



**PennState**  
Dickinson Law

**DICKINSON LAW REVIEW**  
PUBLISHED SINCE 1897

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Volume 39  
Issue 4 *Dickinson Law Review* - Volume 39,  
1934-1935

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6-1-1935

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### Recommended Citation

Frederick G. McKean, *The Balance of Convenience Doctrine*, 39 DICK. L. REV. 211 (1935).  
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# THE BALANCE OF CONVENIENCE DOCTRINE

FREDERICK G. McKEAN\*

The concept of convenience is, in all likelihood, one of the most prolific sources of law, for we find vast bodies of doctrine based upon notions of convenience; such as, the rule imposing the burden of proof or *onus probandi* upon him who substantially alleges the affirmative of a proposition; the rule *de minimis non curat lex*; divers maxims; and numerous rules of presumption. Specifically the subject of these notes is a principle developed in English equity, probably indigenous; but at the same time the student of comparative law may observe a parallel growth in at least a few civil law jurisdictions such as Louisiana, Quebec, Scotland and South Africa.

At the outset of this discussion it must be acknowledged that there is a conflict of authority as to the solution of numerous questions involving the subject of this paper. So much is this the case that committees framing moot court cases can find much suitable material in this topic which is admirably suitable for debate. If however, we bear in mind the principle voiced by the brilliant Sir George Jessel, that the rules of courts of equity were invented for the purpose of securing the better administration of justice;<sup>1</sup> it may prove possible to extract a few rules, characteristic of the practical working of the doctrine, which will be serviceable in dealing with questions as to the applicability of the principle. Employing the Jessel observation as a pole-star it is fairly obvious that the balance of convenience principle is seldom primary or fundamental, but is generally subsidiary or accessory, and frequently unnecessary to the disposition of reported cases in which the expression "balance of convenience" has been employed as a stock phrase. Furthermore, there are many conditions in which it would be manifestly unjust and squarely opposed to current morality and present-day public policy for a chancellor even to consider comparative convenience or inconvenience where injunctive relief is sought. Hence it is not surprising to find a preponderance of authority supporting the proposition that in equitable proceedings the balance of con-

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<sup>1</sup>In re Hallett, 13 Ch. D. 696, 710 (Eng. 1879).

venience doctrine does not enter, as between the parties to a suit, where it clearly appears that there has been a wanton invasion of legal rights, irremediable by a common law action.<sup>2</sup> Most assuredly a wrongdoer is in no position to object to a curb upon his illegal activities because of the expense or loss of profits which might ensue. This widely accepted rule that the balance of convenience doctrine does not apply to irreparable invasion of legal rights is not only ethical, but in addition, is based upon sound considerations of public policy. Numerous aphorisms support it, such as: No man shall profit by his own wrong; *fiat justitia; equum et bonum est lex legum*; and many others which readily suggest themselves and make equal appeal to the lawyer and to the layman. The criterion is whether a legal remedy would be inadequate, and that is the case only where the injury done or threatened is irreparable, or of a continuous or recurrent nature. In other words, a preliminary injunction will be granted under the pressure of a "present urgent necessity," where the damage threatened to be done is, from an equitable point of view, of an irreparable character.

Adverting to the Jessel doctrine that the rules of courts of equity were invented for the better administration of *justice*; it is clear that it would be op-

