

Remedies Controlling Personal Action

CHAPTER 585

INJUNCTIONS

585.01 ISSUANCE; EFFECT ON RUNNING OF TIME.

HISTORY. R.S. 1851 c. 94 s. 43; P.S. 1858 c. 83 s. 4; G.S. 1866 c. 66 s. 181; G.S. 1878 c. 66 s. 199; 1891 c. 78 s. 1; G.S. 1894 s. 5343; R.L. 1905 s. 4258; G.S. 1913 s. 7888; G.S. 1923 s. 9385; M.S. 1927 s. 9385.

A cause of action to recover payments for the transportation of freight in excess of the rates fixed by Laws 1907, Chapter 232, accrued when the payments were made and not upon the dissolution of the injunction. The statutory limitation is not extended for more than five years by an injunction staying an action nor in any case for more than one year after the disability ceases. *Christian v. C. St. P. M. & O.* 135 M 47, 159 NW 1082.

Laws 1913, Chapter 547, establishing a minimum wage commission and providing for the determination of a minimum wage for women and minors, was a complete statute when it left the legislature, does not delegate legislative power to the commission, and is a valid exercise of the police power of the state. *Williams v Evans*, 139 M 32, 165 NW 495, 166 NW 504.

In calling an election under the power conferred upon him by the federal constitution, to fill a vacancy in the senate of the United States, the governor is exercising a governmental and political power over which the courts have no control. *State ex rel v Dist. Court*, 156 M 270, 194 NW 630.

Under the facts in the instant case the plaintiff was not entitled to a mandatory injunction restraining the maintenance of a concrete sidewalk where located, nor to an injunction restraining the levy of assessments to pay for its construction. *Ferris v Village of Inver Grove*, 161 M 332, 201 NW 550.

Liquidated damages for the breach of a membership contract with an association organized under the cooperative marketing act do not give a full, complete and adequate remedy. The only adequate remedy is an injunction preventing the members from breaking their contracts and thus indirectly forcing delivery of the product to the association. *Minn. Wheatgrowers v Huggins*, 162 M 471, 203 NW 420.

The plaintiff corporation was not entitled to an injunction restraining the defendant society from publishing "Radiology," the name of the journal published by the society after its relations with the plaintiff corporation had ceased, nor compelling it to give to the plaintiff for publication the proceedings of the society. *Tyler v Bruče*, 164 M 167, 204 NW 644.

A district court has jurisdiction to try an action which seeks to restrain the enforcement of a debt, evidenced by a judgment of another district court of the state, by execution, when the plaintiff is not liable on the judgment. *Baune v Maryland Cas. Co.* 168 M 484, 210 NW 396.

Courts of equity will restrain corporate officers from acting in excess of authority or in violation of their trust. *Mortgage Land Co. v McMains*, 172 M 110, 215 NW 192.

A newspaper business conducted in violation of Laws 1925, Chapter. 285, is a public nuisance and as such may be abated without a jury trial. *State ex rel v Guilford*, 174 M 457, 219 NW 770.

The business of the St. Paul Union Stockyards Company is affected with a public interest. The district court has jurisdiction to protect the organization in excluding dishonest traders from its yards. The limit of temporary exclusion

having expired, the trial court did not err in refusing the corporation a permanent injunction restraining Carnes for all time. *Carnes v St. P. Union Stockyards Co.* 175 M 294, 221 NW 20.

A physician who, for a valuable consideration, agreed for a period of five years not to practice his profession within a radius of 25 miles from Mankato, may be enjoined, the contract being entirely valid. *Andrews v Cosgriff*, 175 M 431, 221 NW 642.

There being an adequate remedy at law, an injunction will not lie against a municipality or its officers to restrain the enforcement of special assessments after certification to the county auditor for extension on the tax list. *Schultz v City of No. Mankato*, 176 M 76, 222 NW 518.

City officials as well as those seeking to deal with the city, are bound to take notice of and comply with provisions of the city charter. The council cannot delegate its power to contract. In the instant case the unlawful expenditure of public funds will be enjoined. *Williams v Klemmer*, 177 M 44, 224 NW 261.

In the instant case certiorari not being available, plaintiff's only remedy to prevent improper revocation of his cab license is by injunction. *Nat'l Cab. v Kunze*, 182 M 152, 233 NW 838.

