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DISCRETION TO DENY INJUNCTION AGAINST TRESPASS AND NUISANCE

By Henry L. McClintock*

When the supreme court of Pennsylvania was confronted in a suit to enjoin a continuing trespass with the contention of defendant that an injunction was not of right but of grace and ought to be refused if greater injury would result from its refusal than from leaving a party to his remedy at law, in support of which an earlier Pennsylvania case was cited, the court replied:

"The phrase 'of grace' predicated of a decree in equity had its origin in an age when kings dispensed their royal favors by the hands of their chancellors, but, although it continues to be repeated occasionally, it has no rightful place in the jurisprudence of a free commonwealth, and ought to be relegated to the age in which it was appropriate. It has been somewhere said that equity has its laws as law has its equity. This is but another form of saying that equitable remedies are administered in accordance with rules as certain as human wisdom can devise, leaving their application only in doubtful cases to the discretion, not the unmerited favor or grace of the chancellor. Certainly no chancellor will at this day admit that he dispenses favors or refuses rightful demands, or deny that when a suitor has brought his cause clearly within the rules of equity jurisprudence, the relief he asks is demandable ex debito justitiae, and needs not to be implored ex gratia."

The accuracy of this statement of the origin of the obvious difference between the administration of the common law by the common law courts and the administration of equity by the chancellors is not questioned and it ought to be equally beyond question that this historical basis for the difference in administration

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has disappeared from our legal system. Unless, then, there is some basis other than the historical one for the difference, that ought also to disappear. It is not altogether clear from the above quotation, nor from the opinion from which it was taken, whether the court intended to go to the length of saying that, in equity as at law, a decree for the plaintiff, awarding him a particular form of relief, would always be rendered whenever facts which previously had been held to entitle one to that relief were established to the satisfaction of the trier of the fact issues, or, to restate the proposition with reference to the specific problem to be considered in this article, that whenever it was satisfactorily established that defendant was repeatedly or continuously trespassing on the property of plaintiff and would continue to do so unless enjoined, or was using his land in such a way as to be a nuisance to plaintiff, and the remedy at law was inadequate either because recovery of damages would not redress the injury or because the effective protection at law would require a multiplicity of suits, then the court of equity is under the same duty to enjoin the continuance of the trespass or the nuisance, as a court of law would be to give plaintiff a judgment for damages.

There can be no doubt that the same court did go to that extreme length in Pile v. Pedrick. The defendants in that case had erected a wall within the lines of their own lot as located by a district surveyor. Later surveys disclosed that the line was not correctly located and that, while the wall above ground was all on defendant's side of the true line, some of the stones in the foundation projected 1½ inches over the line into plaintiff's lot. Defendants offered to make the wall a party wall and give plaintiff free use of it, and when that was refused asked permission to excavate on plaintiff's side of the wall and chip off the stones projecting over the line, agreeing to pay all damage suffered by plaintiff or his tenants. This offer also was refused and plaintiff sued for an injunction requiring defendants to take down their entire wall and rebuild it on their own side of the line. The lower court granted the injunction prayed for but divided the costs and both parties appealed. On plaintiff's appeal, the supreme court held that costs in equity were within the discretion of the chancellor and were disposed of properly. On defendants' appeal, the court said:

\*(1895) 167 Pa. 296, 31 Atl. 646.*
"The defendants have no right, at law or in equity, to occupy land that does not belong to them, and we do not see how the court below could have done otherwise than recognize and act on this principle."

Other courts also have announced the proposition that relief in equity is a matter of right and not of grace or of discretion, even though they have not had occasion to apply that principle in a case which put their adherence to it to such a test as in *Pile v. Pedrick*, and this statement has apparently received the approval of some commentators. The extent to which, if at all, the discretion which was formerly exercised by the chancellor in administering the royal prerogative of grace may now be exercised by judges of our courts of equity in granting or refusing to enjoin a trespass or nuisance, and the principles which should control the exercise of that discretion, are the questions to be considered in this article.

I. DISCRETION IN ADMINISTERING EQUITABLE REMEDIES

It has been suggested that discretion in administration is the characteristic most distinguishing equity from the common law, and is essential to give law the flexibility required to meet changing conditions. But, conceding that there must be some discretion in administration, is there good reason why that discretion now should obtain to a greater degree in those cases which formerly would have been decided by the chancellor than in cases before the same court which formerly would have been decided in the common law courts? Two reasons suggest themselves. In the first place the judge of a court of common law can ostensibly administer the principles of law rigidly, because the fact finding body, the jury, may be depended on to exercise discretion to the extent necessary to prevent too great injustice. This element of administrative discretion was recognized by Lord Coke in the time of James I. The judge sitting as a chancellor, who must find the facts himself, cannot so easily conceal a refusal to apply established rules under a cloak of finding facts.

