

**C. S. GILCHRIST, PLAINTIFF AND APPELLEE, VS. E. A. CUDDY ET AL.,
DEFENDANTS. JOSE FERNANDEZ ESPEJO AND MARIANO
ZALDARRIAGA, APPELLANTS.**

G.R. No. 9356. February 18, 1915

Ponente: TRENT, J.

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TRENT, J.:

An appeal by the defendants, Jose Fernandez Espejo and Mariano Zaldarriaga, from a judgment of the Court of First Instance of Iloilo, dismissing their cross-complaint upon the merits for damages against the plaintiff for the alleged wrongful issuance of a mandatory and a preliminary injunction.

Upon the application of the appellee an ex parte mandatory injunction was issued on the 22d of May, 1913, directing the defendant, E. A. Cuddy, to send to the appellee a certain cinematograph film called "Zigomar" in compliance with an alleged contract which had been entered into between these two parties, and at the same time an ex parte preliminary injunction was issued restraining the appellants from receiving and exhibiting in their theater the Zigomar until further orders of the court. On the 26th of that month the appellants appeared and moved the court to dissolve the preliminary injunction. This motion was denied, after hearing, on the same day. On June 5 the appellants filed their answer, wherein they denied all of the Allegations in the complaint and by way of a cross-complaint asked for damages in the sum of P800 for the wrongful issuance of the preliminary injunction. When the case was called for trial on August 6, the appellee moved for the dismissal of the complaint "for the reason that there is no further necessity for the maintenance of the injunction." The motion was granted without objection as to Cuddy and denied as to the appellants in order to give them an opportunity to prove that the injunctions were wrongfully issued and the amount of damages suffered by reason thereof.

The pertinent part of the trial court's findings of fact in this case is as follows:

"It appears in this case that Cuddy was the owner of the film Zigomar and that on the 24th of April he rented it to C. S. Gilchrist for a week for P125, and it was to be delivered on the 26th of May, the week beginning that day. A few days prior to this Cuddy sent the money back to Gilchrist, which he had forwarded to him in Manila, saying that he had made other arrangements with his film. The other arrangements was the rental to these defendants Espejo and his partner for P350 for the week and the injunction was asked by Gilchrist against these parties from showing it for the week beginning the 26th of May.

"It appears from the testimony in this case, conclusively, that Cuddy willfully violated his contract, he being the owner of the picture, with Gilchrist because the defendants had offered him more for the same period. Mr. Espejo at the trial on the permanent injunction on the 26th of May admitted that he knew that Cuddy was the owner of the film. He was trying to get it through his agents Pathe Brothers in Manila. He is the agent of the same concern in Iloilo. There is in evidence in this case on the trial today as well as on the 26th of May, letters showing that the Pathe Brothers in Manila advised this man on two different occasions not to contend for this film Zigomar because the rental price was prohibitive and assured him also that he could not get the film for about six weeks. The last of these letters was written on the 26th of April, which showed conclusively that he

knew they had to get this film from Cuddy and from this letter that the agent in Manila could not get it, but he made Cuddy an offer himself and Cuddy accepted it because he was paying about three times as much as he had contracted with Gilchrist for. Therefore, in the opinion of this court, the defendants failed signally to show the injunction against the defendants was wrongfully procured."

