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never been under her control, a presumption of gift does not arise.¹⁸ The use by the husband of income from the wife's separate estate is sometimes presumed a gift,¹⁹ even in those jurisdictions where a transfer of other property of the wife is presumed to be a loan,²⁰ likewise, where either spouse improves realty of the other.²¹

The rule that a loan is presumed is based upon the realization that a wife commonly intrusts the management of her business to her husband,²² and the rule that a gift is presumed, upon the contention that "emancipated" woman is afforded the same opportunity to protect her property rights as is her husband.²³

It is submitted that the instant case is not in harmony with the true intent and purposes of the married women's acts, for it gives woman a legal equality which strips her of actual equality. If her husband gains control of her property, she has the burden of showing it was not given to him. The cases holding that a presumption of a loan arises recognize that husbands do use their position to gain control of property of their wives; and those cases protect the actual independence of the wife and her property by placing on the husband or his creditors the burden of showing it was given to him.

A. E. GARRETT, JR.

Injunctions—Prerequisites for Preliminary Mandatory Injunctions.

Petitioner, executor under a will, was removed for his refusal to comply with a court order to account for \$80,000 worth of the estate's government bonds which he claimed to be his own. Upon

¹⁸ *Morris v. Westerman*, 79 W. Va. 502, 92 S. E. 567 (1917), 3 A. L. R. 1237 (1919); 12 R. C. L. 928.

¹⁹ *Adoue v. Spencer*, *supra* note 15.

²⁰ *Colangelo v. Colangelo*, *supra* note 15; *Haymond v. Bledsoe*, 11 Ind. App. 202, 38 N. E. 530, 54 Am. St. Rep. 502 (1894); *Estate of Hauer*, 140 Pa. 420, 21 Atl. 445, 23 Am. St. Rep. 245 (1891); 13 R. C. L. 1387; see *Etheredge v. Cochran*, *supra* note 15, at 685.

²¹ *Am. Finance Co. v. Leedy*, *supra* note 17. Improvements made during marriage on separate property of either spouse, although with community funds, belong to spouse owning the separate property. *Dunn v. Mullan*, 211 Cal. 583, 296 Pac. 604 (1931), 77 A. L. R. 1015 (1932). Expenditures by either spouse on the other's property presumed gifts, therefore not basis for equitable lien. *Nixon v. Nixon*, 100 N. J. Eq. 437, 135 Atl. 516 (1927); *Anderson v. Anderson*, 177 N. C. 401, 99 S. E. 106 (1919). Husband's payment of mortgage indebtedness on property taken by entireties presumed gift so far as wife was relieved of contribution. *Cunningham v. Cunningham*, 158 Md. 372, 148 Atl. 444 (1930).

²² *Etheredge v. Cochran*, *supra* note 15.

²³ *Brunswick Bank & Trust Co. v. Valentine*, *supra* note 17, at 571.

affidavits of petitioner's insolvency and fraudulent conduct, the court granted a preliminary mandatory injunction requiring petitioner to surrender the bonds to a receiver appointed by the court. The West Virginia Supreme Court of Appeals denied petitioner's application for a writ of prohibition to restrain the enforcement of the decree.¹

Preliminary injunctions are issued for the purpose of preserving and protecting the *status quo* until final determination of the rights of the parties.² While a few cases hold that an interlocutory injunction can only be preventive or prohibitive,³ it is generally held that equity may in a proper case thus compel the performance of an affirmative act.⁴ But such power is never exercised, except in a case of urgent necessity where there is injury or prospective injury to a clear right and where there is no other adequate remedy for complainant, who has acted promptly and in good faith.⁵ Conversely, where the propriety of the relief is doubtful it will be denied.⁶

Preliminary mandatory injunctions have been most frequently issued where an easement or right of way, or water course, public or private, has been unlawfully obstructed to complainant's irrep-

¹ State *ex rel.* Donley v. Baker, Judge, 164 S. E. 154 (W. Va. 1932).

² Toledo, etc., R. Co. v. Pennsylvania Co., 54 Fed. 730 (N. D. Ohio 1893), appeal dismissed, 150 U. S. 393, 14 Sup. Ct. 123, 37 L. ed. 1120 (1893); Powhatan Coal & Coke Co. v. Ritz, 60 W. Va. 395, 56 S. E. 257, 9 L. R. A. (N. S.) 1225 (1906); BISPHAM, PRINCIPLES OF EQUITY (10th ed. 1923) §400.

