(167 Mass. 92)

VEGELAHN v. GUNTNER et al.

(Supreme Judicial Court of Massachusetts. Suffolk. Oct. 27, 1896.)

INJUNCTION — CONSPIRACY TO INJURE BUSINESS.

1. The maintenance of a patrol of two men in front of plaintiff's premises, in furtherance of a conspiracy to prevent any workmen from entering into, or continuing in, his employment, will be enjoined, though such workmen are not under contract to work for plaintiff. Field, C. J., and Holmes, J., dissenting.

2. A continuing injury to property or business may be enjoined, though it be also punishable as a crime.

Report from supreme judicial court, Suffolk county; Oliver Wendell Holmes, Judge.

Bill by Frederick O. Vegelahn against George M. Guntner and others for an injunction. An injunction issued pendente lite restraining the respondents from interfering with the plaintiff's business by patrolling the sidewalk in front of or in the vicinity of the premises occupied by him, for the purpose of preventing any person in his employment, or desirous of entering the same, from entering it or continuing in it; or by obstructing or interfering with any persons in entering or leaving the plaintiff's said premises; or by intimidating any person in the employment of the plaintiff, or desirous of entering the same; or by any scheme or conspiracy for the purpose of annoying, hindering, interfering with, or preventing any person in the employment of the plaintiff, or desirous of entering the same, from entering it, or from continuing therein. This injunction was approved.

Hale & Dickerman, for plaintiff. Thomas H. Russell and Arthur H. Russell, for respondents.

ALLEN, J. The principal question in this case is whether the defendants should be enjoined against maintaining the patrol. The report shows that, following upon a strike of the plaintiff's workmen, the defendants conspired to prevent him from getting workmen, and thereby to prevent him from carrying on his business, unless and until he should adopt a certain schedule of prices. The means adopted were persuasion and social pressure, threats of personal injury or unlawful harm conveyed to persons employed or seeking employment, and a patrol of two men in front of the plaintiff's factory, maintained from half past 6 in the morning till half past 5 in the afternoon, on one of the busiest streets of Boston. The number of men was greater at times, and at times showed some little disposition to stop the plaintiff's door. The patrol proper at times went further than simple advice, not obtruded beyond the point where the other person was willing to listen; and it was found that the patrol would probably be continued if not enjoined. There was also some evidence of persuasion to break existing contracts. The patrol was maintained as one of the means of carrying out the defendants' plan, and it was used in combination with social pressure, threats of personal injury or unlawful harm, and persuasion to break existing contracts. It was thus one means of intimidation, indirectly to the plaintiff, and directly to persons actually employed, on seeking to be employed, by the plaintiff, and of rendering such employment unpleasant or intolerable to such persons. Such an act is an unlawful interference with the rights both of employer and of employed. An employer has a right to engage all persons who are willing to work for him, at such prices as may be mutually agreed upon, and persons employed or seeking employment have a corresponding right to enter into or remain in the employment of any person or corporation willing to employ them. These rights are secured by the constitution itself. Com. v. Perry, 155 Mass. 117, 28 N. E. 1126; People v. Gillson, 109 N. Y. 389, 17 N. E. 343; Braceville Coal Co. v. People, 147 Ill. 71, 35 N. E. 62; Ritchie v. People, 155 Ill. 98, 40 N. E. 454; Low v. Printing Co. (Neb.) 59 N. W. 362. No one can lawfully interfere by force or intimidation to prevent employers or persons employed or wishing to be employed from the exercise of these rights. It is in Massachusetts, as in some other states, even made a criminal offense for one, by intimidation or force, to prevent, or seek to prevent, a person from entering into or continuing in the employment of a person or corporation. Pub. St. c. 74, § 2. Intimidation is not limited to threats of violence or of physical injury to person or property. It has a broader signification, and there also may be a moral intimidation which is illegal. Patrolling or picketing, under the circumstances stated in the report, has elements of intimidation like those which were found to exist in Sherry v. Perkins, 147 Mass. 212, 17 N. E. 307. It was declared to be unlawful in Reg. v. Druitt, 10 Cox, Cr. Cas. 592; Reg. v. Hibbert, 13 Cox, Cr. Cas. 82; Reg. v. Bauld, Id. 282. It was assumed to be unlawful in Trollope v. Trader's Fed. (1875) 11 L. T. 228, though in that case the pickets were withdrawn before the bringing of the bill. The patrol was an unlawful interference both with the plaintiff and with the workmen, within the principle of many cases; and, when instituted for the purpose of interfering with his business, it became a private nuisance. See Carew v. Rutherford, 106 Mass. 1; Walker v. Cronin, 107 Mass. 555; Barr v. Trades Council (N. J. Ch.) 30 Atl. 881; Murdock v. Walker, 152 Pa. St. 595, 25 Atl. 492; China Co. v. Brown, 164 Pa. St. 449, 30 Atl. 261; Coeur D'Alene Consol. & Min. Co. v. Miners' Union of Wardner, 51 Fed. 260; Temperton v. Russell [1893] 1 Q. B. 715; Floyd v. Jackson [1895] 11 L. T. 276; Wright v. Hennessey, 52 Alb. Law J. 104 (a case before Baron Pollock); Judge v. Bennett, 36 Wkly. Rep. 103; Lyons v. Wilkins [1896] 1 Ch. 811.