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<sup>2</sup>Texas & N. O. Ry. Co. v. Ry. Clerks, 281 U. S. 548, 571 (1930); Mobile & O. Ry. Co. v. Zimmern, 206 Ala. 37, 89, 89 So. 475, 16 A. L. R. 1352 (1921); Peterson v. City, 119 Cal. 387 (1897); Felsenthal v. Warung, 140 Cal. App. 119, 129 (1919); Baldocchi v. Four Fifty Sutter Corporation, 18 Pac. (2d) 682 (Cal. 1933); Kane v. Porter, 77 Col. 257 (1925); Banby v. Krasow, 107 Conn. 109 (1927); Dick v. Sears-Roebuck & Co., 115 Conn. 122 (1932); Chambers v. Cin. & Ga. Ry. Co., 69 Ga. 320, 323 (1882); Wente v. Commonwealth Trust Co., 232 Ill. 526 (1908); Rosehill Cem. Co. v. City, 252 Ill. 11, 30 (1933); State Board Tax Commissioners v. Belt Ry. etc. Co., 191 Ind. 282, 291 (1901); O'Brien v. Murphy, 189 Mass. 353 (1905); Curtis Mfg. Co. v. Spencer Wire Co., 203 Mass. 448 (1909); Summerfield Co. v. Prime Furniture Co., 242 Mass. 149, 155 (1922); Ives v. Edison, 124 Mich. 402 (1900); Bainton v. Clark Equipment Co., 210 Mich. 402 (1920); Wheelér v. McIntyre, 55 Mont. 295, 303 (1918); Hennessy v. Carmony, 50 N. J. Eq. 616 (1892); Delaware, Lack. & West. Ry. Co. v. Breckenbridge, 57 N. J. Eq. 154 (1918); Tribune Assn. v. Simmonds, 104 Atl. 386, (N. J. Eq. 1918); Rutr v. Huelsenbeck, 109 N. J. Eq. 273 (1931); Citrona v. Columbia Theater, 151 Atl. 467 (N. J. Eq. 1930); Storck v. El. Ry., 131 N. Y. 5, 14 (1892); Sammons v. City, 70 N. Y. Supp. 284 (1901); Hale v. Burns, 91 N. Y. Supp. 929 (1905); Whalen v. Union Bag & Paper Co., 208 N. Y. 1 (1913); Hard v. Blue Points Co., 156 N. Y. Supp. 465 (1915); Smith v. Graham, 217 N. Y. 655 (1916); Fraser v. City, 81 Ore. 92, 158 Pac. 514, 9 A. L. R. 614 (1920); Hansen v. Crouch, 98 Ore. 141, 193 Pac. 454 (1920); Sullivan v. Jones & Laughlin Steel Co., 208 Pa. 540 (1904); Baugh v. Bergdoll, 227 Pa. 420 (1910); Kestner v. Homeopathic, etc. Hospital, 245 Pa. 326 (1914); Weiss & Maen v. Greenberg, 101 Pa. Super. 24 (1930); Nesbit v. Riesenman, 298 Pa. 475, 483 (1930); Town of Bristol v. Palmer, 83 Vt. 54, 74 Atl. 332, 31 L. R. A. (N. S.) 881 (1909); Cooke v. Gilbert, 8 Times L. R. 382 (Eng. 1892); Lindsay v. Le Sueur, 11 D. L. R. 411 (Can. 1913); Contra: Donovan v. Kissena Park Corp., 168 N. Y. S. 1035 (1918).

pressive, inequitable, and productive of great mischief to grant the drastic remedy of injunction (which is never given where there is an available legal remedy as complete and efficient as that which equity could afford)<sup>3</sup> when there has been only a technical or unsubstantial invasion of right.<sup>4</sup> This does not mean that the maxim *de minimis non curat lex* is applicable in such a case, for where a legal right is invaded and a legal remedy is necessary to its vindication the law will imply damages even where it is impossible to compute them by monetary standards,<sup>5</sup> and will not hesitate to resort to such implication where, in point of fact such invasion has yielded a pecuniary benefit to a plaintiff.<sup>6</sup> Land is *per se* of peculiar value and of unique character,<sup>7</sup> and an encroachment upon rights of real estate is not deemed trivial or unsubstantial. Consequently equity will take jurisdiction to prevent an unauthorized user from ripening into a right by prescription,<sup>8</sup> even though an invasion of right, such as an obstruction of an easement, has involved a large investment of capital;<sup>9</sup> and will not relegate a complainant in any such case to an action of damages, thereby permitting the perpetrator of a wrongful act to make a forced purchase of his neighbor's rights.<sup>10</sup> To hold otherwise would involve the assumption by a court of a political power akin to that of eminent domain.

Where there is danger of unjust and irreparable mischief being done through an erroneous grant or refusal of an injunction, a natural safeguard would be a careful consideration of the balance of convenience or inconvenience, in order to subserve and not defeat substantial justice. (In this connection, it should not be overlooked that, ordinarily, the rights of a defendant are protected by the bond if an injunction should issue, while there is no such safeguard to a plaintiff if an injunction should be improperly refused). Accordingly, where a right is doubtful or disputed, the balance of convenience

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<sup>3</sup>*Boise Artesian Water Co. v. Boise City*, 213 U. S. 276, 281 (1909).