The appellants duly excepted to the order of the court denying their motion for new trial on the ground that the evidence was insufficient to justify the decision rendered. There is lacking from the record before us the deposition of the defendant Cuddy, which apparently throws light upon a contract entered into between him and the plaintiff Gilchrist. The contents of this deposition are discussed at length in the brief of the appellants and an endeavor is made to show that no such contract was entered into. The trial court, which had this deposition before it, found that there was a contract between Cuddy and Gilchrist. Not having the deposition in question before us, it is impossible to say how strongly it militates against this finding of fact. By a series of decisions we have construed sections 143 and 497 (2) of the Code of Civil Procedure to require the production of all the evidence in this court. This is the duty of the appellant and, upon his failure to perform it, we decline to proceed with a review of the evidence. In such cases we rely entirely upon the pleadings and the findings of fact of the trial court and examine only such assigned errors as raise questions of law. (Ferrer vs. Neri Abejuela, 9 Phil. Rep., 324; Valle vs. Galera, 10 Phil. Rep., 619; Salvacion vs. Salvacion, 13 Phil. Rep., 366; Breta vs. Smith, Bell & Co., 15 Phil. Rep., 446; Arroyo vs. Yulo, 18 Phil. Rep., 236; Olsen & Co. vs. Matson, Lord & Belser Co., 19 Phil. Rep., 102; Blum vs. Barretto, 19 Phil. Rep., 161; Cuyugan vs. Aguas, 19 Phil. Rep., 379; Mapa vs. Chaves, 20 Phil. Rep., 147; Mans vs. Garry, 20 Phil. Rep., 134.) It is true that some of the more recent of these cases make exceptions to the general rule. Thus, in Olsen & Co. vs. Matson, Lord & Belser Co. (19 Phil. Rep., 102), that portion of the evidence before us tended to show that grave injustice might result from a strict reliance upon the findings of fact contained in the judgment appealed from. We, therefore, gave the appellant an opportunity to explain the omission. But we required that such explanation must show a satisfactory reason for the omission, and that the missing portion of the evidence must be submitted within sixty days or cause shown for failing to do so. The other cases making exceptions to the rule are based upon peculiar circumstances which will seldom arise in practice and need not here be set forth, for the reason that they are wholly inapplicable to the present case. The appellants would be entitled to indulgence only under the doctrine of the Olsen case. But from that portion of the record before us, we are not inclined to believe that the missing deposition would be sufficient to justify us in reversing the findings of fact of the trial court that the contract in question had been made. There is in the record not only the positive and detailed testimony of Gilchrist to this effect, but there is also a letter of apology from Cuddy to Gilchrist in which the former enters into a lengthy explanation of his reasons for leasing the film to another party. The latter could only have been called forth by a broken contract with Gilchrist to lease the film to him. We, therefore, fail to find any reason for overlooking the omission of the defendants to bring up the missing portion of the evidence and, adhering to the general rule above referred to, proceed to examine the questions of law raised by the appellants.

From the above-quoted findings of fact it is clear that Cuddy, a resident of Manila, was the owner of the "Zigomar;" that Gilchrist was the owner of a cinematograph theater in Iloilo; that in accordance with the terms of the contract entered into between Cuddy and Gilchrist the former leased to the latter the "Zigomar" for exhibition in his (Gilchrist's) theater for the week beginning May 26, 1913; and that Cuddy willfully violated his contract in order that he might accept the appellants' offer of P350 for the film for the same period. 'Did the appellants know that they were inducing Cuddy to violate his contract with a third party when they induced him to accept the P350? Espejo admitted that he knew that Cuddy was the owner of the film. He received a letter from his agents in Manila dated April 26, assuring him that he could not get the film for about six weeks. The arrangements between Cuddy and the appellants for the exhibition of the film by the latter on the 26th of May were perfected after April 26, so that the six weeks would include and extend beyond May 26. The appellants must necessarily have known

at the time they made their offer to Cuddy that the latter had booked or contracted the film for six weeks from April 26. Therefore, the inevitable conclusion is that the appellants knowingly induced Cuddy to violate his contract with another person. But there is no specific finding that the appellants knew the identity of the other party. So we must assume that they did not know that Gilchrist was the person who had contracted for the film.

The appellants take the position that if the preliminary injunction had not been issued against them they could have exhibited the film in their theater for a number of days beginning May 26, and could have also subleased it to other theater owners in the nearby towns and, by so doing, could have cleared, during the life of their contract with Cuddy, the amount claimed as damages. Taking this view of the case, it will be unnecessary for us to inquire whether the mandatory injunction against Cuddy was properly issued or not. No question is raised with reference to the issuance of that injunction.

The right on the part of Gilchrist to enter into a contract with Cuddy for the lease of the film must be fully recognized and admitted by all. That Cuddy was liable in an action for damages for the breach of that contract, there can be no doubt. Were the appellants likewise liable for interfering with the contract between Gilchrist and Cuddy, they not knowing at the time the identity of one of the contracting parties? The appellants claim that they had a right to do what they did. The ground upon which the appellants base this contention is, that there was no valid and binding contract between Cuddy and Gilchrist and that, therefore, they had a right to compete with Gilchrist for the lease of the film, the right to compete being a justification for their acts. If there had been no contract between Cuddy and Gilchrist this defense would be tenable, but the mere right to compete could not justify the appellants in intentionally inducing Cuddy to take away the appellee's contractual rights.