The defendants contend that these acts were justifiable, because they were only seeking to secure better wages for themselves, by compelling the plaintiff to accept their schedule of wages. This motive or purpose does not justify maintaining a patrol in front of the plaintiff's premises, as a means of carrying out their conspiracy. A combination among persons merely to regulate their own conduct is within allowable competition, and is lawful, although others

may be indirectly affected thereby. But a combination to do injurious acts expressly directed to another, by way of intimidation or constraint, either of himself or of persons employed or seeking to be employed by him, is outside of allowable competition, and is unlawful. Various decided cases fall within the former class; for example: Worthington v. Waring, 157 Mass. 421, 32 N. E. 744; Snow v. Wheeler, 113 Mass. 179; Bowen v. Matheson, 14 Allen, 499; Com. v. Hunt, 4 Metc. (Mass.) 111; Heywood v. Tillson, 75 Me. 225; Cote v. Murphy, 159 Pa. St. 420, 28 Atl. 190; Bohn Manuf'g Co. v. Hollis, 54 Minn. 223. 55 N. W. 1119; Steamship Co. v. McGregor [1892] App. Cas. 25; Curran v. Treleaven [1891] 2 Q. B. 545, 561. The present case falls within the latter class.

Nor does the fact that the defendants' acts might subject them to an indictment prevent a court of equity from issuing an injunction. It is true that, ordinarily, a court of equity will decline to issue an injunction to restrain the commission of a crime; but a continuing injury to property or business may be enjoined, although it may also be punishable as a nuisance or other crime. Sherry v. Perkins, 147 Mass. 212, 17 N. E. 307; In re Debs, 158 U. S. 564, 593, 599, 15 Sup. Ct. 900; Baltimore & P. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 329, 2 Sup. Ct. 719; Cranford v. Tyrrell, 128 N. Y. 341, 344, 28 N. E. 514; Gilbert v. Mickle, 4 Sandf. Ch. 357; Port of Mobile v. Louisville & N. R. Co., 84 Ala. 115, 126, 4 South. 106; Arthur v. Oakes, 11 C. C. A. 209, 63 Fed. 310; Toledo, A., A. & N. M. Ry. Co. v. Pennsylvania Co., 54 Fed. 730, 744; Emperor of Austria v. Day, 3 De Gex, F. & J. 217, 239, 240, 253; Hermann Loog v. Bean, 26 Ch. Div. 306, 314, 316, 317; Monson v. Tussaud [1894] 1 Q. B. 671, 689, 690, 698.

A question is also presented whether the court should enjoin such interference with persons in the employment of the plaintiff who are not bound by contract to remain with him, or with persons who are not under any existing contract, but who are seeking or intending to enter into his employment. A conspiracy to interfere with the plaintiff's business by means of threats and intimidation, and by maintaining a patrol in front of his premises, in order to prevent persons from entering his employment, or in order to prevent persons who are in his employment from continuing therein, is unlawful, even though such persons are not bound by contract to enter into or to continue in his employment; and the injunction should not be so limited as to relate only to persons who are bound by existing contracts. Walker v. Cronin, 107 Mass. 555, 565; Carew v. Rutherford, 106 Mass. 1; Sherry v. Perkins, 147 Mass. 212, 17 N. E. 307; Temperton v. Russell [1893] 1 Q. B. 715, 728, 731; Flood v. Jackson [1895] 11 L. T. 276. We therefore think that the injunction should be in the form as originally issued. So ordered.

