

Summer 6-1-1952

The Trend--To Balance the Injuries

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Recommended Citation

Francis Nicholson, *The Trend--To Balance the Injuries*, 4 S.C.L.R. 540. (1952).

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NOTES

THE TREND—TO BALANCE THE INJURIES

INTRODUCTION

To propose that equity should balance the conveniences, in considering the advisability of an injunction to abate a nuisance, seems to instinctively cause many who are only generally familiar with this equitable doctrine to shrink in horror, and answer, no—the court cannot concern itself with conveniences. But to speak of the relative hardship which would result from the issuance or denial of the injunction, or even to suggest a balancing of the equities, causes less consternation.

Whatever be its descriptive terminology,¹ there has developed in equity the principle that the court can and ought to refuse an injunction where to grant it would cause an injury out of all proportion to the injury to the plaintiff by the nuisance which he seeks to enjoin. The equity courts of some jurisdictions deny the existence of their power to balance the conveniences or equities to refuse an injunction on such grounds, while others apply this principle to its fullest extent.

It is beyond the scope of this note to attempt any analytical treatment of the development of the doctrine, other than to show some of the features of, and reasons for, its application. Some indication will be given as to the present status of the doctrine, with especial attention to its status in South Carolina, and its possible application by the South Carolina courts in the future.

The doctrine here under study has been employed in three principal types of cases: suits to enjoin continuing trespasses,² stream pollution,³ and to abate nuisances, both pub-

1. The phrase "balance of convenience" has been justly termed a misnomer. See RESTATEMENT, TORTS § 941, comment *a*; MCCLINTOCK, *Discretion to Deny Injunction Against Trespass and Nuisance*, 12 MINN. L. REV. 565, 569 (1928); 29 MICH. L. REV. 516 (1931).

2. *McElroy v. Kansas City*, 21 Fed. 257 (C. C. W. D. Mo. 1884); *Lynch v. Union Institution for Savings*, 159 Mass 306, 34 N. E. 364 (1893); 5 POMEROY, EQUITY JURISPRUDENCE § 1922 (4th ed. 1919); 31 YALE L. J. 330 (1922).

3. *Monroe Carp Pond Co. v. River Raisin Paper Co.*, 240 Mich. 279, 215 N. W. 325 (1927); *Driscoll v. American Hide and Leather Co.*, 102 Misc. 612, 710 N. Y. S. 121 (1918), *aff'd* 184 App. Div. 916; see JACOBSON, *Stream Pollution and Special Interests*, 8 WIS. L. REV. 99, 113

lic and private. The approach to the doctrine being substantially the same in all three situations, no distinction will be hereafter made between them, and the nuisance cases (being by far the most numerous) will be considered typical.

WHERE COURTS MUST BALANCE

Before approaching the problem in its essential form, several situations should be noted in which the courts do clearly and of necessity balance the injuries. Upon application for preliminary injunctions the courts must consider the possibilities of injury and refuse such relief if the hardship which would result to the defendant from the issuance of such an injunction greatly exceeds the benefit the injunction would bestow upon the complainant or any hardship caused to him by the denial of the relief.⁴ Some such utilization of a comparative injury doctrine has also been made in considering mandatory injunctions, both interlocutory⁵ and permanent.⁶

Further, it is generally recognized that in cases where the nuisance complained of causes no direct injury to the plaintiff—constitutes “no invasion of a clearly defined right of the plaintiff”⁷—but is rather a nuisance only under the particular circumstances present (*e.g.*, noise, vibration, pollution of air), then, in determining the existence of a nuisance, the court should employ some sort of balancing of injury to determine whether the alleged nuisance warrants injunctive relief.⁸ In addition to the degree and extent of injury and other circumstantial elements present, the locality in question (*i.e.*, whether a predominantly industrial area) is utilized as one of the considerations in determining whether a nuisance actually exists.⁹ Quite accurately, a commentator on this sub-

(1932); note, 60 U. OF PA. L. REV. 665 (1912); notes, 46 A. L. R. 60; 106 A. L. R. 692, 696.

4. *Kennerty v. Etiwan Phosphate Co.*, 17 S. C. 411, 417 (1881); *Benton v. Kernan*, 126 N. J. Eq. 343, 8 A. 2d 719 (1939); 5 POMEROY, EQ. JUR. § 1944.