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7*Pound, The Decadence of Equity, (1905) 5 Col. L. Rev. 20.*

8*Hixt v. Goates, (1616) 1 Rolle 257.*
But a more important consideration is the nature of the relief awarded. At common law the judgment for plaintiff ordinarily awards him the possession of his property, or damage for the loss he has suffered. It may be that morally defendant has an equal claim to the property or has committed no act for which he should be mulcted in damages, but it will rarely, if ever, happen that his loss is greater than that of plaintiff would be if recovery were denied. But when we are administering a system in which specific reparation is awarded, it very commonly occurs that to award such relief would be to impose a burden on defendant out of all proportion to the benefit which plaintiff would receive. These situations, which in our Anglo-American legal system are peculiar to what we know as suits in equity, present similar problems in a legal system in which our principle that specific redress will be granted only by a court which administers the King's prerogative of grace is unknown. Thus the Supreme Court of Canada, in a case arising in Montreal, and after a consideration of civil, as distinguished from common law, authorities only, held that, where a wall of a building encroached slightly on the lot of an adjoining owner, but had been erected with the consent of the adjoining owner on what both mistakenly thought was the true line, the court will not compel the demolition of the wall, but will allow the owner to retain the occupied strip on payment of a reasonable indemnity. The reasoning by which the result is justified differs from that which a common law court would adopt, but the result is strikingly similar to that reached by some of our courts when confronted by the same problem.

If we include within the term "discretion" the power of the court to consider all facts in the particular case in determining the relief to be given, as distinguished from its duty to grant

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10See infra, nn. 50-53. It is, however, interesting to note that the Court cited a Norman decree of 1618, which held that demolition would not be awarded where the builder had acted in good faith, because, though the rigor of the strict law would require the demolition, the equitable rule, which ought to be followed, regarded the interests of both parties. Delorme v. Cusson, (1897) 28 Can. Sup. Ct. 66, 81.
11Courts have not always used the term in this broad sense, e.g. in Hennessy v. Carmony, (1892) 50 N. J. Eq. 616, 625, 25 Atl. 374, Vice Chancellor Pitney refers to a possible meaning as substantially equivalent to the personal discretion of an officer which is not subject to control by established principles and, therefore, not reviewable. He rightly limits discretion in that sense, in judicial proceedings,
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a specified remedy whenever it determines that certain facts exist, regardless of the presence of other possible facts, probably no one would deny that courts of equity should exercise discretion; certainly all agree that the remedy to which plaintiff would otherwise be entitled may be denied where he has delayed seeking it for a period which, under all the circumstances, amounts to laches.12 Even the Pennsylvania court in the repudiation of the doctrine that relief in equity is a matter "of grace"13 apparently recognizes a discretion to refuse relief in "doubtful cases." The existence of a discretion in administering equitable remedies, differing in degree if not in kind from that exercised in administering common law remedies, is, therefore, supportable in reason and well established by authority.

II. OBJECTIONS TO THE BALANCING OF EQUITIES

But if there is substantial unanimity that courts of equity have discretion in administration of their remedies, greater than courts of common law possess, there is great disagreement as to some of the principles by which that discretion is to be controlled. Our discussion will be limited to one only of the many principles which equity courts have at different times suggested, that is the principle that an injunction against a trespass or nuisance will be refused where to grant it would cause damage to defendant, greater than would result to plaintiff from the refusal of the injunction, the principle frequently called "balancing the equities," or "conveniences," though a more accurate term is "balancing the hardships." In this article the term "balancing the hardships" will be used to refer to this weighing of the injuries that will result from the issuance of the injunction, while the term "balancing the equities" will be used to include consideration of other factors, such as the conduct of the respective parties with reference to the transaction. A principle similar to the balancing of hardships is frequently resorted to in suits for specific performance of contracts,14 to matters affecting procedure only. Not all courts, in rejecting the doctrine of discretion in administering equitable relief, give us so clear a statement of the sense in which that term is used.

12Kinsman v. Utah Gas & Coke Co., (1918) 53 Utah 10, 177 Pac. 418. Laches is a standard to be applied with discretion and not a fixed rule, except in those cases where equity follows the analogy of the statute of limitations barring relief at common law for the same injury.

13See quotation from Walters v. McElroy, supra, p. 565.

14For examples of the extent to which courts have gone in denying specific performance of contracts for the sale of land because
but in many of those cases the problem is complicated by at least a suspicion that the hard bargain was obtained by some unfair means, and for that reason it may be argued that different principles should apply.\(^5\)

The situations in which the principle of balancing the hardships has been invoked to defeat injunction against trespass or nuisance have been grouped into three classes:\(^6\) (1) The injury to the plaintiff is small absolutely; (2) The injury to the plaintiff is large absolutely, but small relatively to the hardship upon the defendant or others and the defendant has no power of eminent domain; (3) The situation is like that of the second group, except that the defendant has the power of eminent domain, that is the legal privilege of taking the land of another or of damaging it on payment of compensation. In this last class the question is one merely of proper procedure to protect the right to damages, which differs essentially from the question whether equity will deny the injunction in a case where defendant's act is found to be a legal wrong. Cases falling within this class are, therefore, outside the scope of this discussion.

