February 1939

The Doctrine of Weighing Equities in West Virginia

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Despite the influence of the salutary doctrine of stare decisis, courts of equity still retain their flexibility to grant or deny relief as a matter of "judicial discretion." Though perhaps as comprehensive as the term "discretion" itself, the doctrine of "weighing the equities" is considered as only one of the principles developed to guide the courts in administering equitable relief. The application of the doctrine has been much discussed. It should


2 The term, for purposes of this note, is taken in its broadest meaning, including within its scope such other terms as "balance of injury", "comparative hardship", "balance of convenience", and "balance of equity".

3 Lawrence, Equity Jurisprudence (1929) § 863; Slaymaker, The Rule of Comparative Injury in the Law of Injunction (1905) 60 CENT. L. J. 23; Chafee, Progress of the Law — Equitable Relief Against Torts (1920) 34 HARV. L. REV. 388, 392-394.
be applied with great caution is not doubted. But equity is never bound to make a decree which will do more mischief, and work greater injury than the wrong it is asked to redress. Because the application of the doctrine is largely dependent upon the facts and circumstances of each case, the only expeditious method of determining its status in West Virginia is to review those cases where it has been employed, and note the conditions to which the court has given weight.

It is a settled equitable principle in West Virginia and other jurisdictions, that strict enforcement of a contract right will not be granted where the enforcement would impose great hardship upon the defendant, with little or no corresponding benefit to the plaintiff. This is so whether the covenant sought to be enforced is in an affirmative or negative form. Two cases will suffice to illustrate the proposition.

In *Johnson v. Ohio River Railroad Company* the plaintiff sought to enforce a covenant by the defendant to construct cattle guards, crossings, and an outlet for a spring. There was no showing that these were necessary or would even be used. The court in refusing relief said: "... the enforcement of the covenants is virtually the exaction of a penalty imposing a burden upon the defendant, without any corresponding benefit, if indeed any benefit at all, upon the plaintiff. It is plain, therefore, that here, if anywhere, the discretionary power to withhold the remedy ought to be exercised."

Specific enforcement of a covenant in a contract of employment, not to engage in competing business was denied in *Hommel Company v. Fink*. The court gave as its reason that the restriction was not reasonably necessary for the protection of the plaintiff, and would impose undue hardship upon the defendants.

It has been suggested that there can be no difference in the principle which grants or withholds equitable relief in those cases praying for specific enforcement of a legal right created by contract, and the enforcement of any other legal right created by

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4 Ritz v. Woman's Club, 114 W. Va. 675, 173 S. E. 564 (1934); LAWRENCE, EQUITY JURISPRUDENCE § 47.
6 Note (1938) 44 W. Va. L. Q. 387.
6 McClintock, Equity §§ 67, 69; Fry, Specific Performance of Contracts (3d ed. 1884) §§ 397-417.
7 61 W. Va. 141, 56 S. E. 200 (1906).
8 Id. at 150.
9 115 W. Va. 686, 177 S. E. 619 (1934); Note (1920) 9 A. L. R. 1467.
operation of law.\textsuperscript{10} If this proposition is sound, there would seem to be no logical reason to prevent a court from weighing equities where injunctive relief is asked against a nuisance or a trespass. Indeed, in determining whether to grant a preliminary injunction, it is the general view, not only that it is proper to weigh equities, but that it is the duty of the court to do so.\textsuperscript{11} On the other hand, in regard to final injunctions, some courts hold that the plaintiff is entitled to relief as a matter of right.\textsuperscript{12} The West Virginia court, however, has apparently taken the other view.

In \textit{Brokaw v. Carson}\textsuperscript{13} the plaintiff sought to enjoin the operation of the defendant's ice plant as a nuisance. Though denied relief because of laches, the court strongly indicates that it would have refused the plaintiff relief had there been no laches, because the advantages to the defendant and the locality greatly preponderated over the injuries resulting from the operation of the plant.

In \textit{Powell v. Bentley & Gerwig Furniture Company}\textsuperscript{14} it was not clear that the noise the plaintiff sought to enjoin was in fact a nuisance. The defendants had constructed a factory at great cost, and were employing more than sixty persons. The factory was located on a street made noisy by an overhead railway. \textit{A fortiori}, a court which will weigh equities where a nuisance in fact does exist, will weigh equities when the existence of the nuisance is questionable. So here, the fact that to grant the injunction would silence such a useful industry, was held by the court of sufficient weight to deny relief to the plaintiff.

Although the court refused to weigh equities at the instance of, and in favor of the defendant in \textit{Ritz v. Woman's Club},\textsuperscript{15} this case is not to be construed as a denunciation of the doctrine. The opinion is rendered somewhat misleading by citing Pomeroy that the weight of authority is against allowing a balancing of injury as a means of determining the propriety of issuing an injunction.