FIELD, C. J. (dissenting). The practice of issuing injunctions in cases of this kind is of very recent origin. One of the earliest authorities in the United States for enjoining, in equity, acts somewhat like those alleged against the defendants in the present case, is Sherry v. Perkins (decided in 1888) 147 Mass. 212, 17 N. E. 307. It was found as a fact in that case that the defendants entered into a scheme, by threats and intimidation, to prevent persons in the employment of the plaintiffs as lasters from continuing in such employment, and, in like manner, to prevent other persons from entering into such employment as lasters; that the use of the banners was a part of the scheme; that the first banner was carried from January 8, 1887, to March 22, 1887, and the second banner from March 22, 1887, to the time of the hearing; and that "the plaintiffs have been and are injured in their business and property thereby." The full court say: "The act of displaying banners with devices, as a means of threats and intimidation to prevent persons from entering into or continuing in the employment of the plaintiffs, was injurious to the plaintiffs, and illegal at common law and by statute. Pub. St. c. 74, § 2; Walker v. Cronin, 107 Mass. 555." "The banner was a standing menace to all who were or wished to be in the employment of the plaintiffs, to deter them from entering the plaintiffs' premises. Maintaining it was a continuous unlawful act, injurious to the plaintiffs' business and property, and was a nuisance such as a court of equity will grant relief against. Gilbert v. Mickle, 4 Sandf. Ch. 357; Spinning Co. v. Riley, L. R. 6 Eq. 551." Gilbert v. Mickle, one of the authorities cited in Sherry v. Perkins, was a suit in equity by an auctioneer against the mayor of the city of New York to restrain him and those acting under him from parading, placing, or keeping before the plaintiff's auction rooms a placard as follows: "Strangers, beware of mock auctions." A temporary injunction was issued, but, on hearing, it was dissolved. Notwithstanding what is said in the opinion of the vice chancellor, his conclusion is as follows: "I am satisfied that it is my duty to leave the party to his remedy by an action at law." Spinning Co. v. Riley is a well-known decision of Vice Chancellor Malins. The bill prayed that the defendants might be "restrained from printing or publishing any placards or advertisements similar to those already set forth." The defendants had caused to be posted on the walls and other public places in the neighborhood of the plaintiff's works, and caused to be printed in certain newspapers, a notice as follows: "Wanted all well-wishers to the Operative Cotton Spinning, &c., Association not to trouble or cause any annoyance to the Springhead Spinning Company, lees, by knocking at the door of their office, until the dispute between them and the self-actor minders is finally terminated. By special order. Carrodus, 32 Greaves Street, Oldham." The case was heard upon demurrers. The vice chancellor says: "For the reasons I have stated, I overruled these demurrers, because the bill states

Mass. 69, say: "The opinions of Vice Chancellor Malins in Spinning Co. v. Riley, L. R. 6 Eq. 551, in Dixon v. Holden, L. R. 7 Eq. 488, and in Rollins v. Hinks, L. R. 13 Eq. 355, appear to us to be so inconsistent with these authorities [authorities which the court had cited], and with well-settled principles, that it would be superfluous to consider whether, upon the facts before him, his decisions can be supported." Much the same language was used by the justices in Assurance Co. v. Knott, 10 Ch. App. 142, a part of the headnote of which is: "Dixon v. Holden and Spinning Co. v. Riley overruled." In Temperton v. Russell [1893] 1 Q. B. 435, 438, Lindley, L. J., says of the case of Spinning Co. v. Riley that it was overruled by the court of appeal in Assurance Co. v. Knott. Since the judicature act, however, the courts of England have interfered to restrain, by injunction, the publication or continued publication of libelous statements, particularly those injuriously affecting the business or property of another, as well as injunctions similar to that in the present case. St. 36 & 37 Vict. c. 66, § 25, subds. 5, 8; Monson v. Tussaud [1894] 1 Q. B. 671, 672; Lyons v. Wilkins [1896] 1 Ch. 811, 827. But, in the absence of any power given by statute, the jurisdiction of a court of equity, having only the powers of the English high court of chancery, does not, I think, extend to enjoining acts like those complained of in the case at bar, unless they amount to a destruction or threatened destruction of property, or an irreparable injury to it. In England the rights of employers and employed with reference to strikes, boycotts, and other similar movements have not, in general, been left to be worked out by the courts from common-law principles, but statutes, from time to time, have been passed defining what may and what may not be permitted. The administration of these statutes largely has been through the criminal courts.