In *Broadbent v. Imperial Gas Co.*,\(^7\) the chancellor distinguishes an earlier case as holding merely that equity would not enjoin even an admitted nuisance where the damage was "infinitesimal," the injury in the case referred to being that caused to an abutting owner by temporary excavation in the street to lay gas pipes. In *Exton v. Glen Gardner Water Co.*,\(^8\) a diversion of

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\(^5\) Chafee, The Progress of the Law—Equitable Relief Against Torts, (1921) 34 Harv. L. Rev. 388, 394.

\(^6\) In *Bochterle v. Saunders*, (1913) 36 R. I. 39, 88 Atl. 803, specific performance of a contract to remove an addition to a house which encroached 18 inches on a private way belonging to plaintiff was refused on the ground of hardship. It would seem there should be no distinction between the enforcement of the property right and of the contract right in such a case. In *American Book Co. v. State*, (1927) 216 Ala. 367, 373, 113 So. 592, the court refused to apply the doctrine of "balancing of convenience" where the state sought to enjoin breach of a contract not to sell books in other states at a lower price than in Alabama. In the comment on this case in 22 Ill. Law Rev. 775, most of the cases referred to are cases where injunction against tort was involved and cases refusing affirmative specific performance of contracts because of "hardship" were not discussed.

\(^7\) (1857) 7 De G., M & G. 436, 462.

\(^8\) (N.J. Ch. 1925) 129 Atl. 255. See comment on this case in 24 Mich. L. Rev. 70.
about four gallons of water per minute for sale to non-riparian users was enjoined at the suit of lower riparian owners who used the stream for power, though the diversion diminished complainants' power by only one three-thousandth of a horse power. The vice chancellor said that "if the diversion is of such a perceptible and sensible amount as not to be excluded under the maxim 'de minimis,' complainant is entitled to resort to this court for protection." If we are to accept as universally true Professor Chafee's statement that in the first class of cases the injunction will be denied if it would seriously burden defendant, it is evident we will have to limit the term "absolutely small" to so few cases that the rule becomes of almost no practical importance. This is especially true if we accept the proposition that loss of a legal right which is of no substantial use to the owner, is a substantial injury if the owner could have obtained substantial compensation for his surrender of that right. Sometimes the ulterior object of a suit for injunction is to compel the defendant to buy off the plaintiff for a substantial amount. The important class is, therefore, that in which we find cases where the wrong causes some substantial injury to plaintiff, but where the injunction would inflict a much greater hardship upon defendant.

The reason that is probably most often given for refusing to balance hardships in cases of this class is that indicated by the Pennsylvania court in the case from which the quotation is made.

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29This is the ground on which the court in refusing an injunction in Cooper v. Crabtree, (1882) 20 Ch. Div. 589, distinguished the earlier case of Goodson v. Richardson, (1874) 9 Ch. App. 221, in which the injunction had been granted.


21No attempt will be made in this article to discuss or even cite all of the cases in which this question has been considered. Citations of the cases may be obtained from the Decennial Digests, Tit. Injunction, sections 23, 24, 50, and Tit. Nuisance, section 25 (2); 32 C. J., Tit. Injunctions, 77-83; 29 Cyc. Tit. Nuisances, 1231; 14 R. C. L. 357-360, Tit. Injunctions, sections 60, 61; 20 R. C. L. 480, 481, Tit. Nuisances, section 93. An elaborate note on the question as related to nuisances is to be found in 31 L. R. A. (N.S.) 881. See also, 5 Pomeroy, Eq. Jurisprudence, 2d ed., Eq. Rem., sections 1943-1945; Slaymaker, The Rule of Comparative Injury in the Law of Injunction, 60 Cent. L. J. 23; Chafee, Progress of the Law—Equitable Relief Against Torts, 34 Harv. L. Rev. 388, 392-394 and notes and comments, 8 Calif. L. Rev. 127, 128; 13 Col. L. Rev. 635; 23 Col. L. Rev. 684; 9 Cornell L. Quar. 63; 14 Harv. L. Rev. 458; 18 Harv. L. Rev. 149; 22 Harv. L. Rev. 61, 596; 28 Harv. L. Rev. 110, 209; 36 Harv. L. Rev. 211; 2 MINNESOTA LAW REVIEW 229; 9 MINNESOTA LAW REVIEW 290; 57 U. Pa. L. Rev. 396.
at the beginning of this article. As we have seen, courts of equity do exercise discretion in other situations, before we can accept this reason for refusing to balance hardships in exercising discretion as to injunction against trespass or nuisance, we must find some objection to that principle which does not apply in other cases.