5. *Herbert v. Penn. R. R. Co.*, 43 N. J. Eq. 21, 10 A. 872 (1887); *CLARK, EQUITY* 276 (1919); note, 15 A. L. R. 2d 250.

6. *Forest Land Co. v. Black*, 216 S. C. 255, 266, 57 S. E. 2d 754 (1950).

7. 5 POMEROY, *op. cit. supra* note 4, at 4414.

8. *Parker v. Winnipisogie Lake Cotton & Woolen Co.*, 2 Black 545 (U. S. 1863); *Demarest v. Hardham*, 34 N. J. Eq. 469 (1881).

9. *Gilbert v. Showerman*, 23 Mich. 448 (1871); *Riedeman v. Mt. Morris Electric Light Co.*, 56 App. Div. 23, 67 N. Y. S. 391 (1900); see notes, 31 L. R. A. (N. S.) 894; 61 A. L. R. 931.

ject has noted that when applied for this purpose, the doctrine of balancing injuries has seldom been mentioned by name,¹⁰ for the courts have unconsciously applied the principle in properly considering the purported nuisance in the light of the relevant circumstances. The result of the court's finding that no nuisance exists is, of course, a bar to any relief, both injunctive and at law.

It should also be noted that where the defendant's conduct has been malicious and not innocent the courts have properly rejected his invocation of the comparative injury doctrine.¹¹

WHERE CONFLICT ENTERS

The essential problem, in regard to balancing the injuries, arises when the court, having determined the existence of a nuisance, is confronted with the realization that the issuance of an injunction would bring about a harsh and undesirable result. Is the court justified in refusing injunctive relief and remitting the plaintiff to an action at law for damages because of the gross nature of the resultant injury to the defendant, and perhaps thereby to the public?

The cases considering this question result, as has been noted, in a decided split among the courts,¹² and even among the text-writers and other authorities there is difference of opinion as to what is the prevailing view.¹³ To further complicate the matter, there is variance among decisions within single jurisdictions.¹⁴

10. Note, 25 VA. L. REV. 465, 471 (1939). This writer criticized the use of the doctrine in determining the existence of a nuisance "as the rankest discrimination against small property owners". It is of significance, however, that Mr. Pomeroy, who otherwise strongly objects to the doctrine, spoke of its application in this sort of case as "an essential factor in the decision whether any nuisance exists or not". Note 7, *supra*.

11. *Kershishian v. Johnson*, 210 Mass. 135, 96 N. E. 56 (1911); *Stowers v. Gilbert*, 156 N. Y. 600, 51 N. E. 282 (1898). This consideration has, of course, appeared in the cases dealing with continued trespasses, as a nuisance rarely involves the element of wilfulness. *But cf.*, *Barker v. Mintz*, 73 Colo. 262, 215 P. 534 (1923).

12. It would be impractical to attempt any listing of cases employing the doctrine and those rejecting it. See note, 61 A. L. R. 924; 28 AM. JUR. 250; 43 C. J. S. 465; Comment, 37 YALE L. J. 96, n. 3 on p. 97 (1927).

13. The earlier authorities considered the weight to be opposed to balancing. 5 POMEROY, EQ. JUR. § 1944 at 4416; CLARK, EQUITY 279; note, 61 A. L. R. 927. But more recent commentaries present some doubt as to that position today. 31 TEX. JUR. 448, quoted in *Storey v. Central Hide and Rendering Co.*, 148 Tex. 509, 226 S. W. 2d 615, 619 (1950) as follows: "Some decisions ignore the balance of injury doctrine . . . But these cases do not represent the weight of authority".