<sup>4</sup>*Frost v. City*, 181 Cal. 22, 31 (1919); *Ontjes v. Bagley*, 250 N. W. 17 (Iowa, 1933); *Stock v. City*, 155 Mich. 375 (1909); *Stampp v. Board of Supervisors*, 252 N. Y. Supp. 303, 308 (1931); *Naun v. Raimist*, 225 N. Y. 307, 319 (1931); *Salem Iron Co. v. Hyland*, 74 Ohio St. 160 (1906); *Lillibridge v. Lackawanna Coal Co.*, 143 Pa. 293 (1891); *Chartiers Block Coal Co. v. Mellon*, 152 Pa. 286, 299 (1893); *Trout & Salmon Club v. Mather*, 68 Vt. 338 (1895); *Behrens v. Richards*, (1905) 2 Ch. 614; *British Ry. &c. Co. v. London County Council, et al.*, (1922) 2 K. B. 260.

<sup>5</sup>*Railway v. Flagg*, 43 Ill. 364 (1867); *Smith v. Holcomb*, 99 Mass. 552 (1869); *Railway v. Allen*, 53 Pa. 276 (1866).

<sup>6</sup>*Dewire v. Hanley*, 79 Conn. 454, 65 Atl. 563 (1907).

<sup>7</sup>*Moss v. Jourdan*, 129 Miss. 598, 615 (1922).

<sup>8</sup>*Townsend v. Bell*, 17 N. Y. Supp. 210 (1891).

<sup>9</sup>*Hard v. Blue Points Co.*, 156 N. Y. Supp. 465 (1915).

<sup>10</sup>*Shelfer v. Electric Lighting Co.*, (1895) 1 Ch. 287, 322.

or inconvenience is an important factor in determining whether to grant or refuse a preliminary or interlocutory injunction, and in such cases a decree, when granted, is customarily, so framed as to maintain the *status quo* or prevent irremediable mischief pending the final disposition of a suit.<sup>11</sup> Wherever the grant or refusal of a preliminary or interlocutory injunction depends upon the consideration of the preponderance of inconvenience, the *onus* is upon the plaintiff of showing that his inconvenience would exceed that of the defendant,<sup>12</sup> and where an equity proceeding has reached the stage where the question arises as to the grant of permanent relief to a plaintiff, the petitioner must establish every disputed fact essential to his title to relief.<sup>13</sup>

An important category of cases in which the balance of convenience is frequently found to be important, is that in which a conflict of interests is involved. Valuable assistance in the solution of such questions has been furnished by the development of rules as to the relative weight of different classes of rights. Thus, for illustration, the law attributes to an enjoyment right a higher status than that of the injuring use right,<sup>14</sup> rights of habitation are deemed superior to rights of trade,<sup>15</sup> and human rights are valued more highly than material ones.<sup>16</sup>

Taking it by and large, the jurisprudence of English speaking people lays special emphasis upon the protection of the individual against governmental or community oppression as well as against attempted wrong-doing by individuals; and, where necessary this protection will be accorded by means of that branch of the law of remedies which is known in our system of laws as equity jurisprudence. This principle is considered so sacred in American

<sup>11</sup>*Erhardt v. Boaro*, 113 U. S. 537 (1885); *New England Mortgage Security Co. v. Powell*, 97 Ala. 483, 489 (1893); *Castleman v. Knight*, 215 Ala. 429 (1927); *Mayor, etc. of Wilmington v. Addicks*, 47 Atl. 366, 374 (Del. 1900); *Everett v. Tabor*, 119 Ga. 128 (1903); *Loomis v. Collins*, 272 Ill. 221, 236 (1916); *Munson v. Tryon*, 7 Phila. 395, 400 (1867); *Freer v. Davis*, 52 W. Va. 1, 59, 59 L. R. A. 556 (1903); *Cory v. Railway Co.*, 3 Hare 593, 600, 601 (Eng. 1844); *Clowes v. Beck*, 13 Beav. 347 (Eng. 1851); *Read v. Richards*, 45 L. T. 54, 57, 58, 59 (Eng. 1881); *York Publishing Co. v. Coulter & Wayside Publishers Ltd.*, 24 O. L. R. 384 (Can. 1913); *Playter v. Lucas*, 51 O. L. R. 492 (Can. 1921); *Canadian Radiator Co. v. Anonyme de Construction*, 6 Quebec Pr. Rep. 354 (1904).

