrants injunction against collection of the tax. *Dalton v. City of East Portland*, (1884) 11 Or 426, 5 P 193.

The rule of equitable estoppel applies where a party has by some act consented to the improvement resulting in the assessment. *Hawthorne v. City of East Portland*, (1886) 13 Or 271, 10 P 342.

In a suit by a taxpayer to enjoin the collection of an excessive assessment, the amount admitted to be due must be deposited with the court to keep the tender good. *Welch v. City of Astoria*, (1894) 26 Or 89, 37 P 66.

To prevent cloud on title, equity will entertain a suit to restrain the sale of realty on void tax process. *Hughes v. Linn County*, (1900) 37 Or 111, 60 P 843.

When the valuation is so grossly excessive that the assessor must know it is not just, an injunction may issue to prevent fraud on the taxpayer. *Oregon & Calif. R. Co. v. Jackson County*, (1901) 38 Or 589, 65 P 369.

Equity will not ordinarily restrain the collection of public revenue for mere illegality or irregularity in the proceeding. *Yamhill County v. Foster*, (1909) 53 Or 124, 99 P 286.

Injunction is the proper remedy where a tax is unauthorized or where a multiplicity of suits might ensue. *Kellaher v. Portland*, (1911) 57 Or 575, 110 P 492, 112 P 1076.

Injunction is proper to restrain a county sheriff from listing property for taxation, where the right to have such property left off the list depends on whether the property is subject to taxation. *Callender Nav. Co. v. Pomeroy*, (1912) 61 Or 343, 122 P 758.

Ordinarily the collection of a special assessment for municipal improvements will not be restrained for mere illegality or irregularity. *Wilson v. Portland*, (1918) 87 Or 507, 169 P 90, 171 P 201.

Where an assessment was without jurisdiction from the beginning, the property owners were not estopped from enjoining the collection because the work had been partly performed. *Jones v. City of Salem*, (1912) 63 Or 126, 123 P 1096; *Dyer v. City of Bandon*, (1914) 68 Or 406, 136 P 652.

Where defendant city did not await the outcome of an appeal from an order erroneously denying an injunction against the city, but completed the improvements in question before the appeal was perfected, an assessment could not be sustained against the appellant for the improvements. *Lais v. Silverton*, (1917) 82 Or 503, 162 P 251.

19. Trespass

A road supervisor acting in good faith cannot be enjoined from taking soil and gravel from neighboring lands for the repair of his roads. *Kendall v. Post*, (1879) 8 Or 141; *Cherry v. Matthews*, (1894) 25 Or 484, 36 P 529.

The general rule is that a mere trespass or waste will not be enjoined, except where injury to the substance of the estate is threatened and damage is irreparable. *Haines v. Hall*, (1888) 17 Or 165, 20 P 831, 3 LRA 609; *Oldenburg v. Claggett*, (1933) 142 Or 238, 20 P2d 234.

Continuous successive trespasses, each comparatively unimportant in itself, with intention to continue may be enjoined. *Stotts v. Dichdel*, (1914) 70 Or 86, 139 P 932; *Columbia R. Fishermen's Protective Union v. City of St. Helens*, (1939) 160 Or 654, 87 P2d 195.

A plaintiff may bring an action for damages in an ejectment proceeding and at the same time maintain a suit for injunction against further damage to the property. *Waskey v. McNaught*, (1908) 163 Fed 929.

An injunction cannot be used to determine title to land. *Hume v. Burns*, (1911) 50 Or 124, 90 P 1009.

Repeated trespasses which might grow into an easement may be enjoined. *Chapman v. Dean*, (1911) 58 Or 475, 115 P 154.

Injunction lies to prevent a repetition of damages reasonably apprehended from threats to continue trespass on realty. *Micelli v. Andrus*, (1912) 61 Or 78, 120 P 737.

Where the acts complained of have been performed in the entirety, an injunction will not lie. *Weigand v. West*, (1914) 73 Or 249, 144 P 481.

Though the defendant claims the locus in quo as a public road in a suit to enjoin repeated trespasses, the trial of that issue at law is not such a complete and adequate remedy

as to bar equity. *Stotts v. Dichdel*, (1914) 70 Or 86, 139 P 932. *But see*, *Tomasini v. Taylor*, (1903) 42 Or 576, 72 P 324.

An unauthorized sewer across one's land is a trespass producing a continuing enjoinable wrong. *Fraser v. Portland*, (1916) 81 Or 92, 158 P 514, 9 ALR 614.

Altering and accelerating the flow and volume of water was a continuing trespass to lands injured thereby. *Oregon-Wash. R. & Nav. Co. v. Reed*, (1918) 87 Or 398, 418, 169 P 342, 170 P 300; *Stephens v. Eugene*, (1918) 90 Or 167, 175 P 855.

The cutting and removal of protective brush and timber on a swale across plaintiff's premises, which would permit a river to erode plaintiff's premises, was enjoinable. *Mathews v. Chambers Power Co.*, (1916) 81 Or 251, 159 P 564.

The removal of cordwood without owner's consent was enjoined. *Sandy Holding Co. v. Ferro*, (1933) 144 Or 466, 25 P2d 561.

20. Unfair competition

Injunction is a proper remedy to protect one's trade name and business from unfair competition. *Danton v. Mohler Barber School*, (1918) 88 Or 164, 170 P 288.

Solicitation of customers of another party in violation of his contractual obligation to refrain therefrom may be enjoined. *Snow Cap Dairy v. Robanske*, (1935) 151 Or 59, 47 P2d 977.

