Supreme Court of Vermont. In Chancery.

GEORGE HOWE *v.* CHARLES B. EDDY AND WALTER TAYLOR.

By the chancery practice of Vermont, where an injunction is awarded, and the complainant takes out a subpœna returnable to the next term of the court, but neglects to get it served in time, the injunction is not thereby dissolved, but a new subpœna may be issued returnable to the next succeeding term.

The respondent may, however, come in at any time, and apply for an order to have the subpœna and bill served on him in order to allow him to answer, or he may move to dissolve the injunction on account of the complainant's delay, or invoke any other action of the court necessary to protect his rights.

RULE on defendants to show cause why they should not be dealt with for contempt of court in disregarding an injunction. Before Chancellor BARRETT, at the General Term of Supreme Court, November 1867, PIERPONT, C. J., PECK, WILSON, and STEELE, JJ., hearing the argument as advisers.

The complainant, in August 1867, was in possession of the law library of the late Hon. William C. Bradley, under a claim of title. One Henry A. Willard, as executor of Mr. Bradley's will, claimed the right, and was about to use a writ of replevin, to take possession of the said library. On the 7th of August 1867, complainant obtained an order, made by Chief Justice PIERPONT as Chancellor, in pursuance of which, on the 8th day of August, the clerk of the Court of Chancery issued a writ of injunction restraining Willard and all persons acting under him from removing the library from the possession of complainant during the pendency of said writ, or until the dissolution of said injunction, or until such further order as the court should make in the premises.

The defendant Eddy, as attorney of Willard, had taken out a writ of replevin; and on the 9th of August went to Brattleboro, where complainant resided and kept the library, for the purpose of having the writ served. On presenting it to Mr. Herrick, a deputy sheriff, he was told that complainant had put in his (Herrick's) hands a bill in chancery and injunction, with directions to serve said injunction on any one whom he should see meddling with the library; and he then exhibited them to Eddy, who examined them. The bill was the one presented to the Chancellor, upon which the order for said injunction, issued by the clerk as aforesaid, was made; and the injunction was the one so issued.

The bill had been filed by the clerk on said 8th day of August, pursuant to the order of the Chancellor, and his certificate of such filing was duly indorsed thereon. A subpœna, dated the same day, signed by the clerk in common form, was appended to said bill, returnable to the September Term of the court, which was to commence on the 10th day of that month. Upon such examination Mr. Eddy concluded not to have said writ of replevin served. Mr. Willard was a resident of Hudson, New York, or Washington, D. C., but was spending the summer in Charlestown, N. H., and was often at Bellows Falls and Westminster, and occasionally at Brattleboro, in said county of Windham, during said month of August. Considerable evidence was exhibited in the case, showing various propositions by Mr. Eddy to complainant for some arrangement for having the bill and injunction served on Mr. Willard; and considerable conflicting evidence as to complainant's expressions of a purpose not to have the same served, unless Mr. Willard, by himself or his agents, should undertake to get possession of the library. The decision of the case, however, did not depend on these facts.

The bill and subpœna were not served seasonably for said term of the court, no arrangement having been made in that behalf, and Willard not having been found within the state by the deputy sheriff. The last day for the legal service of the subpœna was the 29th of August. On the next day complainant procured a new subpœna of the clerk, dated on that day, returnable to next April Term of said court, and substituted it for the one originally appended to said bill, and replaced the papers in the hands of said Herrick, with the same instructions as before. The defendant Eddy being of opinion that said injunction had become inoperative and void by the failure of service of the same with the bill and subpœna upon Mr. Willard seasonably for September Term, and Mr. Willard having been advised by counsel to the same effect, on the 6th day of September, caused a writ of replevin in his favor against complainant, to be put into the hands of the other defendant, Taylor, sheriff of said county, with directions to replevy said library. Eddy accompanied Taylor, at his request, to Brattleboro for that purpose. On arriving there it was found that complainant was absent, and that said library was locked up in his office, and the key not to be found. Taylor procured another key and unlocked the door, and he and Eddy went in

and began to take the books down from the shelves, preparatory to taking them away by virtue of said writ. While they were thus in the process of taking down the books, Herrick the deputy sheriff saw them, and at once forbade them to remove the books, telling them that he had said bill and injunction, which he then showed them, and which they took and made some examination of and passed back. Eddy signified that he regarded the injunction as of no effect for the reason aforesaid, and that he should have the writ of replevin served by the taking of said library. Thereupon Taylor and Eddy proceeded to take and remove said library, and it still remains in the hands of said Taylor. At the September Term of said court complainant filed his petition in said court for an order on said Eddy and Taylor, to show cause why they should not be dealt with for *contempt*. Such order was issued, and evidence was taken showing the facts aforesaid.

