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William Q. de Funiak
University of San Francisco

REQUISITES FOR EQUITABLE PROTECTION AGAINST TORTS

By William Q. de Funiak*

It may be stated as a general rule that whenever a person threatens or undertakes to perform any act affecting property, contrary to the legal right of another, the consequences of which will be permanent or irreparable injury to the property, equity will give relief by way of injunctive decree.[1] To justify a suit for injunctive relief, it is not necessary that any injurious act shall actually have been done by the defendant. When there is reasonable probability of injury, when the intention to do the wrong has been clearly manifested, equity at once interferes. However, mere idle words or mere possibility of injury do not suffice. On the other hand, no one can complain that equity has taken him at his word.[2]

Nor is it any sufficient answer to the suit for the defendant to come in and say that he no longer harbors his wrongful purpose but has abandoned it. The court will not leave the plaintiff to the good will of a defendant who has once shown an intention to disregard his rights, but will by its decree take care that the defendant's good professions are carried out. Of course, if the court is satisfied that there is no likelihood of the occurrence or repetition, as the case may be, of the wrong complained of, and evidence of abandonment or repentance is convincing, the court may deny the application for injunction.[3]

Relief can be accomplished, if necessary, by requiring the taking of any affirmative or positive steps to remove or render

* LL.B., Univ. of Virginia, LL.M., Univ. of San Francisco; Professor of Law, Univ. of San Francisco.

[1] See Merwin, Principles of Equity 18 (1895).

[2] Reasonable probability is important, since mere possibility or anything short of reasonable probability of injury is said to be insufficient to warrant equitable relief. See, e.g., Lorenz v. Waldron, 96 Cal. 243, 31 Pac. 54 (1892). Cf. Edison v. Edison Polyform Mfg. Co., 73 N. J. Eq. 136, 67 Atl. 392 (1907), as to "possibility of injury."

[3] Snyder v. Gurney, 43 F Supp. 204 (1942).

The court should, nevertheless, proceed to allow substitutional redress by way of money damages. Lewis v North Kingstown, 16 R. I. 15, 11 Atl. 173, 27 Am. St. Rep. 724 (1887). That this should not include prospective damages, see Cox v. City of New York, 265 N. Y. 411, 193 N. E. 251, 105 A. L. R. 1378 (1934).

harmless the source or cause of the threatened injury (consistent, of course, with the practicability of supervising and making effective the order or decree) If the act has already been committed and, with reasonable probability, will be continued or repeated, equity can compel the wrongdoer to desist in future from repetition of the wrong and, as well, compel him to repair the injury which he has already done, to the extent that this is possible. Repairing the injury may consist of payment of pecuniary compensation, since it has long been established in equity that pecuniary compensation may be granted as an incident of the injunctive relief,[4] or it may consist of positive or affirmative acts to remove or to discontinue the cause or source of injury,[5] or both.[6]

From the foregoing it is necessary to branch off on discussions of several interrelated matters. For one, what is property? For another, what is permanent or irreparable injury? Both of these matters are of importance in view of the principle that equity does not assume jurisdiction where there is an adequate remedy at law and the principle, although subject nowadays to exception,[7] that equity does not assume jurisdiction except to protect property and property rights. And conceding that a sufficient so-called property right or interest is present,

[4] Originally, in the separate courts of chancery or equity this was frequently done by exacting an accounting of the profits of a wrongful act or sometimes by the allowance of damages as an incident to the granting of equitable relief, as the circumstances warranted. In the code states, damages may be obtained in the same proceeding as an injunction. These, as formerly, may usually be assessed by the court as an incident of the equitable relief, without the necessity of a jury See Judson v Los Angeles Suburban Gas Co., 157 Cal. 168, 106 Pac. 581, 26 L.R.A.(N.S.) 183, 21 Ann. Cas. 1247 (1910). That this should not include prospective damages, see Cox v. City of New York, *supra*, n. 3.

[5] Where continuing injury was being done to plaintiff by abuse of license to pile rocks on plaintiff's land, defendant was ordered to remove the rocks. Wheelock v Noonan, 108 N.Y. 179, 15 N.E. 67, 2 Am. St. Rep. 405 (1888). At law the plaintiff would have had to assume what would have amounted to an unconscionable burden of removing the rocks himself and suing for the cost thereof or else allow the rocks to remain and recover damages based on the rental value of the land.