Nothing having been done toward laying out a street except that the city council by resolution ordered the appointment of commissioners to view the premises and assess benefits and damages, the petition for an injunction is premature. *Heller v Schroder*, 182 M 353, 234 NW 461.

Although defendant on taking employment with plaintiff had agreed not to engage in a similar occupation in the same locality for one year after leaving plaintiff's employment, there being no question of trade or business secrets involved, the trial court properly refused to enjoin the defendant. *Standard Oil v Bertelsen*, 186 M 483, 243 NW 701.

By reason of events transpiring since the commencement of the action, (the taxes had been spread and partially collected) it is now impossible to grant relief and the judgment of the trial court must be affirmed. *Republic Iron v Borgen*, 187 M 373, 245 NW 615.

Where a bondholder failed without justification to comply with the terms of the trust deed by demand upon the trustee before bringing this injunction suit, the trial court properly sustained a demurrer. *North Shore Co. v Broman*, 188 M 433, 247 NW 505.

The district court has no jurisdiction to enjoin an administrator from selling land under license of the probate court, nor to require an accounting by the administrator. *Munding v Breeze*, 188 M 621, 248 NW 47.

The fact that the act complained of is criminal, and that the state's ownership consists of an easement over defendant's land, is no defense to an action to enjoin the defendant from removing rock which is a part of the support of the highway. *State v Neeson*, 189 M 87, 248 NW 751.

The criminality of defendant's acts, in the unlawful practice of law, does not bar injunctive relief. *Fitchette v Taylor*, 191 M 582, 254 NW 910.

The court could only enjoin that use of the stream which evidence shows to be productive of a nuisance, and the injunction ordered should go no further than to abate the cause of the nuisance. *Satren v Hader Cheese Factory*, 202 M 553, 279 NW 361.

Title to public office will not be tried in a suit for injunction against claimant. *Doyle v Ries*, 205 M 82, 285 NW 480.

Prayer for equitable relief premised solely upon the alleged invalidity of an "election" was properly denied. *Repsold v Ind. School*, 205 M 316, 285 NW 827.

When a small loan business is so conducted that in every loan the state statute as to usury is flagrantly and intentionally violated, there is no adequate remedy to protect the public and the borrowers, and the business is a public nuisance which may be abated. *State ex rel v O'Neil*, 205 M 366, 286 NW 316.

In the instant case employer's application for an injunction was premature, since it failed to show the commission of an unfair labor practice resulting in real, substantial, or irreparable injury. There must be a more substantial base

than mere fear or apprehension. *Quest v International Molders*, 216 M 436, 13 NW(2d) 32.

Where there have been continual and persistent violations of the liquor statutes and repeated convictions have failed to abate them, an injunction is properly granted. *State v Preuss*, 217 M 100, 13 NW(2d) 774.

Evidence sustains the finding that proposed drainage operations will constitute a continuing trespass as to plaintiffs and that the nature of the threatened injury to them is such as to entitle them to injunctive relief. *Petraborg v Zontelli*, 217 M 536, 15 NW(2d) 174.

Suit to enjoin the governor and adjutant general of the state and the mayor of the city from preventing plaintiff from using its property in a lawful manner is not rendered moot by withdrawal of troops, in the absence of assurance that the acts complained of would not be repeated if injunction was denied. *Strutwear v Olson*, 13 F. Supp. 384.

585.02 TEMPORARY INJUNCTION, WHEN AUTHORIZED.

HISTORY. G.S. 1866 c. 66 s. 182; G.S. 1878 c. 66 s. 200; G.S. 1894 s. 5344; R.L. 1905 s. 4259; G.S. 1913 s. 7889; G.S. 1923 s. 9386; M.S. 1927 s. 9386.

1. Purpose
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1. Purpose

The purpose of a temporary injunction is to maintain the matter in controversy in the existing condition until there is a decree. *Mann v Flower*, 26 M 479, 5 NW 365.

The trial court must, when requested, find one way or the other upon material issues. While courts of equity will not interfere with the action of corporate officers as to acts within their powers and which involve an exercise of discretion committed to them, it will stay those acts which are in excess of authority or in violation of their trust. *Mortgage Land v McMains*, 172 M 110, 215 NW 192.

Where an appeal will give an adequate remedy, prohibition will not lie. The rule that an absolute writ of prohibition will not issue unless the petitioner has first raised the question of its jurisdiction in a subordinate tribunal is one of practice only. It will not prevent the issuance of the writ in a clear case where justice requires it. *State ex rel v Dist. Court*, 195 M 169, 262 NW 155.

