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IS COLOR BLINDNESS A DISEASE OR DISABILITY SUCH AS WILL ENTITLE A MEMBER TO SICK BENEFITS FROM A RELIEF SOCIETY.

Very many questions involving the relation of master and servant have been examined and decided by the courts, including a large number arising from sick-benefit clauses in employers' contracts. The usual terms of these clauses have been interpreted and rules laid down determining what is meant by "sickness" and "physical inability" such as will entitle a person to receive benefits. In most cases the application of these rules is not very difficult and little room for doubt is left as to the decision.

In a recent case, however, a question was presented for which there seems to be no direct precedent. This was the case of *Kane v. Chicago B. & Q. R. R. Co.*, 132 N. W. (Neb.), 920, in which a railway night switchman is suing for benefits after being discharged on account of color blindness. The plaintiff had worked for the defendant as night switchman for about sixteen years and became color blind during his term of service. The by-laws of the relief department, among other things, provided that "wherever used in these regulations the word 'disability' shall be held to mean physical inability to work by reason of sickness or

accidental injury, and the word 'disabled' shall apply to members thus physically unable to work"; and "to establish a claim for sick benefits there must be positive evidence of acute or constitutional disease sufficient to cause disability". The Court, following *Chicago, B. & Q. R. R. Co. v. Olsen,* 70 Neb., 559, 116 N. W., 957, and *Keith Adm'x v. Chicago, B. & Q. R. R. Co.,* 82 Neb., 12, 97 N. W., 831, held that the words "physical inability to work" mean inablity to perform manual labor which would enable the injured member to earn wages equal to what he would have earned in the employment in which he was engaged at the time he was injured, and that the evidence established that condition. They further held that this condition was the result of "sickness" or "constitutonal disease" within the meaning of the by-laws and that the plaintiff could therefore recover.

Since no cases can be found which discuss the question of color blindness in this relation, those cases which discuss other forms of sickness and disability in connection with relief benefits must be examined in order to determine to what extent a member must be disabled to be entitled to benefits.

In *C., B. & Q. R. R. Co. v. Olsen, supra,* the plaintiff had recovered so far as to be able to do light work which gave him a compensation much less than he had received prior to his injury. The Court held that he was still entitled to relief benefits, saying that to relieve the company the plaintiff must recover from the injury so as to be able to perform labor similar and equivalent to that required in the employment in which he was engaged at the time of the accident, or was able to perform the duties of an engagement that was open and available to him, whereby he could support and maintain himself as he was able to do before the accident. This statement is approved and the rule applied in *Keith v. C., B. & Q. R. R. Co., supra.* In *Plattdeutsche Grot Gilde, etc. v. Ross,* 117 Ill. App., 247, it is said that where the by-laws of a fraternal benefit society provide for the payment of sick benefits where a member is "sick and unable to work", sick benefits are payable where a member has not been restored to full health and is substantially unable to do such work as he was accustomed to do prior to his sickness. The Court interprets the words "sick and unable to work" as meaning that so long as a man is not restored to his full health and is substantially unable

to do such work or make such a living as he did before, he is entitled to the benefit. Another case, *B. & O. Employees Relief Association v. Post,* 122 Penna. State, 579, interprets the words "total inability to work," in the constitution and by-laws of such an association, to mean a total inability to earn a livelihood at any employment, and not restricted to a particular trade or the employment in which a member is engaged at the time of his injury. It was said in the opinion: "This was a relief association, not an accident insurance company. Its object was to relieve its members during the time when they were unable to work by reason of injury or sickness. Hence, if a member was injured in such a way that he could no longer earn a livelihood at the particular labor in which he was employed at the time of the accident, yet was capable of earning as much or more money in some other employment, it was certainly not the object of the association, as expressed by its charter and by-laws, that he should remain idle and draw benefits all his life." This implies that though the fact that a person is unable to engage in the same or similar occupation would not alone entitle him to benefits, yet if he is unable to earn substantially as much at some other work, he would be so entitled.

The plaintiff in the case of *Albert v. Order of Chosen Friends,* 34 Fed., 721, construed the section in the by-laws similar to the ones already given, as meaning his or her usual or other like occupation. It was granted that such a construction was sustained by excellent authority, but a recovery was refused because another section of the by-laws defined the permanent and total disabilities mentioned adverse to the plaintiff's construction. Again in *Kelly v. Ancient Order Hibernians,* 9 Daly (N. Y.), 289, a recovery was refused for a permanent lameness resulting from an injury. But there the by-laws used simply the word "sickness", and the Court decided that after the man had recovered his physical health he could no longer be said to be sick.

Total incapacity means inability to perform sustained manual labor so as to enable one to earn or assist in earning a livelihood. *Grand Lodge B. L. F. v. Orrell,* 206 Ill., 208, 69 N. E., 68. A by-law providing that a member receiving bodily injuries causing "total and permanent loss of eyesight" should receive the full amount of his certificate, applies to the total and permanent loss

of the sight of one eye, disabling the injured from following his occupation. *Maynard v. Locomotive Engineers' Mut. L., etc.,* 16 Utah, 145, 51 Pac., 259.