[6] See The Salton Sea Cases, 172 Fed. 792 (1909), cert. den. 215 U.S. 603, 30 Sup. Ct. 405, 45 L.Ed. 345 (1909), noted (1910) 23 HARV. L. REV. 390.

[7] See de Funiak, *Equitable Protection of Personal or Individual Rights* (1947) 36 KY. L. J. 7.

does the threat of permanent or irreparable injury present the only situation in which the remedy at law will be inadequate? Or do other situations instanced by the courts as those in which the remedy at law is inadequate constitute, in effect, situations of irreparable injury?

Conduct of the complainant which may affect his ability to obtain equitable relief must also be considered.

PROPERTY AND OTHER RIGHTS OF SUBSTANCE

The development of equity during a period when property rights rather than personal or individual rights were paramount has beeen referred to by me in a previous article.[8] The result has been the repeated statement of the principle that equity intervenes or interposes only to protect property and rights and interests therein. So, as equitable relief was extended to the field of torts, its protection was confined to the protection of property and rights therein. It must be kept in mind, then, that though there have been departures from this prerequisite to equity jurisdiction in the past and though there is a growing tendency to depart from it, the rule is still followed rigidly in many jurisdictions and is given at least lip service in many others.

Since real property and rights therein were, in early England, the chief sources of wealth, power and influence, equitable relief against torts developed in relation to real property, against the torts of waste, trespass and nuisance. Gradually, by reason of the national growth and the consequent complexities of the modern social and economic order, the concept of property was extended to include intangibles as well as tangibles, in other words incorporeal things of value. The term "property" thus came to include the right to carry on a lawful business, with all the incidents thereof which gave or added value to a business. Whether the right to carry on a lawful business, or for that matter the power to earn a living, is strictly a property right or a personal right is now an academic question. The fact is that equity has termed business and similar rights of substance to be property rights in order to justify its interposition, on the

[8] See de Funiak, *op. cit., supra* n. 7.

ground of protecting property and property rights. Thus the idea of property has been extended to include what are sometimes termed rights of substance, in the nature of property rights, having a pecuniary value.[9]

There is no reason why equity should not extend its relief to all cases of substantial rights conferred by law, whether such rights of substance are termed personal rights or property rights. In this country we recognize many rights of substance other than so-called property rights, and neither the common law nor statutory remedies may provide the complete and adequate protection of such rights and the prevention of injury to them which equity can afford. Certainly, so far as property rights or rights in the nature thereof have been concerned, equity looks to their importance to the complainant and may consider them substantial as to him, without requiring a great pecuniary value.[10]

ADEQUACY OR INADEQUACY OF REMEDY AT LAW

The development of equity as a system of jurisprudence to supply the deficiencies or inadequacies of the relief available at common law in the courts of law and the unwillingness of equity to infringe on or invade the province of the courts of law have resulted in the question of the adequacy or inadequacy of the remedy at law in a given case becoming one of importance. It is considered as prerequisite to equity jurisdiction that there be no remedy at law available or that it be inadequate.[11] By inadequate is meant that the remedy at law is not so speedy,

[9] See de Funiak, *Equitable Protection of Business and Business Rights* (1947) 35 KY. L. J. 261.

[10] See Felsenthal v. Warring, 40 Cal. App. 119, 180 Pac. 57 (1919), where defendant had prescriptive right to maintain irrigation ditch on plaintiff's land. When a large part of the ditch was washed away by a flood, defendant began construction of new ditch at a different point, claiming right to maintain ditch anywhere on plaintiff's land. The value of the land so taken was only $12. It was held that the easement included no right to change the mode of use or enjoyment by shifting it and that so long as a substantial right of plaintiff was involved, whatever its small pecuniary value, he was entitled to have such right protected.

[11] See LAWRENCE, EQUITY JURISPRUDENCE (1929), Ch. VII; McCLINTOCK, HANDBOOK OF EQUITY (1936), Sec. 41, WALSH, TREATISE ON EQUITY (1930), Sec. 25.

practical and efficient to the ends of justice and its prompt administration as the remedy in equity [12]

Where law and equity are administered in separate courts, the decision of the equity court in a given case that there is an adequate remedy at law results in the dismissal of the suit in equity Delay and expense are thus imposed on the complainant who must begin all over again in another court. It is true that in more recent periods there have developed frequent situations in which the equity court has awarded some form of temporary relief while the action in the court of law is being tried, as well as the fact that statutes have frequently been enacted to soften the difficulties brought about by two sets of courts.[13]