It frequently is said that to refuse an injunction on the balance of hardships and thereby compel the injured party to accept damages for invasion of his property right is to permit his property to be taken or damaged for a private purpose, which is prohibited by our constitution. No case is cited in which it has been decided that the constitutional guaranty requires a state to afford specific prevention of, or redress for, violations of property rights, but it cannot well be denied that the practical effect of denial of an injunction is that the property is taken or damaged. It is not, however, impossible that a "wise social engineering" would prevent a rigid adherence to the principle that no man's property can be taken or damaged, except for a purpose recognized as public in our law of eminent domain. While there would be little, if any, dissent from the proposition that the law ought to protect property owners from loss resulting from the development of other industries in the community, there is not the same concurrence in the proportion that it should compel those new industries either to cease operation or to submit to whatever exaction a neighboring property owner may choose to demand for surrendering his right to protest.

The United States Supreme Court has held that the public interest in the development of a state's resources is sufficient to sustain a statute authorizing condemnation of a right of way for a private irrigation ditch which will serve only one user. That interest is frequently involved in suits to enjoin nuisances where often the industrial life of a community and

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24For an extreme illustration of the desire of equity to safeguard possibility for future development of the community, see Wilkins v. Diven, (1920) 106 Kan. 283, 187 Pac. 665, where the court not only refused to enjoin interference with an easement for a water pipe from a well on an adjoining lot, but also enjoined the owner of the easement from exercising his right to enter to restore the pipe and thereby compelled him to accept compensation for the value of the easement.
26Madison v. Ducktown, etc. Co., (1904) 113 Tenn. 769, 83 S. W. 658.
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even the most important industry of a state\(^2\) depends on the continued operation of the plant causing the nuisance and no way is known by which that operation can be continued without causing a nuisance. Certainly in these cases the public interest is at least as great as it is in the condemnation of a right of way for a railroad, even if there is no technical "public use." It has been suggested that the courts ought to leave the protection of that interest to the legislature.\(^2\) No reason is stated why the court should wait for action by the legislature before it exercises a power which it admittedly possessed when our constitutions were adopted and which is not claimed to be contrary to any constitutional provision. It would seem to be clear that the court can and ought to refuse an injunction where to issue it would cause an injury to the public interests out of all proportion to the injury which is caused to plaintiff by the tort he seeks to enjoin.

It is perhaps not so clear that the injury to defendant alone should be balanced against the injury to plaintiff, yet many courts have not hesitated to refuse an injunction on that ground where the result has clearly been to permit defendant to occupy plaintiff's property on condition of payment of damages.\(^2\) However sound theoretically the objection may be, it has been disregarded in practice by courts whose opinions are generally accorded great weight.\(^2\)

\(^{27}\)Bliss v. Washoe Copper Co., (C.C.A. 9th Cir. 1911) 186 Fed. 789.

\(^{28}\)14 Harv. L. Rev. 458, 459.


\(^{30}\)The United States Supreme Court has apparently not definitely passed on this question. In McCarthy v. Bunker Hill, etc., Co., (C.C.A. 9th Cir. 1909) 164 Fed. 927, the injunction was refused on the balancing of hardships and certiorari was denied, 212 U. S. 583, 29 Sup. Ct. 692, 53 L. Ed. 660. In American Smelting etc. Co. v. Godfrey, (C.C.A. 8th Cir. 1907) 158 Fed. 225, the injunction was issued notwithstanding a claim of great hardship to defendant and certiorari was also denied, 207 U. S. 597. In Georgia v. Tennessee Copper Co., (1906) 206 U. S. 230, 238, 27 Sup. Ct. 618, 51 L. Ed. 1038. Mr. Justice Holmes, writing the opinion of the court, says of suits by a State for an injunction against a nuisance committed in another state: "This court has not quite the same freedom to balance the harm that will be done by an injunction against that of which the plaintiff complains, that it would have in deciding between two subjects of a single political power." In Arizona Copper Co. v. Gillespie, (1912) 230 U. S. 46, 56, 33 Sup. Ct. 1004, 57 L. Ed. 1394, Mr. Justice Lurton, writing the opinion of the court, says that whether equity will restrain a nuisance depends "upon a variety of circumstances, including the comparative injury by granting or refusing the injunction." The decree for injunction was affirmed, the court below not having found the hardship it would cause the defendant.
Another objection often urged against the balancing of hardships is that the effect of the operation of the rule "would be to deprive the poor litigant of his little property by giving it to those already rich," or that "it is in effect saying to the wrongdoer, 'If your financial interests are large enough so that to stop you will cause you great loss, you are at liberty to invade the rights of your smaller and less fortunate neighbors.'" The objection has great weight if all that is meant by the doctrine is that the amount of pecuniary injury to defendant shall be balanced against the amount of pecuniary loss plaintiff sustains from the injury, but the courts which have adopted the doctrine have not followed such a simple rule as that. Unquestionably one factor to be considered in any balancing of hardships is that public policy which is "more concerned in the protection of individual rights than in the profits to inure to individuals by the invasion of those rights."