<sup>12</sup>*Child v. Douglas*, 5 De G. M. & G., 739, 742 (Eng. 1854).

<sup>13</sup>*World Realty Co. v. Omaha*, 113 Neb. 390, 203 N. W. 574, 40 A. L. R. 1313 (1925); *Chizek v. City*, 253 N. W. 441 (Neb. 1934).

<sup>14</sup>*Nesbit v. Riesenman*, 298 Pa. 475, 483 (1930).

<sup>15</sup>*Wente v. Commonwealth Trust Co.*, 232 Ill. 526, 83 N. E. 1049 (1908); *Poskey v. Cumberland Realty Co.*, 35 Misc. 50, 70 N. Y. S. 1125 (1901); *Sullivan v. Jones & Laughlin Steel Co.*, 208 Pa. 540 (1904); *Lavner v. Light & Water Co.*, 74 Wash. 373, 133 Pac. 592 (1913); *Rogers v. Lumber Co.*, 117 Wis. 5 (1903).

<sup>16</sup>*Stead v. Fortner*, 255 Ill. 408, 478 (1912); *Nesbit v. Riesenman*, 298 Pa. 475 (1930).

jurisdictions that we frequently find equity powers exercised to enjoin the threatened enforcement of an unconstitutional statute, "whenever it is essential in order to protect property rights and the rights of persons against injuries otherwise irremediable."<sup>17</sup> Whether or not an injury is irreparable depends upon the completeness of a remedy at law, and not upon the magnitude of the damage inflicted.<sup>18</sup> This may be where the wrongs are of a repeated and continuing character, or occasion damages conjecturable in amount and incommensurate by any accurate standard.<sup>19</sup> The term "irreparable" has been defined as that "which cannot be repaired, retrieved, put back again, atoned for."<sup>20</sup> In a negative form it has been phrased that an injury which can be fully compensated in money is not an irreparable injury.<sup>21</sup> Probably the most familiar class of cases illustrative of the jural concept of irreparability is that wherein money damages are not equivalent to the interest threatened, such as land, heirlooms and other property of unique character.<sup>22</sup> Other examples of irreparable invasion of right, may be found in cases of continuous trespass by public officers;<sup>23</sup> unlawful interference with business;<sup>24</sup> secondary boycott;<sup>25</sup> interference by a sub-contractor with the work of his building contractor;<sup>26</sup> invasion of right by an insolvent;<sup>27</sup> disclosure of confidential information or analogous breach of faith;<sup>28</sup> and, in general, any cases wherein no certain pecuniary standards exist for the measurement of unlawful damage

<sup>17</sup>Champton Refg. Co. v. Commission, 286 U. S. 210, 238 (1932).

<sup>18</sup>Winslow v. Fleischner, 110 Ore. 554, 563 (1924).

<sup>19</sup>Stuart v. Gimbel Bros. Inc., 285 Pa. 102 (1926).

<sup>20</sup>Gause v. Perkins, 3 Jones Eq. 177, 179 (N. C. 1857).

<sup>21</sup>Turnpike Road v. Steam Company, 5 Pa. Co. Ct. 354 (1888).

<sup>22</sup>Kane v. Porter, 77 Colo. 257 (1925); Schavoir v. Re-Bonded Leather Co., 104 Conn. 472 (1926); Wilson & Son v. Harrisburg, 107 Me. 207, 218 (1910); Prosley v. Cumberland Realty Co., 35 Misc. 50, 70 N. Y. Supp. 1125 (1901); Pardee v. Camden Lumber Co., 70 W. Va. 68, 73 S. E. 82, 43 L. R. A. (N. S.): 262 (1911); Wilson v. City, 39 Wis. 160 (1875); Read v. Richardson, 45 L. T. 54, 57, 58, 59 (Eng. 1881).

<sup>23</sup>Rutr v. Huelsenback, 109 N. J. Eq., 273 (1931); Hale v. Burns, 91 N. Y. Supp. 929 (1905).

<sup>24</sup>Scherman v. Stern, 93 N. J. Eq., 626, 631 (1922); Flaccus v. Smyth, 199 Pa. 128, 136 (1901).