14. See Comment, 37 YALE L. J. 96, n. 4 on p. 97 (1927).

The theoretical crux of the conflict lies in the more basic problem of whether an injunction is a matter of right or of grace. The weight of authority has been attributed to the view that where there exists a nuisance causing substantial and irreparable injury for which there is no adequate remedy at law, then the injured party is entitled, as a matter of right, to injunctive relief.¹⁵ On the other hand, it has been repeatedly held that an application for an injunction appeals to the conscience of the court, and that the right to such relief is not absolute.¹⁶ It is submitted, however, that this theoretical problem is of no practical importance in approaching the realities of nuisance cases, for the courts seem to adopt the cloak of the chameleon, saying, when they wish to balance the injuries, that an injunction is a matter of grace, and holding, when they wish to refute any application of the doctrine, that this grace becomes a matter of right when it is clear that the law can give no relief.¹⁷

FACTORS TO BE CONSIDERED

Any attempt to make an analytical survey of the cases professing to balance the injuries results in almost hopeless, but justifiable, confusion. The reason for this inability to group or reconcile the cases is apparent. While the fundamental issues are the same, the many varying factors involved necessitate the consideration, in each decision, of its complete factual background.

The disproportion between the respective injuries is, of course, the determinative factor in each of the cases where the court has undertaken to balance the injuries. Other factors, such as amount of the injury, laches, attempted extortion,

15. *American Smelting & Ref. Co. v. Godfrey*, 158 Fed. 225 (8th Cir. 1907); *Sullivan v. Jones & Laughlin Steel Co.*, 208 Pa. 540, 57 A. 1065 (1904); see note, 61 A. L. R. 927.

16. *Arizona Copper Co. v. Gillespie*, 230 U. S. 46 (1913); *Mountain Copper Co. v. U. S.*, 142 Fed. 625 (9th Cir. 1906); *Elliott Nursery Co. v. Duquesne Light Co.*, 281 Pa. 166, 126 A. 345 (1924).

17. See *McCLINTOCK*, 12 MINN. L. REV. 565 (1923); 23 MICH. L. REV. 406 (1925). This proposition is aptly illustrated by the experience of the Pennsylvania courts, who first broadly affirmed equity's discretion to grant or deny injunctions—*Richard's Appeal*, 57 Pa. 105, 98 Am. Dec. 202 (1868); *Huckenstine's Appeal*, 70 Pa. 102, 10 Am. Rep. 669 (1871), then changed their attitude and declared that an injunction was a matter of right—*Walters v. McElroy*, 151 Pa. 549, 25 A. 125 (1892); *Sullivan v. Steel Co.*, 208 Pa. 540, 57 A. 1065 (1904), and finally reverted to their original position—*Elliott Nursery Co. v. Duquesne Light Co.*, *supra* note 16.

effect of an injunction on the defendant, and effect on the public, may be present in varying degrees and are often inextricably mixed.

Technically, a distinction must be made between applying the doctrine of comparative injury to cases of material and substantial injury to the plaintiff, and those involving slight or trifling injury¹⁸ (meaning inherently slight or trifling and not comparatively so).¹⁹ An injunction is normally refused where the injury to the plaintiff is slight, not by a comparison of injuries, but on the theory that equity will not redress a technical, as distinguished from a material, wrong, where the relief sought is oppressive.²⁰ Nevertheless, the cases speak of a comparison of injuries, though the injury to the plaintiff could be classed as slight,²¹ and thus the extent of injury remains a factor to be considered.

Any element of laches on the part of the plaintiff or acquiescence by him in the defendant's conduct has been given consideration by the courts,²² such element tending to afford more reason to balance the injuries in the defendant's favor. While the fact that the plaintiff "came to the nuisance" will not necessarily defeat his right to relief, yet if there has been any indication that the plaintiff bought his land with the purpose of compelling the defendant to purchase it at an exorbitant price, the courts have refused injunctive relief.²³

Although it has been stated that, by the weight of authority, convenience to the general public affords no basis for the application of the doctrine of balancing the injuries,²⁴ that position is open to question today (as will be pointed out in the discussion of recent cases). The effect on the public, particularly on employees of the defendant and the inhabitants of the region in which the offending plant is situated, has been

18. See note, 31 L. R. A. (N. S.) 881; 20 MICH. L. REV. 799, 801 (1922).

19. Whalen v. Union Bag and Paper Co., 208 N. Y. 1, 101 N. E. 805 (1913); Behrens v. Richards, 2 Ch. 614 (1905); see note, 61 A. L. R. 931.

20. Bentley v. Empire Portland Cement Co., 48 Misc. 457, 96 N. Y. S. 831 (1905); McCann v. Chasm Power Co., 211 N. Y. 301, 105 N. E. 416 (1914).

