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BALANCING INJURIES IN DETERMINING THE RIGHT TO AN INJUNCTION.

As the tendency of industrial establishments to concentrate and condense in certain localities each year increases, largely due to economic conditions, convenience to market, etc., in proportion thereto does it become more difficult for the courts to determine the relative rights of such establishments as opposed to the rights of smaller property-holders in such vicinage. The manufacturing neighborhoods about large cities,—more especially those associated with the allied industries of coal, iron, and steel,—are at the present day so constantly darkened by vast clouds of dust, smoke, cinder, and obnoxious gases that man's

right to pure air and light has been there practically destroyed, in so far as a possibility of enforcing it is concerned. The question has therefore become one of great interest in the law: Will a court of equity consider the balance of injury when a complainant comes before it asking for an injunction against a defendant company for polluting the atmosphere?

The doctrine that every man is necessarily entitled to an injunction, or even to damages, when his rights are encroached upon, finds but few precedents in the decisions. From the earliest ages the peculiar characteristics of particular districts have necessitated a discrimination in deciding as to the applicability of general legal principles to the conditions there found; and that which, for example, may be negligence in one locality or season, may not be so at another place or time; so although a bone-boiling establishment, nitro-glycerine factory, or even a steel-mill, would not be permitted to exist in a residential portion of a large city, yet there are localities where owing to the prevalency of different conditions and surroundings such concerns would have a right to continue their respective industries. Where then shall the courts draw the line? How shall they determine the extent to which the individual should give way to the general need in cases where the right of eminent domain does not exist? When such cases come before common law courts, as actions for damages, they are of relatively facile solution; but when the complainant comes before a Chancellor, claiming that he has no adequate remedy at law, that the injury alleged is irreparable, and that to avoid a possible multiplicity of suits or interminable litigation he prays the intervention of a court of equity by an injunction, what then is to guide the court? Has the suitor a substantial "right" to the injunction if a real property interest is injured, regardless of the possibility of greater injury being done thereby to the defendant and the community, or is the granting of an injunction here to be considered as a matter of grace and not of right?

In a very recent case (*Sullivan* v. *Jones & Laughlin Steel Co.*, 208 Pa. 540) the Supreme Court of Pennsylvania came to the conclusion, despite its opposite tendency in most of the decisions previous to that time, that it was not a question of grace but of right, that the question of balance of injury was not to be considered where a substantial right of property was invaded; to this decision three justices dissented, two of whom filed separate opinions. The facts of the case were as follows: the defendant, a steel company, occupied land in the city of Pittsburg upon which had been situated for forty-four years its extensive mills and blast-furnaces, which had been in constant operation for that length of time; above these mills upon a bluff were situated eight houses of the plaintiffs. The district had always been subject to the smoke and dust from the many mills along the Allegheny River but prior to 1901 had not been subject to ore-dust in injurious quantities. About 1901 the defendant enlarged the furnaces and began using a greater quantity of fine, dust ore, owing to the fact that the rock ore formerly used was becoming exhausted. This fine ore produced a great amount of dust which escaped from the furnaces and settled on the plaintiffs' houses, ruined fabrics and paints, fruit and shade trees, and depreciated the value of the properties. There was no evidence whatever as to faulty construction or negligent management of the furnaces; in fact it was proven that the escape of the ore-dust was a financial loss to the defendant, and that the company had attempted in various ways to prevent it. There was some evidence that there were appliances in use at other mills to prevent such escape of dust which the defendant had not tested, but nothing to prove that they had been generally adopted, or that they were efficient for the purpose. The material facts in the case were not disputed, and the court held that, as the properties of the plaintiffs were being destroyed they were entitled to an injunction. There was a great amount of testimony taken which proved that the locality in which the defendant's mills were situated was wholly given up to manufacturing interests, and