Chief Justice Wells in *Walker vs. Cronin* (107 Mass., 555), said: "Everyone has a right to enjoy the fruits and advantages of his own enterprise, industry, skill and credit. He has no right to be protected against competition; but he has a right to be free from malicious and wanton interference, disturbance or annoyance. If disturbance or loss come as a result of competition, or the exercise of like rights by others, it is *damnum absque injuria*, unless some superior right by contract or otherwise is interfered with."

In *Read vs. Friendly Society of Operative Stonemasons* ([1902] 2 K. B., 88), Darling, J., said: "I think the plaintiff has a cause of action against the defendants, unless the court is satisfied that, when they interfered with the contractual rights of plaintiff, the defendants had a sufficient justification for their interference; * * * for it is not a justification that 'they acted bona fide in the best interests of the society of masons,' i. e., in their own interests. Nor is it enough that 'they were not actuated by improper motives.' I think their sufficient justification for interference with plaintiff's right must be an equal or superior right in themselves, and that no one can legally excuse himself to a man, of whose contract he has procured the breach, on the ground that he acted on a wrong understanding of his own rights, or without malice, or bona fide, or in the best interests of himself, or even that he acted as an altruist, seeking only the good of another and careless of his own advantage." (Quoted with approval in *Beekman vs. Marsters*, 195 Mass., 205.)

It is said that the ground on which the liability of a third party for interfering with a contract between others rests, is that the interference was malicious. The contrary view, however, is taken by the Supreme Court of the United States in the case of *Angle vs. Railway Co.* (151 U. S., 1). The only motive for interference by the third party in that case was the desire to make a profit to the injury of one of the parties of the contract. There was no malice in the case beyond the desire to make an unlawful gain to the detriment of one of the contracting parties.

In the case at bar the only motive for the interference with the Gilchrist-Cuddy contract on the part of the appellants was a desire to make a profit by exhibiting the film in their theater. There was no malice beyond this desire; but this fact does not relieve them of the legal liability for interfering with that contract and causing its

breach. It is, therefore, clear, under the above authorities, that they were liable to Gilchrist for the damages caused by their acts, unless they are relieved from such liability by reason of the fact that they did not know at the time the identity of the original lessee (Gilchrist) of the film.

The liability of the appellants arises from unlawful acts and not from contractual obligations, as they were under no such obligations to induce Cuddy to violate his contract with Gilchrist. So that if the action of Gilchrist had been one for damages, it would be governed by chapter 2, title 16, book 4 of the Civil Code. Article 1902 of that code provides that a person who, by act or omission, causes damage to another when there is fault or negligence, shall be obliged to repair the damage so done. There is nothing in this article which requires as a condition precedent to the liability of a tortfeasor that he must know the identity of a person to whom he causes damage. In fact, the chapter wherein this article is found clearly shows that no such knowledge is required in order that the injured party may recover for the damage suffered.

But the fact that the appellants' interference with the Gilchrist contract was actionable did not of itself entitle Gilchrist to sue out an injunction against them. The allowance of this remedy must be justified under section 164 of the Code of Civil Procedure, which specifies the circumstances under which an injunction may issue. Upon the general doctrine of injunction we said in *Devesa vs. Arbes* (13 Phil. Rep., 273):

"An injunction is a 'special remedy' adopted in that code (Act No. 190) from American practice, and originally borrowed from English legal procedure, which was there issued by the authority and under the seal of a court of equity, and limited, as in other cases where equitable relief is sought, to cases where there is no 'plain, adequate, and complete remedy at law,' which 'will not be granted while the rights between the parties are undetermined, except in extraordinary cases where material and irreparable injury will be done,' which cannot be compensated in damages, and where there will be no adequate remedy, and which will not, as a rule, be granted, to take property out of the possession of one party and put it into that of another whose title has not been established by law."