Upon a showing that a subsequent encumbrancer has tendered to a prior encumbrancer the entire amount due on a mortgage, together with costs required by statute, the court may enjoin foreclosure of the mortgage until disputed issues in the case are determined. *First Nat'l v Schunk*, 201 M 359, 276 NW 290.

The purpose of a temporary injunction is to preserve the status quo so that parties may not by their acts pendente lite impair the effect of the judgment to be rendered. *Jannetta v Jannetta*, 205 M 269, 285 NW 619.

Where the nature of the questions which arise, as in the instant case, relating to the validity of the minimum wage law for women and children, on a suit for an injunction makes them a proper subject for deliberate examination, and if a stay will not result in too great an injury to defendants, it is proper to preserve existing state of things until rights of parties can be fairly and fully investigated and determined. *Western Union v Ind. Commission*, 24 F. Supp. 370.

Injunctive relief under uniform fraudulent conveyance act. 7 MLR 542.

Rights of creditors whose claims have not matured. 7 MLR 548.

2. Discretionary

Granting a temporary injunction rests on judicial discretion. Such discretion is to be influenced by a consideration of the relative injury and inconvenience which may be likely to result to the parties, respectively, from the allowance or disallowance of the writ. *Conkey v Dike*, 17 M 457 (434); *Myers v Dul. Transfer*, 53 M 335, 55 NW 140; *Gorton v Town of Forest City*, 67 M 36, 69 NW 478; *McGregor v Case*, 80 M 214, 83 NW 140; *Fuller v Schulz*, 88 M 372, 93 NW 118; *Owens v Levine*, 164 M 519, 204 NW 629.

The rule that it is largely within the discretion of the trial court to grant or deny an application for a temporary injunction is applicable in a case where an injunction is sought to restrain the negotiation of a promissory note alleged to be tainted with usury and the enforcement of a mortgage given to secure the note. *Durgin v Merc. Accept. Co.* 167 M 330, 209 NW 5.

The trial court did not abuse its discretionary power in denying an application for a temporary injunction restraining the city council from signing a contract for the construction of a public sewage system and outletting the effluent into Goose Lake. *Auto. Club v City of White Bear Lake*, 170 M 442, 212 NW 909.

The appellate court will not disturb the trial court's discretionary order relating to designation of a game preserve. *Schmidt v Gould*, 172 M 180, 215 NW 215.

Whether an ordinance exacting a license is an exercise of police power or a tax should be left to a decision or evidence, and the trial court was not in error when in its discretion it denied an injunction restraining the city. *Crescent Oil v City of Mpls.* 175 M 276, 221 NW 6.

The fact that a defendant's acts are criminal is no bar to injunction; and the granting of a temporary restraining order is largely in the discretion of the trial court. *State v Nelson*, 189 M 87, 248 NW 751.

The trial court did not abuse its discretion in denying the state's application for a temporary injunction restraining the installation of telephone service in the state capitol. *State v Tri State Co.* 197 M 575, 267 NW 489.

Injunctive relief cannot be based on mere fear of what may happen, but there must be a showing of real substantial facts and conditions which will produce irreparable damage. *Quest v International*, 216 M 436, 13 NW(2d) 32.

Discretion to deny injunction against trespass and nuisance. 12 MLR 565.

3. Appeal

The appellate court will not interfere with the action of the trial court in granting or refusing a temporary injunction, where the evidence as to the facts is conflicting and no irreparable injury impends. *Twitchell v Cummings*, 128 M 391, 151 NW 139.

An order granting or refusing a temporary injunction will not be disturbed by the appellate court unless the trial court's judicial discretion is abused. *Potter v Engler*, 130 M 510, 153 NW 1088.

Laws 1923, Chapter 435, is unconstitutional. Taxpayers are entitled to an injunction restraining public officials from calling an election under an unconstitutional law because it is an unlawful expenditure of public funds. *Consolidated School v Christison*, 167 M 45, 208 NW 409.

Appeal from an order denying an injunction against the clerk to prevent his entry of a judgment pursuant to an order, affirmed by the appellate court, but procedure criticized. *Berkner v Segal*, 169 M 116, 210 NW 868.