<sup>25</sup>Stuhmer v. Korman, 269 N. Y. Supp. 788 (1934).

<sup>26</sup>McFarland v. Quinn, 188 N. C. 645 (1924).

<sup>27</sup>Friedberg v. McClary, 113 Ky. 579, 191 S. W. 309 (1917); Button's Admr. v. Hill, 27 N. J. Eq., 756 (1903); Hodgson v. Duce, 28 L. T. O. S. 155 (Eng. 1856).

<sup>28</sup>Schavoir v. Leather Co., 104 Conn. 472 (1926); Stone v. Goss, 65 N. J. Eq. 756 (1903); Prince Albert v. Strange, 1 Mac. & G. 55 (Eng. 1849); Pollard v. Photographic Co., 40 Ch. D. 545 (Eng. 1888); King v. King, 25 Wyo. 275, 168 Pac. 730 (1917).

done or threatened.<sup>29</sup> Notwithstanding all this, numerous syllabi of reported decisions unequivocally set forth that the balance of convenience doctrine applies to controversies where equitable relief is sought for wanton and irreparable invasion of right; but it is a matter of common observation that a syllabus, like a newspaper head-line, frequently falls short of being a dependable *precis* of its subject-matter. Consequently we often find in the reports, instances of equities disentitling a complainant to relief, overlooked in the head-notes, and thereby leading a searcher to infer that a chancellor has ruled a possible inconvenience to a wrongdoer to be of more importance than the threatened wrong to his victim, by stressing the balance of convenience principle. In many such instances the head-note digester has abstracted discussions of comparative injury and ignored more important factors of the *ratio decidendi*, thus employing language too broad for the basic facts involved. Furthermore there are reported decisions stressing comparative injury which satisfy "the psychological source of all law, the feeling of legal right (*Rechtsgefühl*)"<sup>30</sup> in their results, although very faint allusion to vital equities supporting the opinions appears in the discussion, possibly due to a conviction that the importance of such factors is too obvious to require extended comment.

Returning to the Jessel observation that the rules of courts of equity were invented for the better administration of justice, it is manifest that a chancellor's conscience will not only sedulously protect a plaintiff's interests against irreparable injury; but, whenever occasion demands, will also guard against oppressive, unreasonable or otherwise penalizing of a defendant under the guise of awarding equitable relief. Consequently we find that where acquiescence, laches, or cognate equitable elements tend to weaken or impair a plaintiff's title to injunctive relief, the balance of convenience principle will enter as a legitimate factor for consideration in the exercise of judicial discretion.<sup>31</sup> The importance of this rule is obvious when one bears in mind that while harm done by improvident granting of a preliminary injunction might be remedied by an action for malicious institution thereof; no action would lie for an innocent mistake.<sup>32</sup> It is sometimes overlooked that the function of

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<sup>29</sup>Cleveland v. Martin, 218 Ill. 73, 87 (1905); Philadelphia Ball Club Ltd. v. Lajoie, 202 Pa. 210, 216 (1902).

<sup>30</sup>Dr. von Jhering, *The Struggle for Law*, (Lalor's transl.) 13.

<sup>31</sup>Herr v. Central Kentucky Asylum, 110 Ky. 282 (1901); Stock v. City, 155 Mich. 375 (1909); McCann v. Chasm Power Co., 211 N. Y. 301 (1914); Becker v. Lebanon St. Ry. Co., 188 Pa. 484 (1898); Baugh v. Bergdoll, 227 Pa. 422 (1910); Shelfer v. City of London Electric Lighting Co., (1925) 1 Ch. 287, 322, 323.

<sup>32</sup>City v. Sugar Refining Co., 221 N. Y. 206, 208 (1917).

preliminary equitable relief is provident, cautionary, conservative, and primarily preservative of the *status quo*, and while preventitive to some extent, is seldom unqualifiedly remedial. In accordance with these principles it may be noted that the consensus of enlightened professional opinion is to the effect that the balance of convenience should be carefully considered before the transcendent powers of equity are exercised or withheld where a decree is prayed for on a doubtful question of law or fact.<sup>33</sup> Those who are wedded to the formula method of dealing with jural problems may prefer to summarize this and analogous rules by the statement: When in doubt about equitable relief, balance the conveniences or inconveniences. Upon final hearing, courts of equity govern themselves in accordance with the rights of the parties regardless of questions of inconvenience.<sup>34</sup>