Conceding the weight of these objections to the balancing of hardships, is there any reason for applying that doctrine sufficiently cogent to overcome the objections? The experience of Pennsylvania seems to require an affirmative answer. After first stating the power of equity to exercise discretion in granting or denying injunctions as broadly as any court has ever done, the courts of that state later changed their attitude and announced the principle that an injunction was a matter of right whenever it was clear that a wrong was being committed or threatened and that the remedy at law was inadequate. In Pennsylvania Coal Co. v. Sanderson the court was required to determine, in an action for damages, whether the pollution by mine drainage of a stream from which plaintiff obtained his domestic water supply was a nuisance. In connection with a comment on the importance of the mining industry to the state and the impossibility of carrying it on without draining the polluted waters from the mines into the surface streams, the court remarked, as an added reason for holding there was no nuisance:

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32 Arizona Copper Co., Ltd. v. Gillespie, (1909) 12 Ariz. 190, 204, 100 Pac. 405.
36 (1886) 113 Pa. 126, 6 Atl. 453.
"Indeed, if the right to damages in such cases is admitted, equity may and under the decisions of this court undoubtedly would, at the suit of any riparian owner, take jurisdiction, and, upon the ground of a continuous and irreparable injury, enjoin the operation of the mine altogether."

In a later suit by a plaintiff who had conveyed the coal under his land without waiving the right to support of the surface, the court was asked to enjoin the removal of the coal in such manner as would damage the surface. Earlier cases had determined that the plaintiff had a right to such support; the court had no discretion as to the remedy nor as to the legal right; it avoided the issuance of an injunction which it felt would be unjust by holding that the remedy at law was adequate.

Still later the court was asked to enjoin the further operation of a large electric power plant which supplied light and power to the Pittsburgh district, and which had been erected adjacent to plaintiff's nursery. The court found that the power plant could not be operated without injuring the nursery by the deposit of soot and other chemical products of combustion thereon. It quoted with approval from Richard's Appeal and Huckenstine's Appeal, refused to determine whether the nursery could be condemned and concluded:

"We plant our conclusion on the broader general ground, taken by the court below, that it would not be the part of wisdom, under the facts shown by the record before us, to enjoin the depositing of the substances which are the results of the combustion of bituminous coal in the Pittsburgh district, that the injury which would result from such action, as applied to defendant, furnishing power and light to the manifold interests it does, would be incalculably greater than that which will happen from refusing it, and leaving plaintiff to its legal remedy, it not being shown by such testimony as should appeal to a court of equity that there are appliances procurable by defendant, the installation of which would minimize plaintiff's damages."

The attempt to eliminate discretion in the administration of the remedy of injunction led to the denial of all relief in one case by inducing the conclusion that the injury was not a nuisance, then to the obvious fiction that the legal remedy was adequate, and

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37(1886) 113 Pa. 126, 144, 6 Atl. 453.
41(1871) 70 Pa. 102, 10 Am. Rep. 669.
42(1924) 281 Pa. 166, 176, 177, 126 Atl. 345.
finally was abandoned by the court which had announced it after careful consideration of earlier cases to the contrary. No better demonstration could be asked of the practical necessity for preserving the discretion of equity.

These objections are usually stated as applying only to the balancing of hardships. The one last mentioned is so limited but it is not clear why the objections that equitable relief is a matter of right and not of discretion, and that a denial of injunction permits a taking for a private use do not apply to any balancing of equities, which do not affect the rights involved. No serious contention has ever been made that plaintiff's personal conduct may not warrant the denial of equitable relief to him, though it does not warrant interference by equity with his pursuit of his remedies at common law.

III. HOW TO WEIGH THE EQUITIES

The opinions of the courts are of little help in determining the factors to be considered in balancing equities when an injunction is sought. The tendency is strong, as we have seen in the case of Pennsylvania, when the court decides to issue the injunction to deny its power to balance equities, and, when it decides to refuse the injunction, to stress the injury from its issuance and either ignore or minimize the injury to plaintiff from the trespass or nuisance. It has been suggested that the courts which deny their power to balance equities, really are applying a more critical balancing by according weight to the preservation of individual rights. This is undoubtedly true in many cases, but a distinction must be drawn between a determination that, as a matter of law, the right of an individual to the undamaged enjoyment of his property is superior to the right of an owner of an adjacent tract to conduct thereon a lawful business the consequence of which would be to injure the enjoyment of the former, and the determination, as a matter of discretion, that the injury to the plaintiff, including consideration of his legal right to unimpaired enjoyment, outweighs the injury the injunction would inflict on defendant or the public. When the federal court adopted the statement that "The rights of

43 In the opinion in the case of Elliott Nursery Co. v. Duquesne L. Co., (1924) 281 Pa. 166, 126 Atl. 345, we are not told what the effect of refusing the injunction would be on plaintiff's nursery. Would it make its operation merely less profitable or impossible so as to compel its abandonment or removal?
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habitation are superior to the rights of trade, and whenever they conflict, the rights of trade must yield to the primary right, it was ostensibly announcing a rule of law, not a principle which ought to govern the exercise of discretion. When the Minnesota court said that the same statement "is the better doctrine, and that ordinarily it should be applied in determining whether an injunction should be granted or denied" it was balancing equities. How many courts which adopt the former mode of expression really intend the latter we have no means of ascertaining.