4. Labor

Workmen may go on a strike and may use legitimate means to induce other workmen to join them or to refrain from taking the positions vacated by them; but may not go to the extent of intimidating, coercing and terrorizing such other employees. The facts justify the issuance of a temporary injunction, but the appellate court modified the order by striking therefrom a paragraph that might be construed as forbidding defendants from using legal means or methods. *Minn. Stove v Cavanaugh*, 131 M 458, 155 NW 638.

An agreement among union employees in the building trades, who have a bona fide dispute with a contractor to withhold their services until the dispute is settled, is not a violation of any statute and a temporary injunction was rightfully denied. *Grant v St. P. Bldg. Trades*, 136 M 167, 161 NW 520, 1055.

Display of an "unfair" placard on the public street near plaintiff's place of business is not unlawful if there is no obstruction to traffic or access to plaintiff's place of business, and no threats or intimidation, and an injunction was properly denied. *Steffes v Motion Pic. Operators*, 136 M 200, 161 NW 524.

Labor injunctions in Minnesota. 24 MLR 796.

5. Public officials

The sheriff brought an unsuccessful action in ejectment against other county officers. When he lost the case he locked the doors and refused access to the only county building. An injunction was properly granted to the other officers of the county against the sheriff. *County of Lincoln v Curtis*, 134 M 473, 159 NW 129.

An order granting a temporary injunction restraining the city of St. Paul from executing an order for the removal of an alleged obstruction to the use of a public alley, declared by the city a public nuisance, is not an abuse of discretion. *Smith v City of St. Paul*, 137 M 109, 162 NW 1062.

Where a municipal corporation, in good faith, erects a building for municipal purposes, and includes therein an auditorium which is no longer needed for public use, the municipality has a legal right to lease the property and the leasing not being ultra vires, and no showing of special harm to complainant, the trial court properly refused to enjoin. *Anderson v City of Montevideo*, 137 M 179, 162 NW 1073.

The court did not err in denying in a taxpayer's suit, a temporary injunction restraining the payment of expenses of city officials in attending conventions. *Tousley v Leach*, 180 M 293, 230 NW 788.

Where plaintiff obtained an injunction against the sheriff from selling certain real estate, the court was in error because the execution creditor was not named as a party. *Cheney v Bengston*, 193 M 586, 259 NW 59.

A temporary injunction is generally denied where the answer denies all equities on which the complaint is based, and seldom will the court interfere with the discretion of public officials; but in the instant case, an examination of the affidavits and record sustain the trial court in its decision to grant a temporary injunction. *School Dist. v Lindhe*, 195 M 14, 261 NW 486.

There was no showing of abuse of discretion on the part of the trial court in issuing a temporary writ, restraining the city officials from carrying out a resolution of the city council authorizing expenditure of money to dredge the river. *Behrens v City of Mpls.* 199 M 364, 271 NW 814.

While an injunction may issue to protect the possession of an incumbent against a claimant whose title is in dispute, title to public office will not be tried in a suit for injunction against a claimant; and the issue of possession pendente lite becomes moot if the claimant, under a certificate of election, goes into possession of the office. *Doyle v Ries*, 205 M 82, 285 NW 480.

The legislature has provided remedy for contesting the validity of "elections" called or conducted in an illegal manner; and a prayer for equitable relief premised solely upon the alleged invalidity of an "election" was properly denied. *Repsold v Ind. School*, 205 M 316, 285 NW 827.

The federal court has the power to stay the enforcement of an ordinance of the city of Duluth which is unreasonable and oppressive upon a railway company operating switching engines within the city limits. *Northern Pacific v Weinberg*, 53 F. Supp. 133.

6. Breach of contract

There was a sufficient showing of probable irreparable injury to plaintiff if defendant was permitted to cancel the land contract during the action to warrant granting an order restraining the vendee during the pendency of the action from

attempting to cancel the contract by giving notice under the statute. *Freeman v Fehr*, 132 M 384, 157 NW 587.

Where, pending an action by vendee of real estate in possession to recover damages from the vendor for alleged fraud inducing the contract, and have such damages applied in reduction of the balance due, the vendor serves statutory notice of cancellation, equity cannot vacate, pendente lite and by temporary injunction, the service of the notice; but may restrain the vendor from recording proof of cancellation of taking steps to oust the vendee. *Follingstad v Syverson*, 160 M 307, 200 NW 90.

The court was within its discretion in denying an injunction, pendente lite, restraining defendant from interference with the performance of a certain contract which plaintiff claimed to have entered into with defendant. *Leslie v Midway Co.* 164 M 152, 204 NW 925.