We subsequently affirmed the doctrine of the *Devesa* case in *Palafox vs. Madamba* (19 Phil. Rep., 444), and we take this occasion of again affirming it, believing, as we do, that the indiscriminate use of injunctions should be discouraged.

Does the fact that the appellants did not know at the time the identity of the original lessee of the film militate against Gilchrist's right to a preliminary injunction, although the appellants incurred civil liability for damages for such interference? In the examination of the adjudicated cases, where injunctions have been issued to restrain wrongful interference with contracts by strangers to such contracts, we have been unable to find any case where this precise question was involved, as in all of those cases which we have examined, the identity of both of the contracting parties was known to the tort-feasors. We might say, however, that this fact does not seem to have been a controlling feature in those cases. There is nothing in section 164 of the Code of Civil Procedure which indicates, even remotely, that before an injunction may issue restraining the wrongful interference with contracts by strangers, the strangers must know the identity of both parties. It would seem that this is not essential, as injunctions frequently issue against municipal corporations, public service corporations, public officers, and others to restrain the commission of acts which would tend to injuriously affect the rights of persons whose identity the respondents could not possibly have known beforehand. This court has held that in a proper case injunction will issue at the instance of a private citizen to restrain ultra vires acts of public officials. (*Severino vs. Governor-General*, 16 Phil. Rep., 366.) So we proceed to the determination of the main question of whether or not - the preliminary injunction ought to have been issued in this case.

As a rule, injunctions are denied to those who have an adequate remedy at law. Where the choice is between the Ordinary and the extraordinary processes of law, and the former are sufficient, the rule will not permit the use of

the latter. (In re Debs, 158 U. S., 564.) If the injury is irreparable, the ordinary process is inadequate. In *Wahle vs. Reinbach* (76 Ill., 322), the supreme court of Illinois approved a definition of the term "irreparable injury" in the following language: "By 'irreparable injury' is not meant such injury as is beyond the possibility of repair, or beyond possible compensation in damages, nor necessarily great injury or great damage, but that species of injury, whether great or small, that ought not to be submitted to on the one hand or inflicted on the other; and, because it is so large on the one hand, or so small on the other, is of such constant and frequent recurrence that no fair or reasonable redress can be had therefor in a court of law." (Quoted with approval in *Nashville R. R. Co. vs. McConnell*, 82 Fed., 65.)

The case at bar is somewhat novel, as the only contract which was broken was that between Cuddy and Gilchrist, and the profits of the appellee depended upon the patronage of the public, for which it is conceded the appellants were at liberty to compete by all fair and legitimate means. As remarked in the case of the "ticket scalpers" (82 Fed., 65), the novelty of the facts does not deter the application of equitable principles. This court takes judicial notice of the general character of a cinematograph or motion-picture theater. It is a quite modern form of the play house, wherein, by means of an apparatus known as a cinematograph or kinematograph, a series of views, representing closely successive phases of a moving object, are exhibited in [rapid sequence, giving a picture which, owing to the persistence of vision, appears to the observer to be in continuous motion. (The Encyclopedia Britannica, vol. 6, p. 374.) The subjects which have lent themselves to the art of the photographer in this manner have increased enormously in recent years, as well as have the places where such exhibitions are given. The attendance, and, consequently, the receipts, at one of these cinematograph or motion-picture theaters depends in no small degree upon the excellence of the photographs, and it is quite common for the proprietor of the theater to secure an especially attractive exhibit as his "feature film" and advertise it as such in order to attract the public. This feature film is depended upon to secure a larger attendance than if its place on the program were filled by other films of mediocre quality. It is evident that the failure to exhibit the feature film will reduce the receipts of the theater.