³ In Audenreid v. Philadelphia etc., R. Co., 68 Pa. St. 370, 375, 8 Am. Rep. 195, 196 (1871), Judge Sharswood declared ". . . the authorities, both in England and this country, are very clear that an interlocutory or preliminary injunction cannot be mandatory." But see Klein, *Mandatory Injunctions* (1898) 12 HARV. L. REV. 95, where the author pictorially presents the case for preliminary mandatory injunctions, with especial emphasis on English cases.

World's Columbian Exposition Co. v. Brennan, 51 Ill. App. 128 (1893) (obstruction of public way); Rogers Locomotive Works v. Erie Ry. Co., 20 N. J. Eq. 379 (1869) (possible exception in case of obstruction to easement); to the effect that a court cannot compel the undoing of an act, see Washington Univ. v. Green, 1 Md. Ch. 97 (1847); Note (1890) 6 L. R. A. 855, 857.

As to statutory prohibition of mandatory injunctions, see GA. CODE ANN. (Michie, 1926) §5499. But see (1931) 17 VA. L. REV. 810, 813-814.

⁴ Toledo, etc., R. Co. v. Pennsylvania Co., *supra* note 2; Pokegama Sugar-Pine Lumber Co. v. Klamath River Lumber Co., 86 Fed. 528 (C. C. N. D. Cal. 1898); Leakesville Mills v. Spray Water Power and Land Co., 183 N. C. 511, 112 S. E. 24 (1922); cases cited in 32 C. J. 24, §7, note 45; Klein, *supra* note 3. Note (1886) 20 Am. Dec. 389, 398.

⁵ POMEROY, EQUITY JURISPRUDENCE (4th ed. 1919) §1359; see cases cited *infra* notes 8-16; especially is this so where the act complained of is willful and fraudulent; Popham v. Wright, 229 S. W. 335 (Tex. Civ. App. 1921).

⁶ National Docks, etc., R. Co. v. Pennsylvania R. Co., 54 N. J. Eq. 10, 33 Atl. 219 (1895) (crossing over another railroad, injunction granted in part); Florida E. C. Ry. Co. v. Taylor, 56 Fla. 788, 47 So. 345 (1908) (operation of spur track off regular line).

arable injury. In such instance equity will order the removal of the obstruction.⁷ Especially is this so where the obstruction was in violation of a court order.⁸ Ordinary encroachments will not usually be disturbed before final hearing,⁹ but where one has unlawfully torn down a structure he may be compelled to restore it.¹⁰ Pending final hearing, real or personal property will not be transferred from one party to another except where the defendant wrongfully obtained possession and the complainant acted promptly.¹¹ However, the de-

⁷ *Cole Silver Min. Co. v. Va. & Gold Hill Water Co.*, 1 Sawy. 685, Fed. Cas. No. 2990 (C. C. D. Nev. 1871) (diversion of subterranean stream used by complainant); *Johnson v. Superior Court of Tulare County*, 65 Cal. 567, 4 Pac. 575 (1884) (diversion of water by dam); *Ryan v. Weiser Valley Land & Water Co.*, 20 Idaho 288, 118 Pac. 769 (1911) (alternative of restoring dam or paying \$2,500 and continuing the injury); *Schneitzius v. Bailey*, 45 N. J. Eq. 178, 13 Atl. 247 (1888) (obstruction to ravine as water course); *Carpenter v. Gold*, 88 Va. 551, 14 S. E. 329 (1892) (boundary stream watering complainant's stock).

Williamson v. McMonagle, 9 Del. Ch. 380, 83 Atl. 139 (1912) (windbreak across alley used thirty years); *Zetrouer v. Zetrouer*, 89 Fla. 253, 103 So. 625 (1925) (fence across road connecting farm and home); *Salisbury v. Andrews*, 128 Mass. 336 (1880) (courtyard providing entrance and light); *Hodge v. Giese*, 43 N. J. Eq. 342, 11 Atl. 484 (1887) (access to basement heater through defendant's shop); *Leakesville Mills Co. v. Spray Water Power and Land Co.*, *supra* note 4 (right of way from factory to highway); *Kennedy v. Klammer*, 104 W. Va. 198, 139 S. E. 713 (1927) (fence across street leading to complainant's property).

Injunction denied: *Gardner v. Stroeveer*, 81 Cal. 148, 22 Pac. 483 (1889) (obstruction to ingress and egress of place of business); *World's Columbian Exposition Co. v. Brennan*, *supra* note 3; *Dobrinsky v. Boyland*, 222 Ill. App. 494 (1921) (public road); *Ladd v. Flynn*, 90 Mich. 181, 51 N. W. 203 (1892) (line fence obstructing window).