Actions to enjoin breach of contract are similar to actions for specific performance and are governed by the same rules; and a court of equity will not decree specific performance of a continuing contract which one of the parties can terminate at will. The parties are left to their remedies at law. *Reichert v Pure Oil Co.* 164 M 2592, 204 NW 882.

The court properly enjoined a physician, who in selling out in Mankato agreed not to engage in a similar business within a radius of 25 miles. The contract was valid. *Andrews v Cosgriff*, 175 M 431, 221 NW 642.

7. When allowed

It is not necessary, in all cases where a temporary injunction is sought in an action, that the plaintiff should ask for a permanent injunction in his complaint. Other equivalent relief may be sought appropriate to the nature of the case. *Hamilton v Wood*, 55 M 482, 57 NW 208.

Courts may, in proper cases, grant injunctions in substance mandatory; that is, requiring some act to be done. *Central Trust v Moran*, 56 M 188, 57 NW 471.

The rule that, when the equities of the complaint are fully and positively denied under oath by the answer, a temporary injunction should not be granted, is not an inflexible one, and does not apply where it appears probable that the material allegations of the complaint will on a final hearing turn out to be true. *Cornell v Upper Mich. Co.* 131 M 337, 155 NW 99; *Neill v City of Red Wing*, 156 M 467, 195 NW 145.

Record plainly indicates that the trial court erred in denying a temporary injunction thus maintaining the status quo until the action can be heard and determined on the merits. *Mpls. Lamp Co. v Fed. Holding*, 161 M 198, 201 NW 324.

Continuous obstruction of a private road justifies granting injunctive relief. *Haberman v Ullman*, 162 M 210, 202 NW 484.

Equity has jurisdiction to abate and enjoin a nuisance (a newspaper in violation of Laws 1925, Chapter 285); and defendants are not entitled to a jury trial. *State ex rel v Guilford*, 174 M 457, 219 NW 770.

Generally a cause should not be tried on affidavits, but where the affidavits are such that there is a great probability that plaintiff will be able to establish his right to an injunction, the court may in its discretion, order the issuance of a temporary restraining order. *Mathwig v Olson*, 190 M 262, 251 NW 518.

In an action by mortgagor to restrain foreclosing of a \$2,300 mortgage on the ground that \$1,500 had been paid to the mortgagee's agent, the relief was properly granted. *Granberg v Pitz*, 195 M 137, 262 NW 166.

The court found plaintiff had a prescriptive right to use the road and enjoined the obstruction. Possession is not a prerequisite to such suit. *Schmidt v Koecher*, 196 M 178, 265 NW 347.

An action for injunction being maintainable against parties conducting an illegal and usurious loan business, a case where patrons of the loan agency were without a proper remedy at law, interlocutory order granting ancillary remedy of a receiver is upheld, there being no abuse of discretion. *State ex rel v O'Neil*, 205 M 366, 286 NW 316.

A purchaser under a contract for the sale of land may have reformation of the contract and specific performance under in the same action, and may enjoin the vendor from any act in breach of the contract. *Pettyjohn v Bowler*, 219 M 55, 17 NW(2d) 83.

8. When denied

Where the answer denies all the equities set up in the complaint, and a petition for an injunction pending the action discloses no others, it is improper to grant the injunction. *Montgomery v McEwen*, 9 M 103 (93); *Hagemeyer v Village of St. Michael*, 70 M 482, 73 NW 412.

The trial court having refused the injunctive relief and the evidence as to the merits being comparatively evenly balanced, the appellate court is not justified in reversing the action. *Mpls. Gas Light v City of Mpls.* 123 M 231, 143 NW 728.

The basis for the motion was to avoid multiplicity of suits. The court under the allegation of the complaint being justified in refusing to entertain the action at all, clearly did not abuse its discretion in denying the application for temporary injunction. *Davis v Forrestal*, 124 M 10, 144 NW 423.

The wife prevailed in a Minnesota action for separate support. The husband took up his residence in Illinois. The Minnesota trial court did not err in denying the wife's application for a temporary injunction restraining defendant from proceeding with his divorce action in Illinois. *Merriam v Merriam*, 127 M 21, 148 NW 478.

The trial court properly denied a motion to temporarily restrain defendant from building within 30 feet of the street line. *Hackett v Starks*, 157 M 411, 196 NW 492.

