has free power to act to secure the infant's rights.[21] The purpose of the next friend is to supply the want of capacity in the minor and to supply someone legally responsible for the costs.[22] One case, at least, has said that it is the next friend and not the infant who decides upon the policy to bring suit.[23]

Nothing appears in the principal case to indicate that the mother as next friend was not acting in her judgment for the best interests of the plaintiff. If the infant has not the capacity to bring an action in the first place, his opinion or judgment that the suit should be terminated should not be grounds for dismissal of the action.

The statute gives control to the court over the next friend because the Court does not appoint the next friend in the first instance. But, where a proper person is acting in the interest of the infant, the statute does not contemplate that the court shall substitute its judgment for that of a jury in determining the merits of the litigation. It is unfair to infants as a class to give a defendant this added defense which he would not have had if the plaintiff had been a person of legal age.

S. L. W.

Equity

Balancing the Inconveniences in Trespass and Nuisances Cases in Ohio.

The court of equity is a court of discretion. A doctrine which is sometimes used to guide that discretion is the principle of balancing the equities or balancing the inconveniences. Its purpose is to avoid the issuance of injunctions which would operate oppressively, or inequitably, or contrary to the justice of the case. Thus, a plaintiff who is suffering irreparable damages, who has no adequate remedy at law, and whose right to an injunction is clear, may, nevertheless, be denied injunctive relief, if equity, after balancing the inconveniences, finds the equities of the case with the defendant.

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[21] Roberts v. Vaughn, 142 Tenn. 361, 219 S. W. 1034, 9 A. L. R. 1528 (1919); *Re* Moore, 209 U. S. 490, 52 L. ed. 904, 28 S. Ct. 585, 14 Ann. Cas. 1164 (1908). (Next friend may select the tribunal.)

[22] Bertinelli v. Galoni, 331 Pa. 73, 200 Atl. 58, 118 A. L. R. 398 (1938); See Ohio G. C. 11248.

[23] Swope v. Swope, 173 Ala. 157, 55 So. 418, Ann. Cas. 1914 A 937 (1911).

As applied to preliminary hearings, the balancing-of-equities doctrine is properly a ruling principle governing the exercise of judicial discretion. On such a hearing, it is clearly the duty of the court to balance the hardships, and, if the injuries resulting to the defendant greatly exceed any benefits which will accrue to the plaintiff from the temporary relief, it should be refused.[1] Ohio is in accord with this firmly established rule as to temporary hearings as is indicated by a statement from the Supreme Court that "It is a settled rule of courts of chancery in acting on applications for injunctions to regard the comparative injuries which would be sustained by the defendant if an injunction were granted, and by the complainant, if refused . . . If a legal right is doubtful, the court is always reluctant to take a course which may result in material injury to either party." [2] In many different fact patterns the lower courts have likewise balanced the injuries on application for preliminary relief. Thus, enforcement of a doubtful statute, pending constitutional hearing, has been restrained rather than preventing the operation of plaintiff's chemical plant;[3] manufacturing plants, which were interfering with complainant's health and comfort were closed;[4] and obstructions which did not totally inconvenience the plaintiff were not compelled to be removed by the defendant.[5] Frequently the convenience of the public has influenced the court's decision.[6] Regardless of the fact situation, the principle in favor of balancing is universally present.

Trespass Cases

On applications for permanent injunctions, there is no such

[1] 61 A. L. R. 925, 31 L. R. A. (N. S.) 881, Clark, Equity §212.

[2] State *ex Rel*, Cleveland v. Court of Appeals, 104 Ohio St. 96, 135 N. E. 377 (1922).

[3] Smith Agri. Chemical Co. v. Calvert, 8 Ohio N. P. (N. S.) 361, 19 Ohio D. (N. P.) 571 (1908).

[4] Amlung v. Lang, 22 Ohio D. (N. P.) 61, 8 Ohio L. R. 286 (1910).

[5] Harrison v. Craighead, 7 Ohio Dec. Rep. 634, 4 W. L. Bull. 500 (1879).