The situation is much less harsh in jurisdictions where code or statutory provisions have merged legal and equitable powers in one court. The substantive differences between the two systems of jurisprudence, law and equity, still remain, in that the complainant seeking equitable relief may still have to show that there is no adequate legal remedy available. But if it develops that there is an adequate legal remedy, no dismissal of the proceedings follows, since the court under its merged powers may proceed to give the relief called for by the issues.[14] At most, the complainant is required only to amend his complaint to ask for the legal relief which has been determined to be available and adequate.[15]

IRREPARABLE INJURY

Irreparable injury has been defined as that which cannot be repaired, restored or adequately compensated in money or where the compensation cannot be safely measured.[16] On the other hand it has been said that irreparable injury does not

[12] Boyce v. Grundy, 3 Pet. 210, 7 L.Ed. 655 (1830).

[13] See de Funiak, *Equitable Protection against Waste and Trespass* (1948) 36 KY. L. J. 255.

[14] See, e.g., CAL. CODE OF CIV. PROC., Sec. 580; N.Y. CIV. PRAC. ACT, Sec. 275. See also Clark, *The Union of Law and Equity* (1925) 25 COL. L. REV. 1, CLARK, CODE PLEADING 44 et seq. (1928), discussing the frequent inconsistences and hostility of the courts in dealing with this problem.

[15] Nevertheless, some courts in code states have insisted on dismissal. See Clark, *op. cit. Supra,* n. 14.

[16] Bettman v Harness, 42 W Va. 433, 26 S.E. 271, 36 L.R.A. 566 (1896).

mean that the injury is beyond the possibility of repair or beyond the possibility of compensation in damages, but rather that the injury is of such constant and frequent recurrence that no fair or reasonable redress can be had therefor in an action at law [17] It will be noticed that the latter statement seems more directly addressed to a wrong of a continuing or repeated nature rather than to one threatened initially [18]

In short, then, it would seem that the standard is that some or all of the very substance of the estate or property or right, if destroyed, will be destroyed to the extent that no pecuniary compensation can provide replacement of the original or restore exactly the status quo,[19] or that no fair or reasonable redress is available at law. Money will only provide the injured person with some substitute for the right of substance that was previously legally his and to the destruction of which he has had to submit. There is no reason, from the standpoint of equity, why a person should have to submit to the destruction or loss of a substantial right which is legally his and accept something else in its place.[20] Nor is there any reason why he should have to

[17] Donovan v. Pennsylvania Co., 199 U.S. 279, 26 Sup. Ct. 91, 50 L.Ed. 192 (1905)

[18] "The term 'irreparable injury,' however, is not to be taken in its strict literal sense. The rule does not require that the threatened injury should be one not physically capable of being repaired. If the threatened injury would be substantial and serious—one not easily to be estimated, or repaired by money—and if the loss or inconvenience to the plaintiff if the injunction should be refused (his title proving good) would be much greater than any which can be suffered by the defendant, through the granting of the injunction, although his title ultimately prevails, the case is one of such probable great or 'irreparable' damage as will justify a preliminary injunction." MERWIN, PRINCIPLES OF EQUITY 426 (1895)

[19] Although destruction of some or all of the substance of the estate or property or right originally seems to have meant injury to the freehold by cutting of timber, quarrying rock or removal of ore, injury to the substance of the estate which causes irreparable injury is now exceedingly broad in its meaning. Kellogg v. King, 114 Cal. 378, 46 P 166, 55 Am. St. Rep. 54 (1896), holding that acts which impaired or destroyed a hunting privilege impaired or destroyed the substance of the right or estate or interest held, so as to cause irreparable injury.

[20] A court of equity will not license a wrong and compel the owner of property to exchange what is his by right for some substitute. Gregory v. Nelson, 41 Cal. 278 (1871).

"The plea that a remedy for money damages exists is made in defense of every application for an injunction. In some ways, under the law at least, any injury may be compensated by an award for

subject to restriction to a remedy that cannot offer a fair and reasonable redress.

