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IN THE MATTER OF EX PARTE RESTRAINING ORDERS, INJUNCTIONS AND WRITS OF NE EXEAT IN DIVORCE CASES

By George F. Dunklee, Presiding Judge, District Court

WHEN I became presiding judge on January 12, 1932, I was struck by an unusually large number of ex parte applications for restraining orders and writs of ne exeat in divorce cases.

The first one issued was ex parte upon application based on allegations of the complaint and an affidavit. The next morning the defendant appeared and showed that he was living at home, regularly employed, and it was plain there was no justification for the plaintiff asking such extraordinary relief. Plaintiff's attorney consented that the order be set aside.

Applications for similar orders were made frequently and I took a stand not to issue them on affidavits alone and required the plaintiff to come into court, take the stand and testify. In practically all cases the court was satisfied, from the evidence, that there was no necessity for any such order.

I had the Clerk make a search of the records for the purpose of ascertaining about how many ex parte restraining orders and writs of ne exeat had been issued in the past seven years and found that in: 1925, 77; 1926, 88; 1927, 98; 1928, 132; 1929, 118; 1930, 104; 1931, 67; 1932, 3, since January 12th to date, April 9th, including one set aside as above stated.

I looked up the authorities, first, as to the authority of the courts to issue such ex parte orders; and second, as to the public policy of the court issuing them without notice ex parte.

It is elementary civil code practice law that, "Every direction of the court or judge, made or entered in writing, and not included in a judgment, is denominated an order. An application for an order is a motion." (Sec. 406, C. Code, C. L. 1921.)

"Written notice of motions shall be required in all cases, except those made during the progress of the trial." (Sec. 407 Civil Code, C. L. 1921.)

That brings us to a question of an exception to the above provisions of the Code, if any, or of the inherent common-law

power of the court, if any, in such cases, to disregard the giving of notice and bond.

The case of *Sedgwick v. Sedgwick,* 50 Colo. 167, deals with temporary injunctions and restraining orders without notice, and on pages 167 and 168 the court says (quoting from Sec. 165 of the Code, C. L. 1921):

> "In the event the temporary restraining order shall issue without notice and it shall afterwards appear to the court, upon any hearing or trial of said matter, that the emergency alleged therefor did not exist, or, existing, was brought about by the act or omission of or for the plaintiff, or by his knowledge, the court shall find and enter judgment accordingly, and shall, also, dismiss the complaint without respect to the merits thereof, and shall, also, summarily enter judgment on said emergency bond for the defendant and against the plaintiff and his sureties aforesaid, and issue execution therefor."

Page 168:

> "It is claimed under this statute, the trial court erred in not dismissing the complaint. The claim is wrong, for the simple reason counsel did not ask to have it dismissed. If counsel wanted the action dismissed upon a hearing of 'said matter,' they should have called it to the attention of the court and had it heard. 'Said matter,' does not refer to the principal suit, but to the issuing of the restraining order. This not to be construed as implying that the code provision on injunction is applicable to divorce actions. Whether the district court possesses inherent common-law power to issue restraining orders in proper cases, in divorce actions, without notice and without bond, we express no opinion."

At least that decision leaves the legal propriety of issuing such orders in doubt.

In the case of *In re Nash,* 62 Colo. 101, on the question of "ne exeat," it says among other things:

> "Scope of the Writ, has not been enlarged by the code," etc.

A practice and custom has been built up by plaintiff coming into court ex parte with stock allegations in complaints and affidavits and getting these extraordinary orders as a matter of course in cases where the husband and wife are at the time of the filing of the suit living together in the same house, and the fact of the issuance of these extraordinary and harsh orders brings about a condition between the husband and wife whereby there can be no reconciliation.

I am of the opinion that ex parte injunction orders not issued if at all without notice, until the Supreme Court holds

otherwise, except the court upon an examination of the plaintiff, not on affidavit or complaint alone, is convinced of a critical condition which would call for the extraordinary powers of the court to protect the plaintiff.

Among the authorities I cite the following:

"Since it is ex parte, and it is 'a remedy of great severity, it is applied to private rights with great caution and jealousy,' and will not ordinarily be granted when the equity is doubtful, nor as a means of improper restraint." 2 Story Equity Practice, p. 801; also 45 C. J. 590.

IN THE SUPREME COURT OF THE STATE OF COLORADO

IN order that the Supreme Court may expedite its work, it has been divided into three departments instead of two, pursuant to the authority of the Constitution. This means that the Chief Justice and two associates constitute a department. Such was the practice until a few years ago, but afterwards two departments were established. Of course should any member of a department disagree with his associates, then the case is considered by the court en banc. Cases involving constitutional questions and capital cases are heard by the court en banc, as well as other cases when so directed by the court.

The three departments as announced by the court Monday are constituted as follows:

Department One:

Mr. Chief Justice Adams — Mr. Justice Campbell

Mr. Justice Alter

Department Two:

Mr. Chief Justice Adams — Mr. Justice Butler

Mr. Justice Moore

Department Three:

Mr. Chief Justice Adams — Mr. Justice Burke

Mr. Justice Hilliard