[6] Fogarty v. Cincinnati, 7 Ohio N. P. 100, 9 Ohio D (N. P.) 753 (1900); Occo Realty Co. v. New York C. & St. L. R. Co. 33 Ohio App. 414, 196 N. E. 719 (1929); Ritter v. Cleveland S. L. R. R. 17 Ohio C. C. (N. S.) 4, 41 Ohio C. C. 678 (1903); Cin. Consol. St. R. Co. v. Cincinnati, 7 Ohio Dec. Rep. 125, 1 W. L. Bull. 134 (1876).

For other cases dealing with the principle on temporary injunction, *see*, Steiner v. Hennon, 5 Ohio N. P. (N. S.) 314, 17 Ohio D. (N. P.) 585 (1907); Gould v. Chesapeake & O. R. Co., 10 Ohio N. P. (N. S.) 129, 21 Ohio D. (N. P.) 733 (1910); Fellows v. Walkers, 6 Ohio F. D. 362, 39 Fed. 651 (1889); Great Southern Hotel v. McClain, 3 Ohio N. P. 247, 4 Ohio D. (N. P.) 309 (1895); Woodrow v. Geneva Coal & Min. Co., 17 Ohio App. 56 (1922); Sedaris v. Riley, 27 Ohio N. P. (N. S.) 215 (1928); Dissette v. Lowrie, 6 Ohio N. P. 392, 9 Ohio D. (N. P.) 545 (1899).

uniformity of decision in Ohio. In the trespass cases, if the complainant's right is clear and the defendant's trespass such that there is no adequate remedy at law, the prevailing view in most jurisdictions is that the equities should not be balanced. Although the Supreme Court of Ohio has rarely spoken on the point involved, and the lower court cases are likewise restricted in number, a review of them indicates that in a slight majority of situations, particularly if no great public inconvenience would result, the courts refuse to balance the equities and grant injunctive relief.

A most outspoken opinion to this effect was handed down in a circuit court case where an injunction was sought against defendant telephone company's placing of poles and stringing of wires on plaintiff's property. The court said, "Plaintiff's right to this remedy is not to be measured by the extent of the injury, nor by the necessity or convenience of the company . . . that some private individual or company may be inconvenienced, or that the public may be prevented from enjoying a luxury is not the plea which takes from a man his property rights without compensation and gives them to another or to the public." [7] In a similar case the Supreme Court granted the injunction, implying that if plaintiff's rights were clearly established, relief should be forthcoming as a matter of right, subject only to equity's omnipresent discretion.[8]

However, the Supreme Court affirmed, without opinion, a case wherein complainant sought to prevent a railroad from laying tracks and building an overhead bridge which would cut off his light and depreciate the value of his property. The lower court had said, "where a perpetual injunction against construction and operation of tracks is concerned, equity can only acquire jurisdiction if, among other things, it would appear that upon consideration of relative expense and inconvenience, an injunction would not be inequitable or oppressive to the defendant or the public." [9] This case is typical of several others in which the court refused the injunction, ostensibly, because plaintiff had an adequate remedy at law or because his damages were not irreparable, and yet found it desirable to speak of the oppressive injuries which would be suffered by the public were

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[7] Mantell v. Bucyrus Tel. Co., 20 Ohio C. C. 345, 11 Ohio C. D. 274 (1900).

[8] Callen v. Col's Edison Elec. Light, 66 Ohio St. 166, 64 N. E. 141 (1902).

[9] Smedes v. Cincinnati Inter. R. Co., 4 Ohio L. R. 44, 16 Ohio D. 743 (1906), *aff. without opinion*, 81 Ohio 519 (1909).

the injunction to be granted.[10] This practice is indicative of an effort by the Ohio courts, at least in some cases, to refrain from deciding the cases on the balancing-of-equities doctrine, but yet, apparently giving the principle considerable attention, especially if the public is in a position to suffer by the ruling.

The cases are about evenly divided as to whether or not the equities should be balanced in those situations where the defendant has trespassed by building on plaintiff's property One court ruled that even though the defendant's encroachment did not interfere with plaintiff's use of his property that the injunction should issue.[11] Another case, on practically identical facts, held, "that if the damages to the defendant by granting the injunction would greatly exceed those of plaintiff if it were to be refused, then equity should not afford relief." [12]

In summary, it would appear that there is little agreement in the lower courts as to the application of the doctrine in trespass cases, but that they will most often balance the equities where the public would be injured by the injunction. In the few instances where the Supreme Court of Ohio has expressed itself on the problem it has refused to condone the principle.