Hence, Gilchrist was facing the immediate prospect of diminished profits by reason of the fact that the appellants had induced Cuddy to rent to them the film Gilchrist had counted upon as his feature film. It is quite apparent that to estimate with any degree of accuracy the damages which Gilchrist would likely suffer from such an event would be quite difficult if not impossible. If he allowed the appellants to exhibit the film in Iloilo, it would be useless for him to exhibit it again, as the desire of the public to witness the production would have been already satisfied. In this extremity, the appellee applied for and was granted, as we have indicated, a mandatory injunction against Cuddy requiring him to deliver the *Zigomar* to Gilchrist, and a preliminary injunction against the appellants restraining them from exhibiting that film in their theater during the week he (Gilchrist) had a right to exhibit it. These injunctions saved the plaintiff harmless from damages due to the unwarranted interference of the defendants, as well as the difficult task which would have been set for the court of estimating them in case the appellants had been allowed to carry out their illegal plans. As to whether or not the mandatory injunction should have been issued, we are not, as we have said, called upon to determine. So far as the preliminary injunction issued against the appellants is concerned, which prohibited them from exhibiting the *Zigomar* during the week which Gilchrist desired to exhibit it, we are of the opinion that the circumstances justified the issuance of that injunction in the discretion of the court.

We are not lacking in authority to support our conclusion that the court was justified in issuing the preliminary injunction against the appellants. Upon the precise question as to whether injunction will issue to restrain wrongful interference with contracts by strangers to such contracts, it may be said that courts in the United States have usually granted such relief where the profits of the injured person are derived from his contractual relations with a large and indefinite number of individuals, thus reducing him to the necessity of proving in an action

against the tort-feasor that the latter was responsible in each case for the broken contract, or else obliging him to institute individual suits against each contracting party and so exposing him to a multiplicity of suits. *Sperry & Hutchinson Co. vs. Mechanics' Clothing Co.* (128 Fed., 800); *Sperry & Hutchinson Co. vs. Louis Weber & Co.* (161 Fed., 219) ; *Sperry & Hutchinson Co. vs. Pommer* (199 Fed., 309); were all cases wherein the respondents were inducing retail merchants to break their contracts with the company for the sale of the latter's trading stamps. Injunction issued in each case restraining the respondents from interfering with such contracts.

In the case of *Nashville R. R. Co. vs. McConnell* (82 Fed., 65), the court, among other things, said: "One who wrongfully interferes in a contract between others, and, for the purpose of gain to himself induces one of the parties to break it, is liable to the party injured thereby; and his continued interference may be ground for an injunction where the injuries resulting will be irreparable."

In *Hamby & Toomer vs. Georgia Iron & Coal Co.* (127 Ga., 792), it appears that the respondents were interfering in a contract for prison labor, and the result would be, if they were successful, the shutting down of the petitioner's plant for an indefinite time. The court held that although there was no contention that the respondents were insolvent, the trial court did not abuse its discretion in granting a preliminary injunction against the respondents.

In *Beekman vs. Marsters* (195 Mass., 205), the plaintiff had obtained from the Jamestown Hotel Corporation, conducting a hotel within the grounds of the Jamestown Exposition, a contract whereby he was made their exclusive agent for the New England States to solicit patronage for the hotel. The defendant induced the hotel corporation to break their contract with the plaintiff in order to allow him to act also as their agent in the New England States. The court held that an action for damages would not have afforded the plaintiff adequate relief, and that an injunction was proper compelling the defendant to desist from further interference with the plaintiff's exclusive contract with the hotel company.

In *Citizens' Light, Heat & Power Co. vs. Montgomery. Light & Water Power Co.* (171 Fed., 553), the court, while admitting that there are some authorities to the contrary, held that the current authority in the United States and England is that:

"The violation of a legal right committed knowingly is a cause of action, and that it is a violation of a legal right to interfere with contractual relations recognized by law, if there be no sufficient justification for the interference. (*Quinn vs. Leatham*, supra, 510; *Angle vs. Chicago, etc., Ry. Co.*, 151 U. S., 1; 14 Sup. Ct, 240; 38 L. Ed., 55; *Martens vs. Reilly*, 109 Wis., 464, 84 N. W., 840; *Rice vs. Manley*, 66 N. Y., 82; 23 Am. Rep., 30; *Bitterman vs. L. & N. R. R. Co.*, 207 U S., 205; 28 Sup. Ct., 91; 52 L. Ed., 171; *Beekman vs. Marsters*, 195 Mass., 205; 80 N. E.f 817; 11 L. R. A. [N. S.], 201; 122 Am. St. Rep., 232; *South Wales Miners' Fed. vs. Glamorgan Coal Co.*, Appeal Cases, 1905, p. 239.)"

See also *Nims on Unfair Business Competition*, pp. 351-371.