Indeed, if equitable principles were followed to a logical conclusion, there would seem to be no reason why a person should have to submit to any wrong even though he can thereafter recover money damages sufficient to replace in kind and quality the very thing lost or destroyed, without appreciable change in his status. In no civilized country should the jurisprudence insist that a wrong be allowed to happen and compensation be sought thereafter rather than preventing the occurrence of the wrong.[21] One may, of course, distinguish merely trivial[22] matters or matters for which other adequate remedies than equitable exist to prevent the occurrence or repetition of the wrong.[23]

MULTIPLICITY OF ACTIONS AT LAW

One of the grounds frequently advanced as rendering the remedy at law inadequate is that a multiplicity of actions will be required. It is apparent that where the injury is recurring, one action after another at law is required to recover for the damages as each act is done. This is expensive, time-consuming and vexatious. Moreover, the repeated or continuous injuries may eventually result in permanent or irreparable injury And too

money damages. Under the law even the taking of a human life may be so compensated." Fox v. Krug, 70 F Supp. 721 (1947), to the effect that regardless of existence of such remedy for money damages, irreparable injury will warrant injunction.

[21] Professor Walsh points out that the growth of modern equity has been in the direction of granting specific relief more freely where definitely superior to damages and that the code merger of law and equity has contributed to this. WALSH, TREATISE ON EQUITY, Sec. 25 (1930).

[22] An illustrative maxim is that "Equity does not stoop to pick up pins." Formerly, at least, in England and in some American jurisdictions, arbitrary amounts have been imposed either by the courts or by statute as requisite to equity jurisdiction. See LAWRENCE, EQUITY JURISPRUDENCE, Sec. 43 (1929), who warns against application of this principle of triviality where the relief sought is not properly measurable by the pecuniary damage immediately imminent, as where the grievance is a recurring one or one which may lead to acquisition of a prescriptive right. Certainly distinction must be made between the merely trivial where some other remedy is available and the situation where a substantial right, although small in dollar value, is threatened, as in Felsenthal v. Warring, *supra*, n. 10.

[23] As where a policeman may well be called. See Randall v. Freed, 154 Cal. 299, 97 Pac. 669 (1908), Mechanics' Foundry v Ryall, 75 Cal. 601, 17 Pac. 703 (1888).

great a delay or failure to bring actions may result in the wrongdoer acquiring an easement or adverse right.[24] Of course, the mere necessity of bringing a multiplicity of actions at law as a ground for equitable relief would not, at first glance, seem to meet the express requirement of many jurisdictions that it is prerequisite to the obtaining of equitable relief that irreparable injury be threatened with reasonable probability However, it will usually be found, as already indicated, that the continued recurrence of the injurious act may result in irreparable injury or in the acquisition of an easement or other adverse right which by reducing the substance of the estate results in irreparable injury It may also be noticed that irreparable injury is sometimes defined as one for which no fair and reasonable redress is afforded.[25]

DAMAGES AT LAW SPECULATIVE OR CONJECTURAL

Another ground frequently advanced as rendering the remedy at law inadequate is that damages are too speculative or conjectural to provide a basis for seeking relief in an action at law. However, such a ground usually exists in connection with other grounds,[26] or results particularly from the probable irreparable injury And indeed, irreparable injury is sometimes defined, as already remarked, as an injury for which no safe measure of recovery is provided.[27]

INSOLVENCY

From a practical standpoint it might well be said that the remedy at law by way of damages is more or less meaningless if the defendant is insolvent. This consideration has led to the view in many jurisdictions that the insolvency of the defendant

[24] Although the term "multiplicity of actions at law" originally, and still occassionally, seems to have been applied only to causes of action against a plurality of persons, it is now also applied to the situation of a succession of actions between the same parties. See LAWRENCE, EQUITY JURISPRUDENCE, Sec. 872 (1929).

[25] See discussion of "Irreparable Injury," *supra.*

[26] See, e.g., Baker v. Howard County Hunt, 171 Md. 159, 188 Atl. 223 (1936), involving impossibility of measuring damages, repetition of trespass and interference with peaceful enjoyment of property

[27] See discussion of "Irreparable Injury," *supra*

renders the remedy at law inadequate and is sufficient ground alone for granting equitable relief.[28] It should be pointed out, however, that in many of the cases so holding the injury or threatened injury is of such a nature that in any event the remedy at law would not be adequate. In fact, some of the cases remark on the immateriality of the circumstances whether the defendant is insolvent or solvent, in view of the nature of the threatened injury.[29] Nevertheless, there are definitely situations in which, but for the insolvency, the remedy at law would be adequate and, hence, the fact of insolvency is the determinative factor in construing the remedy at law as inadequate.[30]

On the other hand, in many jurisdictions it is considered that the proper test continues to be whether the threatened injury will be irreparable so that no relief at law would be adequate, and that if the situation is ordinarily one in which a remedy at law is adequate it is not determinative of the matter that the judgment at law in the immediate case might not procure any pecuniary compensation.[31] However, in these jurisdictions the concession is frequently made that insolvency of the

[28] Martin v. Davis, 96 Iowa 718, 65 N.W 1001 (1896), Clark v. Flint, 22 Pick. (Mass.) 231, 33 Am. Dec. 733 (1839) Wilson v. Hill, 46 N.J. Eq. 267, 19 Atl. 1097 (1890). And see McClintock, *Adequacy of Ineffective Remedy at Law* (1932) 16 MINN. L. REV. 233; Moreland, *Insolvency of Defendant as Basis of Equity Jurisdiction in Tort Cases* (1933) 22 KY. L. J. 1.