Nuisance Cases

On petitions for injunctions against nuisances, the Ohio courts, including the Supreme Court, are apparently more willing to balance the equities, although, as in the trespass cases, there is considerable divergence of viewpoint. The most forceful decision directly sanctioning the principles was an early Nisi Prius holding which denied relief against a manufacturing plant, the operation of which was causing the escape of injurious gases.[13] In that case the court considered the size of the payroll, the number of men employed, the value of the plant and the fact that the defendant was using the

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[10] C. & W. Turnip Co. v. Hamilton County, 5 Ohio N. P. 423, 7 Ohio D. 509 (1898); Tol. Elec. St. R. Co. v. Tol. & R. Co., 7 Ohio N. P. 211, 1 Ohio D. 33 (1894); Cincinnati Union Stock Yards Co. v. Cincinnati, 1 Ohio App. 452 (1913); Jackson v. Bellamy, 10 Ohio L. Abs. 700 (1931).

[11] Young v. Thedieck, 8 Ohio App. 103, 28 Ohio C. A. 239 (1918).

[12] Foster v. Norton, 2 Ohio Dec. Rep. 390, 2 West. L. M. 583 (1896).

For other encroachment cases, *see* Quigley v. Fireproof Storage Co., 18 Ohio C. C. (N. S.) 320, 33 Ohio C. D. 62 (1911); Louisville & N. R. Co. v. Baum, 15 Ohio C. C. (N. S.) 383, 33 Ohio C. C. 462, *Aff.* 78 Ohio St. 427, 85 N. E. 1128 (1908); Gold v. Franz, 5 Ohio N. P. 205, 7 Ohio D. 334 (1898).

[13] Neuhs v. Grasselli Chemical Co., 5 Ohio N. P. 359, 8 Ohio D. (N. P.) 203 (1898).

most modern methods of operation, and ruled that since the balance of convenience was clearly with the defendant the injunction should be refused. Other cases where the principle has been the basis for the court's decision have most often dealt with situations wherein the public would be materially harmed if the injunctions were granted.[14] In more cases than not, however, it has been the practice of the courts to refuse to base their rulings on the doctrine of balancing the equities. Instead, they withhold the injunction because of lack of equitable jurisdiction (usually because plaintiff's damages are not irreparable or because his remedy at law is adequate) but, at the same time, offer statements or implications which indicate the weighing of comparative injuries. In an early Supreme Court case[15] where injunctive relief was being sought against noise emanating from defendant's manufacturing plant, while the decision rested on the presence of an adequate remedy at law, the court said "Where destruction of a business would cause more hurt to the defendant than help to the plaintiff, the injunction should be exercised cautiously." In this case had the relief been granted, a large plant would have been compelled to cease operations. Another court, while not basing its holding on the doctrine, pointed out "What would be the relative effect upon the parties? Would the granting of the injunction entail much more injury to the defendant than benefit to the plaintiff? If so, the injunction should be refused and the parties left to their action at law."[16] A further instance of the practice of mentioning the principle, but allowing the decision to stand on another ground, is afforded by a case wherein defendant's dam was causing water to flow onto plaintiff's property.[17] In that case the court denied relief, ostensibly because the plaintiff's right at law had not been established, but probably for the equally important reason that the comparative injuries resulting would be greater if the injunction were issued. It is interesting to note that one chancellor, rather than merely stating that the petitioner's damages were not irreparable, and withholding the injunction on that ground, definitely

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[14] Standard Bag & Paper Co. v. Cleveland, 2 Ohio C. C. (N. S.) 111, 15 Ohio C. D. 380 (1903); Simondson v. Richardson, 2 Ohio N. P. (N. S.) 170, 15 Ohio D. (N. P.) 33 (1904).

[15] Goodall v. Crofton, 33 Ohio St. 271, 31 Am. Rep. 535 (1877); *see also,* Salem Iron Co. v. Hyland, 74 Ohio St. 160 (1906).

[16] Downs v. Greer Beatty Clay Co., 9 Ohio C. C. (N. S.) 345, 29 Ohio C. C. 328 (1906).