21. Mountain Copper Co. v. U. S., 142 Fed. 625 (9th Cir. 1906); MacDonald v. Perry, 32 Ariz. 39, 255 P. 494 (1927).

22. McCleery v. Highland Boy Gold Min. Co., 140 Fed. 951 (C. C. D. Utah 1904); Herr v. Central Kentucky Lunatic Asylum, 110 Ky. 282, 61 S. W. 283 (1901).

23. Edwards v. Allouez Mining Co., 38 Mich. 46 (1878); Smith v. Staso Milling Co., 18 Fed. 2d 736 (2nd Cir. 1927).

24. See note, 61 A. L. R. 933, citing as authority State ex rel. Lyon v. Columbia Water Power Co., 82 S. C. 181, 63 S. E. 884 (1909).

stressed,²⁵ and it appears that generally the public interest or the necessity of the defendant's enterprise to the public will be considered.²⁶

The result of the consideration of these various elements is that no particular nuisance case wherein the doctrine of comparative injury was considered applicable can be said to be a precedent for another, and slightly different, case. Thus, the reason for confusion is evident. It has been said that many cases professing to balance the injuries can be explained on the ground of laches or bad faith on the part of the plaintiff, or on the ground of some other equitable feature present.²⁷ This is quite true, but not in the sense that the courts were in any way mistaken in balancing the injuries after uncovering the equitable feature. Rather, the equitable feature present "opened the door", so to speak, for balancing, and provided the basis for reaching the proper result.²⁸

THE MODERN VIEW

The above-stated propositions are well supported by the more recent cases invoking the comparative injury doctrine. In *Harrisonville v. Dickey Clay Mfg. Co.*, the U. S. Supreme Court delivered a direct decision on a situation involving public interest, and commented on the situation where only private interests are concerned. Speaking for the Court, Justice Brandeis wrote:

. . . an injunction is not a remedy which issues as a matter of course. Where substantial redress can be afforded by the payment of money and issuance of the injunction would subject the defendant to grossly disproportionate hardship, equitable relief may be denied although the nuisance is indisputable. *This is true even if the conflict is between interests which are primarily private.* . . . Where an important public interest would

25. *McCarthy v. Bunker Hill Mining Co.*, 147 Fed. 981 (C. C. D. Idaho 1906), *aff'd* 164 Fed. 927 (9th Cir. 1908); *Bliss v. Anaconda Copper Co.*, 167 Fed. 342 (C. C. D. Mont. 1909), *aff'd* 186 Fed. 789 (9th Cir. 1911).

26. *Harrisonville v. Dickey Clay Mfg. Co.*, 289 U. S. 334 (1933); *Schwarzenbach v. Oneonta Light and Power Co.*, 144 App. Div. 884, 129 N. Y. S. 384 (1911); see 43 C. J. S. 465.

27. See 9 CONN. L. Q. 63, 65 (1923).

28. See *Hughes v. Jones*, Tex., 94 S. W. 2d 534, 536 (1936).

29. 289 U. S. 334 (1933).

be prejudiced, the reasons for denying the injunction may be compelling.³⁰

In this case, the lower court's decree of injunction against the defendant city's sewer was *reversed*, it appearing that the injunction would cause an expenditure to the defendant of some \$30,000, whereas the property damage to the plaintiff's farm was only about \$100 a year.

A more recent New York case involved a situation where purely private interests were concerned. In an action to enjoin the operation of bowling alleys as a nuisance, injunction was denied, the court saying:

. . . injunction does not necessarily follow in all cases where a nuisance exists. The equities of the parties must be considered, and when the business complained of is lawful . . . the primary question is one of relative rights.³¹

Here, the injury to the plaintiff being comparatively slight, the court, in the final analysis, held that no nuisance existed.

