



UNC
SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 9 | Number 1

Article 18

12-1-1930

Equity -- Injunction to Prevent Garnishment of Wages -- Effect of Usury

H. B. Parker

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>



Part of the [Law Commons](#)

Recommended Citation

H. B. Parker, *Equity -- Injunction to Prevent Garnishment of Wages -- Effect of Usury*, 9 N.C. L. REV. 71 (1930).

Available at: <http://scholarship.law.unc.edu/nclr/vol9/iss1/18>

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

In all cases where malice or want of probable cause is absent, no liability exists apart from the injunction bond and recovery is limited to the penal sum thereof.¹⁴ In North Carolina, the judgment dissolving the injunction carries with it a judgment for damages against the parties procuring it and the sureties on the undertaking, to be ascertained by reference or otherwise as the judge directs.¹⁵ But there can be no assessment of damages until the final determination of the cause in which the injunction is obtained.¹⁶ A motion for damages must be made at or before the time the final judgment is entered and no separate action can be maintained upon the bond.¹⁷ This procedure raises difficult problems where a foreclosure sale is restrained and the injunction continues until the final adjudication. In such cases it will be necessary to assess damages before there can be a sale. It must be shown that the debt, interest, and costs will not be realized on a sale and that the value of the security has been impaired. An actual sale is the easiest and most reliable way to establish this. The difficulty is obviated by permitting a separate action on the bond after the sale has taken place.¹⁸

T. C. SMITH, JR.

Equity—Injunction to Prevent Garnishment of Wages— Effect of Usury

In a recent Georgia case,¹ a wage earner sought an injunction against the enforcement of a "sale of wages" given as a security for a loan alleged to have been usurious, on the ground that the plaintiff would lose his job if garnishment proceedings were brought. The

¹⁴ 10th Ward Rd. District v. Texas and Pac. Ry. Co., 12 F. (2d) 245; 45 A. L. R. 1513 (C. C. A. 5th, 1926); Mark v. Hyatt, 135 N. Y. 306, 31 N. E. 1099; 18 L. R. A. 275 (1892); McAden v. Williams, 191 N. C. 105, 131 S. E. 375 (1926); Nausemond Timber Co. v. Rountree, 122 N. C. 51, 29 S. E. 61 (1898).

¹⁵ N. C. ANN. CODE (Michie, 1927) §855.

¹⁶ Raleigh and Western Ry. Co. v. Glendon and Gulf Mining and Manufacturing Co., 117 N. C. 191, 23 S. E. 181 (1895); Thompson v. McNair, 64 N. C. 448 (1870) (an injunction is an ancillary remedy and until the final determination of the cause, it cannot be said as a matter of law that the order was not rightfully obtained).

¹⁷ Crawford v. Pearson, 116 N. C. 718, 21 S. E. 561 (1895); Shute v. Shute, 180 N. C. 386, 104 S. E. 764 (1920). See McCall v. Webb, 135 N. C. 356, 365, 42 S. E. 802, 805 (1904).

¹⁸ Okla. Cotton Growers Ass'n v. Hooven, *supra* note 13; Belmont Mining Co. v. Costigan, *supra* note 4; Gibson v. Reed, *supra* note 4. In the absence of a statute permitting damages to be recovered in the same action, they cannot be allowed. Chicago, R. I. & P. Ry. Co. v. Dey, 76 Iowa 278, 41 N. W. 17 (1888); American Bonding Co. v. State, 120 Md. 305, 87 Atl. 922 (1913).

¹ Lawrence v. Patterson, 153 S. E. 29 (Ga. 1930).

defendants filed demurrers, pleas and counter-claims for the full amount of the wages assigned. Upon an auditor's finding in favor of defendants, *held*, injunction denied unless plaintiff first pay principal and lawful interest, as "he who comes into equity must do equity"; and lenders' counter-claim allowed. The Chief Justice dissented.

Nearly all of the decisions agree with the principal case that when a debtor seeks to enjoin the enforcement of a usurious loan, he "must do equity" by paying into court the amount lawfully due, including principal and the legal rate of interest.² And the same view is taken whether the security given is an assignment of wages³ or a mortgage. On its face, this might seem fair enough. There were in the principal case, however, a number of factors which cast doubt on the fairness of this requirement in wage assignment cases generally.

It should first be noted, however, that the announced condition to an injunction that the plaintiff pay the legal rate of interest as well as the principal, when the Georgia statutes⁴ provide for the forfeiture of all interest on usurious loans, is misleading. This was uttered in connection with a finding that the loan was not usurious. And the judgment on the counter-claim, actually affirmed, did not speak in terms of principal and interest but was for the total wages for a given period on the theory that the title thereto had passed to the defendants and that the plaintiff by taking the wages had converted them. This assumes, as does the defendants' own description of themselves as "buyers of salaries" that the loans were never expected to be paid.