Conversely, mere fact that defendant is solvent does not defeat equity jurisdiction, since recovery of damages may not, of course, constitute as adequate and efficacious remedy as that available in equity. See Edwards Mfg. Co. v. Hood, 167 Ga. 144, 145 S.E. 87 (1928).

[29] See, e.g., Richards v. Dower, 64 Cal. 62, 28 Pac. 113 (1883).

As Professor Moreland points out, where waste or trespass in the nature of waste is threatened, there is no adequate remedy at law in any event. See Moreland, *op. cit., supra,* n. 28.

[30] "These situations are: (1) Where a repeated trespass or a continuing trespass is likely to be committed by an insolvent defendant over a short period of time, the remedy at law is adequate in the absence of the element of insolvency (2) Where the asportation of non-unique personal property is threatened, the insolvency of the defendant becomes a material factor in giving equity jurisdiction to grant preventive relief for in its absence there is an adequate remedy at law." Moreland, *op. cit., supra,* n. 28.

[31] Thompson v. Allen County, 115 U.S. 550, 6 Sup. Ct. 140, 29 L.Ed. 472 (1885), Tampa, etc., R. Co. v. Mulhern, 73 Fla. 146, 74 So. 297 (1917), Moore v. Halliday, 43 Ore. 243, 72 Pac. 801, 99 Am. St. Rep. 724 (1903).

defendant is a factor which may be considered in connection with other matters in determining whether there is an adequate or inadequate remedy at law [32]

Which of the opposing views is the majority view is a matter of dispute, with the judges and legal writers usually declaring for the view which they happen to favor.[33]

OBJECTION TO EQUITY JURISDICTION, WAIVER

Objection to the existence or exercise of equity jurisdiction is usually made on the ground that there is an adequate remedy at law,[34] although it may also, in many jurisdictions, be made on the ground that no property, or property rights, or rights in the nature thereof are involved or threatened. According to the practice of the particular jurisdiction, objection is made by demurrer or by motion or in the answer to the merits.[35]

If the objection is not raised in any form in the pleadings is the objection waived or must the court take notice, of its own motion, of the absence of equity jurisdiction? The answer to this requires recognition of the fact that the term equity jurisdiction does not refer to jurisdiction in the sense of the power conferred by the sovereign on the court over specified subject-matters or to jurisdiction over the res or the persons of the parties in a particular proceeding, but refers rather to the merits. The want of equity jurisdiction does not mean that the court has no power to act but rather that it should not act, as on the ground, for example, that there is an adequate remedy at law.[36]

Undoubtedly, in jurisdictions where law and equity are administered in separate courts, the courts of equity, being loath to invade the province of the courts of law, will take notice, of

[32] Analysis may show, however, that the situation is one in which in any event equity would grant relief on other grounds of inadequacy of legal remedy See Moreland, *op. cit., supra,* n. 28.

[33] Conflicting opinions of writers are shown by MCCLINTOCK, HANDBOOK OF EQUITY, Sec. 45 (1936), who favors the view that insolvency alone is ground for equitable relief, and WALSH, TREATISE ON EQUITY, Sec. 63, (1930), who argues that it should not be.

[34] That a remedy at law by way of money damages exists is pleaded in defense of every application for injunction, is pointed out, with some truth, in Fox v Krug, 70 F Supp. 721 (1947).

[35] As to modes of objecting in various jurisdictions, see Equity, 30 C.J.S. 449 et seq.