H. H. Wheeler, for the orator, cited Gen. Stat. 249, §§ 15, 19; *Payne* v. *Cowan*, 1 Sm. & M. Ch. Rep. 26; Hilliard on Inj. 111, § 90 a, 92; 4 W. C. C. Rep. 174; *Turner* v. *Scott*, 5 Rand. Rep. 332; *Harrington* v. *Am. Ins. Co.*, 1 Barb. 224; *Hightour* v. *Rush*, 2 Hay's Rep. 361; *Baird* v. *Moses*, 21 Ga. Rep. 249; *West* v. *Smith*, 1 Green Rep. 309; *Depeyster* v. *Graves*, 2 Johns. Ch. Rep. 148; 2 Green Ch. Rep. 458–9; *Moat* v. *Holbien*, 2 Edw. Ch. 88; *Partington v. Booth*, 3 Meriv. Rep. 148; Barb. Ch. Pr. 636; 4 Paige's Ch. Rep. 163; 8 Id. 45; Hilliard on Inj. 142.

C. B. Eddy and *H. E. Stoughton*, for respondents, cited Hilliard on Inj. 149, § 32; *Elliot* v. *Osborne*, 1 Cal. Rep. 396; 1 Barb. Ch. Pr. 631, 633, 634; *Skip* v. *Howard*, 3 Atk. 564; *Hearne* v. *Tenant*, 14 Ves. 136; Smith's Ch. Pr. 623–4; *James* v. *Downes*, 18 Ves. 522; 3 Dan. Ch. Pr. 1773, 1775, 1783; Gen. Stat. 253, § 55; Hilliard on Inj. 520; Gen. Stat. 249, §§ 19–20; 4 Paige 439; 5 Id. 85; 2 Mad. 225; Rule 26 in Chancery.

BARRETT, Chancellor, after stating the facts.—The views now to be expressed are concurred in by all the judges who heard the argument.

A primary, and, to a considerable extent, a controlling question is, whether the failure to have service made on Willard season-

ably for the term to which the first subpœna was made returnable, worked a discontinuance of the proceeding, so that the order of the Chancellor, and the injunction issued in pursuance of it, became vacated and void. Our statute, ch. 29, § 55, enacts that "no injunction shall be issued in any case until the bill shall have been filed." Sect. 56: "The issuing of a subpœna, attached to a bill, shall be deemed the filing of the bill." It was not the purpose of the latter section to exclude any other mode of filing a bill, but rather to provide a mode by which, for the purpose of issuing an injunction, it might be regarded as filed, without requiring it actually to be filed in court according to the law and practice independently of the statute. This is evident from other provisions of the same chapter. For instance, in sect. 21, when the defendant is out of the state, so that the subpœna cannot be served on him, the complainant may file his bill or petition in the office of the clerk, and the clerk shall issue an order to be published three weeks successively, the last publication to be at least twenty days previous to the term at which the defendant is required to appear. It is beyond question that in such a case, upon a bill thus filed, a subpœna need not be attached, and still the bill would be *filed*, so as fully to comply with the statute requiring it to be filed before an injunction should be issued. For it will hardly be suggested that an injunction might not as well be granted against a non-resident defendant (his agents, servants, and attorneys), upon whom, by reason of his non-residence, a subpœna could not be served, as against a resident, on whom a subpœna could be served. This would strongly indicate that the 19th and 20th sections of ch. 29 were not designed to make, as is claimed, the bill and subpœna *one process*. In the present case it would have been legitimate for complainant to file his bill in the clerk's office, and not have a subpœna appended, and to take an order for notice to be published, calling on the defendant to appear and answer at the next April Term, instead of the September Term, as, at the time he applied for the injunction, there was not sufficient time to give notice in that way for the September Term. He, however, did take a subpœna, and that was, as it must have been, made returnable to said September Term. He, at the same time, had his bill actually filed, and the certificate thereof duly indorsed on it by the clerk. If he should get the subpœna seasonably served, he would not need to resort