21. Waste

Where there is a privity of estate between the parties, the owner of real property may sue to restrain threatened or partly accomplished waste thereon. *Sheridan v. McMullen*, (1885) 12 Or 150, 6 P 497; *Bishop v. Baisley*, (1895) 28 Or 119, 41 P 936; *Elliott v. Bloyd*, (1902) 40 Or 326, 67 P 202.

A statutory bond in forcible detainer proceeding affords an adequate remedy at law for damages caused by seizing a crop pending the appeal. *Wolfer v. Hurst*, (1907) 50 Or 218, 91 P 366.

22. Appeal

Appeal lies from a decree which not only denies a preliminary injunction but determines the rights of the parties. *Helm v. Gilroy*, (1891) 20 Or 517, 26 P 851.

A peremptory mandatory injunction to perform an official act that constituted the whole relief asked dealt with a substantial right and was appealable. *American Life Ins. Co. v. Ferguson*, (1913) 66 Or 417, 134 P 1029.

In a pure injunction suit where dissolution terminates the suit, appeal from the order will not be dismissed on defendant's motion before the final hearing. *Birkemeier v. Milwaukee*, (1915) 76 Or 143, 147 P 545.

FURTHER CITATIONS: *Ladd v. Ramsby*, (1882) 10 Or 207; *Davenport v. Magoon*, (1884) 13 Or 3, 4 P 299; *Nicklin v. Hobin*, (1886) 13 Or 406, 10 P 835; *Putnam v. Webb*, (1887) 15 Or 440, 15 P 711; *Dawson v. Croisan*, (1890) 18 Or 431, 23 P 257; *White v. Espey*, (1891) 21 Or 328, 28 P 71; *McDonald v. Mackenzie*, (1893) 24 Or 573, 14 P 866; *Rector v. Wood*, (1893) 24 Or 396, 34 P 18; *Garrett v. Bishop*, (1895) 27 Or 349, 41 P 10; *West Portland Park Assn. v. Kelly*, (1896) 29 Or 412, 45 P 901; *Davis v. Silverton*, (1905) 47 Or 171, 82 P 16; *Andrews v. Donnelly*, (1911) 59 Or 138, 116 P 569; *Barnes v. Marshfield & S.R. Co.*, (1912) 62 Or 510, 124 P 672; *Hendry v. Salem*, (1913) 64 Or 152, 129 P 531; *Carruthers v. City of Astoria*, (1914) 72 Or 505, 132 P 899; *Fellman v. Tidewater Mill Co.*, (1915) 78 Or 1, 152 P 268; *First Nat. Bank v. Pac. Tel. & Tel. Co.*, (1916) 81 Or 307, 159 P 561; *Stephens v. Eugene*, (1918) 90 Or 167, 175 P 855; *Winslow v. Fleischner*, (1924) 110 Or 554, 223 P 922; *Crouch v. Cent. Labor Council*, (1930) 134 Or 612, 293 P 729.

LAW REVIEW CITATIONS: 38 OLR 346, 347; 1 EL 84.

32.050

NOTES OF DECISIONS

The granting or refusal of restraining orders rests in the sound discretion of the court and this discretion must be exercised in accordance with the principles of equity and good conscience. *Coopey v. Keady*, (1916) 81 Or 218, 139 P 108.

LAW REVIEW CITATIONS: 38 OLR 346.

32.060

NOTES OF DECISIONS

The merits cannot be considered in passing on a motion to vacate a restraining order. *Coopey v. Keady*, (1914) 81 Or 218, 139 P 108.

A restraining order reinstated on appeal from final decree which vacated it will not be dissolved because the merits of plaintiff's case are doubtful, if security has been required and no great inconvenience will be suffered. *Id.*

Whether or not a justice of the Supreme Court who granted a temporary order staying an action at law abused his discretion is not involved on motion in the Supreme Court to dissolve it. *Noyes-Holland Logging Co. v. Pac. Livestock & Lbr. Co.*, (1917) 84 Or 386, 165 P 236.

In a case of urgent necessity, a judge need not notify

the person proceeded against before a preliminary injunction will issue. *Forte v. Page* (1943) 172 Or 645, 143 P 669.

A complaint which prays for a decree declaring an act unconstitutional can be treated as a request for a declaratory judgment, even though the purpose of the suit is to prevent injury to property rights. *Miles v. Veatch*, (1950) 189 Or 506, 220 P2d 511, 221 P2d 905.

Where all parties in an action in ejectment are solvent, the court will not continue an injunction preventing the prosecution of the law action. *Id.*

On appeal complaint could not be made of an order modifying a temporary injunction without notice where it appeared that plaintiff was entitled to no injunction. *Wolfer v. Hurst*, (1907) 50 Or 218, 91 P 366.

An injunction against a nuisance by burning sawmill waste, which was too onerous in area covered, was modified by permitting use of a suitable furnace or appliance which would prevent nuisance. *Bourne v. Wilson-Case Lbr. Co.*, (1911) 58 Or 48, 113 P 52, Ann Cas 1913A, 245.

A restraining order prohibiting the defendants from disposing of the land received on exchange should be dissolved where it was granted in aid of an action to recover the value of the land. *Burggraf v. Brocha*, (1915) 74 Or 381, 145 P 639.

ATTY. GEN. OPINIONS: Status of preliminary injunction after dismissal of suit, 1956-58, p 265.