As a means of prevention, the remedy given by Pub. St. c. 74, § 2, would seem to be adequate where the section is applicable, unless the destruction of, or an irreparable injury to, property is threatened; and there is the additional remedy of an indictment for a criminal conspiracy at common law, if the acts of the defendant amount to that. If the acts complained of do not amount to intimidation or force, it is not in all respects clear what are lawful and what are not lawful at common law. It seems to be established in this commonwealth that, intentionally and without justifiable cause, to entice, by persuasion, a workman to break an existing contract with his employer, and to leave his employment, is actionable, whether done with actual malice or not. Walker v. Cronin, 107 Mass. 555. What constitutes justifiable cause remains in some respects undetermined. Whether to persuade a person who is free to choose his employment not to enter into the employment of another person gives a cause of action to such other person, by some courts has been said to depend upon the question of actual malice; and, in considering this question of malice, it is said that it is important to determine whether the defendant has any lawful interest of his own in preventing the employment, such as that of competition in business. For myself, I have been unable to see how malice is necessarily decisive. To persuade one man not to enter into the employment of another, by telling the truth to him about such other person and his business, I am not convinced is actionable at common law, whatever the motive may be. Such persuasion, when accompanied by falsehood about such other person or his business, may be actionable, unless the occasion of making the statements is privileged; and then the question of actual malice may be important. This, I think, is the effect of the decision in Rice v. Albee, 164 Mass. 88, 41 N. E. 122. When one man orally advises another not to enter into a third person's employment, it would, I think, be a dangerous principle to leave his liability to be determined by a jury upon the question of his malice or want of malice, except in those cases where the words spoken were false. In the present case, if the establishment of a patrol is using intimidation or force, within the meaning of our statute, it is illegal and criminal. If it does not amount to intimidation or force, but is carried to such a degree as to interfere with the use by the plaintiff of his property, it may be illegal and actionable. But something more is necessary to justify issuing an injunction. If it is in violation of any ordinance of the city regulating the use of streets, there may be a prosecution for that, and the police can enforce the ordinance; but if it is merely a peaceful mode of finding out the persons who intend to enter the plaintiff's premises to apply for work, and of informing them of the actual facts of the case, in order to induce them not to enter the plaintiff's employment, in the absence of any statute relating to the subject, I doubt if it is illegal, and I see no ground for issuing an injunction against it.

As no objection is now made by the defendants to the equitable jurisdiction, I am of opinion on the facts reported, as I understand them, that the decree entered by Mr. Justice HOLMES should be affirmed, without modification.

HOLMES, J. (dissenting). In a case like the present, it seems to me that, whatever the true result may be, it will be of advantage to sound thinking to have the less popular view of the law stated, and therefore, although, when I have been unable to bring my brethren to share my convictions, my almost invariable practice is to defer to them in silence, I depart from that practice in this case, notwithstanding by unwillingness to do so, in support of an already rendered judgment of my own.

In the first place, a word or two should be said as to the meaning of the report. I as-