to any other mode of service; but if he should not, it would seem to be a strange effect to give to the fact of his taking a subpœna and failing to get it served, to hold that thereby he lost any right that he would have had if he had not taken such subpœna. Sections 19 and 20 do not purport to make the bill and subpœna one process. Sect. 19 provides that process issued out of the Court of Chancery shall be signed by the clerk or a chancellor, without defining what shall constitute *process*. It may be *original*, as a subpœna. It may be *final*, as an execution. It may be a writ of sequestration, or it may be an injunction. Sect. 20 only provides that the *original* subpœna, with the bill, shall be served in the same manner as writs of summons. That obviously is designed to apply to cases in which service is to be made for the purpose of bringing the party into court to answer the bill, and await upon the proceeding in due course of ordinary litigation in that court, and only to cases in which the subpœna and service of it constitute the only mode of effecting that purpose. It does not undertake to connect the two as necessary to constitute the *process* meant in the preceding section, but only to prescribe the mode in which the *subpœna* shall be served for the purpose intended, viz.: it shall be served with the bill. In the English chancery law the subpœna is entirely distinct from the bill for all purposes. The bill is filed in the court before any subpœna is issued. It is issued in pursuance of the prayer of the bill thus filed, and its office is to compel the defendant to appear and answer the same: (see Smith's Ch. Pr. 110). There is an exception to the necessity of having the bill filed before subpœna is issued, when the bill prays that an injunction may be awarded against the defendant; in which case it is sufficient if the bill be filed on or before the day on which the subpœna is made returnable: (see Id.). The subpœna alone is served, the bill remaining on file; and successive subpœnas may be obtained to meet the various exigencies that may require this to be done in the progress of the cause. Various considerations of supposed inconvenience and injury likely to result to the defendant have been suggested, as reasons why the court should hold as claimed by the respondents. But they do not seem to be well grounded. When a bill has been presented to a chancellor for some preliminary or interlocutory order warranted by the law, the cause is then to be regarded as pending in court for all purposes arising

from or incident to such order; and for all such matters the court is at all times open and accessible to all the parties affected thereby. If an order has been obtained *ex parte*, which affects the other party, and he has knowledge of it, he may at once, and at any stage, come before the court with any proper application in the premises, and invoke any action by the court that may be proper to secure his rights and serve his convenience. If, for instance, an injunction has been obtained which operates upon his interests, without having been served on him with the subpœna and bill, and which he desires to have dissolved, and in order thereto it is necessary for him to answer the bill, on application to the Chancellor he could obtain an order that the subpœna with the bill should be served, or a copy of the bill furnished to him by a time named. In the present case, Mr. Willard, having been fully apprised of the existence of the bill and injunction, which had not been served on him seasonably for the September Term, might have appeared in court at that term, and moved to have the cause entered on the docket, and it would have been so ordered; and then it would have stood, for all proper proceedings, the same as if the bill and injunction had been formally served. If there had been improper delay in the service of the bill or of the injunction, he might have appeared before the Chancellor and moved for the dissolution or discharge of the injunction. The cause was in fact pending in the court from the time the Chancellor made the order for issuing said injunction. But, though the defendant was not *bound* to appear and answer to it, still he was at liberty to do so, and it would not have been permissible for the orator to object.

Without taking further time to discuss or illustrate this aspect of the case, in the opinion of the court, the failure to serve the original subpœna with the bill and injunction did not work a discontinuance affecting the validity and force of the order of the Chancellor, or of the injunction issued in pursuance of it, and the same, notwithstanding such failure, were in force at the time said injunction was exhibited to the respondents by the deputy sheriff on the occasion of taking away said library.

The evidence is satisfactory that the complainant did not intend to discontinue his bill, or the order and process of injunction, and we think that the course he pursued did not work such a result.