Near the beginning of these notes it was set forth that where there has been a wanton invasion of legal rights, irremediable at common law, the balance of convenience doctrine plays no part in equitable proceedings, as *between the parties thereto*. Where however a chancellor finds that a case is complicated by an entanglement with public interests, he will sometimes refuse equitable relief to the complainant on the ground that granting the decree petitioned for would cause public inconvenience without furnishing any corresponding advantage to the plaintiff. Many note-writers trace the doctrine of public convenience to an eighteenth century case in which Lord Hardwicke refused to stay the erection of a small-pox hospital for the stated reason that the contemplated institution "would be of great advantage to mankind."<sup>35</sup> Such a principle involves danger of denying relief to an innocent party against unjust or uncompensable injury by a willful or reckless wrongdoer. It is submitted that the doctrine should be recognized only in cases of public necessity. Otherwise there would arise the anomaly of treating a wrongdoer as the champion of third parties or of the public, which has occasionally

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<sup>33</sup>*Park & Telford Corporation v. Hunter Baltimore Rye Inc.*, 5 Fed. Supp. 888 (S. D. N. Y. 1933); *Loomis v. Collins*, 272 Ill. 221, 236 (1916); *Hackensack Improvement Commission*, 22 N. J. Eq. 94 (1871); *McCorkle v. Brem*, 76 N. C. 407 (1877); *Flippin v. Knaffle*, 2 Tenn. Chan. 238, 244 (1875); *Oil & Gas Co. v. Cox*, 5 S. W. (2d) 796 (Tex. 1928); *Funk v. Inland Power & Light Co.*, 1 Pac. (2d) 872, 874 (Wash. 1931); *Bettman v. Harneson*, 42 W. Va. 433, 36 L. R. A. 566 (1896); *Wilkinson v. Rogers*, 12 W. R. 284, 285 (Eng. 1864); *Read v. Richardson*, 45 L. T. 54, 57, 58, 59 (Eng. 1881); *York Publishing Co. v. Coulter Wayside Publishers Ltd.*, 24 O. W. R. 384 (Can. 1913); *Playter v. Lucas*, 69 D. L. R. 514 (Can. 1921).

<sup>34</sup>*Tribune Assn. v. Simmonds*, 104 Atl. 386, 389 (N. J. Ch. 1918); *Citrona v. Columbus Theater*, 151 Atl. 467 (N. J. Ch. 1930).

<sup>35</sup>*Barnes v. Baker, Ambler*, 158 (Eng. 1752).

happened. Extreme misapplication or distortion of the balance of public convenience rule has sometimes sanctioned exploitation under the out-moded policy of *laissez-faire*, as in the case of *Daughtry v. Warren*,<sup>36</sup> wherein an injunction was refused against the flooding of the plaintiff's mill, with resulting injury to the complainant's health, because, forsooth, the enterprise was "a public utility." To paraphrase the language of Mr. Chief Justice Taft (then a Circuit Court judge), in a case of a different nature; this principle should not be applied when the sacrifice of the individual becomes so great that the public good to be derived from it is outweighed.<sup>37</sup> Thus where there has been a willful continuance of a wrong, hardship and inconvenience to the public is no bar to injunctive relief against violation of a patent right;<sup>38</sup> nor would an injunction against a municipality for wrongful discharge of sewage be refused, although great inconvenience to the city would result from such recognition's rights;<sup>39</sup> and taking property without compensation will be enjoined irrespective of public convenience.<sup>40</sup> Seeming exceptions which appear in numerous reported decisions where public hardship or inconvenience has been stressed as a ground for refusing equitable relief, could be supported by the well settled principle that equity does not take jurisdiction of causes involving merely consequential and incidental injury. This latter rule justifies a refusal to enjoin the execution of an unconstitutional statute where no irreparable injury is threatened;<sup>41</sup> sanctions a denial of equitable relief against indirect damage arising from the lawful operation of a public utility;<sup>42</sup> supports a refusal to grant an injunction against a municipal improvement on account of consequential damages;<sup>43</sup> and in general, will remit a complainant to an action for damages wherever the harm done or threatened is small in scope or easily remedied by compensatory damages. At one time there was a suggestion that benefit to the public would be a complete defense for tortious conduct; but it has been settled that a commercial adventure for profit wherein no indictment would lie for an undertaking to carry on an undertaking is not

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<sup>36</sup>85 N. C. 136 (1881).