Frequently a member is allowed benefits by the terms of his certificate or the laws of the society where he is unable to follow his usual occupation; *Beach v. Supreme Tent K. M.,* 177 N. Y., 100, 69 N. E., 281; ordinarily, however, a member is not entitled to benefits if he is able to follow some other occupation, provided he can obtain it, and it calls for substantially the same physical and mental ability as his former occupation, *Neill v. Order of United Friends,* 149 N. Y., 430, 44 N. E., 145; and is substantially as remunerative, *Monahan v. Supreme Lodge O. C. K.,* 88 Minn., 224, 92, N. W., 972.

These cases represent the general weight of authority, and they seem to present two criterions by which the plaintiffs right of recovery is measured. Some of them allow a recovery of benefits if there is such a disabling as to prevent the earning of simlar wages, in the same or a similar occupation; while others hold that there must be an inability to earn, in any occupation whatsoever, a livelihood substantially the same as that earned before the injury or sickness. In the principal case it is said that "there is sufficient evidence to sustain findings to the effect that the plaintiff became color blind while in the defendant's employ, that he was discharged because of that defect, and that his condition incapacitated him from following his vocation or any other equally remunerative". So there is no doubt that the plaintiff was entitled to recover if his condition was the result of sickness or disease within the meaning of the by-laws.

These by-laws, as quoted above, require that the disability shall result from sicness or accidental injury, or there must be positive evidence of acute or constitutional disease sufficient to cause disability. The Court say that there is little, if any, evidence to justify a finding that this color blindness is the result of acute sickness; but that the jury could lawfully have found that it was caused by constitutional disease, and that there is, therefore, no error. This ruling is right for it seems to be true that color blindness may be the result of a constitutional disease, as well as produced by certain occupations or indulgences. It is defined in

Words and Phrases, Volume 2, pages 1262-1263, thus: "Color blindness, by which is meant either an imperfect perception of colors, or an inability to recognize them at all, or to distinguish between colors, or between some of them, is a defect much more common than is generally supposed. Medical treatises of recognized merit on the subject, represent, as the result of extended examinations, that a fraction over four per cent of males are color blind. With some the defect is congenital, with others brought on by occupations in which they have been engaged, or by vicious habits in the use of liquors or food in whch they have indulged."

Though it is extremely improbable that a man who is incapacitated through color blindness for holding one position, should ordinarily find it impossible to earn a fair remuneration at some other occupation, yet in this case the jury has found that the plaintiff was unable to secure a position where he would secure a remuneration substantially the same as that which he previously received, and since it has also found that his color blindness was the result of "sickness" or "disease" within the meaning of the by-laws, according to the weight of authority he must recover.

THE JURISDICTION OF A COURT OF EQUITY TO PREVENT A MULTIPLICITY OF SUITS.

There is some diversity of opinion among the writers as well as the courts as to the power of a Court of Equity to grant an injunction to enjoin numerous tort actions where there is merely a community of interest in the questions of law and fact involved in the controversy.

The recent case of *Southern Steel Co. v. Hopkins,* 57 Sou., 11 (Ala.), in which the Court overruled its former decision, was a suit in equity to enjoin 110 separate actions at law. The ground of the "Bill of Peace" was to prevent a multiplicity of suits.

These actions were brought by the administrators of 110 workmen who lost their lives in an explosion in a coal mine to recover damages from the complainant. The Court held that a community of interest among several parties in the questions of law and fact involved is not sufficient to confer jurisdiction upon a Court of Equity to enjoin the several tort actions at law, though

brought against the same defendant and though each may depend upon the same state of facts.

The leading case in support of the doctrine of the principal case is *Tribette v. Illinois Central Ry. Co.,* 70 Miss., 182. The Court there held that a Court of Equity would not grant an injunction to enjoin a number of separate actions at law against the same defendant to recover damages where the plaintiffs have no community of interest except in the question of law and fact involved. This was, however, overruled by *Crawford v. R. R. Co.,* 83 Miss., 716.

In order to obtain an injunction in a Court of Equity under such circumstances there must be a common title or a common interest in the subject mater involved. *Turner v. Mobile,* 135 Ala., 73; *Ducktown Co. v. Fain,* 109 Tenn., 56.

"Relief by injunction for the prevention of a multiplicity of suits is allowed only when the subject matter of the various litigations as well as the parties thereto are substantially the same. And the fact of different suits having been brought, each having a distinct object founded on distinct and separate grounds and brought by different persons does not constitute such a multiplicity of suits as to bring the case within the rule and to warrant an injunction." *High on Injunctions,* Sec. 65a.

The requisites of a community of interest have been described in *Bliss on Code Pleading,* Sec. 76. "Two or more owners of mills propelled by water are interested in preventing an obstruction above that shall interfere with the downflow of the water and may unite to restrain it or abate it as a nuisance; but they cannot hence unite in an action for damages, for, as to the injury suffered, there is no community of interest."