sume that my brethren construe it as I meant it to be construed, and that, if they were not prepared to do so, they would give an opportunity to the defendants to have it amended in accordance with what I state my meaning to have been. There was no proof of any threat or danger of a patrol exceeding two men, and as, of course, an injunction is not granted except with reference to what there is reason to expect in its absence, the question on that point is whether a patrol of two men should be enjoined. Again, the defendants are enjoined by the final decree from intimidating by threats, express or implied, of physical harm to body or property, any person who may be desirous of entering into the employment of the plaintiff, so far as to prevent him from entering the same. In order to test the correctness of the refusal to go further, it must be assumed that the defendants obey the express prohibition of the decree. If they do not, they fall within the injunction as it now stands, and are liable to summary punishment. The important difference between the preliminary and the final injunction is that the former goes further, and forbids the defendants to interfere with the plaintiff's business "by any scheme * * * organized for the purpose of * * * preventing any person or persons who now are or may hereafter be * * * desirous of entering the [plaintiff's employment] from entering it." I quote only a part, and the part which seems to me most objectionable. This includes refusal of social intercourse, and even organized persuasion or argument, although free from any threat of violence, either express or implied. And this is with reference to persons who have a legal right to contract or not to contract with the plaintiff, as they may see fit. Interference with existing contracts is forbidden by the final decree. I wish to insist a little that the only point of difference which involves a difference of principle between the final decree and the preliminary injunction, which it is proposed to restore, is what I have mentioned, in order that it may be seen exactly what we are to discuss. It appears to me that the opinion of the majority turns in part on the assumption that the patrol necessarily carries with it a threat of bodily harm. That assumption I think unwarranted, for the reasons which I have given. Furthermore, it cannot be said, I think, that two men, walking together up and down a sidewalk, and speaking to those who enter a certain shop, do necessarily and always thereby convey a threat of force. I do not think it possible to discriminate, and to say that two workmen, or even two representatives of an organization of workmen, do; especially when they are, and are known to be, under the injunction of this court not to do so. See Stimson, Labor Law, § 60, especially pages 290, 298–300; Reg. v. Shepherd, 11 Cox, Cr. Cas. 325. I may add that I think the more intelligent workingmen believe as fully as I do that they no more can be permitted to usurp the state's prerogative of force than can their opponents in their controversies. But, if I am wrong, then the decree as it stands reaches the patrol, since it applies to all threats of force. With this I pass to the real difference between the interlocutory and the final decree.

I agree, whatever may be the law in the case of a single defendant (Rice v. Albee, 164 Mass. 88, 41 N. E. 122), that when a plaintiff proves that several persons have combined and conspired to injure his business, and have done acts producing that effect, he shows temporal damage and a cause of action, unless the facts disclose or the defendants prove some ground of excuse or justification; and I take it to be settled, and rightly settled, that doing that damage by combined persuasion is actionable, as well as doing it by falsehood or by force. Walker v. Cronin, 107 Mass. 555; Morasse v. Brochu, 151 Mass. 567, 25 N. E. 74; Tasker v. Stanley, 153 Mass. 148, 26 N. E. 417.

Nevertheless, in numberless instances the law warrants the intentional infliction of temporal damage, because it regards it as justified. It is on the question of what shall amount to a justification, and more especially on the nature of the considerations which really determine or ought to determine the answer to that question, that judicial reasoning seems to me often to be inadequate. The true grounds of decision are considerations of policy and of social advantage, and it is vain to suppose that solutions can be attained merely by logic and general propositions of law which nobody disputes. Propositions as to public policy rarely are unanimously accepted, and still more rarely, if ever, are capable of unanswerable proof. They require a special training to enable any one even to form an intelligent opinion about them.

In the early stages of law, at least, they generally are acted on rather as inarticulate instincts than as definite ideas, for which a rational defense is ready.

To illustrate what I have said in the last paragraph: It has been the law for centuries that a man may set up a business in a small country town, too small to support more than one, although thereby he expects and intends to ruin some one already there, and succeeds in his intent. In such a case he is not held to act "unlawfully and without justifiable cause," as was alleged in Walker v. Cronin and Rice v. Albee. The reason, of course, is that the doctrine generally has been accepted that free competition is worth more to society than it costs, and that on this ground the infliction of the damage is privileged. Com. v. Hunt, 4 Metc. (Mass.) 111, 134. Yet even this proposition nowadays is disputed by a considerable body of persons, including many whose intelligence is not to be denied, little as we may agree with them.

I have chosen this illustration partly with reference to what I have to say next. It shows without the need of further authority that the policy of allowing free competition justifies the intentional inflicting of temporal damage, including the damage of interference with a man's business by some means, when the damage is done, not for its own sake, but as an instrumentality in reaching the end of victory in the battle of trade. In such a case it cannot matter whether the plaintiff is the only rival of the defendant, and so is aimed at specially, or is one of a class all of whom are hit. The only debatable ground is the nature of the means by which such damage may be inflicted. We all agree that it cannot be done by force or threats of force. We all agree, I presume, that it may be done by persuasion to leave a rival's shop, and come to the defendant's. It may be done by the refusal or withdrawal of various pecuniary advantages, which, apart from this consequence, are within the defendant's lawful control. It may be done by the withdrawal of, or threat to withdraw, such advantages from third persons who have a right to deal or not to deal with the plaintiff, as a means of inducing them not to deal with him either as customers or servants. Com. v. Hunt, 4 Metc. (Mass.) 111, 112, 133; Bowen v. Matheson, 14 Allen, 499; Heywood v. Tillson, 75 Me. 225; Steamship Co. v. McGregor [1892] App. Cas. 25. I have seen the suggestion made that the conflict between employers and employed was not competition. But I venture to assume that none of my brethren would rely on that suggestion. If the policy on which our law is founded is too narrowly expressed in the term "free competition," we may substitute "free struggle for life." Certainly, the policy is not limited to struggles between persons of the same class, competing for the same end. It applies to all conflicts of temporal interests.