<sup>37</sup>Post Publishing Co. v. Hallam, 16 U. S. App. 613, 653 (1893).

<sup>38</sup>Westinghouse Air Brake Co. v. Great Northern Ry. Co., 88 Fed. 258, 263 (1898).

<sup>39</sup>Sammons v. City, 70 N. Y. Supp. 284 (1901).

<sup>40</sup>Chambers v. Railway Co., 69 Ga. 320 (1882); Storck v. Elevated Railway, 131 N. Y. 5, 14 (1892).

<sup>41</sup>Spiegel v. District Attorney, 5 Fed. Supp. 456, 457 (1933); Milton Dairy Co. v. Railway Co., 124 Minn. 239 (1914).

<sup>42</sup>Elliott Nursery Co. v. Duquesne Light Co., 281 Pa. 166, 171 (1924).

<sup>43</sup>Moore v. City, 70 Ga. 611, 615 (1883).

a justification for tortious activity.<sup>44</sup> At the same time it is observable that where the conduct complained of is in furtherance of a public duty and the plaintiff's damage proves to be small or occasional, and easily compensated for in money, an injunction may be refused.<sup>45</sup> Accordingly the construction or use of public utilities will not be enjoined unless the damage inflicted or threatened is both serious in amount and irreparable in character, or the defendant is insolvent.<sup>46</sup>

Analysis of numerous cases in which it has been held that a man's rights must yield to public convenience, will reveal that the convenience referred to substantially approximates or coincides with the principle of public necessity or the policy of public welfare. Anything virtually short of this would run counter to the weighty principle that a wrong and injury should not be condoned because of the importance of an undertaking. Thus we find that potential injury to public health and deprivation of water to cope with possible fires, constitute a substantial reason for denying an injunction against interference with water rights.<sup>47</sup> Likewise an injunction will be refused, where the consequences of granting it would be: the dislocation of a public school system,<sup>48</sup> interruption of traffic to the serious detriment of the public;<sup>49</sup> or an abandonment of municipal sanitary arrangements, where the injury to the plaintiff, by refusal of an injunction, would be wholly financial.<sup>50</sup> A very neat illustration of a fair disposition of a case involving a question of public convenience is afforded by *Schwartzbach v. Oneonta Light & Power Co.*,<sup>51</sup> in which there was damage caused by the overflow of land due to the dam of an electric light company. On the one hand there was presented a question of public safety, for surely, to mention only one of many perils, a community shrouded in darkness would be an Alsatia for criminals; while on the other side there jutted the consideration that a flooding of land is a taking thereof.<sup>52</sup> The equities were balanced by granting an injunction against the trespass and suspending the enforcement of the writ for a fixed period of time within which

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<sup>44</sup>Imperial Gas Light & Coal Co. v. Broadbent, 7 H. L. C. 600, 610 (Eng. 1859).

<sup>45</sup>Raymond v. Transit Development Co., 119 N. Y. Supp. 655 (1909).

<sup>46</sup>Jones v. Lassiter, 169 N. C. 750 (1915).

<sup>47</sup>Booth-Kelly Lumber Co. v. City, 67 Ore. 381, 136 Pac. 29 (1913).

<sup>48</sup>Edinboro Normal School v. Cooper, 150 Pa. 78 (1892).

<sup>49</sup>Torrey v. Railroad, 18 N. J. Eq. 293, 297 (1867).

<sup>50</sup>Harrisonville v. Dickey Clay Co., 289 U. S. 334, 339 (1933).

<sup>51</sup>129 N. Y. Supp. 384 (1911), modified in 207 N. Y. 671 (1912).

<sup>52</sup>Pumpelly v. Green Bay Co., 80 U. S. 166, 178 (1871).

the defendant would have an opportunity of abating the injury. In concluding these notes, it is submitted that the trend of the decisions is to the effect that the "collective juridical conscience"<sup>53</sup> of chancellors is opposed to oppression, either by improvident exercise of the drastic powers of equity, or by refusal of relief against unprovoked and irreparable injury.

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<sup>53</sup>I am indebted to Salleilles for the phrase contained in quotation marks.