that the escape of ore-dust in more or less volume was an incident of the steel business everywhere. The mills it was shown represented an investment of $5,000,000, and about eleven thousand men were there given employment, to whom about $500,000 a month was paid in wages. In the opinion of the court it was said: "It is urged that as an injunction is a matter of grace, and not of right, and more injury will result in awarding it than in refusing, it ought not to go out in this case. A Chancellor does act as of grace, but that grace sometimes becomes a matter of right to the suitor in his court, and, when it is clear that the law cannot give protection and relief, the Chancellor can no more withhold his grace than the law can deny protection and relief, if able to give them." But the Chief Justice took the ground that in some cases, as here, if the dispute is between two conflicting rights, the matter should be ascertained at law before equity will decide in favor of either. And Mr. Justice Thompson, dissenting, said: "As a decree in equity is a matter of grace a Chancellor will not make it where it will produce a greater injury than it will prevent, and because it is a matter of grace will balance the inconvenience that may be caused either by granting or refusing it."

What, then, is to be understood from the majority opinion of the court in this case? Is a court of equity to have no freedom to discriminate, to consider, and to weigh the effect of its decrees? Must it grant an injunction whenever the right is proven, and the injury thereto, regardless of all else? This decision must stand for the proposition that the most insignificant owner of property in or near a manufacturing district, if his petty property is injured, can elect to refuse damages and to insist upon the removal or discontinuance of the cause of the injury; he can insist for the sake of giving free rein to his sentiment in holding his small home that the great industrial interests must either stop the injury or go elsewhere. It is hardly to be conceded that such is the general understanding in the law. True, the owner of a large estate can not insist that the peasant give up his home: the industrial can not come into the residential section and

assert its right to stay, nor can it hold to its former custom of sending forth volumes of soot, smoke, and gas if, for instance, it becomes surrounded with residences, and finds itself alone in that locality. The suitability of the industry to the community is the important question to decide where there is no negligence. A resident of a city or town must make some sacrifices for the advantages which he may derive in other ways from living there. In the leading English case (*St. Helen's Smelting Co.* v. *Tipping*, 116 E. C. L. R. 608) the Court said: "If a man lives in a town, it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality, which are actually necessary for trade and commerce, and also for the enjoyment of property, and for the benefit of the inhabitants and the public at large." This may to some extent even affect his property rights, as appears from the language of the Supreme Court of Pennsylvania in *McDevitt* v. *Natural Gas Company* (160 Pa. 367), in which case a bill was filed to restrain the gas company from laying its pipe under a sidewalk in front of the plaintiff's property. In *Huckenstine's Appeal* (70 Pa. 106) the Court said that when the aid of a court exercising the power of a Chancellor is sought, it "must look at the customs of the people, the characteristics of their business, the common uses of property, and the peculiar circumstances of the place wherein it is called upon to exercise the power," and that "people who live in such a city (Pittsburg) or within its sphere of influence, do so of choice, and they voluntarily subject themselves to its peculiarities and its discomforts, for the greater benefit they think they derive from their residence or their business there." In another English case (*Wood* v. *Sutcliffe*, 8 Eng., L. & E. 217), in which a bill in equity for an injunction was filed to restrain the defendants from pouring into a stream "any dyes, or indigo, or madder" to the detriment of the plaintiffs, worsted-spinners, who were lower riparian owners, the injunction was refused and the Court said: "In cases of this nature the court must have regard not only to the

dry strict rights of the plaintiff and defendant, but must have regard to the surrounding circumstances,—to the rights and interests of other persons which may be more or less involved in it. . . . We cannot concur on the proposition that on the mere dry fact of the plaintiff having the abstract right, and that right being infringed, in ever so minute a way, or ever so little to the practical damnification of the plaintiff, the court of equity will as a matter of course, upon the right being established, grant the injunction."