I pause here to remark that the word "threats" often is used as if, when it appeared that threats had been made, it appeared that unlawful conduct had begun. But it depends on what you threaten. As a general rule, even if subject to some exceptions, what you may do in a certain event you may threaten to do—that is, give warning of your intention to do—in that event, and thus allow the other person the chance of avoiding the consequence. So, as to "compulsion," it depends on how you "compel." Com. v. Hunt, 4 Metc. (Mass.) 111, 133. So as to "annoyance" or "intimidation." Connor v. Kent, Curran v. Treleaven, 17 Cox, Cr. Cas. 354, 367, 368, 370. In Sherry v. Perkins, 147 Mass. 212, 17 N. E. 307, it was found as a fact that the display of banners which was enjoined was part of a scheme to prevent workmen from entering or remaining in the plaintiff's employment, "by threats and intimidation." The context showed that the words as there used meant threats of personal violence and intimidation by causing fear of it.

So far, I suppose, we are agreed. But there is a notion, which latterly has been insisted on a good deal, that a combination of persons to do what any one of them lawfully might do by himself will make the otherwise lawful conduct unlawful. It would be rash to say that some as yet unformulated truth may not be hidden under this proposition. But, in the general form in which it has been presented and accepted by many courts, I think it plainly untrue, both on authority and principle. Com. v. Hunt, 4 Metc. (Mass.) 111; Randall v. Hazelton, 12 Allen, 412, 414. There was combination of the most flagrant and dominant kind in Bowen v. Matheson, and in the Steamship Co. Case, and combination was essential to the success achieved. But it is not necessary to cite cases. It is plain from the slightest consideration of practical affairs, or the most superficial reading of industrial history, that free competition means combination, and that the organization of the world, now going on so fast, means an ever-increasing might and scope of combination. It seems to me futile to set our faces against this tendency. Whether beneficial on the whole, as I think it, or detrimental, it is inevitable, unless the fundamental axioms of society, and even the fundamental conditions of life, are to be changed.

One of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return. Combination on the one side is patent and powerful. Combination on the other is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way. I am unable to reconcile Temperton v. Russell [1893] 1 Q. B. 715, and the cases which follow it, with the Steamship Co. Case. But Temperton v. Russell is not a binding authority here, and therefore I do not think it necessary to discuss it.

If it be true that workingmen may combine with a view, among other things, to getting as much as they can for their labor, just as capital may combine with a view to getting the greatest possible return, it must be true that, when combined, they have the same liberty that combined capital has, to support their interests by argument, persuasion, and the bestowal or refusal of those advantages which they otherwise lawfully control. I can remember when many people thought that, apart from violence or breach of contract, strikes were wicked, as organized refusals to work. I suppose that intelligent economists and legislators have given up that notion today. I feel pretty confident that they equally will abandon the idea that an organized refusal by workmen of social intercourse with a man who shall enter their antagonist's employ is unlawful, if it is dissociated from any threat of violence, and is made for the

sole object of prevailing, if possible, in a contest with their employer about the rate of wages. The fact that the immediate object of the act by which the benefit to themselves is to be gained is to injure their antagonist does not necessarily make it unlawful, any more than when a great house lowers the price of goods for the purpose and with the effect of driving a smaller antagonist from the business. Indeed, the question seems to me to have been decided as long ago as 1842, by the good sense of Chief Justice Shaw, in Com. v. Hunt, 4 Metc. (Mass.) 111. I repeat at the end, as I said at the beginning, that this is the point of difference in principle, and the only one, between the interlocutory and final decree; and I only desire to add that the distinctions upon which the final decree was framed seem to me to have coincided very accurately with the results finally reached by legislation and judicial decision in England, apart from what I must regard as the anomalous decisions of Temperton v. Russell and the cases which have followed it. Reg. v. Shepherd, 11 Cox, Cr. Cas. 325; Connor v. Kent, Gibson v. Lawson, and Curran v. Treleaven, 17 Cox, Cr. Cas. 354.