The plaintiff in an action for a permanent injunction, to which he was not found entitled, was not entitled to an injunction restraining defendant from interfering with a division line fence, until the true boundary should be determined. *Jones v Williams*, 165 M 415, 206 NW 654.

Where a buyer who is not in default has a defense to an action in replevin, injunction will not lie, as his defense is adequate. *Cary v Satterlee*, 166 M 507, 208 NW 408.

In an action to enjoin defendant from prosecuting an unlawful detainer, plaintiff being forced to elect on which of two inconsistent causes of action she will rely, chose the one to which she had a remedy at law, and in the instant case a dismissal was had. *Tergen v Johnson*, 168 M 22, 209 NW 485.

The trial court properly denied a petition to perpetually enjoin Carnes from trading in and using the yards. *Carnes v St. P. Stockyards*, 175 M 294, 221 NW 20.

Issues of fact in a pending action are not triable on a motion for a temporary injunction; and an injunction should not be made conditional on the surrender of a cause of action. *Linde v Canby Co.* 177 M 318, 225 NW 150.

District courts being courts of concurrent jurisdiction, and the district court of the eleventh district having first acquired jurisdiction, were properly granted an alternative writ restraining interference by the district court of the fourth district. *State ex rel v District Court*, 195 M 169, 262 NW 155.

A suit by a council of state employees to enjoin the parent organization from engaging in activities leading to organization of a new state council, and where the matter at issue related to the powers of the parent organization, did not concern "terms or conditions of employment" and was not within the anti-injunction act. *Minnesota Council v American Federation*, 220 M —, 19 NW(2d) 414.

585.03 NOTICE OF APPLICATION; RESTRAINING ORDER.

HISTORY. G.S. 1866 c. 66 ss. 183, 184, 186; G.S. 1878 c. 66 ss. 201, 202, 204; G.S. 1894 ss. 5345, 5346, 5348; R.L. 1905 s. 4260; G.S. 1913 s. 7890; G.S. 1923 s. 9387; M.S. 1927 s. 9387.

If a complaint is verified and its allegations are positive, an injunction may issue thereon without an affidavit. *McRoberts v Washburne*, 10 M 23 (8); *Stees v Kranz*, 32 M 313, 20 NW 241.

The instant foreclosure sale would constitute a cloud on plaintiff's title pendente lite; and is an act the commission of which may be restrained under the statute as well as on general principles of equity. *Conkey v Dike*, 17 M 457 (434); *O'Brien v Oswald*, 45 M 59, 47 NW 316; *Ekeberg v Mackay*, 114 M 501, 131 NW 787.

Though the injunction was granted ex parte, an appeal from an order dissolving an injunction suspends the operation of the order dissolving, and the injunction remains in force. *State v Dul. St. Ry.* 47 M 372, 50 NW 332.

An appeal from an order dissolving a temporary writ of injunction, if a proper supersedeas bond be given, operates to revive and continue the writ in force pending the appeal. *State v Dul. St. Ry.* 47 M 372, 50 NW 332; *State ex rel v Dist. Ct.* 78 M 464, 81 NW 323.

It was not error for the trial court to cause an order to be issued restraining each of the defendants from proceeding in his action at law pending the disposition of this proceeding in equity. *City of Albert Lea v Nielsen*, 83 M 246, 86 NW 83.

Proceeding, in pais, for a cancellation of a land contract, is in the nature of a strict foreclosure. The time for removing the default commences running when notice is served. After service of the notice, the vendee cannot have a temporary injunction vacating the service upon the ground that he is not in default. *Nolan v Greeley*, 150 M 443, 185 NW 647.

As no trade secret or secret process was involved, nor breach of contract, the court properly refused to enjoin defendant, a former employee or plaintiff, from soliciting the patronage of plaintiff's customers. *Boone v Krieg*, 156 M 83, 194 NW 92.

Whether a restraining order pendente lite shall be made rests in the discretion of the trial court and in the absence of an abuse of such discretion the appellate court will not interfere. *Kief v Chippewa Co. Bank*, 163 M 278, 203 NW 784.

A temporary injunction should not be made conditional on surrender of a cause of action, nor are trials of issues of fact allowable on a motion for an injunction. *Lende v Canby Co.* 177 M 318, 225 NW 150.

In an action to restrain the sheriff from selling real estate on execution, the execution creditor is a necessary party defendant, and if he is not made a party, no injunction against the sheriff will lie. *Cheney v Bengston*, 193 M 586, 259 NW 59.