But if we cannot rely very much on the opinions of the courts, some generalizations may be attempted as to what courts have actually done in the way of balancing equities, what facts they have stressed as distinguishing certain cases from others. It ought to be universally conceded that the court can balance equities in determining the terms of an injunction, but some courts apparently act on the theory expressed by a Minnesota trial court that relief must be wholly denied or defendant's business destroyed. At least time may be given in which defendant can adjust himself to the situation if such adjustment is possible. Where plaintiff can, without great hardship, avoid the injurious consequences, equity, if it can exercise any discretion, ought not to grant an injunction which will impose great hardship on defendant if the latter will pay the damages sustained by plaintiff and the cost of the works which will avoid the consequence in the future. It is, of course,

47Sammons v. City of Gloversville, (1903) 175 N. Y. 346, 67 N. E. 622. But in Hulbert v. California Portland Cement Co., (1911) 161 Calif. 239, 118 Pac. 928, the court refused to stay an injunction against the operation of a cement plant because the dust from it was a nuisance to neighboring orchards, pending the determination of an appeal, though the company, in support of its motion, represented that it was then constructing a process with all diligence which it believed would prevent the escape of dust. The opinion relies on authorities holding that an injunction may not be denied on balance of hardships without any recognition that many of the reasons advanced did not apply to a delay of injunction.
48Rosser v. Randolph, (1838) 7 Port. (Ala.) 238, where an injunction against operating a mill was refused on the ground that the spring from which plaintiff derived his domestic water supply, and which was flooded by the mill dam, could be protected by easily constructed works. An injunction against polluting a stream with salt, rendering it unfit for use in a steam boiler was refused where it appeared plaintiff could obtain suitable water from another convenient source, or render the stream water suitable
obvious without regard to balance of equities that the injunction should never place any greater restriction on defendant than is necessary to protect plaintiff from the injury of which he complains.  

In suits to compel the removal of structures which encroach on the property of others, many courts refuse the injunction if the defendant acted innocently and great hardship would result to defendant but grant it regardless of the balance of hardships if the encroachment was willful.  This rule is followed in New York and Massachusetts, though in other cases the courts of those states have refused to consider the balance of hardship as a ground for denying an injunction against a nuisance. The Massachusetts court, which balances hardships where the encroachment is innocent, refused to consider defendant's hardship where he merely directed his builder not to go over the line after he knew there was a disagreement between him and the adjoining owner as to the location of the line.  No other courts apparently have considered the effect of a negligent encroachment by defendant. Perhaps the cases which refuse to balance hardships when an injunction against a nuisance is sought may be reconciled with these cases on the ground that defendant knows, or ought to know, that his acts will constitute a nuisance. Some of the opinions in nuisance for such use at a reasonable and ascertainable expense. Salem Iron Co. v. Hyland, (1906) 74 Oh. St. 160, 77 N. E. 751. In an action for damages and an injunction against collecting surface water and discharging it at one point on a lower owner, an instruction that the lower owner should prevent the injury if he could do so at small expense was held erroneous as a matter of law in Paddock v. Somes, (1890) 102 Mo. 226, 238, but it was also held to be unsupported by any evidence that plaintiff could have avoided the injury.

In Georgia v. Tennessee Copper Co., (1916) 237 U. S. 474, 35 Sup. Ct. 631, 59 L. Ed. 1054, 240 U. S. 650, 36 Sup. Ct. 465, 60 L. Ed. 846, the court fixed the amount of sulphur fumes which defendant might discharge into the air during a trial period and at the expiration of the trial period made a final decree on the basis of the observed results of the trial period. See, also, note on Nebulous Injunctions, 19 Mich. L. Rev. 83.

Pomeroy Equity, 2d ed., Eq. Rem. sec. 1919, and cases cited. But in Barker v. Mintz, (1923) 73 Colo. 262, 215 Pac. 534, wilful trespass to the surface by an owner of underlying coal was not enjoined because of relative hardship. See comments in 23 Col. L. Rev. 684; 33 Yale L. Jour. 205.


cases have stressed such knowledge by defendant. Those cases which balance hardships where it is doubtful whether a nuisance in fact exists may then be explained as cases where it is not reasonable to say that defendant knew, or ought to have known, that his acts would create a nuisance. Conversely the court in refusing to issue the injunction has often emphasized the endeavors of defendant to avoid a nuisance. Thus where it appeared that a corporation operating a smelter, on receiving complaints that fumes from its plants were injuring adjoining agricultural lands, settled for the damage caused to that time and expended $750,000 in constructing works to prevent the escape of fumes, the court balanced hardships and refused an injunction though the nuisance, while lessened, was not entirely eliminated. Again where a large power plant embodied the latest devices for preventing the escape of soot and smoke, and it appeared those devices were largely, but not entirely, successful, the hardships were balanced. We may conclude then that the moral guilt or innocence of the defendant is one factor to be considered in balancing equities.