The general question of the propriety of dealing with this kind of case by injunction I say nothing about, because I understand that the defendants have no objection to the final decree if it goes no further, and that both parties wish a decision upon the matters which I have discussed.

CLARK et al. v. CITY OF WORCESTER.

(Supreme Judicial Court of Massachusetts. Worcester. Oct. 23, 1896.)

EQUITY—ADEQUATE REMEDY AT LAW—MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—ASSESSMENTS—PAYMENT.

1. A bill in equity will not lie to recover an assessment for a public improvement, paid under protest.

2. A bill to restrain the collection of an alleged illegal assessment for a public improvement, which fails to allege that defendant threatens to collect, or is proceeding to collect, the assessment, is demurrable.

3. A petition for a jury to revise an assessment for a public improvement does not vacate the original assessment.

Appeal from superior court, Worcester county.

Bill by Henry W. Clark and another against the city of Worcester. There was a judgment for defendant, and plaintiffs appeal. Affirmed.

Plaintiffs' bill was as follows: "Respectfully represent the above-named plaintiffs that on the 21st day of December, 1901, they were the owners in fee, in trust for Charlotte R. Chamberlin, of said Worcester, of a large tract of land in said Worcester, and have ever since been, and still are, owners thereof (excepting as to such part thereof as was taken by said city of Worcester upon the laying out of Maywood street, as hereinafter set forth); and they further represent against said defendant as follows, to wit: (1) On December 21, 1901, the board of mayor and aldermen of the city of Worcester adopted a decree laying out and locating Maywood street, in said city, through said land of the said trustees, which decree was duly approved by the mayor of said city on December 22, 1901; and in said decree it was expressly declared and adjudicated that said street is laid out under the provisions of law authorizing the assessment of betterments. (2) On December 30, 1901, said board of mayor and aldermen, pursuant to the aforesaid decree, passed an order or decree assessing certain betterments upon the several estates abutting upon said Maywood street, a copy of which decree or order, so far as it relates to said assessments upon the estates of Henry W. and Charles A. Clark, trustees, is hereto annexed, marked 'Exhibit A.' (3) On or about January 27, 1904, said trustees made application in writing to the board of aldermen of said city for an apportionment of said assessments into three equal parts, as provided by law, a copy of which application is hereto annexed, marked 'Exhibit B.' (4) In compliance with said application, said assessment was apportioned April 2, 1904, the first one-third part thereof to be payable October 10, 1904, with interest from said April 2, 1904. (5) On November 30, 1904, said trustees filed in the superior court for the county of Worcester a petition against said city of Worcester for a jury to revise said betterment assessments, as provided by law in such cases, upon which petition notice to said city was duly issued, served, and returned to said court. Said city duly appeared by its solicitor, W. S. B. Hopkins, Esq.; and on January 13, 1906, trial was had upon said petition, in said court, before a jury, and a verdict was returned by said jury, finding that the estate of said petitioners was benefited by the laying out, locating, and construction of said Maywood street in the sum of $1,362.96, and assessing damages against them in the sum of $661.98. Judgment was entered upon said verdict on February 3, 1906, by said court, for said sum of $661.98. Said judgment being a reduction of the said assessment as originally made, an execution for costs in favor of said trustees was issued from said court on February 4, 1906, in the sum of $62.70, which sum has been fully paid by said city to said petitioners. (6) On the 17th of September, 1904, the said trustees petitioned the board of mayor and aldermen for an abatement of said assessment, upon which petition hearing was held, and on December 31, 1904, said petitioners were given leave to withdraw. (7) On and after October 10, 1904, said trustees failed and refused to pay to said city said one-third part of said assessments, apportioned as aforesaid; whereupon said city of Worcester, by its tax collector, W. S. Barton, proceeded to enforce payment of the same, and on the 20th and 27th days of July, 1905, and the 3d day of August, 1905, advertised for sale, in the Worcester Evening Post, a newspaper published