In the most recent work on Equity (Bispham, p. 614, 7th ed.) the author says, in referring to injunctions against noisy and offensive industrial establishments: "The jurisdiction in all these cases should be exercised with great caution. Lord Chancellor Selborne, in *Gaunt* v. *Fynney*, (L. R. 8, ch. 11) quoted with approval the old Scotch maxim which forbids a man to use his own rights 'in emulationem vicini;' and said that neighbors everywhere ought not to be extreme or unreasonable either in the exercise of their own rights or in the restriction of the rights of each other. Nevertheless, while regard should be had to this doctrine, yet, on the other hand, due weight should be given to the right of every man to the comfortable enjoyment of his dwelling. A dangerous business may be a nuisance; but this may depend upon whether the locality is populous or otherwise. (*Dilworth's Appeal*, 91 Pa. 247)." Likewise an offensive steel-mill, extensive brick-works, coke-ovens, or similar establishments from which obnoxious gases and deleterious fumes are emitted, may be a nuisance; but it always depends upon not only the question of the populousness of the community, but also upon the general character of industrial interests there established.

After a very careful reading of such expressions of judicial opinion on this subject, to what conclusion does one arrive? It is surely evident that the general belief and impression in the profession is that courts of equity will weigh the effect of their decrees before making them, and that the balance of injury is a most important factor in determining the advisability of summary action on their part.

The cases that seem to stand for the opposite rule will almost always, upon critical examination, show some peculiar or special reason for the action of the court in resorting to the extraordinary remedy of an injunction. There are a number of cases which are often cited in favor of granting an injunction; in one commonly referred to (*Campbell* v. *Seaman,* 63 N. Y. 568) where the manufacturing of bricks was enjoined as causing material injury by smoke and coal-gas to the plaintiff's trees and property generally; there is a very good example of the necessity for special consideration and examination of the character of the community. The injunction was granted and the court specially pointed out that the brick-works was the only manufacturing plant in the vicinity, and that moreover it had not been in continuous operation but was used only at special times or periods. It is interesting to compare this case with *Huckenstine's Appeal,* supra. One of the strongest cases against considering the balance of injury is that of *Cogswell* v. *N. Y., and H. R. R. Co.,* (103 N. Y. 10) in which the railway company was restrained from maintaining an engine-house so near to the plaintiff's dwelling as to endanger health and to render plaintiff's premises untenable by reason of smoke, cinders, and soot, and it was clearly stated that the railway company could not justify the nuisance on the ground that the engine-house was a necessity in the operation of its road.

The question must ever be one of great difficulty, to decide how far the useful trades may encroach and how much citizens must surrender of their primal rights. Our modern civilization is so organized that the healthful and peaceful dwellings of the citizens must of necessity be in close proximity to the industrial establishments in which their owners receive employment. We, then, find ourselves with two interests very closely associated, but which must in this respect be in constant conflict; and the courts in deciding disputes between such interests must ask each to give up something of what pertains to comfort and convenience;

but for what the minor party must thus surrender he can be fully repaid by an action at law for damages.

Among the cases of interest upon this question is an Indiana case (*Owen* v. *Phillips*, 73 Ind. 284), in which a bill to enjoin the rebuilding of a flour-mill was filed by an adjoining owner; the counsel for the plaintiff took the ground that if there was an infringement of a real substantial right, an injunction would be the proper remedy, and the lower court so instructed; the appellate court upon review called special attention to the question of locality and in referring to the instruction said: "Under the instruction as framed, all interferences, lawful or unlawful, with the property of another, would supply grounds for relief by injunction. The law recognizes no such doctrine;" and the injunction was refused. In another "mill" case (*Gilbert* v. *Showerman*, 23 Mich. 448), the plaintiff occupied the upper stories of a building as a residence, and the defendants fitted up the adjoining building as a flour-mill. Both were in a business block of the city of Detroit. Among other alleged objectionable features of the mill was that "the fires of said boiler and engine generate large quantities of soot and cinder." There was no dispute as to the leading facts; and in its opinion the court said: "There can be no question that the mill causes annoyance to the complainant and his family, and renders the occupation of his building as a residence less desirable, but we are not satisfied by the evidence that there has been any want of due care or any wilful disregard of the rights of their neighbors, in the manner in which the defendants have carried on their business." And also that: "We cannot shut our eyes to the obvious truth that if the running of this mill can be enjoined, almost any manufacturing plant in any of our cities can be enjoined upon similar reasons. . . . Minor inconveniences must be remedied by actions for damages rather than by the severe process of injunction." As to this want of "due care, or wilful disregard of the rights of others," the plaintiff must show affirmatively, in such a case, by a preponderance of proof, that a practical change in the construction of the

structures could be made so as to lessen the annoyance complained of. *Vide* Shearm. and Redf. on Negligence, No. 12.