⁸ In *Keys v. Alligood*, 178 N. C. 16, 100 S. E. 113 (1919) the defendant obstructed a road in violation of a court order not to interfere with or use the road except for ingress and egress. A preliminary mandatory injunction ordered the ditches restored to their former locus.

⁹ *Dallas Hunting & Fishing Club v. Dallas County Levee District*, 235 S. W. 607 (Tex. Civ. App. 1921) (levee erected at cost of \$400,000, causing only negligible damage to complainant); *Williams v. Silverman Constr. Co.*, 111 App. Div. 679, 97 N. Y. Supp. 945 (1906) (bay windows projecting over setback line); *Novi v. Del Prete*, 121 Misc. Rep. 637, 202 N. Y. Supp. 86 (1923) (wall encroachment).

¹⁰ In *Pierce v. City of New Orleans*, 18 La. Ann. 242 (1865) defendant was required to restore a boundary wall in which he had unlawfully made apertures.

¹¹ Denial of relief as to real property: *Minneapolis & St. L. R. Co. v. Chicago, M. & St. P. R. Co.*, 116 Iowa 681, 88 N. W. 1082 (1902) (claim by purchaser against condemnation claimant); *Arnold v. Bright*, 41 Mich. 207, 2 N. W. 16 (1879) (lessee for term of years not ousted on *ex parte* application); *Stephens v. Stephens*, 87 Fla. 466, 100 So. 746 (1924) (wife versus husband owner); *State ex rel. Reynolds v. Graves*, 66 Neb. 17, 92 N. W. 144 (1902) (administrator of deceased owner versus lessee in possession); *Proctor v. Stuart*, 4 Okla. 679, 46 Pac. 501 (1896) (disputing homesteaders). As to disputes over church property see: *Whitecar v. Michenor*, 37 N. J. Eq. 6 (1883); *Fredericks v. Huber*, 180 Pa. 572, 37 Atl. 90 (1897); *Tebo v.*

fendant may be preliminarily dispossessed of personalty if it is being or is about to be dissipated in violation of the rights of others.¹² In case of a clear *prima facie* breach of duty by a public servant or public corporation the court will by interlocutory decree order service to an individual or the general public where other relief is inadequate.¹³

Hazel, 74 Atl. 841 (Del. Ch. 1909) (relief denied though defendants were in possession through wrongful conveyances).

But property was ordered transferred in *Pokegama Sugar-Pine Lumber Co. v. Klamath River Lumber & Improvement Co.*, *supra* note 4 (lessors wrongfully ousted lessee); in *Sproat v. Durland*, 2 Okla. 24, 35 Pac. 682, dissent at page 886 (1894) (between homesteaders where one is a trespasser); and in *Hodges v. Christmas*, 212 S. W. 825 (Tex. Civ. App. 1919), where the complainant had been forceably and fraudulently ejected from oil land.

Where transfer of personal property was refused: *Hutton v. Hammond*, 194 Ind. 212, 142 N. E. 427, 32 A. L. R. 888 (1924) (architect's data in his possession after performance of building contract); *Crossland v. Crossland*, 53 W. Va. 108, 44 S. E. 424 (1903) (attempt to get the property to sell); *Spoor-Thompson Machine Co. v. Bennett Film Laboratories*, 105 N. J. Eq. 108, 147 Atl. 202 (1929) (film-developing machines made under contract, there being bond to prevent irreparable injury); *Moller v. Lincoln Safe Deposit Co.*, 174 App. Div. 458, 161 N. Y. Supp. 171 (1916) (access to safe deposit box in dispute). But wrongfully possessed personalty was transferred in *McCullom v. Morrison*, 14 Fla. 414 (1874), where the litigation was over the location of a Confederate monument unlawfully removed. A mortgagee was given possession of rolling stock levied upon and about to be dispersed in impairment of his security. *Central Trust Co. v. Moran*, 56 Minn. 188, 57 N. W. 471 (1894).

See also Note (1924) 32 A. L. R. 894-918, on transfer of property by preliminary order.

¹² Ordinarily the defendant must be insolvent or otherwise irresponsible. The best view requires that the court take custody of the property. *Fargo v. Rider*, 36 S. W. 340 (Tex. Civ. App. 1896) (irresponsible assignee of fraudulent vendee required to pay into court money realized from sale of goods); *Murrah v. Shirley*, 237 S. W. 307 (Tex. Civ. App. 1922) (money from check cashed by stakeholder in violation of conditional delivery, the condition having failed); *McCarty v. McCarty*, 40 S. W. (2d) 165 (Tex. Civ. App. 1931) (preservation of community property during divorce proceedings). Relief was denied in State *ex rel. Brookfield Co. v. Mart*, 135 Ore. 603, 295 Pac. 459 (1931) (contempt proceedings for failure to turn over warrants and money to court); in *Trust Co. of Florida v. Crider*, 136 So. 434 (Fla. 1931) (money from trustee's sale of building and stock); and in *Sims v. Stuart*, 291 Fed. 707 (S. D. N. Y. 1922) (where customs officer seized money, Hand, J., seeing no necessity for equity to hurry the legal cause).