It is still more evident that the conduct of plaintiff is another factor. No court denies that the hardship an injunction would cause to defendant is decisive in many cases in determining whether delay by plaintiff in asserting his rights has amounted to

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64 Weston Paper Co. v. Pope, (1900) 155 Ind. 394, 57 N. E. 719; Strobel v. Kerr Salt Co., (1900) 164 N. Y. 303, 58 N. E. 142; Whalen v. Union Bag Co., (1913) 208 N. Y. 1, 101 N. E. 805. These cases all involved diversion or pollution of water. But many of the cases refusing to order removal of encroachments on the ground of hardship to an innocent defendant, state the rule as applying to mandatory injunctions and similar statements have been made with reference to mandatory injunctions where encroachments are not involved. See Hill v. Kimball, (1915) 269 Ill. 398, 110 N. E. 18. Do we not have here merely a following of precedents established when the courts were more reluctant to grant mandatory than prohibitory injunctions?

65 Parker v. Lake Winnipiege Lake Cotton & Woolen Co., (1862) 2 Black (U.S.) 545; Demarest v. Hardham, (1881) 34 N. J. Eq. 469; Powell v. Bentley & G. Furn. Co., (1891) 34 W. Va. 804, 12 S. E. 1085; Salvin v. North Brancepeth Coal Co., (1874) L. R. 9 Ch. 705. In Sullivan v. Jones & L. Steel Co., (1904) 208 Pa. 540, 552, 57 Atl. 1065, in which the court refused to balance hardships, the court pointed out the inconclusive character of the evidence as to nuisance in Huckenstine's Appeal, (1871) 70 Pa. 102, 10 Am. Rep. 669, in which the injunction had been refused. It is more probable that these cases are to be explained as a survival of the former rule that the existence of a nuisance from the conduct of a lawful business must be established at law before equity would enjoin. That is quite obviously the basis of the decision by the U. S. Supreme Court in the case first cited in this note.

66 Bliss v. Washoe Copper Co., (C.C.A. 9th Cir. 1911) 186 Fed. 789.

So the fact that plaintiff bought lower riparian land for the purpose of compelling defendant to buy him off at a big price was held to defeat his right to an injunction against depositing mine refuse in the stream which would impose great hardship on defendant. Again a mandatory injunction for the removal of an encroaching wall was denied because plaintiff refused to permit defendant to enter plaintiff's land and remove a shed in order to make the necessary alterations in the wall and it would impose unnecessary hardship on defendant to compel him to make the alteration without entry on plaintiff's land.

Where the decree cannot be framed so as to avoid hardship to defendant and still protect plaintiff, and where there is no inequitable conduct of either party, there are still factors that may be considered aside from the mere pecuniary values involved. The court may well take into consideration the extent to which the use of the respective properties will be affected by the issuance or refusal of the injunction. If the use of plaintiff's property is not prevented but only rendered slightly less valuable, while the injunction would prevent the only economically valuable use of defendant's property the court should deny the injunction.

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Simmons v. City of Patterson, (1900) 60 N. J. Eq. 385, 45 Atl. 995.
Compare McCann v. Chasm Power Co., (1914) 211 N. Y. 301, 105 N. E. 416, where the court in refusing an injunction against raising the water on the land of upper riparian owners, stressed the fact that plaintiffs were officers of, or stockholders in, defendant company and had bought the upper land after they had participated in erecting the dam.

Tramonte v. Calaruso, (1926) 256 Mass. 299, 152 N. E. 90. In a comment on this case in 27 Col. L. Rev. 100 it is said the only other case in which the question of similar conduct by plaintiff was shown was Pile v. Pedrick, (1895) 167 Pa. 296, 31 Atl. 646 supra, note 4.

Where the mill pond of defendant was shown by the evidence to render plaintiff's residence slightly less healthful, but not to make it uninhabitable, injunctions were denied on the ground of hardship to defendant and the community dependent on the mill. Attorney General ex rel. Eason v. Perkins, (1831) 17 N. Car. 38; Attorney General ex rel. Bradsher, (1844) 38 N. C. 301; Wilder v. Strickland, (1856) 55 N. C. 386; Daugherty v. Warren, (1881) 85 N. C. 136. So, also, where there is an obstruction to the flow of a stream, found by the jury to be a nuisance but which damaged plaintiff's land only to the extent of $25 a year, Brown v. Caroline Central R. Co., (1880) 83 N. C. 128. The language in these cases justifies the statement that in all cases in North Carolina injury to the public from an injunction justifies the chancellor in withholding it. An injunction against raising the water in a stream on adjoining land was refused where the banks were perpendicular so the only injury to plaintiffs was loss of head for power purposes and they were not making that use. McCann v. Chasm Power Co., (1914) 211 N. Y. 301, 105 N. E. 416. Contra Parker v. American Woolen Co., (1907) 191 Mass. 591, 81 N. E. 468.
DISCRETION TO DENY INJUNCTION

