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BALANCE OF HARDSHIP—
INJUNCTIVE RELIEF

*Wendell H. Shanner**

HISTORICALLY, equity has protected owners of property in the legitimate enjoyment of the benefits of ownership by its injunctive decree. This powerful weapon, fashioned by the chancellor, for the purpose of making dominant the equity law in its struggle with the common law, has found frequent use in the field of torts as well as in the domain of contract. Particularly those continuing torts such as nuisances and permanent or continuing trespasses, the injurious consequences of which are essentially cumulative, readily lent themselves to the restorative therapeutics of the writ of injunction. In this field, however, the executive character of early equitable intervention survived the accumulation of precedents and the crystalization of equitable rules as a phase of the doctrine of judicial discretion. Accordingly, it is said that the writ of injunction issues *ex gratia* and not *ex debito justitiae*.

The mechanical revolution and the application of power to the production of goods accomplished such fundamental changes in the economic structure of the American Republic as to impose on courts and legislative bodies the necessity of modifying, extending or restricting many of the rights of property theretofore known to the law. As might have been anticipated, the relatively flexible character of equitable principles and remedies placed the chancellor in the vanguard of "judicial legislators." The conflict between the "legitimate," economic or socially desirable uses of property broadened immeasurably the field whereon the chancellor with his injunctive armament was to play the part of arbi-

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ter or ally. The notion that the writ of injunction is not of course but of grace and its offspring the so-called doctrine of the "balance of hardship"—their existence or non-existence, their proper meaning and application, the extent to which "state of mind" of one or both of the parties litigant, laches, fraud and other circumstances shall control or condition their application—are the structural framework of innumerable decrees in the fields of nuisance, trespass and equitable servitudes.

Irreconcilable conflict among the several jurisdictions of this country, and even in the decisions of particular states, coupled with much diversity of judicial expression and emphasis, renders rather difficult a precise and systematic survey of the decisions of the several jurisdiction. Accordingly, nothing more than a somewhat critical and suggestive analysis has been undertaken.

With considerable unanimity courts of equity have balanced hardships and refused the protection of the injunctive writ where the interest of the complainant is small absolutely, i. e., the pecuniary injury which he has suffered or may suffer by reason of defendant's wrongful invasion of his property rights is slight, while the injunction will prove burdensome to defendant or the public.

A few illustrative cases will be considered:

In *McCann v. Chasm Power Company*, 211 N. Y., 301, an injunction was denied upon complainant's application to restrain the defendant from permanently flooding certain lands owned by complainant. Defendant, an electric power company, had invested \$97,000. Its dam caused an increase in the height of water through 348 feet of the stream upon which complainant's land abutted. These facts were known to complainant when he acquired the property. The court observes:

"An equity court is not bound to decree an injunction where it will produce great public or private mischief, merely for the purpose of protecting a technical or unsubstantial right."

While there would have followed inconvenience and loss to the public generally had the injunction issued and the defendant failed to purchase its peace by acquiring the right to flood complainant's lands, the hardship to defendant seems to have been the principal determinative fact.

Injunctive relief against a trespass which amounted to an eviction of the complainant was denied against the defendant in *Lynch v. Union Institution for Savings*, 159 Mass., 306. Defendant owned the reversion and complainant was lessee. Defendant had appropriated a space having a floor area of 13x12 feet and had erected thereon a masonry wall enclosing one of the vaults in which it kept securities. Complainant paid \$15 a month rent and the cost of defendant to remove the erection would have been \$3,500. Defendant offered complainant equivalent space in another part of the basement. The court in denying relief said:

"It would be inequitable, under the circumstances of this case, to compel the defendant to expend \$3500, and to suffer, in addition, great inconvenience and loss in its business, simply to enable the complainant to enjoy for a year and a half the use of the basement including the space in one corner, 13x12 feet, instead of the same basement without that space, and with a greater space added to it on the opposite side toward the front. The case shows no such deliberately wrongful conduct on the part of the defendant as should deprive it of the benefit of equities such as these."

In *Wilkins v. Diven*, 106 Kans. 283, the court went a step further, and by active intervention restrained the defendant from exercising certain rights appurtenant to an easement. Defendant owned a city lot improved with a dwelling house which was supplied with water by a conduit connecting defendant's house with that of the complainant in the basement of which was located the well from which the water was taken. Defendant undertook to repair the connecting pipe, which necessitated entry upon the lands of complainant. The court

enjoined such entry for the reason that changed conditions brought about by the community's growth made the destruction of the easement socially desirable. While "changed conditions" supply the "atmosphere" of the opinion, it is apparent that the slight loss to defendant is the real reason for the injunction.

In *Scott v. Glenwood*, 105 Kans., 603, the court refused to enjoin the maintenance of a culvert that caused water to stand upon complainant's garden. The court said, in part:

"It has been held that whether a structure or a use is unreasonable, and the injury complained of is serious or substantial, is a question for the determination of the trial court, and if the injury, although technically wrong, is only slight and trivial, the plaintiff is ordinarily not entitled to injunctive relief."