[36] See McClintock, *op. cit., supra,* n. 33, pp. 57, 58.

their own motion, of the absence of equity jurisdiction. Indeed, they may even be inclined to state that the availability of adequate remedies at law goes to the very power of the courts of equity to act.[37] The usual view, however, as already indicated, is that want of equity jurisdiction, as because of existence of an adequate remedy at law, goes not to the power of the court but to the merits.[38]

In this country, the widespread code merger of legal and equitable powers in the same court has resulted in the tendency of the courts to proceed to hear the petition for equitable relief in the absence of an objection based on the ground of lack of equity jurisdiction. In some jurisdictions, so long as there is a waiver by reason of failure of the defendant to object that there is a lack of equity jurisdiction, the court does not take notice, on its own motion, of any such lack and proceeds to render equitable relief if the merits of the case warrant it.[39] In other jurisdictions, as in the federal courts, the failure to object is a waiver only if the want of equity jurisdiction is not obvious. If such want is obvious, the court may and should notice it of its own motion.[40]

EQUITABLE CONDUCT OF COMPLAINANT

Pursuant to the equitable maxim that "He who comes into equity must come with clean hands," the so-called "clean hands" doctrine, the complainant seeking equitable relief must not himself have been guilty of any inequitable or wrongful conduct with respect to the transaction or subject-matter sued on. Equity will not give relief to one seeking to restrain or enjoin a tortious act where he has himself been guilty of fraud, illegality, tortious conduct or the like in respect of the same matter in litigation.[41] This is said to be a matter of public policy and not a matter of defense.[42]

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[37] See MERWIN, PRINCIPLES OF EQUITY 56 (1895)

[38] Viles v. Prudential Ins. Co., 124 F 2d 78 (1941).

[39] As to this view in Massachusetts, see Merwin, *op. cit., supra* n. 37, p. 57.

[40] Viles v. Prudential Ins. Co., *supra* n. 38. See also Pusey & Jones Co. v. Hanssen, 261 U.S. 491, 43 Sup. Ct. 454, 67 L.Ed. 763 (1923).

[41] Mas v. Coca-Cola Co., 163 F 2d 505 (1947), Western Lithograph Co. v. W H. Brady Co., 71 F Supp. 383 (1947).

[42] White v. Baugher, 82 Colo. 75, 256 Pac. 1092 (1927).

But the rule or doctrine applies only to the particular matter under consideration, for the court will not go outside of the case for the purpose of examining the conduct of the complainant in other matters or for the purpose of questioning his general character for fair dealing.[43] Even though the conduct of the complainant is similar to that of the defendant or in respect of similar matters, it is not ground for denial of equitable relief where it is not connected with the matter in dispute between the immediate parties, according to the usual rule.[44] It is true that one finds statements to the contrary, to the effect that similar but disconnected acts by the complainant constitute unclean hands barring him from relief.[45] However, the cases cited to these statements usually turn out, upon analysis, to be cases in which the similar but disconnected acts of the plaintiff constituted a fraud upon the public, or involved the commission of illegal acts injurious to the public or contrary to public policy, or involved conduct verging on connection with, if not actually connected with, the matter in litigation. It is also necessary to keep in mind that the acts or conduct of the plaintiff not connected with the matter sued upon, if causing injury to the defendant himself, may place the plaintiff in equal guilt with the defendant so far as inequitable conduct is concerned and thus bar his right to relief.

An exception to the clean hands doctrine, as indicated in the preceding paragraph, exists where the conduct of the complainant, although not connected with the matter in litigation, amounts to a fraud on or deceit of the public. In such cases, the conduct of the complainant bars him from obtaining equitable

[43] Lyman v. Lyman, 90 Conn. 399, 97 Atl. 312 (1916), Mills v. Susanka, 68 N.E. 2d 904 (Ill. 1946) noted (1947) 33 VA. L. REV. 207· Tami v Pikowitz, 138 N.J. Eq. 410, 48 A. 2d 221 (1946).

"But a court of equity is not an avenger of wrongs committed at large by those who resort to it for relief, however careful it may be to withhold its approval from those which are involved in the subject-matter of the suit, and which prejudicially affect the rights of one against whom relief is sought." Kinner v. Lake Shore, etc., R. Co., 69 Ohio St. 339, 69 N.E. 614 (1903).

[44] Miller v Enterprise Canal Co., 142 Cal. 208, 75 P 770, 100 Am. St. Rep. 115 (1904), wherein plaintiff canal company sought to enjoin defendants from obstructing a river and diverting water therefrom in violation of rights of canal company which was itself obstructing another stream so as to constitute a public nuisance.

[45] See, e.g., Equity, 30 C.J.S.483, text and notes 40, 41.

relief.[46] Although there is less certainty as to the situation where the complainant's conduct does not fall exactly within the realm of fraud on or deceit of the public but constitutes conduct violative of public policy,[47] it logically appears that such latter conduct is as injurious to the public welfare and should equally constitute a bar to equitable relief.