The statute permitted but $3\frac{1}{2}\%$ per annum on loans of less than \$300.00. It was alleged that the usury came into the case by the method of charging for renewals of loans in short periods of less than thirty days, and that "petitioner signed papers for the defendants without reading the same, knowing that they were made out as only a part of a scheme and a device to defeat the usury laws, by signing

² *Mortgage Securities Corp. v. Levy*, 11 F. (2d) 270 (C. C. A. 5th, 1926); *Polite v. Williams*, 149 Ga. 726, 10 S. E. 791 (1920); *Poulk v. Cario Banking Co.*, 158 Ga. 338, 12 S. E. 292 (1924); *Carver v. Brady*, 104 N. C. 220, 10 S. E. 565 (1889); *Owens v. Wright*, 161 N. C. 127, 76 S. E. 735, ANN. CAS. 1914D, 1021 (1912); LAWRENCE, EQ. JUS. (1929) §1089; POMEROY, EQ. JUS. (4th ed.) §§391, 937.

There is some authority for the proposition that a penalty for usury provided by statute may be deducted from the principal and legal rate of interest. *Lewis v. Hickman*, 200 Ala. 672, 77 So. 46 (1917); *Union Bank v. Bell*, 14 Ohio St. 200 (1862); *Yonack v. Emery*, 13 S. W. (2d) 677 (Tex. 1929).

³ *Patterson v. Moore*, 146 Ga. 364, 91 S. E. 116 (1917); *Roberts v. Penn. Loan and Trust Co.*, 39 Pa. Super. Ct. 358 (1909); *cf. Cox v. Hughes*, 10 Cal. App. 553, 102 Pac. 956 (1909).

⁴ GA. ANN. CODE (Michie, 1926) §§3438, 3439.

the same because he needed the money." There were eight of these "buyers of salaries" from whom the plaintiff had borrowed a number of sums ranging from \$5.00 to \$15.00 each over a year's time. Although the defendants in their counter-claim had raised a legal issue on which plaintiff was by the Constitution entitled to a jury,⁵ the case was referred to an auditor. The plaintiff excepted on the ground, among others, that the auditor was prejudiced against enforcement of the small loans of the state, and was disqualified because other loan companies were clients of his law office. Finally, it was alleged that the service of the wage assignment on the employer would cause plaintiff to lose his position. The court objected that the allegation was too general, in that it did not set out facts to show petitioner would lose his position or be irreparably injured. But in an earlier Georgia case,⁶ plaintiff had failed although he set out a contract of employment in which the plaintiff was to be discharged, if garnishment or wage assignment papers were ever served.

This characteristic failure⁷ to investigate the actualities of economic duress and of the effects of garnishment proceedings in connection with the small loan business is, doubtless, the reason for remedial legislation in Massachusetts⁸ and Minnesota⁹ and for the drastic action of the California¹⁰ and Kansas¹¹ courts, which last year, upon injunction proceedings brought by the Attorney General, stopped the operation of a "loan-shark" business as a public nuisance.

H. B. PARKER.

Equity—Injunction to Restrain Enforcement of Municipal Ordinance

An ordinance imposed an occupation tax upon persons engaged in the business of delivering gasoline and oils from wagons or trucks. Plaintiff failed to pay this tax and defendant caused a levy to be made

⁵ GA. CONST., §18, par. 1; CLARK, CODE PLEADING (1928) 64.

⁶ Patterson v. Moore, *supra* note 3.

⁷ Lisle, *A Widespread Form of Usury: The "Loan-Shark"* (1912) 3 J. CRIM. L. 167; Hodson, *Ideal Anti-Loan Shark Statute* (1919) 10 J. CRIM. L. 129.

⁸ ACTS MASS. (1911) c. 727, §13; Thomas v. Bunce, 223 Mass. 311, 111 N. E. 871 (1916).

⁹ MINN. STAT. (Mason, 1927) §7040; Trauernicht v. Kingston, 136 Minn. 445, 195 N. W. 278 (1923).

¹⁰ People *ex rel* Stephens v. Seccombe, 284 Pac. 725 (Cal. App. 1930); (1930) 18 CALIF. L. REV. 328.

¹¹ State v. McMahon, 280 Pac. 906 (Kan. 1929); (1929) 15 CORN. L. Q. 472; (1929) 43 HARV. L. REV. 499; (1929) 28 MICH. L. REV. 939.