585.04 BOND REQUIRED; DAMAGES, HOW ASCERTAINED.

HISTORY. G.S. 1866 c. 66 s. 185; G.S. 1878 c. 66 s. 203; G.S. 1894 s. 5347; R.L. 1905 s. 4261; G.S. 1913 s. 7891; G.S. 1923 s. 9388; M.S. 1927 s. 9388.

An action upon the bond required by General Statutes 1878, Chapter 66, Section 203 (section 585.04), to be filed by plaintiff on the allowance of a writ of injunction, is the sole remedy of a defendant for the recovery of his damages by reason of the issuance of the writ, if the court finally decides the plaintiff not entitled thereto; except the writ was sued out maliciously, and without probable cause. *Hayden v Keith*, 32 M 277, 20 NW 195.

If the sum named in the bond is found insufficient, or if new parties are made defendants, it is the duty of the court to require a new or an additional bond. *Hayden v Keith*, 32 M 277, 20 NW 195; *State ex rel v District Ct.* 78 M 464, 81 NW 323.

Defendant's damages may be ascertained in the same action, by reference or otherwise, as the court may order, or in suit upon the bond. *Hayden v Keith*, 32 M 277, 20 NW 195; *Curtis v Hart*, 34 M 329, 25 NW 636; *Guptil v City of Red Wing*, 76 M 129, 78 NW 970.

Counsel fees recoverable. *Lamb v Shaw*, 43 M 507, 45 NW 1134; *Sofranski v St. P. M. & Man.* 72 M 185, 75 NW 17; *Neilsen v City of Albert Lea*, 87 M 285, 91 NW 1113; 91 M 392, 98 NW 197; *Pelkey v Nat'l Surety*, 143 M 176, 173 NW 435.

The maintenance of an embankment caused sand to be cast on plaintiff's land, and was a continuing trespass and nuisance, entitling plaintiff to an injunction and damages; but it cost less to remove the sand than leaving it there would damage the land, and the lesser sum is the measure of damage. *Heath v M. St. P. & S.* 126 M 470, 148 NW 311.

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A municipal corporation is entitled to a temporary injunction restraining an electric light company, operating under contract fixing rates, from refusing to furnish service at contract rates when it is protected by a bond securing it against loss in case it is finally decided that it should have been permitted to put into effect increased service rates. *Borough of Belle Plaine v Northern Power*, 142 M 362, 172 NW 217.

The trial court has no discretion to grant a preliminary injunction after a hearing, without exacting a bond. The issues litigated in the injunction suit are conclusive in an action on a bond and cannot be relitigated. Where two separate issues of fact are pleaded as a defense in a suit for injunction and findings are made as to each, both must be given effect in an action on the bond. *Ind. School v Oliver Iron M'ng Co.* 169 M 15, 208 NW 932, 210 NW 856.

A temporary injunction restraining an action in municipal court was dissolved by order. Without a vacation of the dissolving order or reinstatement of the injunction another order was made purporting to stay proceedings in municipal court, and directing the bond be kept in force. As against the surety, not made a party to the last proceeding, the last order was ineffective, and the sureties' only liability is for damages caused by the restraint under the original injunction. *Johnson v Maryland Casualty*, 177 M 103, 224 NW 700.

The state is not required to furnish a bond to procure a temporary writ of injunction. *State v Nelson*, 189 M 89, 248 NW 751.

A judgment of voluntary dismissal by agreement of the parties of an action in which a restraining order has been issued is not an adjudication that the restraining order was improvidently or erroneously issued. *American Gas v Foorhees*, 204 M 209, 283 NW 114.

In a suit on an injunction bond, the reasonable rental value of buildings during the period of loss of use is a proper measure of damages. *Detroit Lakes v McKenzie*, 204 M 490, 284 NW 60.

In an action on an injunction bond to recover damages for improvident issuance of the injunction, it was improper to strike out the whole answer as sham. That portion raising the issue of the quantum of damage should remain. *Lund v Gillman*, 205 M 242, 285 NW 534.

While damages from wrongful issuance of an injunction may be determined in the injunction suit, they are recoverable (unless the writ was procured by malice) only by an action on the bond. *Midland Loan v Temple Garage*, 206 M 434, 288 NW 853.

Whether it is inequitable to dismiss an equity case without prejudice must be determined by the trial court in exercise of sound discretion, reviewable only if abused. *United Motors v Tropic-Aire*, 57 F(2d) 479.