This brings us to the inquiry, whether, even if it were shown

that he improperly delayed to have said papers served, to such an extent as to constitute adequate ground for a dissolution of the injunction, on motion for that cause, it was lawful, or justifiable, for the respondents to disregard, and act in violation of it. On this point there seems to be entire uniformity in the text-books and cases: 3 Dan. Ch. Pr. 1782. "Although an injunction be irregularly obtained, it is still an order of the court, and must be discharged before it can be disobeyed." Edw. on Inj. 102; Barb. Ch. Pr. 636; Edwards' Ch. Rep. 188, and note. No case or book has been cited showing that, in any case, does mere impropriety in using an injunction work a dissolution or discharge of it, and leave a party, who is so charged with knowledge of it as to be amenable for contempt if he violates it, at liberty to violate or disregard it. The most that has been held is, that such impropriety may be good cause for a dissolution or discharge on motion: 3 Dan. Ch. Pr. 1783 (note 3), and cases cited; 2 J. C. Rep. 204; 5 Paige 85; 1 Hopkins 342. In the case of *James* v. *Downes*, 18 Ves. 522, the plaintiff, after obtaining an order, neglected for four months to have it drawn up or served. Lord ELDON would not proceed for contempt against the other party, who, after that lapse of time, acted in disregard of it, his only knowledge of it being that he was present at the hearing of the motion. In Drewry on Inj. 399, in remarking on that case, it is said, "The distinction seems that the defendant shall not escape the process, if he heard the motion, merely by turning his back upon the court so as not actually to hear it pronounced; but that, on the other hand, the order is not to be kept suspended over his head for an indefinite length of time." That case does not apply to this, for the reason that the defendant, Willard, had full knowledge of the bill and injunction, and Eddy, his attorney, had seen it on the 9th of August, and he and Taylor both knew of and saw it on the 6th day of September, before they took the books, when it was presented to them as being in force to restrain them from so doing; and for the still other reason, that, in view of all that appears in the case, Willard did not put himself in position to entitle him to claim that complainant had unreasonably delayed making service of the bill. His knowledge of the bill and injunction charged him with the duty of regarding said injunction, and it was so known to, and served upon the respondents as to charge them with the same duty: *Lawes* v. *Morgan*, 5 Price

Rep. 518. The defendant in the bill being non-resident in the state, it appertained to him, under the circumstances, to show that he had exposed himself to service to the knowledge of the orator or the officer holding the papers, so that service might have been made on him with reasonable convenience, without bargaining or watching for an opportunity. Indeed, no question is made, but that the defendant, as well as the respondents, had sufficient notice and knowledge of the injunction to render it operative upon them, provided it was in force at the time the respondents took the library. The cases cited in their behalf bear in their favor only as touching the order that the court should make as to punishment, by fine or otherwise, for the violation of said injunction: see *Partington* v. *Booth*, 3 Meriv. 148; 4 Paige 444. In this case it is not claimed, or shown, that the respondents acted with intent of violating or disregarding an injunction that was in force. They acted upon the honest, though erroneous opinion, that the injunction had expired. In so doing they violated the legal rights of the complainant. Full satisfaction to the complainant and to the court will be made by the restoration of the library to the possession of the complainant, in the place and condition from which it was taken by the respondents. A proper order will be made to effect such restoration.

United States Circuit Court for Wisconsin. Nov. Term 1867.

JOHN GREENING, OWNER OF SCHOONER PERSEVERANCE, *v.* SCHOONER GREY EAGLE.[1]

The fact that one vessel carries a prohibited light does not absolve another from the observance of the caution and nautical skill required by the exigencies of the case.

Although a *white* light usually represents a vessel at anchor, an omission to watch the light and ascertain from its bearings whether the vessel is in motion, is a neglect of ordinary care and skill, and makes the collision the result of mutual fault.

There may be circumstances under which a vessel that is unable to show the proper lights may nevertheless continue her voyage at night. Per DAVIS, J.

THIS was a libel for collision, first tried at Milwaukee in the

[1] We are indebted for this case to the courtesy of J. D. Cleveland, Esq.—ED. AM. LAW REG.