The foregoing two cases present the two extremes—injury to a direct public concern, and injury solely to private interests. A 1950 Texas decision, *Storey v. Central Hide & Refining Co.*,³² deals with the more normal situation—a disproportionate direct injury to the defendant and indirect injury to the public. In this case, the facts alleged by the plaintiff as showing defendant's rendering plant to constitute a nuisance were, *by determination of a jury*, found in the plaintiff's favor. Nevertheless, the court rejected the plaintiff's argument that he was thus entitled to an injunction, which he had obtained, as a matter of right, saying that there should have been a balancing of the equities to determine if an injunction should have been granted. The evidence offered by the defendant, but rejected by the trial court, showed that the plant was in an industrial area, that the offenses complained of (odor and attraction of flies) were of intermittent occurrence, and that there was some element of acquiescence by the plaintiffs. Further, that while the defendant could move its plant for some \$30,000, the practical effect of the injunction would be to put defendant out of business, that the defendant was employing the best known scientific prac-

30. *Id.* at 338. (Emphasis supplied).

31. *Canfield v. Quayle*, 170 Misc. 621, 10 N. Y. S. 2d 781, 793 (1939).

32. 148 Tex. 509, 226 S. W. 2d 615 (1950).

tices to keep down odor and flies, and that the plant served the needs of about 75,000 people in the community.

Again, in *Haack v. Lindsay Light and Chemical Co.*,³³ the existence of a nuisance was established by the verdict of a jury, but again the court rejected the complainant's argument that an injunction should follow as a matter of course, saying:

That any injunction should be entered as a matter of course, runs counter to the fundamental principles of equity, since it is the first duty of all courts of equity to consider the equities of any case before them.³⁴

Other recent decisions continue in the same vein: effort to enjoin construction of an airport, denied;³⁵ to abate a nuisance arising from operation of sewer of a public school, also denied.³⁶

But this is not to suggest that the variance of opinion earlier referred to no longer exists. The courts of New Jersey adhere to their refusal to consider the doctrine of balance of injuries,³⁷ and among others, Minnesota³⁸ and West Virginia.³⁹

The foregoing treatment of the more recent decisions cannot, of course, be considered exhaustive; but it is submitted that there is an apparent trend to balance the injuries,⁴⁰ evidenced by the American Law Institute's adoption of the view that relative hardship is a factor to be considered in such cases.⁴¹ And the cases discussed indicate an increasing adherence to several theories: to deny the existence of a nuisance where the injury to the plaintiff is slight and defendant has taken all measures possible to prevent such injury;⁴² to seize on any equitable feature present, such as laches or acquies-

33. 393 Ill. 367, 66 N. E. 2d 391 (1946).

34. *Id.* at 392.

35. *Antonik v. Chamberlain*, 81 Ohio App. 465, 78 N. E. 2d 752 (1947).

36. *Johnson v. Independent School Dist. No. I*, 239 Mo. App. 749, 199 S. W. 2d 421 (1947).

37. *Benton v. Kernan*, 127 N. J. Eq. 434, 13 A. 2d 825 (1940); *Sexton v. Public Service Coordinated Transport*, 5 N. J. Super. 555, 68 A. 2d 648 (1949).

38. *Herrmann v. Larson*, 214 Minn. 46, 7 N. W. 2d 330 (1943).

39. *Ritz v. Woman's Club*, 114 W. Va. 675, 173 S. E. 564 (1934).

40. See 22 ILL. L. REV. 775 (1928).

41. RESTATEMENT, TORTS (1939) § 941.

42. Notes 31 and 35 *supra*; *Heppenstall v. Berkshire Chemical Co.*, 130 Conn. 485, 35 A. 2d 845 (1944); *Wojnar v. Yale & Towne Mfg. Co.*, 348 Pa. 595, 36 A. 2d 321 (1944).

cence by the plaintiff, as a basis for balancing the injuries;⁴³ and a growing recognition of a social ingredient in the composition of property rights.⁴⁴

SOUTH CAROLINA'S REFUSAL TO BALANCE

The attitude of the South Carolina Supreme Court toward the comparative injury doctrine is aptly illustrated by a terse comment in the 1948 decision of *Davis v. Palmetto Quarries Co.*⁴⁵ There, in an action to abate a nuisance consisting of vibration of earth, throwing of dirt on plaintiff's land, dust and noise, the lower court had stricken from the defendant's answer the following:

Defendant has by reason thereof for years past and at the present time has a large investment in said property in order that it may carry on a lawful and productive industry which is not only beneficial to the defendant but to the community in which it is located.