In 3 *Elliott on Contracts*, section 2511, it is said: "Injunction is the proper remedy to prevent a wrongful interference with contracts by strangers to such contracts where the legal remedy is insufficient and the resulting injury is irreparable. And where there is a malicious interference with lawful and valid contracts a permanent injunction will ordinarily issue without proof of express malice. So, an injunction may be issued where the complainant and the defendant were business rivals and the defendant had induced the customers of the complainant to break their contracts with him by agreeing to indemnify them against liability for damages. So, an employee who breaks his contract of employment may be enjoined from inducing other employees to break their contracts and enter into new contracts with a new employer of the servant who first broke his contract. But the remedy by injunction cannot be used to restrain a legitimate competition, though such competition would involve the violation of a contract. Nor will equity ordinarily enjoin employees who have quit the service of their

employer from attempting by proper argument to persuade others from taking their places so long as they do not resort to force or intimidation or obstruct the public thoroughfares."

Beekman vs. Marsters, supra, is practically on all fours with the case at bar in that there was only one contract in question and the profits of the injured person depended upon the patronage of the public. Hamby & Toomer vs. Georgia Iron & Coal Co., supra, is also similar to the case at bar in that there was only one contract, the interference of which was stopped by injunction.

For the foregoing reasons the judgment is affirmed, with costs, against the appellants.

Arellano, C. J., Torres, Carson, and Araullo, JJ., concur.

CONCURRING

MORELAND, J.,

The court seems to be of the opinion that the action is one for a permanent injunction; whereas, under my view of the case, it is one for specific performance. The facts are simple. C. S. Gilchrist, the plaintiff, proprietor of the Eagle Theater of Iloilo, contracted with E. A. Cuddy, one of the defendants, of Manila, for a film entitled "Zigomar or Eelskin, 3d series," to be exhibited in his theater in Iloilo during the week beginning May 26, 1913. Later, the defendants Espejo and Zaldarriaga, who were also operating a theater in Iloilo, representing Pathe Freres, also obtained from Cuddy a contract for the exhibition of the film aforesaid in their theater in Iloilo during the same week.

The plaintiff commenced this action against Cuddy and the defendants Espejo and Zaldarriaga for the specific performance of the contract with Cuddy. The complaint prays "that the court, by a mandatory injunction, order Cuddy to deliver, on the 24th of May, 1913, in accordance with the aforesaid contract, the said film 'Zigomar, 3d series, or Eelskin,' to the plaintiff Gilchrist, in accordance with the terms of the agreement, so that plaintiff can exhibit the same during the last week beginning May 26, 1913, in the Eagle Theater, in Iloilo; that the court issue a preliminary injunction against the defendants Espejo and Zaldarriaga prohibiting them from receiving, exhibiting, or using said film in Iloilo during the last week of May, 1913, or at any other time prior to the delivery to the plaintiff; that, on the trial, said injunction be made perpetual and that Cuddy be ordered and commanded to specifically perform his contract with the plaintiff."

On the filing of the complaint the plaintiff made an application for a mandatory injunction compelling the defendant Cuddy to deliver to plaintiff the film in question by mailing it to him from Manila on the 24th of May so that it would reach Iloilo for exhibition on the 26th; and for a preliminary restraining order against the other two defendants prohibiting them from receiving or exhibiting the said film prior to its exhibition by plaintiff.

The court, on this application, entered an order which provided that Cuddy should "not send said film 'Zigomar, 3d series, or Eelskin,' to the defendants Espejo and Zaldarriaga and that he should send it to the plaintiff, Gilchrist, on the 24th day of May, 1913, in the mail for Iloilo." This order was duly served on the defendants, including Cuddy, in whose possession the film still was, and, in compliance therewith Cuddy mailed the film to the plaintiff at Iloilo on the 24th of May. The latter duly received it and exhibited it without molestation during the week beginning the 26th of May in accordance with the contract which he claimed to have made with Cuddy.