[17] McCord v. Iker, 12 Ohio 387 (1843).

ruled that, in the determination of the irreparability of damages, equity should decide, "if the conditions and effect is such as to be irreparable in damages under all the circumstances of the case, having in mind the character and location of defendant's premises, the number of men employed, whether or not the plant is operated in a modern manner and all other pertinent factors.[18] This holding would seem to advocate a principle, very similar to balancing the equities, to be used in determining the plaintiff's type of damages. It may be worth while to suggest the possibility that other courts, without mentioning it, have used this method of determination, and so, in effect, balanced the inconveniences in deciding the plaintiff's rights, instead of doing so after his rights were established. If such be the case, it may be at least one reason why the Ohio courts have been able to escape, for the most part, direct holdings on the principle of balancing the equities.

The instances in which the principle has been repudiated are restricted to lower court opinions. In *Shaw* v. *Queen City Forging Co.*,[19] it was asserted, "it is not the duty to balance the inconveniences that may be caused to the parties, and if a substantial legal right is invaded, if the right and its violation is clear, an injunction will issue regardless of consequences." In another case the plaintiff was being damaged by smoke, soot, and cinders from the defendant's use of coke ovens.[20] The court granted the injunction although it meant closing the defendant's valuable plant. A decision definitely disapproving the doctrine was rendered by a court which enjoined the defendant from further operation of its garbage disposal plant which was of substantial public benefit.[21]

Conclusion

It is difficult to make generalizations regarding balancing the equities in Ohio. It is, however, evident that the principle is accepted more frequently in nuisance cases than in trespass cases, and that it is more likely to receive the sanction of the courts in situa-

[18] Bell v. Pollak Steel Co., 19 Ohio N. P. (N. S.) 529 (1916).

[19] 10 Ohio Dec. 107, 7 Ohio N. P. 254 (1900). *See* Batsche v. Kisinger Co., 15 Ohio D. (N. P.) 30 (1904); Gau v. Ley, 27 Ohio C. A. 1, 38 Ohio C. C. 235 (1916).

[20] McClung v. North Bend Coal Co., 9 Ohio C. C. 259, 6 Ohio C. D. 243 (1895).

[21] Reifsnyder v. Canton Fertilizer Chemical Co., 9 Ohio App. 161, 28 Ohio C. A. 577 (1918). *See,* Union Reduction Co. v. Story, 8 Ohio App. 381, 30 Ohio C. A. 252 (1917); Munk v. Col's Sanitary Works, 7 Ohio N. P. 542, 5 Ohio D. (N. P.) 548 (1896), *aff.* 62 Ohio St. 640, 58 N. E. 1098 (1900).

tions where the public is directly or indirectly involved. It is quite obvious that the courts are not anxious to settle the law in this respect as they refrain from passing on the principle whenever possible. As a result, the status of the doctrine in Ohio is not clearly established. Perhaps, however, this condition of the law is not necessarily undesirable. In some jurisdictions the doctrine has oscillated between acceptance and rejection. An instance of such a practice is shown by two decidedly conflicting statements from the Supreme Court of Pennsylvania. In 1868 the court ruled, "It is elementary law, that in equity a decree is never of right but of grace. Hence the chancellor will consider whether he would not do a greater injury by enjoining than would result from refusing . . . If in conscience the former should appear, he will refuse to enjoin." [22] Yet, only a quarter of a century later, the same court said, " . . . a refusal of an injunction upon the ground that plaintiff cannot suffer as great a loss from discontinuance of the nuisance as defendant would from its interdiction would be as far removed from equity as can be. There is to my mind no more offensive plea than that by which one seeks to justify an act injurious to his neighbor on the ground of its advantage to himself." [23] If the adoption of a definite rule as to the principle of balancing the equities necessitates such diametrically opposed viewpoints when only slightly different fact patterns are being considered, perhaps the Ohio courts are prudent in not definitely declaring the law, and thus being better able to base their decisions on the particular facts of the case.

L. B. C.

Trusts

Status and Liability of an Executor Who is Also a Trustee.

Testator, by will, appointed his wife and one Nixon executors of his estate, and specifically listed the acts they were authorized to perform in that capacity. Testator also named his wife and Nixon trustees of the residue of the estate for the benefit of the deceased's children. The appointees qualified as executors and gave

[22] Richard's Appeal, 57 Pa. 105, 98 Am. Dec. 202 (1868).
[23] Evans v. Readin Chemical Fertilizing Co., 160 Pa. 209, 20 Atl. 702 (1894).