In affirming on this point, the court said:

The court was influenced to strike the quoted allegations because of their apparent purpose to raise the *irrelevant question of balance of convenience and advantage*, and we agree.⁴⁶

The foundation for this attitude was laid early⁴⁷ and rigidly adhered to. The noted case of *State v. Columbia Water Power Co.*,⁴⁸ affords some indication of a reluctance to balance the injuries, although it cannot be said that the question was there squarely presented to the court. In this petition in the original jurisdiction of the Supreme Court, the complainant sought to restrain the defendants (including the city of Columbia) from building a bridge across the Columbia Canal, thereby obstructing a navigable water of the state. In holding that the State was entitled to an injunction, as the obstruction of the canal would be a permanent nuisance, continued

43. Notes 28 and 32 *supra*.

44. Note 35 *supra*.

45. 212 S. C. 496, 48 S. E. 2d 329 (1948).

46. *Id.* at 500, 48 S. E. 2d at 331. (Emphasis supplied).

47. "The power of this court can rarely be exercised with more salutary effect than in protecting the rights of the humble citizen against the strong arm of a powerful corporation".—*Bird v. W. & M. Ry.*, 8 Rich. Eq. 46, 55 (S. C. 1855).

48. 82 S. C. 181, 63 S. E. 884 (1908).

injury to a property right, and an interference with the valuable right of free navigation, the court said:

The right of the State and the proposed violation by the defendants of that right being perfectly clear, the court cannot refuse to enforce the State's right by enjoining the defendants' proposed obstruction on the ground that the right of navigation of the Columbia Canal *may be of small value in comparison* with the great value to the city of Columbia of the obstruction it proposes to erect. The court's discretion is not broad enough to permit it to refuse to protect either private or public property or rights, because the invasion of such property or the violation of such right would be of benefit to an individual or to a portion of the public.⁴⁹

However, recognizing some duty "to protect, as far as possible, the welfare and health of the city of Columbia", the court found it necessary to delay final order until a master could determine whether an immediate injunction would so seriously interfere with the city's water supply as to endanger the health of its citizens, and if so, what length of time should be allowed the city to provide another method of securing water.⁵⁰

Two factors apparently weaken this decision as authority for the proposition that South Carolina has refused to balance the injuries. First, it did not definitely appear that the proposed obstruction to be built by the defendants was the only feasible way of securing water. With this in mind, and considering the possibilities of harm to the residents of the city, the court refused to immediately enjoin the defendants. Secondly, the principal thesis of the court in considering the proposed bridge to be objectionable was the obstruction of a navigable water. Thus, it was public interest on the part of the State, against a still-contingent public concern of the citizens in their water supply. This is not the usual situation where an application of the comparative injury doctrine is proposed.

49. *Id.* at 194, 63 S. E. at 890. (Emphasis supplied).

50. *Id.* at 195, 63 S. E. at 890. Permanent injunction was decreed in 85 S. C. 113, 68 S. E. 1118 (1909). For interesting further development in the case, see 90 S. C. 568, 74 S. E. 26 (1911).

A few years later, in *Williams v. Haile Gold Mining Co.*,⁵¹ the proposition was again presented, in a more direct manner. Here, by verdict of a jury, the acts of the defendant were held to constitute a nuisance, and it was proved that the refuse matter from defendant's mills had so destroyed the vegetation on plaintiff's land that no cultivation of the lands so affected had been possible for nearly ten years. In affirming the grant of an injunction, the court first stated that "when the existence of a nuisance has been established by the verdict of a jury, the party injured is entitled, as a matter of right, to an injunction to prevent its continuance",⁵² and continued:

Whatever may be the doctrine in other states, under the provisions of the Constitution of this State, that private property shall not be taken for private use without the consent of the owner, the court could not have considered, in deciding whether to grant or refuse the injunction, the question raised by the defendant as to the balance of convenience, or of advantage or disadvantage to the plaintiff and defendant and the public at large, for the defendant's use of the stream. That question would be pertinent only in an application addressed to the Legislature to give such corporations the power of condemnation.⁵³

This quotation shows the reliance of the court upon the State's constitutional provision that private property shall not be taken for a private use.⁵⁴ Such reliance appears to have been warranted in the *Williams* case because the injury to the plaintiff's land did amount to a physical deprivation of any use of the land. It can only be questioned whether the court would likewise rely upon that provision in a case involving a nuisance of less pernicious qualities, one in which the plaintiff was subjected to only a theoretical "taking" of his land. At least one theory of the *Williams* case has been repudiated by modern decisions representing the trend to balance—that the establishment of a nuisance by the verdict of a jury entitles the plaintiff to an injunction as a matter of right.⁵⁵

51. 85 S. C. 1, 66 S. E. 117 (1909).