\textsuperscript{11} Clark, \textit{Principles of Equity} (1924) § 212; Pomeroy, \textit{Equity Jurisprudence} (2d ed. 1919) 1916; Walsh, \textit{Equity} (1930) c. 9; Notes (1929) 61 A. L. R. 926; (1911) 31 L. R. A. (N. S.) 882; L. R. A. 1916C 1269.
\textsuperscript{12} 5 Pomeroy, \textit{Equity Jurisprudence} § 1944; Notes (1929) 61 A. L. R. 927; 31 L. R. A. 888.
\textsuperscript{13} 74 W. Va. 340, 81 S. E. 1133 (1914).
\textsuperscript{14} 34 W. Va. 804, 15 S. E. 1085, 12 L. R. A. 53 (1891); See McClintock, \textit{Equity} 250; McClintock, \textit{Discretion to Deny Injunction Against Trespass and Nuisance} (1928) 13 Minn. L. Rev. 565, 578.
\textsuperscript{15} 114 W. Va. 675, 173 S. E. 564 (1934).
but it clearly recognizes the doctrine by determining, in effect, that
the weight of equity in the cause is on the side of the plaintiff. The
defendant did not controvert the answer of the plaintiff that the
use of the club house as a dance hall in a residential district, had
repelled prospective purchasers of the plaintiff's properties; and,
it was stated in the opinion that "it would be manifestly unfair to
require the plaintiffs to bear all the effects of a nuisance, merely
that the public might benefit indirectly".16

Benefit or inconvenience to the public has often been an im-
portant factor in the denial of the relief prayed for. In Wees v.
Coal & Iron Railway Company,17 the court refused to enjoin the
defendant from laying its track across a public road as a nuisance,
saying, "when the public benefit derived from the thing com-
plained of outweighs the private inconvenience; the injunction will
not be granted".

A striking example of the flexibility exercised by courts of
equity in granting or withholding relief is found in Wheeling v.
Natural Gas Company.18 There the city sought to enjoin the use
of the streets by the defendant in supplying gas for lighting pur-
poses in violation of its franchise. The fact that the interests of
the public would be injuriously affected if the injunction were
granted, was held by the court to be sufficient ground to refuse
the relief asked by the plaintiff city.

In no class of cases has the power of the courts to weigh the
equities been more vigorously denied than those involving injuries
to land.19 The objections most frequently voiced are, that it favors
the rich over the poor, and countenances the exercise of private
eminent domain.20 Whatever deterrent effects these objections
may have had in some jurisdictions, they do not seem to obtain in
West Virginia where equitable relief is a matter resting within the
sound discretion of the court. It is clear that it is contrary to the
policy of our court to arrest the development of the coal industry
by enjoining an excess user of a mineral easement, when the bur-
den upon the servient estate is inconsequential.

16 Id. at 678.
17 54 W. Va. 421, syl. 5, 46 S. E. 166 (1903); Note (1938) 44 W. Va. L. Q.
387.
18 74 W. Va. 372, 82 S. E. 345 (1914); Note 28 HARV. L. REV. 110 (1914).
19 McClintock, Equity 247.
20 Id. at 247, 250. It is there stated that no case has been cited in which a
court has decided that the constitutional due process clauses, require a state to
afford a remedy for the specific prevention of, or redress for, violations of
property rights.
In *Beard v. Coal River Collieries* the plaintiff sought to enjoin the defendant from hauling coal over a tramway and trestle on the plaintiff’s land from an adjoining tract. The plaintiff’s land was worth between fifteen and twenty dollars per acre. The defendants were hauling three hundred and fifty tons of coal each day over the tramway, claiming a right to do this under the lease from the plaintiff. Although the defendants invoked the aid of the doctrine of weighing equities, the court did not find it necessary to the decision to employ it, nor to construe the lease, because the plaintiff was estopped to complain, having stood by and watched the trestle constructed. Nevertheless, the doctrine is clearly recognized in the opinion by Judge Lively, who said that “a court of equity has discretion to refuse relief where the benefits to the plaintiff are small and insignificant, as compared to the damage and inconvenience done to the defendant if the relief was granted”.

The defendant was clearly violating the terms of the lease in *Chafin v. Gay Coal & Coke Company* by hauling in coal from an adjoining tract. But because the injury to the defendant would be out of all proportion to the advantage gained, if the plaintiff were allowed to prevail, the prayer for an injunction was refused. A more unequivocal adherence to the doctrine could rarely be found than in the following statement of the court in that case: “Equities must be balanced, and if the injury done to the servitude by grant is capable of being ascertained and compensated at law, and inconvenience and loss to the other party would be serious, generally, the bill will be dismissed, reserving to the plaintiff his right to proceed at law.”