The purpose of this article is to contend that courts of equity should not be restricted in such a way in the exercise of their extraordinary jurisdiction, as they certainly would be if they were compelled to grant an injunction upon a good case,—so far as a right and the infringement thereof,—having been made out, and were not allowed to consider the advisability of granting it. The old doctrine that they could not move in the case of a nuisance until the plaintiff's right had been established at law is now obsolete; but the very nature of the decree of a court of equity is such that it must be conceded that the court acts within its own discretion; and if this were otherwise, the real value of its jurisdiction would be *nil.* A writ in a court of equity can rightfully be demanded to prevent irreparable injury, interminable litigation, and a multiplicity of suits, and in a proper case an injunction will be granted; but the court, realizing that it is a matter of grace and that it rests within its own discretion, will not grant it where it is evident that the general effect of it would be to cause more injury to the defendant and to the public at large than would be consistent with the preservation of the plaintiff's free and unrestricted enjoyment of his rights. In the state of Pennsylvania there is a line of cases which offers a most striking instance of the tendency of the courts of equity to consider always the balance of injury,—the cases following *Sanderson* v. *Coal Company;* the doctrine there laid down is, however, restricted to cases of property where the owner of minerals can bring them to the surface in no other way than that which causes the injury complained of; but those cases offer a most pertinent example of the fact that in certain communities, in the absence of negligence on the part of the defendant, not even damages can be recovered for injury to property which has been caused by the development of the natural resources of land. It has at times been suggested that the fact that there is a remedy at law, either by indictment or action, will prevent the issuance of an injunction; but the general weight of authority is against such a theory, however, the fact

that there is a legal remedy will induce a court of equity to inquire very carefully into the peculiar exigencies of a case before granting an injunction,—another striking instance that there is no abstract right vested in anyone to an injunction of which a court must take cognizance. Everyone has a right to the quiet enjoyment of his own; however the right, so far as the injunction is concerned, lies not in the individual but in the court; it may resort to severe measures to remedy the situation, but as to whether it should do so or not is a question to be decided within the sound discretion of the court after due consideration.

On the opposite side of the question one often sees quoted the remarks of Lord Eldon in *Attorney-General* v. *Nichol*, (16 Ves. 342), in which case he said: "Where the injury is not susceptible of adequate compensation of damages, or where the injury is a constantly recurring grievance a court of equity will interpose by injunction;" and Lord Hardwicke in *The Fishmongers' Company* v. *The East India Company*, (1 Dick. 163) placed the jurisdiction of a court of equity over nuisances upon "that head of mischief, that sort of material injury to the comfort of the existence" of those who are affected by the nuisance, "requiring a power to prevent as well as to remedy an evil, for which damages, more or less would be given in a court of law." Such expressions in the opinions are merely explanatory in their nature. The situation outlined by Lord Eldon is one where equity may rightfully interpose, but it does not follow simply because the injury is not susceptible of compensation in damages or is of a recurring nature that an injunction must necessarily issue; that the court will act blindly and not consider the effect of its acts.

To revert to the original question then; Will a court of equity balance injuries in deciding upon the issuance of an injunction? Most assuredly from the very nature of its jurisdiction it must do so, and although it is not contended that the balance of injury alone will decide the question, it is certainly very often, when coupled with the evidence in a particular case, a question of much importance, and will be

considered, and even may at times prevent the plaintiff from securing an injunction. The position of the defendant must, however, be a very strong one to warrant a refusal to grant an injunction that is based on the question of the balance of injury alone.

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