If, however, the defendant has been guilty of deliberate misconduct in his interference with the rights of the complainant an injunction will issue to protect complainant's property rights, irrespective of their value. Trespass and equitable servitude cases exhibit most strikingly situations of this type.

See *Kershishian v. Johnson*, 210 Mass. 135. *Curtis Mfg. Co. v. Spencer Wire Co.*, 203 Mass. 448. *Nechman v. Supplee, et al.*, 236 Mich. 116.

The case of *Curtis Mfg. Co. v. Spencer Wire Co.*, *supra*, presents the situation of a complainant seeking a mandatory injunction to compel the defendant to remove its foundation to the extent of its projection into complainant's land. The encroachment was entirely beneath the surface of the land and extended a distance of 2.46 feet into complainant's land for a length of 55.4 feet. The defendant was notified of its encroachment by complainant prior to the erection of the building, which rested upon the encroaching foundation. The court, after terming the trespass plain and intentional, continues as follows:

“We see no redeeming feature in the case before us so far as respects the manner of the trespass. Nor do we think that the fact that an injunction will impose upon the defendant an expense disproportionate to the apparent benefit to the plaintiff is of itself enough to deprive the latter of its right to an injunction.”

The interest of the public in trespass cases is generally less conspicuous than in the nuisance cases, and accordingly in such cases, the courts give less prominence to the balance of hardships doctrine. Not infrequently courts that recognize the doctrine take the position, in the equitable servitude cases, that a defendant cannot well object to a decree that requires of him an observance of the requirements or undertakings of his contract. Such reasoning seems cumulative in character, as injunctive relief should in no wise depend upon the contractual character of the violated right.

The refusal of injunctive relief may result in hardship to the complainant which, though substantial, is small relative to the hardship that its issuance will occasion to the defendant and to the public generally.

Under such circumstances the English rule excludes consideration of relative hardships and requires that the injunction issue if injunctive relief be otherwise appropriate. See *Cowper v. Laidler*, 2 Chancery Div. 337 (1903).

The English rule has been followed in a number of American jurisdictions, and finds what is perhaps its fullest and best exposition in the case of *Hulbert v. California Portland Cement Co.*, 161 Cal., 239. In that case complainants, adjacent landowners, were seeking an injunction to restrain the defendant from releasing large quantities of lime and raw mix which was a finely ground mixture of clay and lime, from its kilns. The evidence showed that the defendant had invested \$800,000 in the development of its plant; that at the time of its location at its then site the surrounding land was not planted with trees or other vegetation; that the company employed

500 men who were paid \$35,000 per month; and that most of the supplies and materials, amounting in value to \$35,000 per month, was purchased in the vicinity; that the defendant was employing the most advanced methods of manufacturing; was constantly investigating the problem of reducing the quantities of raw mix which were allowed to escape upon the lands of adjacent owners. The court reviews the authorities and decides that the temporary injunction should be suffered to remain effective pending final hearing. The court characterizes as an excellent statement of the rule the following paragraph quoted from the dissenting opinion of Judge Hawley in *Mountain Copper Co. v. United States*, 142 Fed., 625.

“The pith, point, and substance of this whole matter is that where the acts of a party, whether individuals or corporations, wealthy or poor, destroy the substance of complainant’s estate, whether it be of great or of but little value, an injunction should be issued. This is the underlying principle, the essence and effect of all the decisions upon the subject which distinguish this character of cases from those where the injury is slight and trivial and the damage not irreparable and not absolutely destructive of complainant’s estate.”

The reasons ordinarily given by the courts that refuse to balance hardships are (1) That to do so would deprive the poor of their property for the benefit of the rich; (2) That remitting the complainant to his common law remedy compels him to accept damages in exchange for his property, thereby creating a sort of private eminent domain in violation of the spirit if not of the letter of the Constitution. See *Hennessey v. Carmony, et ux*, 50 N. J. Eq., 616; and (3) The general public interest will be best served by requiring all persons to respect the property rights of others. *Mobile & O. R. Co. v. Zimmern*, 206 Ala., 37.

While the rule that requires the chancellor to compare the hardship that injunctive relief will inflict upon the defendant and the public generally with the hardship that refusal of such relief will impose upon the complainant,

and if comparatively the former is much greater than the latter, refuse to assist the complainant, is the minority rule, the current tendency is undoubtedly toward a more general recognition of its wisdom and fairness.

In *Bliss v. Anaconda Copper Mining Co.* (1909), 167 Fed., 342, the court refused to enjoin the operation of a great copper smelter built at a cost of \$9,500,000 and smelting 7,000 tons of ore per day. There was no question of the injury to complainant's farm produced by the poisonous fumes of the smelter. Hunt, District Judge, in stating and applying this doctrine, said:

"I need not dwell on the question of power, for it is too well established that, from an ancient date, with regard to nuisance, courts of equity have jurisdiction, based upon the reasonable certainty of irreparable mischief, that sort of material injury by one to the comfort of another, which requires the application of a power to prevent, as well as to remedy, the evil (citing authorities) but will pass to the point of close bearing upon the original question, that of discretion where injury of the character proved in this case is threatened to be continued. In my opinion, where there is presented a conflict of rights, it is the duty of a court of equity, in protecting those of the complainant, to consider those of the defendant, and in doing so it may consider also the injuries that may result to others by issuing the writ of injunction."