It should be noted that in this case the defendant was deliberately committing a trespass. As far back as *Howell v. King*, an excess user of an easement has been considered a trespass. It is almost universally held that if an encroachment or other taking is wilful, the plaintiff should have his injunction irrespective of damage to the defendant. This is the one exception recognized even

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*Note: The text continues with citations to legal cases and statutes, which are not reproduced here for brevity.*
by those courts which, as a general rule, grant equitable relief as a
matter of discretion and not of right. Even here, however, it would
seem that the courts are not refusing to weigh equities, but are
merely determining that the deliberate trespass is of such weight
as to be the controlling factor.

Equities will also be weighed where the plaintiff’s contingent
interest in the land is so remote, that the likelihood of its ever be-
coming vested is almost beyond the realm of possibility, as in Brown
v. Brown.28 There the sixty-six year old defendant, joined by his
nine children, was planning to sell the land to meet a $12,000
mortgage. The plaintiff, who would succeed to the land if the de-
fendant died with no living issue, sought to enjoin the sale. The
relief was denied in view of the remote possibility of the defend-
ant’s outliving nine children and several grandchildren, and the
extreme hardship on the defendant if the injunction were granted.

Thus, from the foregoing decisions, we see that the West Vir-
ginia court will weigh the equities in the following cases: (1) those
involving specific enforcement of contracts; (2) those in which
a nuisance in fact exists; (3) those in which it is not clear that a
nuisance exists; (4) those in which there is an excess user of a
mineral easement; and, (5) those in which the plaintiff’s con-
tingent interest in land is so remote, that the likelihood of its ever
becoming vested is almost beyond the realm of possibility.

It is suggested that in weighing equities, our court is doing
nothing that is foreign to the province of equity. This will not be
disputed in the first class of cases, for it is universally recognized
that equity will not decree specific performance of a contract which
imposes undue hardship upon the defendant with no corresponding
benefit to the plaintiff;29 yet, that is but one of the component parts
of the broader proposition that equities will be weighed in every
case. As to those in the second class, dealing with the comparison
of injury in nuisance and trespass cases, there is more controversy.
But we cannot divorce this question from the general doctrine, for

207 (1910); Jones v. City of Newark, 11 N. J. Eq. 462 (1884); Note (1916)
14 R. C. L. 359.

Supp. 6, 135 Misc. Rep. 70 (1929), and dissenting opinion on appeal, id., 245
N. Y. Supp. 402, 231 App. Div. 704 (1930). For cases recognizing the prin-
ciple of “meliorating waste”, see New York, O. & W. Ry. Co. v. Livingston,
238 N. Y. 300, 144 N. E. 589, 34 A. L. R. 1075 (1924); Pyncheon v. Sterns, 11
Metc. 304, 45 Am. Dec. 207 (Mass. 1846); Melms v. Pabst Brewing Co., 104
Wis. 7, 79 N. W. 738 (1899).

29 Note (1938) 44 W. VA. L. Q. 387; McClintock, Equity §§ 67, 69; Fry,
Specific Performance of Contracts §§ 397-417.
that would place the court in the inconsistent position of refusing to apply on the one hand, a principle which it freely applies on the other. Nor does it seem particularly strained to say, when the plaintiff is denied relief because of his laches,\(^5\) because he refuses to do equity,\(^6\) or because of unconscionable conduct,\(^7\) that the court is but weighing the equities between the parties, and that these too are but applications of the general doctrine. However this may be, it is apparent that practical experience has demonstrated to our court the advisability of frankly recognizing the doctrine in order to prevent undue hardship to the defendant or the public, and to encourage our economic and industrial progress.\(^7\)

C. E. G.

**INTERPRETATION OF INTENTIONAL INJURY CLAUSES IN INSURANCE POLICIES**

The West Virginia cases of *Harper v. Jefferson Standard Life Insurance Company*\(^1\) and *Adkins v. Provident Life and Accident Insurance Company*\(^2\) decided this year, raise the interesting question of the interpretation to be given clauses in insurance policies limiting the liability of the insurer where the injuries were inflicted on the insured intentionally by a third party. As respects wording, such clauses fall substantially into four classes, the limitation being imposed where the injury was (1) intentionally inflicted by a third party,\(^3\) (2) the result of design on the part of any third party,\(^4\) (3) an intentional injury inflicted by a third party,\(^5\) and (4) inflicted by the intentional act of a third party.\(^6\) Courts seem to be unanimous in treating the first three clauses as identical, but

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\(^2\) Tee v. Barlow, 85 W. Va. 490, 102 S. E. 127 (1920); Watzman v. Unatin, 101 W. Va. 41, 131 S. E. 874 (1926).

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\(^5\) 196 S. E. 12 (W. Va. 1938).
\(^6\) 196 S. E. 16 (W. Va. 1938).
\(^7\) General Accident, Fire, etc. Corp. v. Hymes, 77 Okla. 20, 185 Pac. 1085, 8 A. L. R. 318 (1919).