In *Turner v. City of Mobile,* 135 Ala., 73, the Court states that there must be some privity among the plaintiffs, either by force of contract or of estate. "It is palpably illogical to say that when numerous persons have like but independent legal estates or legal rights in respect of which severally they have no right to invoke the jurisdiction of chancery, yet because they are numerous the separate legal right of each is metamorphosed into an equity right in all or in one for all."

In *Tribette v. Illinois Central Ry. Co.,* 70 Miss., 182, the Court says, in criticising the principle enunciated by Pomeroy and some of the decisions which have held *contra* to the doctrine of the principal case, that they have failed to distinguish between two distinct things: joinder of parties and avoidance of multiplicity of suits. "Where each of several may proceed or be proceeded against in equity their joinder as plaintiffs or defendants in one suit is not objectionable; but this is a very different question from that whether, merely because many actions at law arise out of the same transaction or occurrence and depend on the same matters of fact and law, all may proceed or be proceeded against jointly in one suit in chancery."

One of the reasons advanced for refusing jurisdiction is that it would impair the right of trial by jury. The liberty of the citizen, the Court say, is largely safeguarded by his right to a jury trial, and where a party has a right to a jury trial, they are not disposed to deny such right. *Vandalia Coal Co. v. Lawson,* 43 Ind., 226.

It is also pointed out by the Courts which sustain the doctrine of the principal case that although the question should be determined in favor of the defendant, it cannot be claimed by them that the decision of the Court of Equity was *res judicata.* If, on the other hand, the complainant wins, the matter is ended. And it is also true, as is stated in *Vandalia Coal Co. v. Lawson, supra,* that, "If a Court of Equity take jurisdiction and should the issue be tried out therein, it would be necessary to submit the questions of fact, the amount of damage done the several injured parties, etc., to a jury. The possibility that the jury might confuse the evidence relating to so many separate parties is strong. Great difficulty might arise in adjusting the rights of all parties in one decree, and justice would be more likely obtained by separate trials."

The Courts which have laid down a broader rule from that expressed in the cases *supra* have substantially adopted the doctrine stated in Pomeroy *Equity Jurisprudence,* Sec. 268-269: "In order that a Court of Equity may grant relief and thus exercise its jurisdiction on the ground of preventing a multiplicity of suits there does and must exist among the indviduals composing the

numerous body, or between each of them and their single adversary a common right, a community of interest, in the subject matter of the controversy, or a common title from which all their separate claims and all the questions at issue arise;" and that "in cases 'analagous to' or 'within the principles' of 'Bills of Peace' equity will intervene, although there is no common title or community of right or of interest in the subject matter, but where there is merely a community of interest among them in the question of law and fact involved or in the kind and form of relief demanded and obtained by or against each individual member of the numerous body."

The jurisdiction of equity has extended to a great variety of cases which do not come strictly within bills of peace, but which Courts have declared to be analagous thereto, those in which there was no common title or community of interest in anything save the question at issue and the remedy sought. *Carlton v. Newman,* 77 Me., 408.

The jurisdiction for the prevention of a multiplicity of vexatious suits at law is a part of chancery jurisprudence, and the exercise thereof does not deprive plaintiff at law of any right to trial by jury. *Boring v. Williams,* 17 Ala., 510.

This doctrine is distinctly held by many decisions and text writers not to be an inequitable one, for, as is stated in Pomeroy's *Equity Jurisprudence,* Sec. 914: "Justice could be better administered and the rights of both litigants protected far better by a trained judge than by leaving everything to the rough and ready justice of an ordinary jury."

Some courts hold that the parties must claim in privity. *Turner v. Mobile, supra.* But Pomeroy's *Equity Jurisprudence,* Sec. 251, says: "Suits have often been sustained by a single plaintiff against a numerous class of defendants, and by or on behalf of a numerous class of defendants, and by or on behalf of a numerous class of plaintiffs against a single defendant, avowedly on the ground of "preventing a multiplicity of suits," where there was no relation existing between the individual members of the class and their common adversary to which the term 'privy' was at all applicable."

The Court in *Morgan v. Morgan,* 3 Stewart (Ala.), 383, states

that it is not necessary in bills of peace that there should appear to be any privity or connection between the defendants.

It is now recognized, however, that even in the class of cases holding *contra* to the principal case a Court of Equity will not interfere where the exercise of the jurisdiction is unnecessary or would be ineffectual. *Hale v. Allison,* 188 U. S., 56; *Town of Springport v. Teutonia Savings Bank,* 75 N. Y., 397. Pomeroy recognizes these limitations on the general doctrine: "The equity suit must result in a simplification of the issues. If after the numerous parties are joined there still remain separate issues to be tried between each of them, nothing has been gained by the Court of Equity assuming jurisdiction." "Equity will not take jurisdiction for the purpose of awarding the remedy that may be obtained at law. The danger of a vexatious suit must be more than a mere possibility, it must be a real one." Pomeroy's *Equity Jurisprudence,* Sec. 251½, 251¾.

The tendency of the more recent decisions is against the doctrine of the principal case and favors the doctrine that it is not necessary that there be a common title or community of interest in the subject matter, but that a community of interest among the several parties in the questions of law and fact involved is sufficient to invoke the aid of a Court of Equity solely on the ground of preventing a multiplicity of actions.