Another somewhat similar maxim or principle is the one that "He who seeks equity must do equity" This requires that the one seeking the equitable relief must himself, as a prerequisite to obtaining such relief, have done whatever is in his power to restore the status quo. He must not seek to bring about the cessation of the wrong to him and at the same time retain any benefits, at the defendant's expense, that may have accrued to him from the defendant's acts. This maxim, however, will be found more applicable to equitable suits involving contracts than to those involving torts.[48]

The plaintiff must also not be guilty of laches, that is, he must not be presenting or attempting to enforce a so-called stale demand. According to the governing maxim, "Equity aids the vigilant, not those who slumber on their rights." Incidentally, this manner of stating the principle is somewhat misleading, since it disregards the element of the effect of the delay For laches does not result from mere lapse of time but from the fact that, during the lapse of time, changed circumstances inequitably work to the disadvantage or prejudice of another if the claim is now allowed to be enforced. By his negligent delay, the plaintiff may have misled the defendant or others into acting on the assumption that the plaintiff has abandoned his claim, or that he acquiesces in the situation, or changed circumstances may make it more difficult to defend against the claim.[49]

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[46] Worden v. California Fig Syrup Co., 187 U.S. 516, 23 Sup. Ct. 161, 47 L.Ed. 282 (1903) American University v Wood, 294 Ill. 186, 128 N.E. 330 (1920), A. N. Chamberlain Medicine Co. v. H. A. Chamberlain Medicine Co., 43 Ind. App. 213, 86 N.E. 1025 (1904).

[47] See Skinner v. Lake Shore, etc., R. Co., *supra* n. 43, wherein complainant railroad's conduct of being party to an illegal combination in restraint of trade did not bar its relief.

[48] The similarity of the two maxims is discussed in Skinner v. Lake Shore, etc., R. Co., *supra* n. 43.

[49] See MERWIN, PRINCIPLES OF EQUITY 512, 513 (1895)

Laches does not depend upon any fixed or arbitrary time limit as does a statute of limitations since it is not mere lapse of time which constitutes laches. And statutes of limitations, unless so providing, do not relate to suits of an equitable nature but only to actions at law [50] Accordingly, a court of equity may refuse relief on the ground of laches although pursuit of a legal remedy on the same cause would not be barred by the applicable statute of limitations, or it may grant relief after the bar of the statute of limitations has been raised against the legal remedy [51] The discretion of the court, in view of the circumstances of the case, is freely exercised.[52] Sometimes the equity court does apply the analagous statute of limitations on the presumption that the lapse of time fixed by the statute carries with it injurious consequences.[53]

Since laches implies fault, lapse of time due to ignorance of one's rights will not serve to constitute laches, if the ignorance does not, of course, result from lack of diligence.[54] This is also true where disability operates to prevent the bringing of suit.[55]

BALANCING EQUITIES OR CONVENIENCES

A matter which may be highly determinative of whether or not equitable relief should be granted is the doctrine variously described as the balancing of equities or the balancing of conveniences or hardships. The rule commonly owes its existence to development by courts in the exercise of equitable powers,[56]

[50] In MCCLINTOCK, HANDBOOK OF EQUITY 40, 41, (1936) it is advanced that, although originally statutes of limitation did not apply to suits in equity latter day statutes do. Their application, however, must be determined from their language. Walsh, in his TREATISE ON EQUITY 474, 475 (1930), notes the existence in the code states of statutes of limitation governing certain of the important equitable suits.

[51] Stevenson v Boyd, 153 Cal. 630, 96 Pac. 284, 19 L.R.A. (N.S.) 525 (1908)

[52] See Ide v. Trorlicht, 115 Fed. 137 (1903).

[53] See Note (1931), 79 U. OF PA. L. REV. 341, alleging growing tendency in this regard.

[54] Citizens Nat. Bank v Blizzard, 80 W Va. 511, 93 S.E. 338, L.R.A. 1918A 129 (1917).

[55] Scheel v Jacobson, 112 N.J. Eq. 265, 164 Atl. 270 (1933).

[56] That doctrine of balancing the equities in trespass cases has no place in Louisiana jurisprudence, see Esnard v. Cangelosi, 200 La. 703, 8 So. 2d 673 (1942), noted (1942) 5 LA. L. REV. 41.

but its application is authorized by statute in some states.[57] Its application will be found most frequently in trespass and nuisance cases.