The character of the uses to which the land is devoted may be considered. One whose dwelling is rendered unfit for habitation is entitled to greater consideration in the balancing of equities than one who is prevented from conducting on particular premises a business which he might equally well conduct elsewhere. The case in which the supreme court of Pennsylvania most emphatically rejected the principle of balancing hardships as a ground for refusal to enjoin a nuisance was one where the injury was to residences, while the subsequent case in which the principle was applied dealt with an injury to a business. It may be doubted whether a present day balancing of interests would sustain this distinction but it was strongly entrenched in our legal thinking at a time when most men retained their homes long enough to become deeply attached to them, something denied to most of us today. Where both uses are commercial, their relative value has been considered.

There still remain a few cases, in which the solution of the problem is the most difficult, those in which it is clear that the refusal of the injunction will result in plaintiff losing all substantial use of his property, and that its issuance will have a similar effect on defendant. In those cases the fact that the pecuniary value of defendant’s property greatly exceeds that of plaintiff’s ought not to be controlling, but can we and ought we to expect the judge to disregard the indirect consequences to the community of the issuance of the injunction? While the law ought to attach great importance to the protection of the property right of plaintiff from injury, it cannot be overlooked that the consequences of closing defendant’s plant may be disastrous to hundreds, perhaps thousands, who will thereby lose their means of livelihood, an interest which there is much reason to believe has not yet been adequately recognized by the law, and many of them, and others also, will lose all that they have invested in residence property or busi-

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65 Baker v. Mintz, (1923) 73 Colo. 262, 215 Pac. 534, where defendant owned the coal under land whose surface was useful only for stock grazing and the coal could not be economically mined except by stripping the surface soil. The injunction was refused because of the slight relative value of plaintiff’s use for grazing.
ness which will become worthless when there are no longer employees of defendant to occupy, or patronize it.

In any attempt to solve this problem, and indeed properly to balance the other factors that may be present in the particular case, the courts ought not to be compelled to act solely on their individual conceptions of the relative importance of those factors, or to depend on the partisan claims of the parties before it. Here would seem to be a case in which a study of the “law of action” would be of great benefit.\(^6\) A scientific survey of the consequences which have followed the issuance or refusal of injunctions against trespass and nuisances would give us information which would be of great use in the future in determining how equity may properly exercise its discretion in the administration of “its strongest arm.”\(^7\)

IV. Conclusion

The results of this study of the problem may be summarized as follows:

1. Courts of equity have a discretion, on considerations both of authority and practical necessity, in the administration of their remedies by way of specific redress, greater than that possessed by courts of common law in the administration of the common law remedies of recovery of possession of property or of damages for a wrong.

2. Notwithstanding the theoretical objections urged against it, experience has shown that equity must balance the equities, including a balancing of hardships, in determining whether to issue or refuse an injunction against a trespass or nuisance.

\(^6\)The reports give us a glimpse of the results in one case. In Whalen v. Union Bag Co., (1913) 208 N. Y. 1, 101 N. E. 805, an injunction against pollution of a stream by a pulp mill was reinstated after the decree issuing it had been reversed by the appellate division (1911) 145 App. Div. 1, 129 N. Y. S. 391. Apparently the lower court thought the pollution could be avoided for it stayed the operation of the injunction for one year to give opportunity for that. See dissenting opinion, 145 App. Div. 1, 129 N. Y. S. 391, 395. But in Driscoll v. American Hide & Leather Co., (1918) 102 Misc. Rep. 612, 170 N. Y. S. 121, a suit to enjoin pollution of the same stream by another, the court said, p. 122, that as a result of the earlier case, the Union Bag mill, which represented an investment of more than $1,000,000 had been shut down ever since 1913. No information is given us as to the loss inflicted on the 400 or 500 employees of that mill, thus thrown out of work in a community which probably did not have other industries large enough to employ more than a few of them.

\(^7\)Coombs v. Lenox Realty Co., (1913) 111 Me. 178, 181, 88 Atl. 477.
3. The court should balance equities, including balancing hardships, in settling the terms of the injunction; the conduct of the respective parties with reference to the transaction is an important equity to be considered; the proportion of the use of plaintiff’s property which will be lost if the injunction is denied may be compared with the proportion of use of defendant’s property which the injunction will destroy; the character of the uses may be considered, a use for residence purposes being accorded greater protection than a use for business; and, in cases where the result must be either the substantial loss of the entire use of either the plaintiff’s or defendant’s property, the mere pecuniary value of the respective properties is not decisive, but even in these cases the court cannot disregard the possible injury to the community.

All of these principles of balancing of equities call for exact information as to the social and economic consequences of the possible decisions from which a choice must be made, information which can be supplied only by a scientific survey of the results of the decisions reached in earlier cases.