To the same effect, see *Richard's Appeal*, 57 Pa., 105.

Complainant owned and occupied a dwelling on a bluff about 70 feet above the nearest furnace floor of defendant's iron puddling works. When the wind was toward complainant's house his property was constantly enveloped in a cloud of coal smoke. Plaintiff operated a small cotton cloth manufacturing plant on the premises, and it appeared from the evidence that his fabrics were discolored and deteriorated by the coal smoke from defendant's plant. The court apparently felt that the remedy at law was adequate, and after so observing proceeded to say:

"It seems to be supposed that, as at law, whenever a case is made out of wrongful acts on the one side and consequent in-

jury on the other, a decree to restrain the act complained of, must as certainly follow, as a judgment would follow a verdict in a common-law court. This is a mistake. It is elementary law, that in equity a decree is never of right, as a judgment at law is, but of grace. Hence the chancellor will consider whether he would not do a greater injury by enjoining than would result from refusing, and leaving the party to his redress at the hands of a court and jury * * * We think this is a safe rule, and that the case we are considering is within it."

A succinct but clear and adequate statement of the doctrine is found in *Smith v. Staso Milling Co.*, 18 Fed. (2d), 736. Plaintiff was the owner of a summer residence located less than a mile from the defendant's slate crushing mill. Defendant's operations resulted in the pollution of a stream that ran through the lands of plaintiff, in the deposit of slate dust on plaintiff's land and in recurring jars to plaintiff's house, occasioned by defendant's blasting. In refusing to enjoin the operation of the mill in such manner as to prevent the escape of all slate dust, the court, by Judge Hand, said:

"The very right on which the injured party stands in such cases is a quantitative compromise between two conflicting interests. What may be an entirely tolerable adjustment, when the result is only to award damages for the injury done, may become no better than a means of extortion if the result is absolutely to curtail the defendant's enjoyment of his land. Even though the defendant has no power to condemn, at times it may be proper to require of him no more than to make good the whole injury once and for all. * * * To say that whenever an injured party can show that he could recover damages he has only in addition to prove that the tort will be repeated, appears to us to ignore the substance of the situation in the interest of an apocryphal consistency."

An injunction, restraining the conduct of a business that is utilizing the latest and best devices, methods and processes in an effort to avoid injury to the property of others, imposes upon the enjoined defendant a choice of equally uninviting alternatives. Defendant must either acquire at an exorbitant price the right to inflict the injuries complained of or cease the conduct of its business.

Either course involves marked hardship to defendant, economic waste and, at times, widespread social distress. This is the "substance of the situation" of which Judge Hand speaks and the true ground of decision in those cases where the courts have compared hardships and refused injunctive relief.

The courts have not undertaken to supply a precise standard of measurement wherewith the quantitative superiority of defendant's "hardships" is to be compared in determining whether the injunction should issue or be refused. This has led to confusion, real or apparent, in the decisions of particular jurisdictions, but, it is believed that such a result is more or less unavoidable, as in matters of judicial discretion, reasonableness must remain the ultimate standard. It seems certain, however, that the anticipated loss to defendant must be pecuniarily greater than the gain to complainant if the injunction issues. The courts will not refuse to interfere if to do so will operate to restore to the complainant property or property rights that complainant can use or exercise with as much pecuniary profit as can the defendant.

That the state of mind or motive of the complainant is at times a consideration sufficiently cogent to induce the chancellor to withhold injunctive relief is discoverable in the opinion of Justice Cooley in *Edwards v. Allouez Mining Co.*, 38 Mich., 46. Defendant owned a stamping mill which it had erected and equipped at a cost of \$60,000. Its operation resulted in the discharge of large quantities of sand into Hill Creek, some of which was deposited upon the bottom lands below. Complainant purchased land a short distance below the mill about one year after the mill was put in operation. Complainant had made several unsuccessful attempts to sell his land to defendant. The court, in affirming the decree of the trial court dismissing the bill for an injunction, said:

"The land injured in this case was bought by the complainant with the preconceived purpose to force a sale of it upon the de-

fendant. He did not want it for a homestead or for business property, but for the money that he could compel the defendant to pay for it. * * * In general it must be assumed that the rules of the common law will give adequate redress for any injury; and when the litigant avers that under the circumstances of his particular case they do not, and that therefore the gracious ear of equity should incline to hear his complaint, it may not be amiss to inquire how he came to be placed in such circumstances."

Finally it may be noted that the courts will issue an injunction vs. an encroaching defendant that has a right to acquire by eminent domain proceedings the property wrongfully appropriated, unless such defendant shall have compensated the complainant or given security for such compensation. However, the particular conditions of the injunction will depend very largely on the peculiar constitutional and statutory provisions of the jurisdiction.