52. *Id.* at 6, 66 S. E. at 118.

53. *Id.* at 7, 66 S. E. at 118.

54. S. C. Const. Art. I, § 17.

55. Notes 32 and 33, *supra*.

SOCIAL ENGINEERING

In answer to objections that to refuse an injunction on the balance of hardships and compel the injured party to seek damages is to take his property for a private purpose,⁵⁶ and to deprive the poor man of his property to give it to those who are already rich,⁵⁷ the courts are today replying with a demand for recognition of a change in public policy and are speaking of a "wise social engineering". For example, the following was quoted with approval in *Storey v. Central Hide & Rendering Co.*,⁵⁸ a case analyzed earlier:

Some one must suffer these inconveniences rather than that the public interest should suffer. . . . These conflicting interests call for a solution of the question by the application of the broad principles of right and justice, leaving the individual to his remedy by compensation and maintaining the public interests intact; this works hardships on the individual, but they are incident to civilization with its physical developments . . .⁵⁹

Again, in *Antonik v. Chamberlain*:⁶⁰

All systems of jurisprudence recognize the requirement of compromises in the social state. . . . Undoubtedly the plaintiffs will experience some discomfort, but that is one of the incidents or results of residing in a heavily-populated, highly industrialized state. It is an incident of living in an age of progress, in which . . . thousands of various industries throughout the cities and countryside contaminate and defile the former natural beauty, peacefulness and quiet of the vicinage.

These expressions come from cases where there would have been a definite injury to the public if an injunction were granted, and they represent the more advanced treatment of such situations. It is of course difficult to employ such reason-

56. 5 POMEROY, EQ. JUR. § 1944 (4th ed. 1919); 13 COL. L. REV. 635, and cases cited. This objection refuted in RESTATEMENT, TORTS (1939) § 941, comment *d*; and in article by MCCLINTOCK, 12 MINN. L. REV. 565, 572 (1928).

57. *Arizona Copper Co. v. Gillespie*, 12 Ariz. 190, 100 P. 405 (1909); *Whalen v. Union Bag Co.*, 208 N. Y. 1, 101 N. E. 805 (1913).

58. 148 Tex. 509, 515, 226 S. W. 2d 615, 619 (1950).

59. 31 TEX. JUR. 448.

60. 81 Ohio App. 465, 477-478, 78 N. E. 2d 752, 759-760 (1947).

ing in cases where the injury is to the defendant alone, and it is not so clear that an attempt to balance the injuries should be made in such cases.⁶¹ It is submitted, however, that few such cases arise today.

CONCLUSION

It has been accurately proposed that the misleading character of the term "balance of conveniences",⁶² by which the comparative injury doctrine is commonly known, has induced many courts, when dealing with cases not in themselves involving strong equities, to hold that the doctrine is not a permissible defense.⁶³ A more firm foundation for the utilization of the doctrine is accorded by such treatment as the following:

. . . it (the doctrine of balance of conveniences) is an equitable one and is merely a statement of a phase of the proposition that all the circumstances will be taken into consideration, including the damages to the respective parties, in granting or withholding the discretionary writ of injunction.⁶⁴

Thus considering the doctrine in its true sense, it becomes less difficult to stomach, and even more, it appears to be well grounded in reason and logic.

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61. See *McCLINTOCK*, 12 MINN. L. REV. 565, 573 (1928).

62. See note 1, *supra*.

63. See 29 MICH. L. REV. 516 (1931).

64. *Stock and Sons v. Litchfield Co-op. Shipper's Ass'n*, 251 Mich. 461, 232 N. W. 395, 396 (1930).