The defendants Espejo and Zaldarriaga having received due notice of the issuance of the mandatory injunction and restraining order of the 22d of May, appeared before the court on the 26th of May and moved that the court vacate so much of the order as prohibited them from receiving and exhibiting the film. In other words, while the

order of the 22d of May was composed of two parts, one a mandatory order for immediate specific performance of the plaintiff's contract with the defendant Cuddy, and the other a preliminary restraining order directed to Espejo and Zaldarriaga prohibiting them from receiving and exhibiting the film during the week beginning the 26th of May, their motion of the 26th of May referred exclusively to the injunction against them and touched in no way that portion of the order which required the immediate performance by Cuddy of his contract with Gilchrist. Indeed, the defendants Espejo and Zaldarriaga did not even except to the order requiring Cuddy to specifically perform his agreement with the plaintiff nor did they in any way make an objection to or show their disapproval of it. It was not excepted to or appealed from and is not before this court for review.

The motion of Espejo and Zaldarriaga to vacate the injunction restraining them from receiving the film was denied on the 26th of May. After the termination of the week beginning May 26, and after the exhibition of the film by the plaintiff in accordance with the alleged contract with Cuddy, the plaintiff came into court and moved that, in view of the fact that he had already obtained all that he desired to obtain or could obtain by his action, namely, the exhibition of the film in question during the week beginning May 26th, there was no reason for continuing it and moved for its dismissal. To this motion Cuddy consented and the action was dismissed as to him. But the other defendants objected to the dismissal of the action on the ground that they desired to present to the court evidence showing the damages which they had suffered by reason of the issuance of the preliminary injunction prohibiting them from receiving and exhibiting the film in question during the week beginning May 26. The court sustained their objection and declined to dismiss the action as to them, and, on the 8th of August, heard the evidence as to damages. He denied defendants the relief asked for and dismissed their claim for damages. They thereupon took an appeal from that order, and that is the appeal which we have now before us and which is the subject of the opinion of the court with which I am concurring.

We thus have this strange condition:

An action for specific performance of a contract to deliver a film for exhibition during a given time. A preliminary mandatory injunction ordering the delivery of the film in accordance with the contract. The delivery of the film in accordance with the preliminary mandatory injunction. The actual exhibition of the film during the time specified: in the contract. No objection to the issuance of the mandatory injunction, to the delivery of the film, or to the exhibition thereof. The dismissal of the action against the party with whom the plaintiff made the contract on the ground that the plaintiff had obtained full relief by means of the so-called preliminary remedy by virtue of which the contract was actually specifically performed before the action was tried. No objection or exception to the order requiring the specific performance of the contract.

Under such conditions it is possible for the defendants Espejo and Zaldarriaga to secure damages for the wrongful issuance of the preliminary injunction directed against them even though it be admitted that it was erroneously issued and that there was no ground therefor whatever? It seems to me that it is not. At the time this action was begun the film, as we have seen, was in the possession of Cuddy and, while in his possession, he complied with a command of the court to deliver it to the plaintiff. In pursuance of that command he delivered it to plaintiff, who used it during the time specified in his contract with Cuddy; or, in other words, he made such use of it as he desired and then returned it to Cuddy. This order and the delivery of the film under it were made in an action in which the defendants Espejo and Zaldarriaga were parties, without objection on their part and without objection or exception to the order. The film having been delivered to defendants' competitor, the plaintiff, under a decree of the court to which they made no objection and took no exception and from which they have not appealed, what injury can they show by reason of the injunction restraining them from making use of the film? If they themselves, by their conduct, permitted the plaintiff to make it impossible for them to gain possession of the film and to use it, then the preliminary injunction produced no injury for the reason that no harm can result from

restraining a party from doing a thing which, without such restraint, it would be impossible for him to do. Moreover, the order for the delivery of the film to plaintiff was a complete determination of the rights of the parties to the film which, while the court had no right to make, nevertheless, was valid and binding on all the parties, none of them objecting or taking exception thereto. Being a complete determination of the rights of the parties to the action, it should have been the first point attacked by the defendants, as it foreclosed them completely and, if left in force, eliminated every defense. This order was made on May 22d and was not excepted to or appealed from. On the 8th of August following the defendants appealed from the order dismissing their claim to damages but the order for the delivery of the film to plaintiff was final at that time and is now conclusive on this court.