The doctrine or rule is sometimes stated to be that the court will weigh the loss, injury or hardship resulting to the respective parties from granting or withholding equitable relief, that if the benefit resulting to the plaintiff from granting the equitable relief will be slight as compared to the loss or hardship caused to the defendant, the equitable relief will be denied. The plaintiff is left to the pursuit of damages as his remedy.[58]

Too strict an application of the doctrine or rule, as the rule was just stated, may lead too often to placing the plaintiff's right to relief upon a dollars and cents basis, whereby what to the plaintiff is a substantial right is lost or irreparably injured simply because it does not approach in pecuniary amount the loss or hardship that the defendant will suffer if relief is granted. Accordingly, many courts refuse to follow or give weight to the doctrine or rule as stated above. They insist that if a substantial right of the plaintiff is endangered by the defendant's wrongful act or threatened wrongful act, the latter will be enjoined even though the loss or hardship, therefrom to the defendant exceeds the pecuniary value of the plaintiff's right.[59] If, however, the right of the plaintiff is describable as trifling or insubstantial, the loss or hardship to the defendant will be considered and plaintiff left to a remedy by way of damages.[60] The doctrine or rule may also properly include giving the defendant an opportunity to remove the cause of injury, instead of arbitrarily

[57] In Obermiller, *The Balance of Convenience Doctrine* (1944) 19 NOTRE DAME LAW 360, the author cites Colorado, Georgia and Tennessee statutes to this effect. Application of statutes in Colorado with respect to mining, see Whiles v. Grand Junction Min. & Fuel Co., 86 Colo. 418, 218 Pac. 260 (1920).

[58] See Madison v. Ducktown Sulphur, Copper & Iron Co., 113 Tenn. 331, 83 S.W 658 (1904)

[59] Wright v. Best, 19 Cal. 2d 368, 121 P 2d 702 (1942), Whalen v. Union Bag Co., 208 N.Y. 1, 191 N.E. 805 (1913).

[60] In Tramonte v. Calarusso, 256 Mass. 299, 152 N.E. 90 (1926), not only was the injury to plaintiff's land trifling in nature, but plaintiff refused defendant access to accomplish removal of offending obstruction.

throwing a severe loss upon him by flatly enjoining from all further activities.[61]

In either of the two approaches to the doctrine or rule, it will be found that if the defendant's act is willfully tortious or is committed with knowledge of the plaintiff's right, the courts will refuse to balance the equities or conveniences and will grant the equitable relief sought. It will be observed that the defendant's conduct has been such as not to entitle him to consideration on the part of the court.[62]

What may be described as another exception or qualification occurs where the grant of equitable relief by restraint of the defendant will affect the public convenience or rights of the public. In such a situation the hardship upon or great inconvenience to the public outweighs any right, however substantial, of the plaintiff to relief and he is left to his remedy in damages. There is some difference of opinion among the courts as to when the rights or conveniences of the public are involved. Some courts have confined the balancing of equities or conveniences to situations where the defendant is in the nature of a public service corporation, curtailment or prevention of whose activities will definitely affect the public interest.[63] It has been said that to apply any balancing of equities in favor of a corporation essentially private in nature, for instance because it pays large taxes and employs a great number of people locally, would permit such a corporation in effect to condemn property of the plaintiff for private purposes.[64] In other jurisdictions, though, in such a situation the interest of the public has been considered to outweigh the right of the plaintiff.[65]

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[61] Payne v Johnson, 20 Wash. 2d 24, 145 P 2d 552 (1944).

[62] Tucker v Howard, 128 Mass. 361 (1880), Evangelical Lutheran Church v Sahlem, 254 N.Y. 161, 172 N.E. 455 (1930).

[63] See Ukhtomski v Tioga Mut. Water Co., 12 Cal. App. 2d 726, 55 P 2d 1251 (1936) Barger v City of Tekamah, 128 Neb. 805, 260 N.W 366 (1935).

[64] Hulbert v. California Portland Cement Co., 161 Cal. 239, 118 Pac. 928, 38 L.R.A. (N.S.) 436 (1911), Whalen v Union Bag Co., *supra* n. 59.

[65] Madison v. Ducktown Sulphur, Copper & Iron Co., 113 Tenn. 331, 83 S.W 658 (1904). See also Harris-Stanley Coal & Land Co. v. Chesapeake & O. R. Co., 154 F 2d 450 (1946), cert. den. 329 U.S. 702, 67 Sup. Ct. 111, 91 L.Ed. 656 (1947)