¹³ Toledo, etc., *R. Co. v. Pennsylvania Co.*, *supra* note 4 (railroad traffic facilities); *Mason v. Byrley*, 26 Ky. L. Rep. 487, 84 S. W. 767 (1904) (Canvassing votes by district committee); *Broome v. N. Y. & N. J. Tel. Co.*, 42 N. J. Eq. 141, 7 Atl. 851 (1887) (erecting telephone poles unlawfully); *McCran v. Public Service Ry. Co.*, 95 N. J. Eq. 22, 122 Atl. 205 (1923) (for street railway service pending mandamus proceedings during strike), discussed in (1923) 37 HARV. L. REV. 368, at 371; *Clinton-Dunn Tel. Co. v. Carolina Tel. Co.*, 159 N. C. 9, 74 S. E. 636 (1912) (Hoke, J., discussing the use of mandamus and preliminary mandatory injunctions); *City of Houston v. Little*, 244 S. W. 247 (Tex. Civ. App. 1922) (city school board). See *Farrall v. Hood*, 32 S. W. (2d) 480, 482 (Tex. Civ. App. 1930) (attorney not allowed to see jailed client). Injunction denied in *City Council v. Fort*

Preliminary mandatory injunctions in the nature of specific performance, however, issue very rarely.¹⁴ Courts occasionally adopt this form of relief for abating nuisances.¹⁵

The case under discussion has all the prerequisites necessary for a preliminary mandatory injunction. In view of petitioner's conduct, his insolvency, and the possible dissipation of part of the decedent's estate, the court quite properly invoked the provisional remedy to place the bonds in the custody of the court until final hearing. At that time the petitioner may set up his claim and have his rights adjudicated. The court wisely took that course in preference to transferring the property to the other claimants. While the case turns in part on a West Virginia statute¹⁶ providing for the equitable protection of property in a case pending, that statute only strengthens the court's hand.

WM. CAREY PARKER.

Insurance—Incontestable Clause as Defense in Action on Life Policy.

The plaintiff issued a life insurance policy containing a liability exemption clause in case insured met his death while engaged in railroad employment. A statute provided that life insurance policies

Worth, etc., Contractors, Inc., 8 S. W. (2d) 730 (Tex. Civ. App. 1928) (revocation of plumber's license).

¹⁴In *Boskowitz v. Cohn*, 197 App. Div. 776, 189 N. Y. Supp. 419 (1921) an injunction ousted sub-lessees where lessees sub-leased in violation of a condition in their lease giving lessors right to possession without notice in case of breach, and in *Kellerman v. Chase & Co.*, 101 Fla. 785, 135 So. 127 (1931), the court ordered performance of contract to deliver tomato crop, it being highly perishable. See also *American Lead Pencil Co. v. Schneegass*, 178 Fed. 735 (C. C. N. D. Ga. 1910) where mandatory relief was properly refused. Where complainant acted in bad faith relief was denied in *Winton Motor Carriage Co. v. Curtis Pub. Co.*, 196 Fed. 906 (E. D. Pa. 1912) (contract for commercial advertising in periodical). Accord: *Amalgamated Furniture Factories, Inc. v. Rochester Times-Union, Inc.*, 128 Misc. Rep. 673, 219 N. Y. Supp. 705 (1927).

¹⁵*Pennsylvania R. Co. v. Kelley*, 77 N. J. Eq. 129, 75 Atl. 758 (1910) (defective building a public and private nuisance which must be removed or repaired); *Salisbury v. Andrews*, 128 Mass. 336 (1880) (light and sunshine shut out by alley obstruction); *Pierce v. City of New Orleans*, *supra* note 11; relief refused in *Ort v. Bowden*, 148 S. W. 1145 (Tex. Civ. App. 1912) (baseball park blocking street).

¹⁶W. VA. CODE (1931) c. 53, art. 6, §1: "A court of equity may, in a proper case pending therein, in which funds or property of a corporation, firm or person is involved, and there is danger of the loss or misappropriation of the same or a material part thereof, appoint a special receiver of such funds or property, or of the rents, issues and profits thereof, or both, who shall give bond with good security to be approved by the court. . . ."