Section 143 of the Code of Civil Procedure, providing for appeals by bill of exceptions, provides that "upon the rendition of final judgment disposing of the action, either party shall have the right to perfect a bill of exceptions for a review by the Supreme Court of all rulings, orders, and judgments made in the action, to which the party has duly excepted at the time of making such ruling, order, or judgment." While the order for the delivery of the film to plaintiff was in one sense a preliminary order, it was in reality a final determination of the rights of the parties to the film, as it ordered the delivery thereof to plaintiff for his use. If it had been duly excepted to, its validity could have been attacked in an appeal from the final judgment thereafter entered in the action. Not having been excepted to as required by the section just referred to, it became final and conclusive on all the parties to the action, and when, on the 8th day of August following, the defendants presented their claim for damages based on the alleged wrongful issuance of a temporary restraining order, the whole foundation of their claim had disappeared by virtue of the fact that the execution of the order of the 22d of May had left nothing for them to litigate. The trial court, on the 8th of August, would have been fully justified in refusing to hear the defendants on their claim for damages. Their right thereto had been adjudicated on the 22d of May and that adjudication had been duly put into execution without protest, objection or exception, and was, therefore, final and conclusive on them on the 8th of August.

I have presented this concurring opinion in an attempt to prevent confusion, if any, which might arise from the theory on which the court decides this case. It seems to me impossible that the action can be one for a permanent injunction. The very nature of the case demonstrates that a permanent injunction is out of the question. The only thing that plaintiff desired was to be permitted to use the film for the week beginning the 26th of May. With the termination of that week his rights expired. After that time Cuddy was perfectly free to turn the film over to the defendants Espejo and Zaldarriaga for exhibition at any time. An injunction permanently prohibiting the defendants from exhibiting the film in Iloilo would have been unjustifiable, as it was something that plaintiff did not ask for and did not want; and would have been an invasion of the rights of Cuddy as, after the termination of the week beginning May 26, he was at liberty, under his contract with plaintiff, to rent the film to the defendants Espejo and Zaldarriaga and permit its exhibition in Iloilo at any time. The plaintiff never asked to have defendants permanently enjoined from exhibiting the film in Iloilo and no party to the action has suggested such a thing.

The action is one for specific performance purely; and while the court granted plaintiff rights which should have been granted only after a trial of the action, nevertheless, such rights having been granted before trial and none of the defendants having made objection or taken exception thereto, and the order granting them having become final, such , order became a final determination of the action, by reason of the nature of the action itself, the rights of the parties became thereby finally determined and the defendants Espejo and Zaldarriaga, being parties to the action, were precluded from further litigation relative to the subject matter of the controversy.

No damages are claimed by reason of the issuance of the mandatory injunction under which the film was delivered to plaintiff and used by him during the week beginning the 26th of May. While the opinion says in the

first paragraph that the action is "for damages against the plaintiff for the alleged wrongful issuance of a mandatory and preliminary injunction," the opinion also says in a later portion that "it will be unnecessary for us to inquire whether the mandatory injunction against Cuddy was properly issued or not. No question is raised with reference to the issuance of that injunction ;" and still later it is also stated that "as to whether or not the mandatory injunction should have been issued, we are not, as we have said, called upon to determine." I repeat that no objection was made by the defendants to the issuance of the mandatory injunction, no exception was taken to the order on which it was issued and no appeal has been taken therefrom. That order is now final and conclusive and was at the time this appeal was taken. That being so, the rights of the defendants were foreclosed thereby. The defendants Espejo and Zaldarriaga cannot now be heard to say that they were damaged by the issuance of the preliminary restraining injunction issued on the same day as the mandatory injunction.

From what has been said it is clear, it seems to me, that the question of a breach of contract by inducement, which is substantially the only question discussed and decided, is not in the case in reality and, in my judgment, should not be touched upon. Courts will not proceed with a litigation and discuss and decide question which might possibly be involved in the case when it clearly appears that there remains nothing about which to litigate, the whole subject matter of the original action having been settled and the parties having no real controversy to present. At the time the defendants Espejo and Zaldarriaga offered their claim for damages arising out of the wrongful issuance of the restraining order, there was nothing between them and the plaintiff to litigate, the rightfulness of plaintiff's demand having already been finally adjudicated and determined in the same action.

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